(b) That the recipient is under no obligation either to return the merchandise to the sender, or to preserve it intact, and

(c) That he is required to pay for the merchandise only if he decides to purchase it.

(6) Representing, directly or by implication, contrary to the fact, that respondents will refer "accounts" to any other organization, attorney, or firm of attorneys for collection or for legal action;

(7) Misrepresenting in any manner the legal consequences of their mailees' failure to pay for or return merchandise that has been sent to said mailees without a prior order therefor or in spite of specific directions from said mailees not to send such merchandise; and

(8) Sending merchandise without first obtaining a specific order therefor after respondents have been notified by the mailees that shipments of unordered merchandise are to be discontinued.

It is ordered, That the hearing examiner's initial decision and order, as modified hereby, be, and they hereby are, adopted as the decision and order of the Commission.

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

Commissioner Nicholson not participating for the reason that oral argument was heard prior to his taking the oath of office.

IN THE MATTER OF

JEWELL MYERS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-1290. Complaint, Jan. 22, 1968—Decision, Jan. 22, 1968

Consent order requiring a Memphis, Tenn., retail furrier to cease falsely advertising and deceptively invoicing its fur products and failing to maintain required records.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority

vested in it by said Acts, the Federal Trade Commission, having reason to believe that Jewell Myers, Inc., a corporation, and Mrs. Jewell Myers, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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 Jewell Myers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee.

Respondent Mrs. Jewell Myers is an officer of the corporate respondent. She formulates, directs and controls the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are retailers of fur products with their office and principal place of business located at 1731 Union Avenue, Memphis, Tennessee.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to show the true animal name of the fur used in any such fur product.

PAR. 4. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder inasmuch as the term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements but not limited thereto, were advertisements of respondents which appeared in issues of The Commercial Appeal, a newspaper published in the city of Memphis, State of Tennessee and having a wide circulation in Tennessee and other States of the United States.

Among such false and deceptive advertisements but not limited thereto, were advertisements of respondents which represented through such statments as "reductions 20% to 40%" that prices of fur products were reduced in direct proportion to the percentages stated from the former bona fide prices at which the respondents offered the fur products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business and that the amount of said reductions afforded savings to the purchasers of respondents' products when in fact such prices were not reduced in direct proportion to the said percentages stated and the represented savings were not thereby afforded to the said purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 6. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder inasmuch as the term "natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of the Rules and Regulations.

PAR. 7. In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based, in violation of Rule 44(e) of said Rules and Regulations.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Fur Products Labeling Act; and

The respondents 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 aforesaid draft of 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 Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Jewell Myers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located at 1731 Union Avenue, Memphis, Tennessee.

Respondent Mrs. Jewell Myers is an officer of said corporation and her address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Jewell Myers, Inc., a corporation, and its officers, and Mrs. Jewell Myers, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, into commerce, or the sale, advertising or

offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Falsely or deceptively invoicing any fur product by:

1. Failing to furnish an invoice, as the term "invoice" is defined in the Fur Products LabelingAct, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Failing to set forth the term "natural" as part of the information required to be disclosed on an invoice under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe such fur product which is not pointed, bleached, dyed, tip-dyed, or otherwise artifically colored.

B. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of such fur products, and which:

1. Misrepresents directly or by implication through percentage savings claims that the prices of such fur products are reduced in direct proportion to the percentages stated from the prices at which such fur products have been sold or offered for sale in good faith by the respondents in the recent regular course of their business, or otherwise misrepresents the price at which the fur products have been sold, or offered for sale by respondents.

2. Falsely represents that savings are afforded to purchasers of respondents' fur products or misrepresents in any manner the amount of savings available to the purchasers of such fur products.

3. Fails to set forth the term "natural" as part of the information required to be disclosed in advertisements under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe such fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

C. Failing to maintain full and adequate records disclosing the facts upon which pricing claims and representations of the types described in subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act, are based.

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

IN THE MATTER OF

CENTER MOTORS, INC., ET AL.

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

Docket C-1291. Complaint, Jan. 23, 1968—Decision, Jan. 23, 1968

Consent order requiring a Washington, D.C., used car dealer to cease using bait advertising and deceptive financing.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Center Motors, Inc., a corporation, and Bernard L. Gordon, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Center Motors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 1333 Rhode Island Avenue, NW., in the city of Washington, D.C.

Respondent Bernard L. Gordon is an individual and is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

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

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

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their used automobiles, respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of interstate circulation, of which the following are typical and illustrative, but not all inclusive thereof:

$85 Down '64 Chevy $1185 S.S. Conv.

* * * * * * *

ONLY $95 DOWN! '63 OLDS STARFIRE COUPE $1095

* * * * * * *

$85 Down DELIVERS '64 OLDS $1295 98 Convert.

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, the respondents have represented, and are now representing, directly or by implication, that:

1. The offers set forth in said advertisements are bona fide offers to sell the advertised automobiles at the prices and on the terms and conditions stated.

2. The advertised automobiles will be financed on offer of the down payment stated.

PAR. 6. In truth and in fact:

1. The offers set forth in said advertisements were not bona fide offers to sell the advertised automobiles at the prices and on the terms and conditions stated, but were made for the purpose of obtaining leads to prospective customers. In a number of instances, the automobiles advertised were not in respondents' possession at the time they were advertised and were not available for purchase. Respondents' salesmen informed prospective customers who responded to the advertisements that the automobiles advertised had been sold and di-

rected the customers' attention to automobiles selling at a higher price. By these tactics, respondents and their salesmen attempted to and frequently did sell higher priced automobiles.

2. The advertised automobiles were not financed on offer of the down payment stated. Frequently the amount of down payment advertised was insufficient and the customer was required to obtain a small loan to make up the deficiency or balance between the amount advertised and the amount actually required as down payment.

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

PAR. 7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of used automobiles of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations 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 into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents 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 to issue herein, 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 Commission, having considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of 30 days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Center Motors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business located at 1333 Rhode Island Avenue, NW., in the city of Washington, D.C.

Respondent Bernard L. Gordon is an officer of said corporation, and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Center Motors, Inc., a corporation, and its officers, and Bernard L. Gordon, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of used automobiles or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any products are offered for sale when such offer is not a bona fide offer to sell such products.

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

3. Representing, directly or by implication, that a product is offered for sale when such product is not in respondents' possession and available for purchase at the time of the offer.

4. Misrepresenting, in any manner, the amount which will be accepted as down payment.

5. Using any advertising, sales plan or procedure involving the use of false, misleading or deceptive statements or representations.

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

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

IN THE MATTER OF

JENS RISOM DESIGN, INC., ET AL.*

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECTION 2(a) OF THE CLAYTON ACT

Docket 8740. Complaint, July 21, 1967—Decision, Jan. 30, 1968

Consent order requiring a New York City furniture manufacturer, to cease discriminating in price between customers who resell its furniture, in violation of Section 2(a) of the Clayton Act.

COMPLAINT

The Federal Trade Commision, having reason to believe that Jens Risom Design, Inc., and Jens Risom Design (California) Inc., the parties respondent named in the caption hereof and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C., Title 15, Section 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Jens Risom Design, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 444 Madison Avenue, New York, N.Y.

PAR. 2. Respondent Jens Risom Design (California) Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place

*Compliance of this order modified by order of March 20, 1968, p. 123 herein. Order setting date of compliance dated December 8, 1969.

of business located at 444 Madison Avenue, New York, N.Y. Respondent Jens Risom Design (California) Inc., is wholly owned and controlled by Jens Risom Design, Inc.

PAR. 3. Respondents are now, and for many years last past have been, engaged in the manufacture, sale and distribution of furniture and furniture products. These products are sold to a large number of customers located throughout the United States and in foreign lands. Sales of these products are substantial, amounting to about $4 million per annum.

PAR. 4. In the course and conduct of their business, respondents have engaged and are now engaged in commerce, as "commerce" is defined in the Clayton Act. Respondents employ interstate means of communication with their customers in the consummation of sales and in the settling of accounts. Respondents ship, or cause to be shipped, their products from the States in which said products are manufactured to their customers, or to purchasers from their customers, located in other States of the United States and the District of Columbia. Thus, there is and has been, at all times mentioned herein, a continuous course of trade in commerce in said products across State lines between respondents and their customers.

PAR. 5. In the course and conduct of their business in commerce, respondents have been and now are discriminating in price, directly or indirectly, between different purchasers of their furniture and furniture products of like grade and quality by selling said products at higher prices to some purchasers than they sell said products to other purchasers, many of whom have been and now are in competition with the purchasers paying the higher prices.

PAR. 6. Included among, but not limited to, the aforesaid discriminations in price as above alleged, are the following:

For several years last past respondents have priced their line of products in terms of list prices. One class of respondents' customers purchases at said list prices less a discount of 40 percent while other classes of customers purchase at list prices less discounts ranging up to 50+10 percent. Various members of each class of customers compete with each other and with various members of each of the other classes.

PAR. 7. The effect of respondents' discriminations in price as alleged herein has been or may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which respondents' customers are engaged, or to injure, destroy, or prevent competition with purchasers from respondents who receive the benefit of such discriminations.

PAR. 8. The aforesaid acts and practices constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C., Title 15, Section 13) as amended by the Robinson-Patman Act, approved June 19, 1936.

DECISION AND ORDER

The Commission having issued its complaint in this proceeding on July 28, 1967, charging the respondents named in the caption hereof with violation of Section 2(a) of the Clayton Act, as amended and said respondents having been served with a copy of that complaint; and

The respondents having thereafter filed a request pursuant to § 2.34(d) of the Rules to have the matter withdrawn from adjudication and the Commission having granted that request by its order dated October 23, 1967; and

The respondents and counsel for the Commission having executed an agreement containing an admission by respondents of all the jurisdictional facts set forth in the said complaint which had been issued, 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 said complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of 30 days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Jens Risom Design, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 444 Madison Avenue, in the city of New York, State of New York.

Respondent Jens Risom Design (California) Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 444 Madison Avenue, in the city of New York, State of New York. Respondent Jens Risom Design (California) Inc., is wholly owned and controlled by respondent Jens Risom Design, Inc.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

ORDER

It is ordered, That respondents Jens Risom Design, Inc., a corporation, and Jens Riscom Design (California) Inc., a corporation, and their officers, representatives, agents, and employees, directly or through any corporate or other device, in, or in connection with, the offering for sale, sale, or distribution of furniture and furniture products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who in fact competes in the resale of such products with the purchaser paying the higher price.

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

ORDER RULING ON RESPONDENTS' PETITION FOR RECONSIDERATION AND REOPENING PROCEEDING AND MODIFYING THE COMMISSION'S DECISION. MARCH 20, 1968

This matter having come on to be heard upon the petition for reconsideration filed by the respondents on February 23, 1968, requesting, among other things, that the Commission reconsider and withdraw the decision and order which issued on January 30, 1968, and issue a revised decision expressly providing that the order herein shall become final in the manner provided in the agreement containing consent order previously accepted by the Commission as the basis for disposition of this proceeding, and which petition further states that the request for reconsideration is not opposed by complaint counsel; and

The Commission being duly cognizant now as it was at the time of its acceptance of such agreement containing consent order that Paragraph 7 thereof recites, among other things, that the order to cease and desist to be entered shall not become final within the meaning of the Clayton Act, as amended, until the date of final disposition of the proceedings *In the Matter of Knoll Associates, Inc.*, Docket No. 8549, then pending on petition for review before the United States Court of Appeals for the Seventh Circuit [8 S.&D. 772]; and

The Commission being of the view that it is appropriate that the decision herein should contain express reference to the aforesaid agreement provision to the end that the accord in that respect be more clearly evident in the decision and the Commission having additionally determined that the order should not contain the customary direction for submission of a report of compliance with the order and that this proceeding should be reopened for the purpose of modifying and altering the decision and order in those respects:

It is therefore ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That the third paragraph of the Commission's decision be, and it hereby is, stricken and the following inserted in lieu thereof.

> The respondents and counsel for the Commission having executed an agreement containing an admission by respondents of all the jurisdictional facts set forth in the said complaint which had been issued, 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 said complaint, and waivers and other provisions as required by the Commission's Rules, and which agreement further provides that the order contained therein shall become final, within the meaning of the Clayton Act, as amended, on the date of final disposition of the proceedings *In the Matter of Knoll Associates, Inc.*, Docket No. 8549, now pending on petition for review before the United States Court of Appeals for the Seventh Circuit: and

It is further ordered, That the second paragraph of the Commission's order which directs the filing of a report of compliance be, and it hereby is, stricken.

IN THE MATTER OF

ALEX KIRSCHNER TRADING AS KIRSCHNER BRUSH COMPANY

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

Docket C-1292. Complaint, Jan. 30, 1968—Decision, Jan. 30, 1968

Consent order requiring a New York City paint and varnish brush manufacturer to cease misrepresenting the true composition of the bristles used in its brushes and using the word "Chinese" for bristles not originating in that country.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Alex Kirschner, an individual trading and doing business as Kirschner Brush Company, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Alex Kirschner is an individual, trading and doing business as Kirschner Brush Company, with his principal office and place of business located at 58 West 15th Street, New York, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, offering for sale, sale and distribution of paint and varnish brushes and other products to distributors and retailers for resale to the public.

PAR. 3. In the course and conduct of his business, respondent now causes, and for some time last past has caused, his said products, when sold, to be shipped from his place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his business, and for the purpose of inducing the purchase of his products, respondent has made numerous representations concerning the quality, composition and origin of his products by the following methods and means:

(1) The handles or ferrules of certain of respondent's brushes are marked or stamped with the words "Pure Chinese Bristle." Respondent thereby represents, directly or by implication, that the brushing part of said brushes is composed entirely of hog or swine bristle (hereinafter referred to as bristle) imported from China.

(2) The handles or ferrules of certain of respondent's brushes are marked or stamped with the words "All Pure Bristle." Respondent thereby represents, directly or by implication, that the brushing part of said brushes is composed entirely of bristle.

PAR. 5. In truth and in fact:

(1) The brushing part of respondent's brushes marked or stamped "Pure Chinese Bristle" is not composed entirely of bristle imported

from China. The brushing part of said brushes is composed of a mixture of bristle obtained from various sources, or in some instances of a mixture or combination of bristle and other material.

(2) The brushing part of respondent's brushes marked or stamped "All Pure Bristle" is not composed entirely of bristle. The brushing part of said brushes is composed of a mixture or combination of bristle and other material.

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

PAR. 6. When the brushing part of paint and varnish brushes is composed of a mixture or combination of bristle and other material which has the appearance of bristle, such brushes are readily accepted by the purchasing public as having brushing parts composed entirely of bristle in the absence of any disclosure to the contrary, a fact of which the Commission takes official notice.

There is a preference among the purchasing public for paint and varnish brushes having a brushing part composed entirely of bristle as contrasted with brushes having a brushing part made with a combination or mixture of bristle and other material, a fact of which the Commission also takes official notice.

Respondent's failure to disclose on paint and varnish brushes having a brushing part composed of a mixture of bristle and other material, all constituent materials, in the order of their predominance, by means of a legible marking or stamping on the handles or ferrules of said brushes is therefore to the prejudice and injury of the purchasing public.

PAR. 7. By the practices as set forth in Paragraphs Four, Five and Six hereof, respondent places in the hands of retailers the means and instrumentalities by and through which they may mislead and deceive the public as to the quality and composition of said brushes and as to the origin of the bristle of which the brushing part of said brushes is made.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations 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 into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 9. 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 commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Decision and Order

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; 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 complaint to issue herein, 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 considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of 30 days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Alex Kirschner is an individual trading and doing business as Kirschner Brush Company with his office and principal place of business located at 58 West 15th Street, in the city of New York, State of New York.

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

It is ordered, That respondent Alex Kirschner, an individual trading and doing business as Kirschner Brush Company, or under any other trade name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of paint or varnish

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

(1) Offering for sale or selling brushes having a brushing part composed in part of bristle of the hog or swine and in part of material other than such bristle but which has the appearance of bristle without truthfully describing, in the order of their predominance, all constituent materials by means of a legible marking or stamping on the handle or ferrule of the brush of such size, conspicuousness and degree of permanency as to be noticeable and readable upon casual inspection when the brush is offered for sale to consumer purchasers.

(2) Using the word "Chinese" or any other word of similar import or meaning, either alone or in conjunction with other words, to designate or refer to bristle of the hog or swine not imported from China; or misrepresenting, in any manner, the origin of respondent's brushes or the bristle or any other component of said brushes.

(3) Using the words "All Pure Bristle" or any other words or term of similar import or meaning, either alone or in conjunction with other words to designate describe or refer to any brush which does not have a brushing part composed wholly of the bristle of the hog or swine; or misrepresenting in any manner the composition of respondent's brushes.

(4) Placing in the hands of others the means or instrumentalities whereby they may mislead the public as to any of the matters or things prohibited in Paragraphs 1, 2 and 3 hereof.

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

IN THE MATTER OF

FAIRWAY MANUFACTURING COMPANY TRADING AS FAIRWAY-SHANE CO. ET AL.

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

Docket C-1293. Complaint, Feb. 1, 1968—Decision, Feb. 1, 1968

Consent order requiring a St. Louis, Mo., distributor of souvenirs and novelties, to cease misrepresenting that any of its products are authentic handcrafted Indian articles and failing to disclose the foreign origin of its merchandise.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Fairway Manufacturing Company, a corporation, trading and doing business as Fairway-Shane Co., and formerly trading and doing business as Leroy Shane, Inc., and Eugene J. Fishgoll and Philip Sternberg, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Fairway Manufacturing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 4363 Duncan Avenue, St. Louis, Missouri 63110.

Respondents Eugene J. Fishgoll and Philip Sternberg are individuals and officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The address of said Eugene J. Fishgoll is the same as that of the corporate respondent. The address of Philip Sternberg is 27 Sixteenth Street, NE., Rochester, Minnesota.

Respondent Fairway Manufacturing Company trades and does business under the name Fairway-Shane Co. and formerly traded and did business under the name Leroy Shane, Inc., with addresses at 27 Sixteenth Street, NE., Rochester, Minnesota.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of curios, souvenirs, gifts, novelties and toys to retailers and dealers for resale to members of the purchasing public.

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

PAR. 4. Respondents, in the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their said merchandise, have made use of signs, symbols, markings and depictions that have an ethnic significance associated with the American Indian and have used certain words, phrases, statements, and representations, directly or by implication, in catalogs, labels, trade journals and other media with respect to the source and production of said merchandise.

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

Indian.
Indian Items.
Hand Beaded.
Hand Made of Genuine Birch.
Indian Made Totem Poles Hand Crafted.
Genuine Indian Hand Made.
Indian Traders.

PAR. 5. By and through the use of said signs, symbols, and markings and said statements and representations, and others of similar import and meaning, but not specifically set out herein, and particularly when used and associated with typical American Indian products such as tom-toms, totem poles, beaded products, pottery and the like respondents represent, and have represented, directly or by implication:

1. That certain of respondents' merchandise is authentic and genuine American Indian products.

2. That certain of respondents' merchandise is handmade or handcrafted by American Indians.

PAR. 6. In truth and in fact:

1. Such products are not genuine and authentic American Indian Products; but on the contrary certain of said products are made in whole or in substantial part in Hong Kong, Japan or some other foreign country.

2. Such merchandise is not handmade or handcrafted by American Indians and certain of said merchandise is not handmade or handcrafted by anyone else.

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

PAR. 7. Much of the merchandise sold and distributed by the respondents is manufactured in and imported from foreign countries, including Japan and Hong Kong. Respondents said foreign made

merchandise bears markings indicating its manufacture in and importation from Japan and Hong Kong. However, in many instances, the markings are so small and placed in such an inconspicuous place that this fact is not readily discernible by the public.

Furthermore, much of said foreign made merchandise bears markings and symbols hereinabove described and is of the kind and character associated with the American Indian so as to constitute an affirmative representation that said merchandise is of a domestic origin.

PAR. 8. In the absence of a clear and conspicuous disclosure that merchandise, including curios, novelties and toys of the type sold by respondents, is of a foreign origin and by the use of the markings, symbols, statements and representations set forth in Paragraph Four hereof, the public believes and understands that such merchandise has been made by American Indians.

As to merchandise, such as that of the respondents, which simulates the products and crafts of the American Indians, a substantial portion of the purchasing public has an assumption that the same has been made by American Indians.

The respondents' failure to clearly and conspicuously disclose the country of origin of said merchandise and their affirmative false, misleading and deceptive statements and representations, with respect to the country of origin thereof is, therefore, to the prejudice and injury of the purchasing public.

PAR. 9. By the aforesaid practices, respondents place in the hands of retailers and others the means and instrumentalities by and through which they may deceive and mislead the purchasing public as to the source, nature, and identity of respondents' merchandise.

PAR. 10. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of curios, souvenirs, gifts, novelties and toys of the same general kind and nature as those sold by respondents.

PAR. 11. The use by the respondents of the aforesaid false, misleading and deceptive representations, statements 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 representations and statements were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair

methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents 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 to issue herein, 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 Commission having considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of 30 days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Fairway Manufacturing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 4363 Duncan Avenue, St. Louis, Missouri 63110.

Respondents Eugene J. Fishgoll and Philip Sternberg are officers of said corporation. The address of respondent Eugene J. Fishgoll is the same as that of said corporation. The address of Philip Sternberg is 27 Sixteenth Street, NE., Rochester, Minnesota.

Respondent Fairway Manufacturing Company trades and does business under the name Fairway-Shane Co. and formerly traded and did business under the name Leroy Shane, Inc., with address at 27 Sixteenth Street, NE., Rochester, Minnesota.

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

ORDER

It is ordered, That respondents Fairway Manufacturing Company, a corporation, trading and doing business as Leroy Shane, Inc., or Fairway-Shane Co., or under any other name or names, and its officers, and Eugene J. Fishgoll and Philip Sternberg, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with offering for sale, sale or distribution of curios, souvenirs, gifts, novelties, toys or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, directly or by implication, that any of respondents' merchandise is authentic or genuine American Indian products; or that any of respondents' merchandise is handmade or handcrafted by American Indians or by anyone else: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that an article of merchandise represented as being handmade or handcrafted in whole or in part is in fact so made or crafted in the manner, to the extent and by the persons of the nationality or ethnic group represented or implied: *And provided further*, That nothing hereinabove shall be construed to prohibit the use, in and of itself, of the term "Indian Type" or the term "Indian Style" to refer to merchandise typically associated with the American Indian.

(2) Placing in the hands of retailers, dealers or others the means and instrumentalities by and through which they may mislead or deceive the purchasing public concerning any merchandise in the respects set out above.

(3) Offering for sale, selling or distributing merchandise of foreign origin without disclosing the country of origin by legible marking or stamping on said merchandise or on a label or tag affixed thereto, which is of such a degree of permanency as to remain on or attached to the merchandise, in legible form, until consummation of the consumer sale thereof, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the merchandise.

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

IN THE MATTER OF

SYDNEY N. FLOERSHEIM TRADING AS FLOERSHEIM SALES COMPANY, ETC.

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

Docket 8721. Complaint, Nov. 7, 1966—Decision, Feb. 5, 1968

Order requiring a Los Angeles, Calif., distributor of skip tracer and debt collection forms, to cease selling false, misleading and deceptive skip tracer and debt collection forms, and to cease misrepresenting that any of the forms have been approved by the Commission or the Courts.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Sydney N. Floersheim, an individual, trading and doing business as Floersheim Sales Company and National Research Company, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sydney N. Floersheim is an individual trading and doing business under the name of Floersheim Sales Company and also under the name of National Research Company. The office and principal place of business of Floersheim Sales Company is 7319 Beverly Blvd., Los Angeles, California. The office and principal place of business of National Research Company is 748 Washington Building, Washington, D.C.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the business of preparing and selling printed forms and other material for use in obtaining information about alleged delinquent debtors and in the collection of delinquent accounts. Respondent causes said printed forms and other material, when sold, to be transported from his place of business located either in the State of California or in the District of Columbia to purchasers thereof located in various other States of the United States, and has sent and received by means of the United States mail, letters, checks and documents to and from States other than the State of California and the District of

Columbia. Respondent maintains, and at all times hereinafter mentioned has maintained, a substantial course of trade in his said forms and other material in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. The said printed forms and other material, prepared by the respondent and transported as hereinbefore alleged, are intended to be and are sold to collection agencies, finance and loan companies, merchants who sell on installment accounts and others who have unpaid accounts. The forms and other material are designed and intended to be, and are, used by said purchasers for the purpose of obtaining information concerning the purchasers' alleged debtors and in the collection of delinquent accounts with the aid and assistance of respondent as hereinafter set forth.

PAR. 4. Said forms and material intended for the purpose of locating delinquent debtors whose present whereabouts is unknown, are prepared in style and content to simulate official or governmental documents. In preparing said forms, the respondent has adopted a number of fictitious and official sounding names among which, but not all inclusive, are the following:

Claimants Information Questionnaire.
Current Employment Records.
Change of Address.
Questionnaire.

These forms all contain the address of 748 Washington Building, Washington 5, D.C., although none of the creditors or other persons to whom these forms are sold and by whom they are used has an office or place of business at that address.

The form entitled "Claimants Information Questionnaire" has a line at the top with a dollar sign at the beginning and sufficient room to insert an amount of money.

Said forms have printed thereon a statement disclosing the purpose of the form and that it is not connected in anyway with the United States Government. However, this statement is printed in such small type and is so inconspicuous that it is likely to be unnoticed by the recipient.

The respondent's method of operation, as to these forms, was, and is, as follows: The printed forms, the envelopes in which the forms are to be mailed and the return envelopes are shipped to the purchaser. The envelope in which the form is to be mailed is a window envelope of a brown color and very similar to those used by the United States Gov-

ernment for some official purposes. The return address on the envelope is "748 Washington Building, Washington 5, D.C." This envelope also has printed on the front "The Form Enclosed is Confidential. No One Else May Open." The return envelope has printed thereon one of the titles hereinabove set forth and the address of "748 Washington Building, Washington 5, D.C." After the forms and the envelopes have been received by the purchaser, he places the name and address of the debtor or of a person who might know of the whereabouts of the debtor on one of the forms and inserts the form and the reply envelope in the window envelope. The envelopes and enclosures are then sent to the respondent in bulk at the said Washington, D.C., address where they are stamped with a postage machine bearing a Washington postmark and mailed by the respondent. If the addressee fills in the necessary information and returns the form to the mailing address, in the postage free reply envelope, the respondent sends the reply to the purchaser of the forms unopened.

PAR. 5. Each of said forms and material sold for the purpose of collecting delinquent accounts is prepared in style and content to simulate official or government documents. In connection therewith, respondent has adopted the name "Payment Demand," the address "748 Washington Building, Washington 5, D.C.," and has printed on said form the words "Notice mailed from Washington, D.C. by Payment Demand." The respondent also causes to be printed on said forms the alleged rights of a creditor to collect a judgment in the state in which the debtor resides, which statement is sometimes incorrect.

The respondent's method of operation, as to these forms, was, and is, similar to that described in the last preceding paragraph, except that no reply envelope is enclosed. Replies go directly to the creditor.

PAR. 6. Through the use, jointly and severally, of (1) the words and terms set forth in Paragraphs Four and Five, (2) the format and phraseology of said forms and (3) the Washington, D.C., return address and a Washington postmark, respondent represents and implies, and places in the hands of the purchasers of his forms and other materials the means and instrumentalities whereby they represent and imply to those to whom said forms are mailed, that the request for information or demand for payment is made by a governmental agency or is to be used for official purposes.

PAR. 7. In truth and in fact, the information is not requested for any governmental agency or is not to be used for official purposes and the demand for payment is not made by any governmental or official agency, but on the contrary, the sole business of respondent, conducted

as aforesaid, is to sell the various printed forms to others, to be used by them for the purpose of obtaining information concerning alleged delinquent debtors or for the purpose of obtaining payment of alleged delinquent accounts.

By selling and placing said forms in the hands of the purchasers, respondent thereby furnishes such purchasers with the false, misleading and deceptive means and instrumentalities by and through which they may obtain information as to delinquent debtors or the payment of delinquent accounts by subterfuge.

Therefore, the statements, representations and practices as alleged in Paragraphs Four, Five hereof are false, misleading and deceptive.

PAR. 8. In the sales promotion literature for the forms described in Paragraph Five hereof respondent represents, directly or by implication, that said forms have been determined by the Federal Trade Commission to be in compliance with the requirements of the order to cease and desist of the Federal Trade Commission in Docket No. 6236, *In the Matter of Mitchell S. Mohr, et al.* [52 F.T.C. 1466], and that said forms have been approved by the Federal Trade Commission.

PAR. 9. In truth and in fact, the forms set forth in Paragraph Five hereof were not in issue in Docket No. 6236 and the Federal Trade Commission has never rendered any official determination that said forms or similar collection forms sold by respondent are in compliance with the requirements of said order to cease and desist or approving said forms.

Therefore, the statements and representations set forth in Paragraph Eight and the implications therefrom are false, misleading and deceptive.

PAR. 10. The use of said forms and other material as above set forth, has had, and now has, the tendency and capacity to mislead and deceive persons to whom said forms are sent into the erroneous and mistaken belief that the said representations and implications are true and to induce the recipients thereof to supply information or to do or perform acts which they might otherwise not have done.

PAR. 11. The aforesaid acts and practices of respondent as herein alleged, were, and are, all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Roy B. Pope supporting the complaint.

Mr. Murray M. Chotiner of Newport Beach, Calif., for respondent.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

JUNE 2, 1967

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Respondent is the publisher (National Research Company, Washington, D.C.) and the seller (Floersheim Sales Company, Los Angeles, Calif.) of so-called "skip-tracer" forms and also of collection forms, each on IBM forms the size of checks, together with envelopes which go with the forms.[1] These are sold to business concerns throughout the country, referred to herein as creditors, who are in pursuit of debtors. The creditors fill out the forms, return them to respondent in Washington, D.C., who mails them to the debtors or other persons in brown window envelopes printed up with respondent's address but no name, and containing, ordinarily, a metered Washington postmark.

The complaint charges the respondent with unfair and deceptive acts and practices within the meaning of Section 5 of the Federal Trade Commission Act. No unfair methods of competition are alleged.

[1] Photocopies of sample forms and envelopes are annexed to and made part of this decision [p. 182].

There are three main allegations as to subject matter:

Paragraph Four challenges the *skip-tracer forms* (and envelopes).

Paragraph Five challenges the *collection forms* (and envelopes). (It also contains an incidental challenge of the correctness in all states [2] of a statement, on the collection forms, of creditors' rights after judgment).

Paragraph Eight alleges misrepresentation by respondent in advertising to business concerns or creditors that the *collection forms* have been determined by the Commission to be in *compliance* with a prior order of the Commission (said prior order actually applying only to skip-tracer forms).

The challenged skip-tracer and collection forms are alleged in Four and Five, respectively, on the facts stated therein, "to simulate official or governmental documents." Additional facts are stated therein, in some detail, as "method of operation," without stating, however, any further conclusion.

Six and Seven, relating to both types of forms (and envelopes) allege (Six) that through their use respondent represents and distributes instrumentalities representing that "the request for information or demand for payment is made by a governmental agency or is to be used for official purposes"; and further allege (Seven), after substantially repeating the quoted words as to "governmental agency" and "official purposes," that this is false, and therefore the "statements, representations and practices as alleged in Paragraphs Four, Five hereof are false, misleading and deceptive."

Ten follows the form of the usual "conclusion" paragraph of a Commission complaint alleging "tendency and capacity to mislead and deceive." However, as developed at the prehearing conference held herein, complaint counsel relies on Ten, and on the aforedescribed statement of "method of operation" in Four and Five, to support a further charge, to wit, of enabling creditors to misrepresent the existence of "third party authority" behind the forms, *i.e.*, by using the address of a third party, here the respondent, and certain names such as "Payment Demand." Such a charge, if present, might bring this case within the pertinent Commission holding in the recent *State Credit Control Board* case,[3] referred to by complaint counsel at the prehearing conference.

In this connection it may be noted here that there is a provision in the suggested order accompanying the complaint prohibiting forms or

[2] The complaint does not contain this limiting phrase "in all states."

[3] *In the Matter of S. Dean Slough, d.b.a. State Credit Control Board,* D. 8661, Commission opinion, November 16, 1966, 70 F.T.C. 1318, 1348.

envelopes from containing an address other than that at which the creditor maintains a place of business, or which is mailed from a post office other than one where the creditor has a place of business.

Respondent herein strongly contests the charge of misrepresentation of governmental or official authority.

Respondent also contends that the issue of third party authority, or the use of a third party address, goes beyond the issues proposed by the complaint or contained in any charge stated therein, and further contends, by implication, that, if this is so, no order which may be issued under this complaint may be widened so as to include a prohibition in respect to third party authority or use of a third party address (or mailing from Washington).

Respondent also contests the charge of misrepresenting that the collection forms are in compliance with the Commission's prior order, *i.e.*, by his proof that the collection forms were submitted as part of the showing of compliance with the Commission's prior order relating to skip-tracer forms. Respondent also contests the incidental allegation that the statement of rights of creditors to collect a judgement, as set forth on the collection forms, is not correct in all States.

Both sides, definitely including the respondent, were unusually cooperative in prehearing conference proceedings herein, with the result that there was substantial expedition, particularly in connection with the charge of simulating governmental or official authority.

As to the existence in the complaint of any charge of misrepresentation as to third party authority or use of a third party address, complaint counsel stated at the prehearing conference that he relied on the facts as alleged in Four and Five of the complaint, and the general allegation of deception in Ten, as referred to above. However, he finally stated at the conference that he would move to amend the complaint to include such a charge (Tr. 35, l. 1–3). The examiner stated that he would give him leave to make such a motion (Tr. 35, l. 4), intending to certify the motion to the Commission as being within its sole prerogative under its Rules and the *Standard Camera* case.[4] The examiner also stated: "If you don't make such a motion, I think I can rule now—and I will rule—the issue is not in the case * * *" (Tr. 36, l. 12).

It so happens, however, that complaint counsel, for reasons not known to the examiner, ultimately elected not to make the motion, and has never made it. Under these circumstances the examiner now con-

[4] *In the Matter of Standard Camera Corporation*, D. 8649, Commission opinion, November 7, 1963 [63 F.T.C. 1238, 1265]. *Rules of Practice*, Section 3.7(a)(1).

cludes, after much deliberation, that he cannot hold that a charge of misrepresentation as to third party authority or the use of a third party address is alleged in the complaint. A contrary holding would, at the very least, be unfair to respondent, who has been lulled into a sense of security and deprived of possible proof, expert or otherwise, in his behalf. Even if the complaint could possibly be construed to allege such a charge, complaint counsel should be estopped from so contending.

In this connection it may be noted that complaint counsel's proposed findings and conclusions essentially and almost literally follow the pertinent wording of the complaint and state no separate finding or conclusion on misrepresentation as to third party authority. Moreover, his proposed order simply presents, without separate comment, the aforementioned provisions in the suggested order accompanying the complaint prohibiting a creditor from using an address not his own or mailing from a post office not in his locality. It is true that complaint counsel's brief dwells liberally (pp. 6–7) on the *State Credit Control Board* case, but it seems careful not to state actually that the complaint in the present case contains a charge of third person authority.

Nor does complaint counsel contend, or has he ever contended, that provisions as to "third party authority" misrepresentation are justified in the order on the theory of broadening its scope for the purpose of enforcing prohibitions therein in respect to "governmental authority" misrepresentation. The question of scope of order will be discussed toward the end of this decision.

The hearing proper was held in Los Angeles, lasting three days, March 6, 7 and 8.

Complaint counsel relied principally on the testimony of respondent himself, and on the various exhibits. He states, quite correctly, in his Proposed Findings (p. 1) that there "are substantially no disputed questions of fact in this case."

Respondent's counsel also relied on the respondent himself as a witness—although calling briefly one other witness in rebuttal on a matter which the examiner regards as hardly implicating the respondent, *i.e.*, the alleged inking out by a creditor of a portion of the "disclaimer" on one of the forms.[5]

Complaint counsel did call a number of witnesses other than respondent, although perhaps not necessary to prove his case.

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[5] As to this rebuttal, see TR 337–348.

He called three attorneys as "expert" witnesses, in a manner of speaking, two of whom had some direct experience with the forms and envelopes herein. He also called a number of public witnesses, *i.e.*, debtors or others who received the forms and envelopes.[6]

One of the experts, a legal aid attorney, had had as a client one of the debtor witnesses in this case. Another, a bar association attorney, had had no such actual experience with debtors or others. The third, a former public defender counsel, had had such experience (but not with any witness produced herein), *i.e.*, Mrs. Bernstein, whose testimony the examiner characterized as of little weight in any event (TR 280–81).

The examiner now grants respondent's motion to strike the testimony of the first two expert witnesses referred to here, that is, insofar as their testimony ventures opinions on the ultimate issues of deception in this case. The examiner is certain that none of the opinions of any of the three "experts" are relied on by him in arriving at his findings and conclusions herein as to deception, which are primarily and squarely based on his personal inspection of the forms and envelopes.

As to the various public witnesses, *i.e.*, debtors or others, their testimony remains, of course, in the record. The testimony primarily serves to corroborate the examiner's findings or conclusions based on his own inspection of the forms and envelopes. As a matter of law the testimony is unnecessary, capacity to deceive being the test, not actual deception.[7]

It is also true that the testimony of the public witnesses, and to some extent that of the expert witnesses, tends to show that illiterate or uneducated debtors are a substantial segment of the debtor community, and, therefore demonstrates that they are deserving of due consideration in determining what constitutes deception in attempting to collect debts. This may be an answer, as contended by complaint counsel, to the word "literate" used by the court in a prior decision [8] absolving this respondent on a criminal contempt charge in connection with his then skip-tracer forms. However, the matter is relatively unimportant since the examiner's findings and conclusions of deception herein relate to deception of literates as well as illiterates.

The examiner at this time denies respondent's motion to dismiss, on which decision was reserved, and disposes of any other motions

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[6] Referred to under Finding 10 and elsewhere.

[7] *Charles of the Ritz* v. *F.T.C.*, 143 F. 2d 676 (C.C.A. 2 1944). *Goodman* v. *F.T.C.*, 244 F. 2d 584 (C.A. 9 1957).

[8] *In re Sydney Floersheim*, 316 F. 2d 423, 427 (C.A. 9 1963).

which may remain undecided so that they accord with and are consistent with this decision.

FINDINGS OF FACT AND CONCLUSIONS

The following are the findings of fact and conclusions of fact in this case. This duality follows the style of the complaint which intermingles alleged facts and alleged conclusions of fact, particularly in respect to alleged deception as to official or governmental authority.

All proposed findings and conclusions of fact not made or adopted hereunder, or elsewhere in this decision, are disallowed and rejected, although not necessarily for lack of proof.

Both complaint counsel and respondent's counsel have conveniently submitted proposed findings and conclusions closely following the sequence of allegations and suballegations in the complaint. Accordingly, the paragraph numbers of the complaint are inserted by the examiner, although only as subcaptions, in the below findings and conclusions.

Since neither complaint counsel nor respondent's counsel have adopted the numbering used in the complaint, and respondent's counsel has used more detailed and extensive numbering than complaint counsel, the examiner has adopted the following system of numbering:

The below findings and conclusions are numbered 1, 2, 3, 4, etc., corresponding to respondent's proposed findings.

They are subdivided, however, by a limited number of subcaptions; First, Second, Third, etc., corresponding to complaint counsel's proposed findings—each subcaption also containing a reference to the complaint paragraph numbering One, Two, Three, etc., as above indicated.

It is believed that this correlation of the numberings of both parties, in their proposed findings, and the primary adoption of the respondent's numbering, together with the further correlation with the paragraph numbers of the complaint, make possible here a close comparison of each part of the complaint with each part of the proposed findings of both complaint counsel and respondent's counsel.

First (Re Complaint, Paragraph One)

1. Respondent, Sydney N. Floersheim, is an individual trading and doing business under the name of Floersheim Sales Company and also under the name of National Research Company.

2. The office and principal place of business of Floersheim Sales Company is 7319 Beverly Boulevard, Los Angeles, California.

3. The office and principal place of business of National Research Company is 748 Washington Building, Washington, D.C.

Authority

Par. One of complaint as admitted by Par. One of answer.

Second (Re Complaint, Paragraph Two)

4. Respondent is now, and for some time long past has been, engaged in the business of preparing and selling printed forms and other material (*i.e.*, envelopes) for use in obtaining information about alleged delinquent debtors, and in the collection of delinquent accounts.

Authority

The first sentence of Par. Two of the complaint as admitted by Par. Two of the answer, except that the reference to envelopes is added here.

Third (Re Complaint, Paragraph Two)

5. Respondent causes said printed forms and other material when sold to be transported from his place of business either in the State of California or in the District of Columbia to purchasers thereof located in various States of the United States, and various States and places other than the State of California and the District of Columbia, and has sent and received, by means of the United States mails, letters, checks, and documents to and from States other than the State of California and the District of Columbia.

(This finding uses "either" instead of "located either," *i.e.*, in line 3.)

6. Respondent maintains, and at all times hereafter mentioned has maintained, a substantial course of trade in the said forms and other material in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Authority (*for 5 and 6*)

With slight clarification, the foregoing paragraphs 5 and 6 hereof are the last two sentences of Par. Two of the complaint as admitted by Par. Two of the answer.

Fourth (Re Complaint, Paragraph Three)

7. The said printed forms and other material, prepared by respondent and transported by him, as hereinbefore set forth, are intended to be, and are, sold to collection agencies, finance and loan companies, merchants who sell on installment accounts, and others who have unpaid accounts.

Authority

The first sentence of Par. Three of the complaint as admitted by Par. Three of the answer.

For convenience, the purchasers may be referred to herein as creditors, and alleged debtors may be referred to as debtors.

Fifth (Re Complaint, Paragraph Three)

8. The forms and other material (envelopes) are designed and intended to be, and are used by said purchasers, or creditors, for the purpose (a) of obtaining information concerning the purchasers' alleged debtors, and (b) in the collection of delinquent accounts with the aid and assistance of respondent as hereinafter set forth.

9. Stated another way, said forms and material (envelopes) are intended for the purpose (a) of locating delinquent debtors whose present whereabouts is unknown or locating their places of employment, or (b) to assist in the collection of delinquent accounts by informing debtors to pay their unpaid obligations to their creditors by making payment directly to the creditors.

Authority (for 8 and 9)

Par. 8 reflects the first sentence of Par. Three of the complaint, and complaint counsel's proposed finding. See CX 5–22, 27, 29–34, 36; and TR 78, 79. As an example of an envelope see CX 23 and 23A.

Par. 9 reflects proposed finding 9 of the respondent, and does not seem to be in dispute.

Skip-Tracer Forms and Envelopes

Sixth (Re Complaint, Paragraph Four)

10. The forms and material (envelopes) designed to obtain information as to debtors, to wit, the so-called "skip-tracer" forms and envelopes, are as a matter of fact, as the hearing examiner here finds, so prepared and constructed that, if used as contemplated and in the regular course, they will simulate an official or governmental origin.

Authority

The examiner bases this conclusion of fact primarily on his own inspection of the forms and envelopes, and on the method according to which they are intended to be used.

In particular, the brown window envelopes, designed for mailing forms (whether skip-tracer or collection) to debtors or others, simulate by themselves—as well as by the printing on them, the spread

eagle stamping, and the apparent contents—an official or governmental origin.

Authority

This conclusion of fact is based primarily on examiner's own inspection. See CX 23 and 23A.

Note that the same envelope used for the skip-tracer forms is used for the collection forms (TR 302).

The finding above as to the misrepresentation as to governmental or official origin by the brown window envelopes, and thus of general misrepresentation of such origin, is corroborated by specific testimony of public witnesses, some of them illiterate or not well educated.

Their testimony, as well as "expert" testimony, brings out the importance, in determining whether or not there is misrepresentation, of the existence of a substantial segment of illiterate or uneducated debtors, a matter of general knowledge in any event. Illiterate or uneducated debtors and their families can also be led to misconstruing enclosed forms tending to indicate governmental or official origin.

However, even educated debtors or others can be deceived by the envelopes as to governmental or official origin. This is not only implied in the examiner's above-stated conclusion on his own inspection, but is corroborated by the testimony herein of a schoolteacher debtor.

Authority

The examiner, as above stated, bases this conclusion of fact primarily on his own inspection of the envelopes. Compare CX 23 with a Treasury Department envelope, CX 46.

Mrs. Gonzalez, a Mexican-American with eight or nine grades of education (TR 224), testified as to an envelope like CX 23 addressed to her debtor husband that "it came from Washington, so I thought it was from the Government" (TR 221). Mr. Haynes, a legal aid attorney, testified that this type of impression is common with the uneducated (TR 137).

The debtor husband of Mrs. Gonzalez testified through an interpreter (TR 208). Manuel Gonzalez, another debtor, displayed very imperfect English in his testimony (TR 191–207). Disinterested testimony indicates that this type of illiteracy is widespread.

* * * * * * *

As to an actual example of the effect on a definitely educated recipient—although the example is hardly needed to support the examiner's conclusion based on inspection—Mr. Blackley, a schoolteacher, testified that when he received the envelope in the mail he thought that it

contained a G.I. insurance check (TR 234) from Washington (TR 235), based, to be sure, on the prior receipt of G.I. checks (TR 236).

The envelopes, used for either type of form, will be more fully described below, after a description of the skip-tracer forms themselves, as well as of return self-addressed envelopes enclosed with the skip-tracer forms.

11. The skip-tracer forms, on IBM cards the size of a check, request information in regard to the debtor. There are several different types of these forms, depending on the kind of information sought. The prominent use of the word "Questionnaire" is common to a number of these types. All of them express the request for information in an authoritative way, with much emphasis on Washington, D.C., and Washington Building, referred to more fully below.

The said forms, when mailed out in the brown window envelopes, are accompained by smaller business reply envelopes (also brown) carrying a printed first class mail permit number, making a postage stamp unnecessary. More particularly, the said return envelopes carry one of the following printed names or designations as addressee (the particular one used being adapted to the particular skip-tracer form used):

Claimants Information Questionnaire (CX 37).[9]
Current Employment Records (CX 35).
Change of Address (CX 28).

Although the respondent's Washington address is used there is no further name of addressee, and a typical return envelope will carry a full printed return address as follows:

Claimant's Information Questionnaire, 748 Washington Building, Washington 5, D.C. (CX 37).

12. It is obvious that the recipients, on opening the official-like brown window envelopes, and viewing the Questionnaire forms, so designated or not, and the cryptically addressed return envelopes, may well consider the envelopes, forms, and return envelopes together in getting an impression as to their meaning of the forms and return envelopes.

The complaint characterizes the name "Questionnaire," appearing on the skip-tracer forms, and the cryptic addressee names "Claimants Information Questionnaire," "Current Employment Records," and "Change of Address," used on the return envelopes. The complaint characterizes them as "fictitious and official sounding names" (Par. Four), whereas complaint counsel's Proposed Findings (Par. Sixth) characterizes them merely as "fictitious names."

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[9] See CX 36, which is a skip-tracer form itself containing this heading.

The *examiner's conclusion* is that the said names or designations, to wit

Claimants Information Questionnaire.
Current Employment Records.
Change of Address.
Questionnaire.

are, but only in conjunction with the brown window envelopes as used, official sounding, as alleged, or carry an official connotation. This conclusion as to being official sounding or having an official connotation applies with less force to the use of "Questionnaire" by itself in some of the types of these skip-tracer forms.

The examiner's further conclusion is that the said names or designations are not fictitious, *i.e.*, in any realistic sense for the purpose of proving misrepresentation. Respondent testified (TR 305–06), and the examiner believes, that the Post Office cleared the use of the names or designations used on the return envelopes. It would be difficult for the examiner to conclude that the Post Office approved the use of "fictitious names." Actually the names are realistic and functional. Although they are not registered trade names (TR 69), and simply were adopted for the purposes of the business (*id.*), this does not make them deceptive. Moreover, the charge of using "fictitious" names goes far beyond the basic and repeated charge in the complaint as to governmental or official origin.

With the foregoing conclusion or conclusions, it will be possible to consider, later in this decision, whether any order which issues in this case may properly permit the use of these names or descriptions, provided that there is a radical change in the brown window envelopes, by way of color or otherwise.

Seventh (Re Complaint, Paragraph Four, Continued)

13. The skip-tracing forms contain the address of 748 Washington Building, Washington 5, D.C. This address also appears as the forwarding address on the brown window envelope in which the forms are to be sent out to the debtors or others. It also appears on the return envelope furnished by respondent at the same time, which is designed for the return of the form, properly filled out, by the debtor or other person.

Authority

See CX 27 through 37. The above happens to summarize the fuller findings thereon immediately above.

Eighth (Par. Four Continued)

14. The creditors to whom the forms are sold, and by whom they are used, do not have offices or places of business at 748 Washington Building, Washington 5, D.C., which, as already stated, is the office of the respondent, trading and doing business as National Research Company.

Authority

This is obvious, and respondent's pertinent proposed finding is in accord with this.

Ninth

15. The form entitled "Claimants Information Questionnaire" has a line at the top with a dollar sign at the beginning, and sufficient room to insert an amount of money.

Authority

Se CX 36. This is precisely as alleged in the complaint and accepted by respondent's pertinent proposed finding. It is not too important a matter, nor is the immediately following paragraph.

Tenth

The creditor inserts the amount of the debt where the dollar sign appears, *i.e.*, the amount of money which the creditor claims the debtor is obligated to pay, and frequently does this with a mechanical check writer.

Authority

TR 90. Respondent's pertinent proposed finding is in accord, except that it does not mention the mechanical check writer.

Eleventh

16. Said skip-tracer forms have printed thereon a statement disclosing that the purpose of the form is to obtain information concerning a delinquent debtor and that it is not connected in any way with any state or the United States Government. The statement reads:

> The purpose of this card is to obtain information concerning a delinquent debtor, and to further advise that this is not connected in any way with the United States Government.

Authority

See CX 27, 29–34, and 36. Respondent's proposed finding is in accord. The examiner has added the above quotation.

Twelfth

17. The statement referred to in the last preceding finding, *i.e.*, that the requested information concerns a delinquent debtor, and that there is no governmental connection, is printed in such small type and is so inconspicuous that it is likely to be unnoticed by the recipients, particularly if uneducated.

Authority

See CX 27, 29–34, and 36. The examiner makes this finding on the basis of his own inspection of the skip-tracer forms. Actually he had a hard time finding the statement on some of the forms. The reference to uneducated recipients has some corroboration in the testimony heretofore referred to on illiterate and uneducated debtors.

Thirteenth

The respondent's method of operation, as to the aforementioned "skip-tracer" forms, is as follows:

18. The printed forms, the brown window envelopes in which the forms are to be mailed, and the return envelopes above mentioned, are shipped to the purchaser.

19. The brown window envelope, as already indicated, is, despite respondent's proposed finding to the contrary, very similar to envelopes used by the United States Government for some official purposes. The similarity is reinforced by the form to be enclosed therein which by size as well as texture and sometimes color, as disclosed through the window envelope, gives the appearance of being a check, and, in conjunction with the envelope, a Government check. The similarity is also reinforced by other considerations.

Authority

The said deceptiveness of the envelope is made clear by viewing it, CX 23, with a skip-tracer form inside. See remarks under Finding of Fact 10. See also Finding of Fact 30 as to viewing CX 23 with a Payment Demand form inside.

20. It may well be true that certain envelopes ordered by respondent were refused by him because he was of the opinion that they were too similar to the color of the envelope used by the United States Government. (TR 353 ff.) However, this would seem to corroborate the finding made here that respondent's envelopes have a sufficient similarity to United States Government envelopes to confuse the public, or a substantial segment of the public here concerned, as to the possible governmental origin of the envelopes.

Moreover, the intent of respondent, except as it may bear on such issues as scope of any cease and desist order and of requisite public interest, is not in issue in this case. The issue is whether or not there is an unfair trade practice or deception as part of an unfair trade practice.

21. Respondent also testified (TR 353, 6) that the envelope used by him was standard in color and is the cheapest [10] in price of all envelopes that have come to his attention. This evidence, also, seems hardly relevant on the basic issue here. However, it does seem to indicate that envelopes of a different shade of color than that used herein were just as cheap, *i.e.*, the same price. Respondent refrained from testifying that a different color, such as white, would cost substantially more, or as to what the cost would be.

22. The return address on the envelope is "748 Washington Building, Washington 5, D.C." This type of return address, with two references to "Washington," reinforces the impression of a governmental origin made by the envelope itself, particularly in the minds of uneducated people or others to whom Washington is a remote and powerful capital city.

The envelope also has printed on the front, usually in the lower left-hand side, in a prominent box, the statement, in three lines, to wit:

The Form Enclosed is
Confidential
No One Else May Open

This statement also, whatever other purpose it may have, adds to the formality of the envelope and to the envelope's outward impression, reinforced by several other considerations, of coming from the United States Government.

Authority

See CX 23A, in which a collection ("Payment Demand") form was sent out. Respondent, as already pointed out, testified (TR 302, 1.6) that the very same envelopes were used for skip-tracer forms.

23. The return envelope has printed thereon one of three of the titles hereinabove set forth (Claimants Information Questionnaire, Current Employment Records, and Change of Address), and the address 748 Washington Building, Washington 5, D.C. This absence of a name, in any usual sense, of the addressee, tends to reinforce the potential impression, due to the envelope, that the inquiry comes from, and the information is being returned to, an official source. Re-

[10] See TR 87.

spondent testified (TR 305–06) that the appellations actually used were approved by the United States Post Office for the purpose of obtaining the first-class permit on these business reply envelopes. However, again the issue is not respondent's intent, but whether or not the practice is unfair or may deceive. Moreover, the standards of the Post Office Department approving such appellations can hardly be compared with those of the Federal Trade Commission, charged with much wider jurisdiction, comprehending unfair trade practices and deception generally.

24. After the forms and envelopes have been received by the purchaser, the purchaser places the name and address of the debtor, or of a person who might know of the whereabouts of the debtor, on one of the forms and inserts the form and reply envelope in the window envelope.

25. The envelopes and enclosures are then sent to the respondent at the said Washington, D.C., address, where they are ordinarily stamped by a postage machine with a Washington postmark, with a prominent spread eagle (see CX 23A). They are mailed by the respondent—although in some instances, it seems, the customers of respondent use a regular five cent postage stamp (TR 308).

26. If the addressee, *i.e.*, the debtor or other person, fills in the information requested on the form and returns the form to the Washington, D.C., mailing address in the postage-free reply envelope, the respondent opens the envelope. According to respondent's testimony, his office tabulates the results, destroys the envelopes, and sends the replies to the purchasers of the forms, to wit, the creditors, and does not so send the replies unopened, or at least sorts and returns them after opening them.

Authority (for 18–26)

Paragraph Four of the complaint, as admitted by Par. Four of the answer—except as to the alleged similarity of the envelopes with government envelopes, as to the allegation that replies are sent by respondent to the purchasers of the forms without being opened by respondent, as to the allegation that names used in the forms are official sounding, and as to the allegation that the disclaimer in the forms is in such small type as to be inconspicuous.

See also TR 80–82; 89, 397.

The examiner in construing the forms and envelopes relies on his own observation and examination.

Collection Forms and Envelopes

Fourteenth (Re Complaint, Paragraph Five)

27. The forms and material (envelopes) sold for the purpose of collecting delinquent accounts, to wit, the so-called "Payment Demand" forms and material (envelopes) are as a matter of fact, as the hearing examiner finds, so prepared and constructed that, if used as contemplated in the regular course, they as a whole simulate an official or governmental origin. The forms themselves do, to be sure, in large measure, but not entirely, tend to dissipate the simulation. The brown window envelopes to be sent to debtors (the same as those sent for "skip-tracer" purposes), and as used by creditors to enclose the forms, definitely simulate an official or governmental origin and thus announce the forms as being of the same origin.

28. In connection therewith, respondent has adopted the name or description "Payment Demand," uses the address "748 Washington Building, Washington 5, D.C.," and has printed on the forms themselves the words "Notice Mailed from Washington, D.C. by Payment Demand." The said "Payment Demand" forms are printed on standard IBM cards and each is the size of a Government check (as is the skip-tracer form).

29. The respondent also causes to be printed on these "Payment Demand" forms the alleged rights of a creditor to collect a judgment in the State in which the debtor resides, stating, however, that it is "Subject to the Laws of the * * *," the creditor inserting the name of the State in which the debtor resides. The statement is that a creditor may request an attorney to attach after judgment specified property, as well as earnings, commission, and salary.

The complaint (Par. Five) alleges that the "statement is sometimes incorrect." Complaint counsel's brief (p. 5) states: "What the pleader had in mind was that all states do not have garnishee laws for wages and earnings." The brief, without pinpointing any inaccuracy, simply refers to a compilation of the laws of the various States received in evidence as CX 56 A–V.

Inasmuch as (a) the statement contained on the forms is made subject to the law of the particular State involved, (b) the complaint counsel has not deemed the matter of sufficient importance to pinpoint the States as to which the law has been allegedly misstated, and how, and since (c) cursory examination of CX A–V

reveals only occasional and atypical variation from general State law, the examiner is of the opinion that the matter of alleged misstatement of the law by respondent on the "Payment Demand" forms is not too important, is perhaps in the de minimis category, and also in the field of minor mistake as to detail rather than actionable misrepresentation.

Authority (for 27–29)

Paragraph Five of the complaint as admitted by Par. Five of the answer, except that the respondent denies that the forms and material simulate official or governmental documents, or origin, and claims that the information relating to the rights of a creditor to collect a judgment is correct to his best information and belief.

Fifteenth (Re Complaint, Paragraph Five)

30. The respondent's method of operation as to these collection or "Payment Demand" forms was, and is, similar to that described above as to the skip-tracing forms—except that no reply envelopes are furnished by respondent, *i.e.*, for return by the recipients. Replies go directly to the creditors, except in isolated instances where they are sent to the respondent in Washington, *i.e.*, 748 Washington Building, Washington 5, D.C.

Authority

Paragraph Five of the complaint as admitted by Par. Five of the answer, but somewhat qualified, *i.e.*, as to isolated replies, as to which respondent testified. Respondent's Proposed Finding 30 is in accord with the qualification. See also TR 90–91.

Despite the above-stated similarity in operation to skip-tracer forms, the method of operation as to "Payment Demand" forms may, for the purpose of clarity, be detailed as follows:

The printed forms and the brown window envelopes in which the forms are to be mailed are shipped by respondent to the purchaser. (As already indicated, no return envelopes are used in the "Payment Demand" operation.)

The brown window envelopes, as already stated, are identical to those used in the skip-tracing operation (TR 301–02). As already found, these envelopes are very similar to envelopes used by the United States Government for some official purposes. The similarity is reinforced by the glossy texture of the form enclosed, and often its color (green being used now), as disclosed through the window envelope, giving the appearance of a Government check. (This is demonstrated by viewing CX 13 as contained in CX 23, the envelope.)

As already referred to, Mr. Blackley, a schoolteacher debtor, thought before opening the envelope that it contained a G.I. dividend check (TR 234).

The return address on the envelope, "748 Washington Building, Washington 5, D.C.," also serves to reinforce the impression of Government origin made by the envelope itself, particularly in the minds of uneducated people in remote areas. The prominent boxed statement on the envelope, "The Form Enclosed is Confidential No One Else May Open," strengthens this impression. The metered stamping, with its spread eagle, which appears on the envelopes going out to debtors also strengthens this impression, at least for uneducated recipients, although it may alert, to some extent, ordinary recipients.

Since there are no return envelopes in connection with the collection of "Payment Demand" forms, obviously no finding or observation is necessary in respect to these forms as to any unfair practice or deception connected with return envelopes.

After the forms and envelopes (*i.e.*, the forwarding envelopes) have been received, the purchaser, or creditor, fills out the forms, stating the demand for the payment of the amount of indebtedness and stating the creditor's name and address, as well as the debtor's name and address, which will appear through the window envelope. The creditor also fills in on each form the name of the state in which the debtor resides, *i.e.*, in connection with the notice that attachment after judgment is possible, subject to the laws of the state.

The envelopes and enclosed forms are then sent to respondent at his Washington, D.C., address, where they are automatically stamped by a postage machine with the Washington postmark and spread eagle, and mailed, exactly as are the skip-tracer forms and envelopes.

The answers, including any enclosed checks or other payments, are received by the creditors directly, except in isolated instances where the debtor writes directly to respondent at respondent's Washington address.

31. Whatever the relevancy herein, the testimony or showing is that there is a corporation known as Payment Demand, Inc., organized in the District of Columbia since the filing of the complaint herein, and that a contract is contemplated between Payment Demand, Inc., and Floersheim Sales Company whereby Floersheim Sales Company will be the exclusive sales agent for the collection of "Payment Demand" forms to be published by Payment Demand, Inc. (Respondent's Proposed Finding 31, as supported by testimony and statements in the record.) [11]

[11] See TR 70, 71, etc.

Unfair Effect of Both Types

Sixteenth (Re Complaint, Paragraph Six)

32. Through the use of both types of forms, *i.e.*, skip-tracing forms as well as collection or Payment Demand forms, and their envelopes—more particularly by (1) the words and terms heretofore set forth, (2) the format and phraseology of the forms and the envelopes, and (3) the Washington, D.C., postmark—respondent represents and implies, and places in the hands of the purchasers of his forms and envelopes the means and instrumentalities whereby they represent and imply to those to whom said forms are mailed, that the request for information in the skip-tracer forms, or the demand for payment in the collection or Payment Demand forms, is made by a governmental agency or is to be used for official purposes.

Authority, or Reasoning

This conclusion of fact summarizes, at least in part, conclusions of fact heretofore made. It more or less follows complaint counsel's Proposed Finding Sixteenth, eliminating, however, the words "jointly and separately," and finding, rather, that the deception or unfair practice results from all the various factors. However, deception or unfairness does arise from some of the individual or several factors, depending upon which of the two kinds of forms are considered, as will be detailed immediately following.

As to *skip-tracing* forms and envelopes, they are individually or severally found to be an instrument of deception, to the extent indicated, as follows:

The forwarding *brown window envelope* is found to be an individual or independent instrumentality of deception, as already in effect found as a conclusion of fact. (This is the same envelope used for collection or Payment Demand forms.) The color brown is dominant in causing deception.

The *form itself* is found to be a separate independent instrumentality of deception inasmuch as the wording that its purpose is to obtain information concerning a delinquent debtor and to advise that "this" is not in connection with the United States Government, is so inconspicous that it is not likely to be read, particularly by uneducated individuals. There are also other contributing factors of deception. This in effect repeats a conclusion of fact heretofore made herein.

The various names printed as addresses on *return envelopes*, such as "Claimants Information Questionnaire," "Current Employment

Records," or "Change of Address"—all containing no further name of the addressee, and being addressed to 748 Washington Building, Washington 5, D.C.—serve to carry out the initial impression created by the brown window envelope that the information is requested by a Government agency or at least is to be used for official purposes. This conclusion of fact also reiterates a conclusion of fact heretofore made.

As to the *collection* forms and envelopes, also referred to as "Payment Demand," the following may be stated:

The brown *window envelope* to be forwarded to the debtor is clearly an instrumentality for perpetrating the deception that the enclosure comes from the United States Government. This is particularly so in conjunction with the appearance of the enclosed form as seen through the window, both because of its glossiness and its color, now green, tending to simulate a Government check. This reaffirms the conclusion of fact heretofore made. (The envelope, of course, is the very same envelope used for skip-tracing forms.)

The collection or "Payment Demand" *forms* are, however, not held by the hearing examiner to be, by themselves, an instrumentality for perpetrating the deception or simulation of governmental action or use for official purposes. Nevertheless, the prominent statement on these forms, to wit, "Notice Mailed from Washington, D.C. by Payment Demand" and often, in addition, on the reverse side, "Mailed from Payment Demand, Washington 5, D.C.," do serve to tend to perpetrate any initial impression created by the envelope as to official or governmental source, particularly in the mind of the uneducated.

As to the statement on these collection forms relating to the *rights of creditors* to attach after judgment, the examiner finds himself unable, on any clear showing in this case, to make a finding of deception, instrumentality of deception, or of unfair trade practice.

Seventeenth (Re Complaint, Paragraph Seven)

33. In truth and in fact, the information is not requested for any Government agency or is not to be used for any official purposes, and the demand for payment is not made by any governmental or official agency, but on the contrary, the sole business of respondent is to sell the various printed forms to others, to be used by them for the purpose of obtaining information concerning alleged debtors or for the purpose of obtaining payment of alleged delinquent accounts.

Authority

This is not in dispute, and is almost identical with the pertinent proposed findings of both sides. It is admitted by the pleadings.

Eighteenth

34 (and 35). By selling and placing said forms and envelopes in the hands of the purchasers, respondent thereby furnishes such purchasers with the false, misleading, and deceptive means and instrumentalities by and through which they may be unlawful subterfuge (a) to obtain information as to delinquent debtors, and (b) to obtain the payment to creditors of delinquent accounts.

Prior Order of Commission

Nineteenth (Re Complaint, Paragraph Eight)

36. In the sales promotion literature for the forms described above as collection or "Payment Demand" forms, respondent represents, and has represented, directly or by implication, that said forms have been determined by the Federal Trade Commission to be in compliance with the requirements of the order to cease and desist of the Federal Trade Commission in Docket No. 6236, *In the Matter of Mitchell S. Mohr, Sydney Floersheim, et al.* [52 F.T.C. 1466], and that said forms have been approved by the Federal Trade Commission.

Authority

Par. Eight of the complaint, as admitted by Par. Eight of the answer (and respondent's Proposed Finding 36), except that respondent claims that the representation is true.

Twentieth

37. The said "Payment Demand" forms, or any collection forms, were not in issue in Docket 6236, and the Federal Trade Commission has never rendered any official determination that said forms or similar collection forms sold by respondent are in compliance with the requirements of said order to cease and desist or approving said forms.

38. The said collection, or "Payment Demand," forms were not in issue in Docket 6236, nor did the order therein deal with them. Said forms have not been determined by the Federal Trade Commission to be in compliance with the requirements of said order in Docket No. 6236. Respondent's claim to the contrary simply twists words contained in two letters (CX 2 and 4) beyond their natural and intended meaning. Accordingly, respondent's representation as to Commission determination of compliance of the collection forms with the prior order, as set forth in Finding 36 hereof, is altogether misleading and is deceptive, as is the included representation that said forms have been approved by the Commission.

Authority (for 36–37)

See CX 1–4, 49, and 50. The examiner is not impressed by respondent's purported reliance on letters from Commission representatives approving respondent's compliance with the order concerning skip-tracer forms as meaning approval of collection or Payment Demand forms submitted by respondent together with the skip-tracer forms actually involved in compliance. The most that this could prove is that respondent thought the collection forms were approved, *i.e.*, that he has misrepresented but in good faith. See examiner's comments (pp. 161–162 below) on the brief of respondent's counsel (at his pages, 4, 5).

Respondent's Brief as to Facts

Respondent's counsel has filed a supporting brief containing what is entitled "A Statement of Material Facts." However, the facts relied on do not alter the Findings of Fact made by the examiner in this case. The said Statement will be reviewed here page by page. Salient portions will be noted and referred to by page number of the brief. They will be followed, in each instance, by the examiner's comment.

The brief points out (p. 1) that respondent, according to his testimony, has been a credit consultant with large concerns, that he has taught individuals in collection and credit departments of the Bank of America, Franklin Simon Company, and the American Collectors Association, that he does consultant work with the Diners Club, American Express, and other organizations, that he is an invited speaker on the subject of collections, and has made an appropriate study of the debt structure of the United States in connection with the retail buying. Respondent testified that it is his opinion that the collection of accounts is vital to our economy (p. 2), justifying, apparently, collection form organizations of the size and extent of his own. This, it seems to the examiner, appears to be directed to the issue of public interest—*i.e.*, in preserving adequate facilities for collecting debts or in not unnecessarily harassing collection efforts—rather than to the issue of unfair trade practice or deception as such.

Respondent also testified (p. 2) that Washington, D.C., was selected as an office for the business because it was best from the point of view of law uniformity, accessibility to large concerns on the East Coast, and also of avoiding "state jealousy." Washington, D.C., has been the office of National Research Company since its inception. A bank account was established there, and taxes have been paid there regularly every year since 1953 (p. 3). This testimony was no doubt elicited to show the lack of intent to deceive, but proof of intent is not required to prove a charge of deception, and this is certainly true of a general charge of commit-

ting an unfair trade practice. Lack of intent may, of course, be considered in connection with scope of order and public interest in general.

According to respondent's testimony (p. 3), the reason that the name of the form does not appear on the forwarding envelope itself is that, for economy, the same envelopes are used for different forms, whether for skip-tracer or collection purposes. However, economy or no economy, it is obvious that the deception is the same. The alleged reason of economy seems to be somewhat thin.

Respondent also testified (pp. 3–4) that he has no objection to putting "Payment Demand" on the forwarding envelope, but that this might violate Postal Regulations, and also be construed as a dun. The desire to avoid possible violation of Postal Regulations may show that respondent did not intend to deceive, but it does not mean that there is no deception. The attempt to avoid the appearance of a dun points, if anything, to a willingness to deceive, *i.e.*, here even as to such an inherently serious matter as governmental or official origin.

According to respondent (p. 4), the Post Office Department has approved the addressee names or designations, "Change of Address," "Current Employment Records," and "Claimant's Information," on the return envelopes, *i.e.*, those enclosed with skip-tracing forms. Approval of these names by the Post Office Department hardly seems to be binding on the Federal Trade Commission, with its primary jurisdiction on unfair trade practices and deception.[12] This is certainly so without proof as to the standards and regulations, if any under which these names were allegedly approved. Furthermore, the claimed approval by the Post Office Department can hardly alter the examiner's finding in this case that these names carry with them, if regarded together with the forwarding brown window envelopes and the enclosed skip-tracer forms, the connotation that an official use is intended for the information supplied pursuant to the request in the forms.

According to respondent's testimony (p. 4), the brown forwarding envelope, CX 23, is used because it is the cheapest made, and he rejected envelopes identical to Government envelopes. This evidence goes to intent and is not relevant to the issue of deception as such. (Incidentally, respondent did not testify how much cheaper a brown envelope is than a white envelope, for instance.)

According to respondent's testimony[13] (p. 4), although the forwarding envelopes are sent out by metered mail (with spread eagle and Washington postmark on the envelopes), this procedure is up to

[12] *Heller & Son, Inc.* v. *Federal Trade Commission*, 191 F. 2d 954 (C.A. 7 1951).
[13] See TR 87.

the creditors and some companies use five cent stamps. However, in the examiner's opinion, the exception proves the rule. Obviously, most of the envelopes go to debtors or others by metered mail.

According to respondent's testimony (p. 4), the present forwarding envelopes—*i.e.*, the brown window envelopes here found to simulate Government envelopes—are justified because debtors who are frequently dunned will not open familiar-looking envelopes. This certainly does not justify the deception of debtors or others as to the Government origin of a communication.

Respondent also testified (pp. 4–5) that there is no special effect in mailing from Washington, D.C., instead of from some other city, provided that the debtor does not recognize the mail as coming from his creditor. (A number of his customers, he testified, mail from their own cities, for reasons of speed. One even has his own address affixed to the envelopes. Other firms in the business of collection make mailings from such cities as Chicago or Boston.) This examiner finds, however, that there is a special effect in mailing from Washington, D.C. The effect is to contribute substantially to any misrepresentation as to governmental or official origin.

The brief states (p. 5) that Mr. Morehouse, compliance counsel for the Commission, wrote a letter dated June 30, 1960, stating that forms submitted as part of a showing of compliance with the Commission's prior order—said forms being "Payment Demand" forms—did not violate the said Commission order. Nor did they, since said Commission order did not and does not relate to "Payment Demand" or collection forms, as distinguished from skip-tracer forms. All that Mr. Morehouse, even assuming he could fully bind the Commission, stated in his one-sentence letter was that the forms "do not violate the Commission's modified order, inasmuch as they do not request any information concerning delinquent debtors." (CX 2.) Moreover, Mr. Morehouse, of course, did not in his letter pass on, or refer to, the brown window envelopes, so prominent in the present case as viewed here.

The brief (p. 6) also cites a letter dated December 20, 1963, from the Secretary of this Commission, stating as to respondent's compliance report containing forms submitted as compliance with the order (part of them being Payment Demand forms) that "the actions set forth therein constitute compliance with the order to cease and desist." There is no reference in this letter, either, as to the brown window envelopes. The letter (CX 4) thus adheres to CX 2.

Neither Mr. Morehouse's letter or that of the Secretary is, in the examiner's opinion, too important in any event for the purposes of the

present case. This is because the examiner does not so much find the Payment Demand forms as deceptive in themselves, but rather finds the primary, moving, and operative deception in the brown window envelopes.

Returning to the brief (p. 6), respondent's testimony is referred to to the effect that the No. 2 man to Mr. Morehouse actually suggested the name, now used, of "Payment Demand," *i.e.*, in place of a name used prior thereto, which had been objected to (TR 363–66). However, whether or not this testimony is relevant or is fully accurate, is not important in view of the consideration that the examiner makes no finding or conclusion in this case that the name "Payment Demand" of itself is deceptive or constitutes an unfair trade practice, any more than the examiner makes a flat finding, which he does not, that the Payment Demand forms are by themselves deceptive as to official or governmental origin, or authority, however much they fit in with the deception caused by the envelopes in which they are sent.

Accordingly, the most respondent can possibly gain by the matters noted in the brief in connection with alleged intended conformity with the prior order by what he has done in respect to Payment Demand forms, is to make some possible showing of good faith which may be considered in deciding on the scope and content of any order which now may properly be issued.

The respondent's brief also describes (pp. 6–12), one at a time, the salient *exhibits* in this case. This presentation is useful, but is not particularly controversial except, possibly, as now noted:

The brief does point out (page 7), apparently to meet the charge that the present green "Payment Demand" form particularly gives the impression of a Government check (when viewed through the window envelope), that other colors have been used, and that color seems to go in cycles, depending on requests of customers. However, green is the color now used on "Payment Demand" forms, and apparently has been used in various past periods as well. Moreover, it is the examiner's finding that the glossy texture of the form, as seen through the envelope, simulates a check, whatever the color, and, combined with the other indicia of Government origin carried by the envelope, simulates a Government check.

Respondent also testified, as pointed out in the brief (pp. 9–10), that Mr. Morehouse stated that it was unnecessary to place a disclaimer on the Payment Demand form since the form discloses to the debtor the demand for money, where it came from, and who is making the demand. It is the examiner's opinion that whatever Mr. Morehouse did or did not say in this connection, he was not, of course, the Commis-

sion, nor does the Commission ordinarily speak by such an oral declaration. However, in the examiner's opinion, it certainly can be plausibly argued and held, from examination of the present Payment Demand form, that a disclaimer is not necessary thereon.

The brief continues for quite a few pages (pp. 12–19), by setting forth sketches, most of them short, of the testimony of various witnesses called by complaint counsel, and Mr. Watson called by respondent. Inasmuch as the examiner relies very little on the testimony of these witnesses, except to the extent that they point up the existence of illiterate debtors as a substantial part of the debtors affected by the challenged practices, and except insofar as the witnesses tend to corroborate the examiner's own inspection of the exhibits, no detailed comment by the examiner is deemed necessary in respect to these witnesses other than has heretofore been given in connection with the Finding of Facts, *supra*.

Respondent's Brief as to "Argument"

After discussing the facts, as referred to immediately above, respondent's counsel devotes four pages of his brief (pp. 19–22) to "ARGUMENT," with three subcaptions, which will now be briefly reviewed in the order presented by him.

I

Respondent's counsel contends that the approval of reports of compliance with the Commission's prior order has not been rescinded or revoked and that, therefore, "the Commission is estopped from proceeding with the instant complaint." In making this contention, in less than half a page, respondent relies on Section 3.26(c) of the Commission's Rules of Practice for Adjudicative Proceedings.

However, all that said Section 3.26(c) states of pertinence to this contention, is the following:

> *The Commission will not proceed against a respondent for violation of an order* with respect to any action which was taken in good faith reliance upon the Commission's approval or advice * * *. (Our emphasis.)

It seems obvious to the examiner that the present proceeding is *not* one for violation of an *order*, *i.e.*, the Commission's prior order. It is a brandnew proceeding alleging a violation of law. Thus it is not in any way proscribed by Section 3.26(c).

Actually, moreover, as heretofore clearly expounded in this decision, the present proceeding is different from the prior proceeding culminating in the prior order. This is because the prior proceeding and order did not relate to "Payment Demand" or collection forms at all.

(Moreover, it may be noted that although the prior proceeding did comprehend skip-tracer forms, it did so with different allegations in the complaint than are in the present complaint, and in conjunction with a series of allegations of misrepresentation not found in the present complaint.)

II

The second point of respondent's "Argument" is entitled "Third Party Mailing is Not Properly Pleaded." It is directed, of course, to whether or not one of the issues of this case, as somewhat indirectly claimed by complaint counsel, is the use by creditors of third party authority or a third party address for the purpose of collecting a debt or perhaps obtaining information about the debtor.

Respondent's brief (p. 20) states substantially that the examiner gave complaint counsel leave to amend the complaint to include the issue, as part of the conclusory Paragraph Ten, that complaint counsel did not do so, and that said Paragraph Ten of the complaint accordingly does not plead the charge or propose the issue.

The examiner agrees that the issue or charge cannot properly be regarded as within the scope of the complaint herein, and is of the opinion that complaint counsel is in any event estopped from urging to the contrary and thus depriving respondent of his full day in court. The examiner has already so ruled in the preliminary portion of this decision (pp. 140–141).

III

The third and last point of the "Argument" in respondent's brief (p. 20) is based on language quoted by the brief from the 1963 opinion of the Court of Appeals, Ninth Circuit, in the case [14] holding that the present respondent was not guilty in that case of criminal contempt, *i.e.*, in connection with the prior skip-tracer forms. This case, already referred to herein, concerned the prior Federal Trade Commission order, or amended order, concerning skip-tracer forms, as enforced by the same Court of Appeals in 1959.[15]

The portion of the opinion from which respondent quotes will now be quoted, but broken up into several sections or parts so as to permit comments by the examiner after each.

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[14] *In re Sydney Floersheim*, 316 F. 2d 423, 427 (C.A. 9th 1963), cited on page 142, *supra*, of the present decision.

[15] *Mitchell S. Mohr, d.b.a. National Research Company*, and *Sydney Floersheim, d.b.a. S. Floersheim Sales Company* v. *Federal Trade Commission*, 272 F. 2d 401 (C.A. 9th 1959). (F.T.C. Docket No. 6236) [6 S.&D. 684].

The first part is:

> We cannot assume that which is clearly expressed in plain English language on any form sent to any literate recipient in this country would *not* be read, or *not* be understood. If that were true, no notice of any kind would be sufficient. It may be difficult to make the American public heed or read a printed statement of fact, but it is there so that all who will look and read may know. * * * (Emphasis is *in the original.* Asterisks inserted to denote an omitted sentence also omitted by respondent.)

In the examiner's view, all that the opinion is saying is that in the criminal contempt case in question the court cannot "assume" that clearly expressed language in English used on any "form" sent to "literate" recipients will not be read or understood. In the present purely civil proceeding it is not necessary to "assume" any such thing, inasmuch as there is actual proof, both from public and "expert" witnesses, of the existence of recipients and potential recipients who are not "literate" or who have very meager education. Secondly, the quoted language is directed only against any "form" sent to a recipient, whereas in the present proceeding the examiner finds that the primary unfair or deceptive practice of respondent relates to the envelope in which the form is received by the recipient.

The language in the next part of the opinion, as quoted in respondent's brief, is as follows:

> In using this language, the respondent did exactly what the Federal Trade Commission in its order asked him to do. If the Federal Trade Commission's order is insufficient, then that body should reopen proceedings and modify its order. * * * (The asterisks denote an omitted sentence also omitted in respondent's quotation.)

In the examiner's view, the present proceeding is not based on any allegation or contention that respondent did not do "exactly what the Federal Trade Commission in its order asked him to do," *i.e.*, in its prior order. The Commission has re-examined respondent's practices, including additional practices such as the use of "Payment Demand" forms, and the current use of envelopes, used to mail both types of forms. The Commission has determined that the prior order, or amended order, issued by it is "insufficient" and that, certainly as of now, it is based on a complaint of insufficient scope. Accordingly, the Commission has commenced an entirely new proceeding. Secondly, and more importantly, the Commission has done the equivalent of what the court indicates in its opinion, *i.e.*, that the Commission "reopen proceedings and modify its order." The underlying reasoning of the court obviously is that there should be a different order of broader scope than the prior order if the Commission desires to enjoin the

respondent in a broader fashion. By commencing an entirely new proceeding, the Commission in a sense has possibly done even more than the opinion basically requires. As indicated under I, *supra*, the examiner rejects respondent's contention that under Section 3.26(c) of its Rules the Commission was limited to proceedings to modify its prior order.

The next portion of the quotation in respondent's brief, from the court's opinion, is as follows:

> Nor are we impressed with the Federal Trade Commission's complaints that the forms used are too "official looking," or that the language used in them is peremptory in nature, or "too demanding," or that the paper used is of a color and design sometimes used on checks, or that the address to which the cards are to be mailed in Washington, D.C., assumes the government must be involved or that the forms should not be originally mailed from that city. * * * (Asterisks represent sentence omitted by respondent, and added below.)

Again, as the examiner views it, the language of the opinion is on its face clearly limited to "forms," and does not relate to the envelopes in which the forms are mailed and which are such a prominent part of the present case. More importantly, however, respondent's brief omits the next and final sentence of the foregoing paragraph, a sentence which discloses the true context in which the prior statements in the paragraph, as quoted above, must be viewed.

The final sentence of the paragraph in question is as follows:

> *The short answer to these complaints is that the cease or desist order, as drawn, does not forbid such acts or use.* (Our emphasis.)

In the examiner's view, this makes it explicit that the court itself recognized that the basic and, practically speaking, the only issue before it was solely whether the respondent violated the cease and desist *order*. The court was thus not, at least not strictly speaking, passing on any allegations of unlawfulness except in respect to alleged violations of the order. Complaint counsel's contention in his brief (p. 3) in this connection is therefore substantially correct, so that statements in the court's opinion, as here quoted, may well be regarded as dicta in respect to lawfulness or unlawfulness except as bearing on the question of an unlawful violation of the order. The order, incidentally, contains no general or catchall provisions, so that there is nothing from which to imply a direction to respondent to cease and desist from other than the specified conduct or activities expressly set forth in the order.

Respondent's brief finishes its quotation from the court's opinion by quoting the paragraph immediately following the foregoing paragraph. The paragraph so quoted is as follows:

We cannot forbid an otherwise legitimate business from mailing its letters from the country's Capital, whether the sender lives or has his business there or elsewhere.

Complaint counsel's brief—submitted, to be sure, without his seeing respondent's brief—does not comment on this paragraph. However, even if this further statement of the court should also be regarded as dictum, *i.e.*, except as limited to the enforcement of the order before the court, it is expressed so clearly, particularly by the use of the words "cannot forbid," that, in the examiner's opinion, it at least serves to indicate that this court was taking a jaundiced view about attempts to restrict creditors from mailing their forms from Washington, D.C., even though residing elsewhere, or from using an address there of a third party—relief now requested in the present proceeding. It may well be, therefore, although it is a matter of conjecture, that complaint counsel finally decided not to move to amend the complaint to include this relief, or the use of third party authority generally, in order to avoid an encounter with the possible legal effect of the language as used by the court. The question of mailing letters from Washington, D.C., must have been vividly in the court's mind inasmuch as the prior paragraph also refers to the Commission's contention, as stated by the court, "that the forms should not be originally mailed from that city."

Complaint counsel's brief (p. 4), but not the respondent's, also quotes further language at the close of the court's opinion. The quotation, omitting citations, is as follows:

This is a *charge of criminal contempt.* The ordinary rules of evidence apply. [Citations omitted.] Intent must be proved beyond a reasonable doubt.

On the record before us, we cannot find the respondent guilty of contumacious conduct, wherein and whereby he *intentionally, flagrantly, deliberately and recklessly* violated the court's order. We find him not guilty of criminal contempt. [Citation omitted.] (Our emphasis.)

This quotation makes it clear that in formulating its opinion and arriving at its decision, the court was guided by standards applicable to criminal cases. This again serves to question the applicability of the opinion in general to the problems presented in the instant proceeding.

CONCLUSIONS OF LAW AND SUMMARY

Forms and Envelopes

The use by respondent of the forms and envelopes herein simulates governmental or official documents, and governmental or official authority, thus constituting and embracing unfair trade practices in commerce, as follows:

(1) The brown window envelopes, as used for both types of forms, primarily simulates this, *i.e.*, even more than the forms do. Said envelopes simulate this particularly by their color, form and size. They also do so by the printing and the metered postmark, with a spread eagle, appearing on them. They further do so by what they disclose of the forms through the windows of the envelopes. These brown window envelopes simulate governmental or official envelopes containing government checks or other official enclosures. Simulation is dominantly brought about by the color brown.

(2) The skip-tracer forms also produce simulation as to governmental or official documents and authority. They do so by reason of the inadequacy of the present printed disclaimer thereon, and also by reason of being mailed in the brown window envelopes. These skip-tracer forms alternatively misrepresent, in the same way, that the requests for information are for information to be used for official purposes.

(3) The return envelopes, mailed out with the skip-tracer forms, also simulate governmental or official documents and authority, but only in a limited sense. They tend to create the simulation by reason of being contained in the brown envelopes and being mailed with the skip-tracer forms, both producing the simulation described in (1) and (2), and by reason of the peremptory addresses, such as "Current Employment Records," Washington, D.C., contained on said return envelopes. So used, the return envelopes simulate or tend to simulate envelopes of government or official origin and to add to the simulation or misrepresentation of the requests for information in the skip-tracer forms as described in (2). However, the return envelopes produce no such simulation by themselves, *i.e.*, they produce no such simulation or misrepresentation except as used together with the brown window envelopes and the skip-tracer forms.

(4) The collection forms ("Payment Demand" forms), also produce or tend to produce the simulation in question, but also only in a limited sense. They do so by their general appearance—size, texture and color—permitting them to be mistaken for government checks, at least before being taken out of the window envelopes, and perhaps to be mistaken by some of their content as to be of governmental or official origin. They do so, more importantly, by reason of being mailed in the brown window envelopes, permitting the simulation of government checks before the envelopes are opened. However, these collection forms definitely do not produce the simulation in question by themselves, *i.e.*, apart from their being used together with the brown window envelopes in which they are mailed.

Charges Disallowed

There are two charges against respondent which cannot be allowed, one of them expressly alleged in the complaint and the other apparently claimed by complaint counsel to be implied in the complaint:

(5) As to respondent's printed statement on each of the collection forms ("Payment Demand" forms) as to alleged rights of creditors to collect a judgment in the state in which the debtor resides, this statement has not been proved and demonstrated to be deceptive in any substantial sense.

(6) There is no charge in the complaint, nor may one properly be implied, as to bringing about unlawful use of third party authority or of a third party address, *i.e.*, here the respondent's address, as used by creditors herein in connection with the forms and envelopes. Accordingly, unlawfulness on the basis of any such charge may not be and is not found herein.

Misrepresenting Prior Order

(7) As to respondent's representation, directly or by implication, contained in the sales promotion literature for the collection forms ("Payment Demand" forms), that said forms have been determined by the Federal Trade Commission to be in compliance with the requirements of the order to cease and desist of the Commission in Docket No. 6236, *In the Matter of Mitchell S. Mohr, Sydney Floersheim, et al.* [52 F.T.C. 1466], and that said forms have been approved by the Federal Trade Commission, the said representation is false, misleading, and deceptive.

General Conclusions

Subject to the exclusions, exceptions and qualifications set forth in paragraphs (1) through (6), inclusive, hereof, the following conclusions also obtain:

(8) The use of said forms and other material, as herein set forth, has had, and now has, the tendency and capacity to mislead and deceive persons to whom said forms are sent into the erroneous and mistaken belief that the said representations and implications are true, and to induce the recipients thereof to supply information, and unlawfully to induce the recipients thereof, to supply information, or to do or perform acts which they otherwise might not have done. [Same as Par. Ten of complaint.]

(9) The aforesaid acts and practices of respondent, as herein found, were, and are, all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

The following conclusion is also made herein:

(10) The Federal Trade Commission has all necessary jurisdiction herein, both of the parties and the subject matter, and for the purposes of issuing an appropriate order.

"TAILORING" THE ORDER

The examiner will now discuss the problem as to the contents of the order which should issue herein. He will do so in the light of a number of considerations indicated by the various subcaptions below.

Simulating Government Authority

So far as concerns the envelopes and forms it is obvious from the Findings of Fact and the Conclusions of Law herein, and it is merely a restatement, that, assuming their correctness, respondent has engaged in unfair trade practices by simulating governmental or official documents, and authority, and that he has done so primarily by and through the distribution and use of the brown window envelopes in which the forms are mailed to debtors and others. Accordingly, it would seem that the order should certainly prohibit the use of these envelopes as distributed and used in the past.

It also follows from the Findings and the Conclusions that respondent has, although perhaps in a somewhat lesser degree, simulated governmental and official documents, and authority, by the skip-tracer forms, principally by not making the present disclaimer thereon sufficiently large and prominent. Inasmuch as the examiner holds that a disclaimer is still necessary, the defect cannot be corrected simply by eliminating the envelopes as used in the past which would cure the simulation caused by the envelopes.

Under the said Findings and Conclusions, however, respondent does not create unlawful simulation of governmental documents or authority through his collection forms ("Payment Demand") as such. This is because they plainly reveal a private indebtedness and a simple demand for payment. Thus, the order to be issued need not proscribe the use of the collection forms. They may still be used by respondent if the unlawful simulation caused by the brown window envelopes is removed.

Moreover, under the Findings and the Conclusions, the respondent does not create the unlawful simulation of governmental documents or authority by the distribution and use of the return envelopes themselves, as used with the skip-tracer forms. The simulation is not produced apart from the brown window envelopes in which the return envelopes are mailed with the skip-tracer forms. Accordingly, the order herein need not prohibit the distribution and use of the return envelopes if there is a sufficient prohibition of the brown window envelopes as used in the past.

Nor, in the examiner's opinion, as will be discussed below, should the order herein attempt to prohibit the use of third party authority or of the address of a third party, or mailing the forms from Washington, D.C.

To the examiner the foregoing makes it absolutely appropriate that any order herein which is tailored [16] to the unlawfulness as actually found, must and should expressly prohibit (1) the use of these brown window envelopes and more specifically, the use of the color brown for these envelopes, (2) the use of the skip-tracer forms unless the disclaimer statement is made more adequate, and (3) nothing else in regard to forms and envelopes except by way of a general prohibition against simulating governmental or official documents, and authority.

This would prohibit less in respect to the forms themselves than the prohibitions in the complaint counsel's proposed order. What this does contemplate is forbidding the respondent to continue to use brown window envelopes—except, it may be added, by written authorization of the Commission as part of compliance procedure.

Commission's Suggested Order

It is true that the suggested order accompanying the complaint, which is followed verbatim by complaint counsel's proposed order, goes beyond the scope of order indicated as appropriate herein. It does so, moreover, without even referring to the brown window envelopes as such and with much more concern for the forms as such. It also, of course, contains a prohibition in respect to the use of third party authority or a third party address, and mailing from Washington, D.C.

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[16] *Federal Trade Commission* v. *Broch and Co.*, 368 U.S. 360, 367, 368 (1962); *Swanee Paper Corp.* v. *Federal Trade Commission*, 291 F. 2d 833, 838 (2d Cir. 1961); *In the Matter of Transogram Co., Inc.*, F.T.C. Docket No. 7978 (Sept. 19, 1962); 61 F.T.C. 629, 700–702.

However, said suggested order does not, of course, represent the Commission's judicial determination. It is merely, as set forth in the prefatory statement, "the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint." In no event, as the examiner believes, is the suggested order intended to, or should it be construed to inhibit the careful tailoring of the order after full hearing and full study, in depth, of all the operative facts and of all the forms and envelopes involved in the case, and based on whatever is found as to the facts as alleged in the complaint, including alleged conclusions of fact.

Moreover, even the suggested order could conceivably be construed to prohibit the envelopes by its provision in "2" as follows:

2. Using or placing in the hands of others for use, any form, questionnaire or other material:

* * * * * * *

b. Which appears to be, or simulates, an official or governmental form or document, either in the form itself or in the manner in which, or in the place from where, it is mailed;

Third Party Authority

The only truly serious question sensed by the examiner which is presented by departing from the suggested order accompanying the complaint is not using the prohibition proposed in the suggested order against using a third party address, *i.e.*, respondent's address, and against mailing in Washington, D.C., rather than the creditor's locality.

This question seems to go, as already indicated in the preface of this decision, to the issue of misrepresentation as to third party authority, something not charged in the complaint.

As regards the framing or tailoring of the order, the question is—bearing in mind that the issue is not tendered by the complaint, and that complaint counsel did not move to amend the complaint although offered the opportunity—whether the same result as would obtain under a complaint containing the charge may be reached here through the back-door method of including a prohibition in this respect by widening the scope of the order.

It is the examiner's opinion that it would be quite inappropriate to bring about such a result simply on the theory of widening the scope of the order so as to include possibly related offenses which may arise in the future. There is no sufficient relationship [17] between simulating

[17] *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613, referring to "no reasonable relation to the unlawful practices found to exist." *William H. Rorer, Inc.* v. *Federal Trade Commission* (C.A. 2d Cir., March 20, 1967), 8 S.&D. 432.

governmental authority and simulating third party authority in general, *i.e.*, of private persons or concerns. This is particularly so where, as here, the simulated governmental authority is, of course, absolutely without any authorization, whereas the simulated third party authority is definitely authorized by the third party, namely, the respondent, who authorizes and allows creditors to use his Washington, D.C., address.

It is not sufficient for the Commission, or the examiner, in devising an order, to rely on the principle that, ordinarily at least, the Commission's determination on scope of order will not be disturbed on appeal. This is because the relative finality as to scope of a Commission order is allowed on the underlying principle that the Commission is relied upon to bear the full responsibility of making and shaping an appropriate order based on a fair and just determination as to the scope thereof—rather than have this burden shift to the courts. The Commission is expected not to do anything which the court would positively not do if the making of the order were before the court—difficult as this may sometimes be for the Commission to anticipate.

As already indicated in a prior portion of this decision, the Court of Appeals for the Ninth Circuit [18] has, whether by dictum or otherwise, already expressed a rather unfavorable view in respect to prohibiting this very same respondent from using his forms in such a way that creditors could not mail them, or have them mailed, from Washington, D.C. It does seem to be at least indelicate to dispose of this view by the indirect route of passing on scope of order and not even on the basis of a charge in the complaint which would have afforded respondent the direct opportunity of opposing it.

Accordingly, the examiner makes no provision in the order herein in respect to third party authority, or to the use of a third party address, or a Washington, D.C., address.

Social Value of Two Types of Forms

The question of scope of order is inextricably intertwined with questions of public policy. Although complaint counsel's proposed order herein, designed to curb respondent's unlawful conduct, would tear asunder a specialized business technique, if not the business itself, and virtually destroy a rather ingenious system of forms designed to assist in the collection of debts, it is doubtful that public policy or public interest requires such a drastic result. To bring about such a result by the order, instead of concentrating the prohibition of the order

[18] *In re Sydney Floersheim*, 316 F. 2d 423, 428 (C.A. 9 1963), *supra*.

on the simulation, largely by the envelopes, of governmental or official authority, is, in the examiner's opinion, quite analogous to taking away an established trade name containing an element of simulation, instead of permitting the trade name to be used in some qualified or limited way which removes the simulation.[19]

To begin with, there is, of course, nothing inherently wrong about the collection business, or about the skip-tracer and collection form business. So long as we continue to have in this country a competitive free enterprise system such as we now have, there will have to be legal means to compel or attempt to induce debtors to pay their debts. Moreover, it is obvious under our system that if debtors do not pay their debts the loss to creditors is shifted to other consumers or purchasers; or if the loss becomes so large as to be insurmountable, the result is bankruptcy for the creditors or at least going out of business. The respondent, citing respectable credentials for himself as to expertise, has testified to this, if actual testimony is necessary to prove the point. Our society is not as yet so permissive that people are not supposed to pay their debts or submit to reasonable efforts to collect the debts.

Skip-tracer and collection forms are necessary, it seems to the examiner, because of the small dollar amount of each indebtedness in many lines of trade, particularly as brought about by mass selling, which is so characteristic of our present free enterprise system. Obviously, lawyers cannot afford to take on accounts of this nature, or, if they do—often as auxiliaries to collection agencies—the amount of their fees and court costs tend to discourage further retention of the attorneys or of the collection agencies which may have retained them. Moreover, the fees of collection agencies even without forwarding to attorneys are not unsubstantial. Small businesses, which many people regard as of particular concern to the Commission, as well as middle-sized businesses, thus very often have to depend on collection efforts through collection forms, rather than utilizing collection agencies, with or without attorneys, or utilizing attorneys directly.

The Commission, of course, is, as a matter of fact, not engaged in any attempt to prohibit the lawful use of forms or other materials in collection work. The Commission is merely concerned with the unlawful use of such forms and materials, and its interest to this end cannot be challenged. The socially useful aspect of the collection form business is emphasized here merely for proper perspective in framing an order in this case.

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[19] See: *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 217 (1933); *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612, 613 (1946).

The unfortunate debtor, or his family, naturally dislikes a debt collector in any guise, as brought out by the testimony and demeanor of at least two of the public witnesses herein.[20] In the same way, perhaps, an unfortunate petty criminal dislikes a policeman, or a delinquent pupil dislikes the critical teacher. However, this does not militate against debt collection, policemen, discipline, or orderly controls generally.

It is true that sometimes alleged debtors *may* not be actual debtors. But as against this there are the "deadbeats," comprising large numbers of people who do not even wish to pay their debts, who may purchase and deliberately change addresses overnight, and who may thus merely load their indebtedness on other purchasers or bankrupt the sellers, much as respondent herein testified.

Extenuating Circumstances

This brings us to our second point in connection with public policy. Respondent here has, to be sure, violated public policy and substantive law as to a very serious offense, the simulation of governmental or official documents, and authority. However, actually there are some extenuating circumstances in connection with this violation. In the examiner's opinion these circumstances are at least sufficiently extenuating so as, by themselves, to exonerate respondent from a cease and desist order as here proposed by complaint counsel, which would virtually put him out of business. This is so, in the examiner's opinion, even though the circumstances are not sufficiently extenuating to exonerate respondent from a drastic prohibition directed against the brown window envelopes.

As to the *brown window envelopes*, the fact is that respondent received a huge quantity of brown window envelopes from his supplier which he rejected because, as he testified, the shade of brown resembled too much that of U.S. Treasury envelopes. (TR 353, 357.)

The examiner believes that respondent testified truthfully about this. Moreover, his testimony narrated a number of details inherently tending to demonstrate its reliability as to the salient fact testified to. (Details testified to included a purported letter thereon to the Commission by his supplier (TR 357) which, of course, could not be proved, due to hearsay considerations.)[21]

There is thus evidence in this case that respondent in using window envelopes having the color brown—which the examiner regards as

[20] Mrs. Mossberg, who received a skip-tracer form as to her husband's niece, is one. Mr. Backley, schoolteacher debtor, is another.

[21] See also TR 408, 411, 412.

the primary violation herein—was not flouting the law in respect to simulating governmental envelopes and authority, but had due concern for the law. This may not excuse respondent from an order even prohibiting the envelopes outright, but it may indicate that an order going far beyond this is not necessary to secure overall compliance in this case.

As to the *skip-tracer forms*, respondent's essential violation—that the disclaimer notice is too small and inconspicuous—does not, under all the facts and circumstances, indicate that he has in any susbtantial sense been really flouting the law. This is because the present disclaimer notice apparently conforms with prior approval of the Commission in compliance procedure. Furthermore, the present disclaimer has some arguable sanction under the wording of the Court of Appeals contempt opinion [22] referring to the ability of the American public to read and understand.

As to the *collection forms* ("Payment Demand")—which, to be sure, the examiner has found not deceptive by themselves—respondent testified, and the examiner has no reason to disbelieve, that the very name "Payment Demand" was approved by Mr. Morehouse as "exactly what it is," in a Commission conference, after being suggested by his No. 2 man (TR 364–5).

As to the *return envelopes*—also, to be sure, not found by the examiner to be deceptive by themselves—the respondent's altogether credible testimony is that the return addresses such as "Change of Address," Washington, D.C., were approved by the Post Office Department (TR 305–6). Although, as the examiner ruled above, this approval does not necessarily absolve respondent of violation of the Federal Trade Commission Act, it does show, in considering the possibility of imposing on him a very drastic order, that respondent was not deliberately flouting the law by reason of these return envelopes, mailed together with skip-tracer forms in the brown window envelopes.

Absolute Prohibition of Brown Window Envelopes

Despite the extenuating circumstances outlined above, particularly in connection with respondent's use of the brown window envelopes, the examiner is of the firm opinion that respondent must be absolutely prohibited from using them, that is, he must be prohibited from using any such envelopes of the color brown, whatever shade, and should be limited to the use of white envelopes—unless the Commission ap-

[22] *In re Sydney Floersheim*, 316 F. 2d 423, 427 (C.A. 9 1963), *supra*.

proves in advance as part of compliance procedure, as noted under the next subcaption herein.

Granting that respondent may not have been acting in bad faith and may not have been engaged in deliberately flouting the law, in the use of these brown window envelopes, it still seems to the examiner that, just as some people are "accident-prone," the respondent is "violation-prone," *i.e.*, even without intent actually to violate the law.

In other words, it is unnecessary to challenge, and the examiner does not challenge, the good faith of respondent's testimony and contentions that his brown window envelopes do not resemble governmental envelopes, that the green forms seen through the envelope windows do not simulate Government checks, that the spread eagle imprinted by the stamp meter is merely accidental, if not unimportant, and that the Washington, D.C., address, including Washington Building, is nothing more than respondent's own address, etc., etc.

Nevertheless, even though this good faith, so to speak, of respondent may negate deliberate flouting of the law on his part—however much his simulation of governmental authority is still proved—it does indicate a somewhat disconcerting proclivity to accomplish simulation, even without intending to, and thus actually to violate the law.

In view of this consideration the examiner feels and rules that the order herein must contain a flat prohibition against the use by respondent of the brown window envelopes, *i.e.*, that he must be directed to give up the color brown and also to use white instead—except that, in view of his not having deliberately flouted the law, the order may also provide that this prohibition may be relaxed by the Commission as part of compliance procedure.

This is not necessarily a ruling that the use by similar concerns of window envelopes having the color brown is unlawful. It represents merely the specific tailoring of the order in this case to respondent's actual conduct in violating the law, with the objective of preventing resumption of violation by him.

Actually, the elimination in this case of window envelopes having the color brown and the insertion of a more prominent disclaimer in the skip-tracer forms, will permit the respondent to continue his business rather than possibly close it up. In connection with his envelopes and forms, he need only conform in these two respects, explicitly stated, and to a general prohibition of governmental simulation which is also included in the order appended hereto. Respondent is, of course, left with far more freedom of action than under complaint counsel's pro-

posed order.[23] More importantly, whatever his situation the public interest is fully protected.

It may be argued that if respondent is violation-prone there is as much reason for a much more drastic prohibitory order as there would be if he deliberately flouted the law. The examiner does not agree. In the examiner's opinion, respondent has not believed that he has been violating the law, in the respects concluded herein, and respondent has had some reasonable ground for not believing so.

The examiner equally believes that respondent will conform to the law if the mandates are made clear to him, as they are in the order below. As a witness, the respondent impressed the examiner both by his testimony and demeanor as being an honorable and dependable person who was merely fighting for what he thought was right as a businessman.

Alternative Envelopes

The examiner has considered alternatives to forbidding to respondent the use of brown window envelopes.

One of these alternatives would be to permit him to print on the envelopes, to the left of the windows, in bold large type the words "NOT FROM THE GOVERNMENT." It is the examiner's understanding that the Post Office Department will tolerate various types of notices on envelopes which might include this type of notice.

Another alternative is to permit respondent to print on the brown envelopes prominent black stripes liberally distributed, or to print on the envelopes, also liberally distributed, various designs. The purpose of the stripes or the designs would be to distinguish his envelopes from governmental or official envelopes, particularly those mailed out by the Treasury Department.

One of the objections to devices like these is that the result may possibly even confuse, *i.e.*, by simulating to some persons governmental or official envelopes, not simulating this to others, or by making dual impressions on still others.

Whether these devices would confuse or not, it may well be that there are other devices which might serve to eliminate the simulation contained in window envelopes of the color brown.

In any event, however, the examiner is quite certain that it would not be wise expressly to specify such devices, to be used with brown envelopes, in the order itself. To do so would be to risk the substantial

[23] Of course, as already noted, respondent did testify that he used brown envelopes because they were cheapest, so that white ones presumably will cost him more (he did not say how much). But this would seem better for him than a broad prohibition against his forms and return envelopes.

possibility of provoking respondent, prone as he is to violation or circumvention, to further violation, even without intent or with good faith.

However, in recognition of respondent's apparent good faith in the past and in order to provide for some elasticity in respect to the provision in the order prohibiting window envelopes having the color brown, and permitting only the color white, the examiner adds a proviso to the order below whereby the prohibition against brown window envelopes does not apply in the event that the Commission, as part of compliance, approves in advance envelopes which it deems satisfactory, *i.e.*, by reason of markings, designs, or other considerations concerning the appearance of the blank envelopes. "Other considerations," for instance, might justify brown envelopes of a different size; or, possibly, yellow envelopes of the same size, at least on an experimental basis; or envelopes combining various features distinguishing them from Government envelopes.

Skip-Tracer Forms

Although the order promulgated by the examiner requires a more adequate disclaimer, on the skip-tracer forms, much as proposed by complaint counsel, it differs somewhat from the complaint counsel's proposed order.

Although the examiner's order substantially uses the proposed direction that the disclaimer shall be in type at least as large as the largest type used on said forms, it qualifies this by adding the phrase "except for captions." It would be unfair to respondent to compel him to print the disclaimer in the size of various captions on the forms.

Furthermore, and quite importantly, the examiner's order, unlike the proposed order, provides that the disclaimer shall include the portion of the present disclaimer as to not being connected in any way with the United States Government, and also adds that the solicited information is not for official use. Basically, this simply continues the full present wording, plus adding the wording about official use. The wording, including the additional wording, follows the allegation of the complaint, particularly Par. Six.

Respondent has not expressed objection as to the wording of the disclaimer in its present small print and lack of prominence. He should have no objection, therefore, to continuing this wording nor, it would seem, to adding the appropriate words disclaiming use of the information for governmental purposes. His only real objection must be to increasing the size of the lettering and making the disclaimer more prominent, but as to this, of course, the examiner decides against him.

Miscellaneous

1. The prefatory portion of the order herein, commencing "*It is ordered*," refers to the collection form part of respondent's business as "assisting in the collection of accounts"—rather than "collection of delinquent accounts," as referred to in complaint counsel's proposed order.

2. The last prohibition in the order herein, bearing the number "(5)," prohibits misrepresentation of "Commission or court approval," of respondent's forms, etc. This contrasts with "the legality or official approval," the wording used in complaint counsel's proposed order. Complaint counsel's wording "in any manner" is also not used in the order. The examiner believes that prohibiting misrepresentation as to "legality" could prohibit mere opinion, and therefore present constitutional difficulties. Since intent to deceive is not required to prove misrepresentation under the Federal Trade Commission Act, the wording of the proposed order could be particularly dangerous.

ORDER

It is ordered, That the respondent Sydney N. Floersheim, an individual trading and doing business as Floersheim Sales Company, National Research Company, or under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the business of obtaining information concerning delinquent debtors or assisting in the collection of delinquent accounts or the offering for sale, sale or distribution of forms, or other material, for use in obtaining information concerning delinquent debtors, or for use in attempting to collect delinquent accounts, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Re Envelopes, Forms, Etc.

Using, or placing in the hands of others for use, in connection with any system of skip-tracer and/or collection forms, the following:

(1) (a) Any brown envelopes to be used to mail such forms (when filled out) to debtors or others: or any envelopes to be so used other than white envelopes—except on written and duly executed approval in advance by the Federal

Trade Commission as part of compliance procedure, in accordance with the decision herein.

(b) Any skip-tracer or collection forms to be mailed in any such brown envelopes, or not to be mailed in white envelopes—except on written and duly executed approval in advance by the Federal Trade Commission as part of compliance procedure, in accordance with the decision herein.

(2) Any skip-tracer forms which do not contain a disclaimer in a prominent place, and in lettering at least as large as the largest lettering, except for captions, used on said forms. The disclaimer shall be both (a) that the forms are not governmental or official documents or soliciting information for official use, and (b) that the purpose is the private one of obtaining information for a creditor as to a delinquent debtor.

(3) Any envelopes, forms, questionnaires, or other materials which, as used, appear to be, or simulate, governmental or official forms, documents, envelopes, or papers generally, or which simulate governmental or official authority, or represent that information requested as to delinquent debtors is for official purposes—subject to the consideration that nothing in this provision "(3)" shall be deemed to restrain present practices of the respondent alleged in or comprehended by the complaint which are not expressly restrained by provisions "(1)" and "(2)" immediately preceding.

Re Claims as to Commission Approval

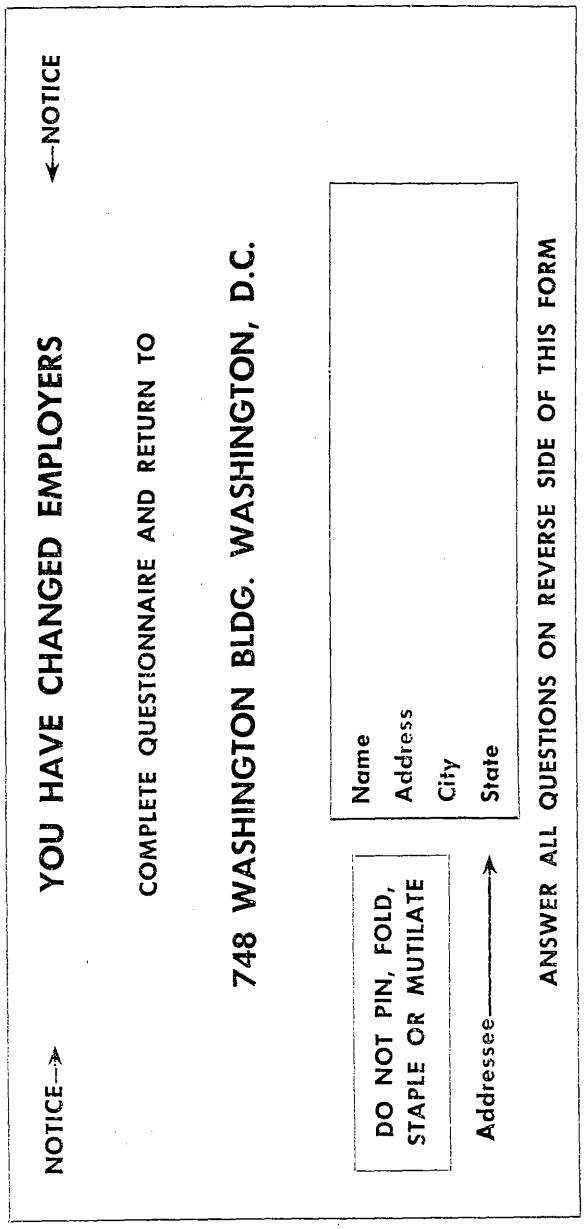
Representing or misrepresenting, in respect to the following:

(4) Representing, directly or by implication, that any of respondent's Payment Demand forms or any similar collection material sold by the respondent have been approved by the Federal Trade Commission or have been deemed to be in compliance with the requirements of the order to cease and desist entered by the Federal Trade Commission in Docket No. 6236, *In the Matter of Mitchell S. Mohr, etc.*, and *Sydney Floersheim, etc.* [52 F.T.C. 1466].

(5) Misrepresenting Federal Trade Commission or court approval of any of respondent's envelopes, forms, or other material.

A SKIP-TRACER FORM

Front



A SKIP-TRACER FORM—Continued

Reverse side

QUESTIONNAIRE

This office has been advised that you failed to answer the original request—Answers must be **kept** current.

ANSWER ALL QUESTIONS BELOW

Give reason here **why first** form was not returned as requested.

Name _____

Address _____

City _____ State _____

Present Employer _____

Employer's Address _____

City _____ State _____

How long Employed _____

S.S. # _____

Wife's Name _____

Wife's Address _____

City _____ State _____

Wife's Employer _____

Employer's Address _____

City _____ State _____

How long Employed _____

S.S. # _____

NOTICE

YOU HAVE CHANGED EMPLOYERS

ADDRESSEE: ↓↓↓

Fill in the information on this form.

All answers must be current and must be printed and returned at once.

If you do not have a Social Security No. write none in the space provided for S.S. #.

If mail was forwarded, correct mailing address in space provided for addressing.

The purpose of this card is to obtain information concerning a delinquent debtor, and to further advise that this is not connected in any way with the United States Government.

Return this completed form in the enclosed envelope.

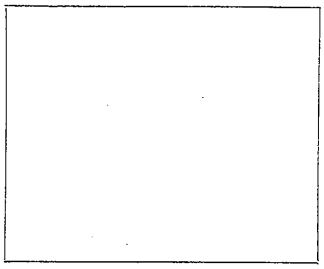
ANOTHER SKIP-TRACER FORM

Front

QUESTIONNAIRE
748 WASHINGTON BLDG.
WASHINGTON, D.C.

ADDRESSEE
Fill Out Reverse Side
of This Form and Return
Within 5 Days

All answers must be current and must be printed and returned at once.
If you do not have a Social Security No. write none in the space provided for S.S. #.
If mail was forwarded correct mailing address in the space provided for addressing.
The purpose of this card is to obtain information concerning a delinquent debtor, and to further advise that this is not connected in any way with the United States Government.
Return this completed form in the enclosed envelope.



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Appendix

ANOTHER SKIP-TRACER FORM—Continued

Reverse side

How Permanent is Your Employment? 1 Mo. ☐ 6 Mo. ☐ 12 Mo. ☐ Longer ☐

Have you been notified of layoff—if so, give day and month.

How Many Days a Week Are You Working Now? 1 ☐ 2 ☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐

Present Employer _____

Address _____

City _____ State _____

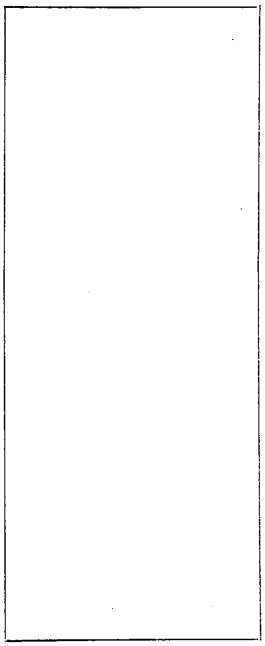
Social Security No. _____ Date of Birth Mo. Day Yr.

COLLECTION FORM (PAYMENT DEMAND)

Front

DO NOT PIN, FOLD OR STAPLE

BRING THIS FORM WITH YOU. IF UNABLE TO APPEAR, SEND AMOUNT PAST DUE BY MAIL TO CREDITORS OFFICE.



Mailed from:
PAYMENT DEMAND
WASHINGTON 5, D.C.

DEBTOR

SEE REVERSE SIDE

COLLECTION FORM (PAYMENT DEMAND)—Continued

Reverse side

You have 10 days to pay the amount of $_____ on the claim of

_____. You are scheduled to appear in the

Creditor

CREDITORS OFFICE, located at _____

in the city of _____ State of _____

on or before two o'clock in the afternoon of the _____ day of _____, 19__

to pay the balance requested or give satisfactory reasons in PERSON why the AMOUNT has not been paid.

IF MAILING PAYMENT TO CREDITOR REFER TO FILE NO. _____

This Demand is made to give you a last opportunity to pay before action is taken on said claim.

NOTICE MAILED FROM WASHINGTON, D.C., BY PAYMENT DEMAND

Subject to the Laws of the

A Creditor may request an Attorney-at-Law to attach after Judgment Property such as Automobile, Jewelry, Boat, Live Stock, Crops, Machinery, House, Real Estate, Bank Account, Bank Vault, Stocks, Bonds and Earnings, Commission or Salary.

ANOTHER COLLECTION FORM (PAYMENT DEMAND)

Front

DO NOT PIN, FOLD OR STAPLE

The Addressee must bring this form to the Agent's Office.

Located at _____ in the City of _____

County of _____ and State of _____ on or before

two o'clock in the afternoon of the _____ day of _____ 19 ____

To pay the balance requested or give satisfactory reasons in person why the amount has not been paid.

This Demand is made to give you a last opportunity to pay and to lay a foundation for action on said claim if the same is not paid within the time aforesaid.

DEBTOR →

Bring this form with you. If unable to appear, send amount past due by mail to agent's office.

See Reverse Side

NOTICE MAILED FROM WASHINGTON, D.C., BY PAYMENT DEMAND.

ANOTHER COLLECTION FORM (PAYMENT DEMAND)—Continued

Reverse side

PAYMENT DEMAND

748 Washington Building
Washington, D.C.

FINAL DEMAND FOR THE PAYMENT OF DEBT

Subject to the Laws of the

Amount Past Due

Dollars Cents

Agent or Assignee

IF MAILING PAYMENT TO AGENT, REFER TO FILE NO._____

A Creditor may request an Attorney-at-Law to attach after Judgment Property such as Automobile, Jewelry, Boat, Live Stock, Crops, Machinery, House, Real Estate, Bank Account, Bank Vault, Stocks, Bonds and Earnings, Commission or Salary.

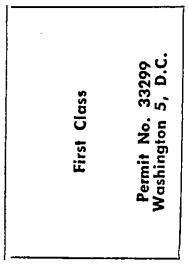
Take Notice that the above named Agent claims a just indebtedness from *Debtor*

BROWN WINDOW ENVELOPE

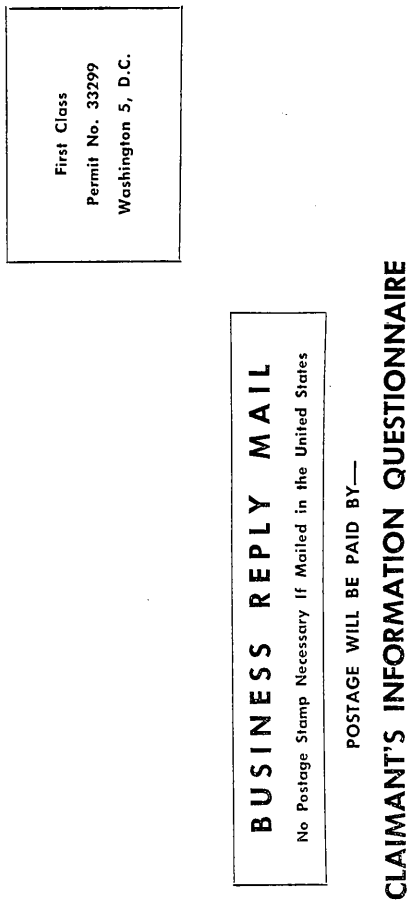
(Used for both types of forms)

(This envelope, CX 48–B, is the same as CX 23–A, referred to in this decision, except for date of postmark.)

SAMPLE RETURN ENVELOPES



SAMPLE RETURN ENVELOPES—Continued



OPINION OF THE COMMISSION

FEBRUARY 5, 1968

BY ELMAN, *Commissioner:*

I

This appeal is the latest round in what has become a Brobdingnagian battle between the Commission and this respondent. It began inauspiciously enough with the issuance on October 11, 1954, of a complaint in Docket No. 6236 against respondent Sydney N. Floersheim and one Mitchell S. Mohr, then trading as National Research Company. After a trial on the merits, the hearing examiner held that the allegations of that complaint had been proven and entered a cease and desist order. On June 1, 1956, the Commission adopted the hearing examiner's initial decision as its own and held that skip tracer forms sold by Mohr and Floersheim were deceptive and that the use and sale of such forms violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. *Mitchell S. Mohr*, 52 F.T.C. 1466 (1956).

When disagreement arose as to the meaning and scope of the order, the Commission, after another evidentiary hearing, reopened the proceeding and modified the order. That action, taken on November 11, 1958 [55 F.T.C. 720], was challenged by respondents Floersheim and Mohr and was upheld by the Court of Appeals for the Ninth Circuit. *Mohr* v. *Federal Trade Commission*, 272 F. 2d 401 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960).

Mohr severed his connection with National Research Company some time in 1961, selling his interest to respondent. Late in 1962 the Commission, believing that Floersheim's practices violated the existing order, filed a petition in the Court of Appeals for the Ninth Circuit to have Floersheim cited for contempt for alleged violations of the order. That court, while finding that at least some of the practices challenged by the Commission fell within the prohibitions of the outstanding order, held that other practices, some of which were similar to those challenged in the instant complaint, did not violate that order, and it declined to cite Floersheim for contempt, stating:

> On the record before us, we cannot find the respondent guilty of contumacious conduct, wherein and whereby he intentionally, flagrantly, deliberately and recklessly violated the court's order. We find him not guilty of criminal contempt. *In re Floersheim*, 316 F. 2d 423, 428 (9th Cir. 1963).

However, apparently adverting to the violations of the order which had occured, the court went on to

> hazard the hope that the respondent will take such a long step forward in voluntary compliance with the language and spirit of the order he is required to obey whether he likes it or not, that this seven year old litigation may be finally terminated, and will not be before us again. *Ibid.*

II

The instant complaint, issued on November 7, 1966, charges respondent, an individual trading and doing business as Floersheim Sales Company and National Research Company, with making false, misleading, and deceptive representations in various debt collection and skip tracer forms [1] sold by him, and with placing in the hands of others the means and instrumentalities by and through which they may make false, misleading, and deceptive representations, all in violation of Section 5 of the Federal Trade Commission Act.

Evidentiary hearings were held in Los Angeles, California, on March 6, 7, and 8, 1967, and the hearing examiner's initial decision, sustaining in part and rejecting in part the allegations of the complaint, was filed on June 2, 1967. (An order amending the decision in two minor respects was entered on June 16, 1967.) The hearing examiner concluded that:

(1) Brown window envelopes used by respondent in connection with his skip tracer and collection forms simulate governmental or official envelopes containing government checks, or other official enclosures. Findings of fact 10, 19, 22, 30, 32; conclusion of law 1.

(2) Respondent's skip tracer forms are similarly deceptive, creating the impression that they emanate from a governmental or official source, despite a disclaimer printed thereon. Findings of fact 10, 11, 17, 19, 32; conclusion of law 2.

(3) Reply envelopes used by respondent in connection with the skip tracer forms, while not deceptive standing alone, do contribute to the overall deception created by respondent's skip tracer form and envelope. Finding of fact 23; conclusion of law 3.

(4) The collection forms used by respondent are not in themselves misleading, but when sent in the brown window envelopes referred to above, they contribute to the impression that a governmental or official agency is involved. Finding of fact 27; conclusion of law 4.

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[1] Skip tracer forms are used to obtain information concerning the whereabouts and current employment of a delinquent debtor. Collection forms are sent to a delinquent debtor to request payment of his debt.

(5) Respondent had misrepresented to potential purchasers that his forms had been approved by the Federal Trade Commission. Findings of fact 36–38; conclusion of law 7.

Two charges were dismissed by the examiner. One, rejected as *de minimis*, or as involving at most a minor mistake as to detail, was the charge that a statement on the collection forms misrepresents the right under state law of the dunning creditor to attach the wages and the real and personal property of the debtor. Finding of fact 29; conclusion of law 5. Also dismissed was a charge, held by the examiner not to have been adequately pleaded, that respondent's use of a third party address, particularly in connection with the collection forms, deceived debtors into believing that their obligations had been transferred to a third party for collection.[2] Initial Decision, pp. 139–141; conclusion of law 6.

The examiner's order is narrowly drawn, reflecting his limited findings of illegality, and forbids respondent from using or placing in the hands of others for use (1) any but white envelopes without the prior written approval of the Commission, (2) skip tracer forms that do not contain a prominent disclosure, in lettering as large as the largest lettering, excluding captions, used on such forms, of the purpose of the form and its nonofficial character, and (3) any envelopes, forms, questionnaires, or other materials which simulate governmental or official authority. The last provision is limited, however, by the statement that it is not to be construed "to restrain present practices of the respondent alleged in or comprehended by the complaint which are not expressly restrained by provisions '(1)' and '(2)' immediately preceding." Finally, respondent is barred from representing that his forms have been approved by the Commission or have been deemed to comply with the earlier cease and desist order entered against respondent.

Complaint counsel's appeal from the initial decision contests the dismissal of the charges relating to third party referral and misrepresentation of creditors' rights under state law. More generally, the appeal challenges the adequacy of the examiner's order to stop the practices alleged in the complaint.

Respondent appeals, contending that the Commission has utilized an improper procedure in moving against him, that neither his forms nor his envelopes violate Section 5 of the Federal Trade Commission Act, that it would be improper for the Commission to bar him from using a Washington, D.C., mailing address, and that no order should be entered against him.

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[2] See *S. Dean Slough*, Docket No. 8661 (November 16, 1966), 70 F.T.C. 1318, appeal docketed, No. 24,463, 5th Cir., February 13, 1967 [8 S.&D. 782].

III

The essential evidentiary facts are not in dispute and need only be sketched briefly here. The examiner's findings of fact, except to the extent that they are inconsistent with findings made in this opinion, are amply supported by the evidence and are hereby adopted as the findings of the Commission.

Respondent, a resident of California, operates his business under the trade names National Research Company, having its office and principal place of business at 748 Washington Building, Washington, D.C., and Floersheim Sales Company, whose office and principal place of business is at 7319 Beverly Boulevard, Los Angeles, California. Specifically, National Research is the publisher and Floersheim Sales the seller of skip tracer and debt collection forms. Details of respondent's method of operation are set out in the initial decision, findings 11, 13–16, 18, 24–26, 28, 30. In general, respondent's forms are sold to creditors seeking to locate debtors or to collect delinquent accounts. Respondent sends the forms to the creditor who inserts the debtor's name, the amount of the debt, and similar information depending on the type of form used. Virtually none of respondent's customers is located in Washington, D.C. The forms are returned to respondent in Washington, D.C., and he mails them to the debtor, or in some cases to persons thought to know the debtor's whereabouts, in brown window envelopes on which respondent's return address is printed, with no name, and to which is affixed a metered stamp depicting a spread eagle. See, *e.g.*, CX 23. Printed on the front of the envelope in a prominent box is the following:

The Form Enclosed Is
Confidential
No One Else May Open

Enclosed with the skip tracer forms, described in findings 11, 13, 15, 16 and 19 are return envelopes, each bearing one of the following names or titles designating the ostensible organization to which the forms are to be returned by the recipient:

Claimants Information Questionnaire [3]
Current Employment Records
Change of Address
Questionnaire See *e.g.*, CX 28, 35.

[3] On the form bearing this title is the statement "Fill In This Form For Identification To Aid Collection In Full For Claimant."

The organizations are not otherwise identified but the address of each is given as 748 Washington Building, Washington 5, D.C. That address is prominently displayed on the forms themselves. The forms also bear an inconspicuous disclaimer which states:

> The purpose of this card is to obtain information concerning a delinquent debtor, and to further advise that this is not connected in any way with the United States Government. See, *e.g.*, CX 27, 29, 31, 33, 36.

The adequacy of this disclaimer to advise the recipient of the purpose of the form and its nongovernmental origin was challenged by the Commission in the 1963 contempt proceedings as not complying with the prior order against respondent. The court rejected the Commission's contentions, stating:

> In using this language, the respondent did exactly what the Federal Trade Commission in its order asked him to do. If the Federal Trade Commission's order is insufficient, then that body should reopen proceedings and modify its order. But such modification procedure, or its advisability, is not now before us. *In re Floersheim*, 316 F. 2d 423, 427–28 (1963).

No return envelopes are enclosed with the collection forms; instead they are to be returned by the debtor directly to his creditor. However, these forms all bear substantially the heading

> Payment Demand
> 748 Washington Building
> Washington, D.C.

Prominently printed on the reverse side is the legend "NOTICE MAILED FROM WASHINGTON, D.C. BY PAYMENT DEMAND." See, *e.g.*, CX 6, 10, 11, 13, 15, 19. Other "Payment Demand" forms used by respondent state:

> Payment Demand
> 748 Washington Bldg.
> Washington 5, D.C.
>
> Requests your Appearance in the office of the creditor, at the time specified. See *e.g.*, CX 20–21.

Respondent's collection forms were not in issue in the earlier proceeding against him and they bear no disclaimer or disclosure of their nongovernmental source.

Finally, forms sold by respondent for use in connection with the Payment Demand forms bear the legend:

> YOUR LETTER TO PAYMENT DEMAND, WASHINGTON, D.C. PROMISING PAYMENT, HAS BEEN FORWARDED TO THIS OFFICE. YOUR AGREEMENT IS ACCEPTABLE ONLY IF RECEIVED AT THIS OFFICE AT THE ADDRESS BELOW ON OR BEFORE _____. CX 24.

A similar form states:

YOUR LETTER TO PAYMENT DEMAND, WASHINGTON, D.C., PROMISING PAYMENT WAS ACCEPTED BY THIS OFFICE ---------- YOUR FAILURE TO KEEP UP YOUR AGREEMENT FORCES US TO DEMAND PAYMENT FROM YOU IN THE AMOUNT OF ---------- CX 25.

These forms are sent by the creditor directly to his debtor.[4]

As we have noted, there is no real dispute as to these facts. The only substantive issues before us concern the deceptiveness of respondent's practices and the proper scope of any order that may be entered. However, we are met at the threshold by a procedural question posed by respondent and it is to this issue that we now turn.

IV

Respondent states in his brief that his reports of compliance with the Commission's prior order were accepted by the Commission on June 30, 1960, and December 20, 1963. Citing Section 3.26(c) of the Commission's former Rules of Practice (now Section 3.61(d)),[5] he argues that "since no action has been taken to rescind or revoke the prior approval of the reports of compliance filed by respondent, the Commission is estopped from proceeding with the instant complaint."

In the interest of clarifying the record, the following facts should be noted. The letter of June 30, 1960, was sent in reply to a request for advice by respondent's counsel received by the Commisison on June 29, 1960. It was signed by the Commission's Assistant General Counsel for Compliance and on its face did not purport to speak for the Commission.[6] It merely stated that "in my opinion" the collection forms submitted by respondent "do not violate the Commission's modified order, inasmuch as they do not request any information concerning delinquent debtors."

As has been previously explained, the Commission, believing respondent's business practices to violate the order, later sought to have respondent cited for criminal contempt by the Court of Appeals for

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[4] As these forms indicate, some debtors sent their replies to Payment Demand instead of to the creditor. Respondent conceded that in "rare cases" debtors would send money to Payment Demand in Washington; such funds were forwarded to the creditor. Record, pp. 90–91; *cf. S. Dean Slough, supra,* note 2, at 1351–1352.

[5] Section 3.61(d) provides:

"The Commission may at any time reconsider its approval of any report of compliance or any advice given under this section and, where the public interest requires, rescind or revoke its prior approval or advice. In such event the respondent will be given notice of the Commission's intent to revoke or rescind and will be given an opportunity to submit its views to the Commission. . . ."

[6] *Cf. Double Eagle Lubricants, Inc.* v. *Federal Trade Commission,* 360 F. 2d 268, 270 and n. 5 (10th Cir. 1965).

the Ninth Circuit. After that court handed down its decision early in the summer of 1963, respondent submitted a compliance report. In view of the court's decision holding that certain of respondent's practices challenged by the Commission were not included within the outstanding cease and desist order, our letter of December 20, 1963, advised respondent that:

> The Commission has reviewed the report of compliance and has concluded, on the assumption that the information submitted is accurate and complete, that the actions set forth therein constitute compliance with the order to cease and desist. The Commission, however, may at any time reconsider, revoke or rescind such approval should it subsequently appear that such information is inaccurate or incomplete, or that actions have been taken in violation of the terms of the order.

Nothing on the face of Section 3.61(d), nor in the letters sent to respondent, justifies the conclusion that if the Commission is to proceed against respondent it must first revoke approval of his compliance reports or that the Commission is otherwise precluded from moving against respondent by initiating a new proceeding. Rejection of a compliance report or revocation of prior approval of a report are not preconditions either to Commission action to reopen and modify an order under Section 3.72 of the Rules or to the Commission's bringing a new complaint—the procedure followed here—and respondent offers no reason why such precondition should be implied here.

However, on oral argument respondent's counsel added a new dimension to his contentions concerning the inappropriateness of the Commission's procedure. He there argued that the Commission abused its discretion by issuing a new complaint and should instead have reopened the old proceeding. No precedent is cited by respondent, and our research discloses none, requiring us to proceed in the way he suggests. The only case that we have found which even remotely supports respondent's view, *Elmo Division of Drive-X Co.* v. *Dixon*, 348 F. 2d 342 (D.C. Cir. 1965) [7 S. & D. 1124], decision of the Commission affirmed after remand, *Elmo Co.* v. *Federal Trade Commission*, Docket No. 20,709 (D.C. Cir. Dec. 27, 1967) [8 S. & D. 610], involved a unique set of facts and is clearly distinguishable. The respondent in that case had signed a consent order rather than contest the charges in the complaint. The consent agreement provided that the settlement could be "set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice." As explained in the court's opinion, Rule V(f) provided "for a reopening procedure whereby the Commission could set aside the consent settlement or any severable part thereof on finding a change

of law or fact or that the public interest so required, and could *thereafter* undertake corrective action by adversary proceedings under the original or a new complaint as to any acts or practices not prohibited by any remaining provisions of the settlement." 348 F. 2d at 343. The court held that the incorporation of this Rule in the consent order, the terms of which were agreed upon by the Commission and respondent, " 'vested' [respondent] with a right to a reopening hearing." Issuance of a new complaint challenging practices related to those dealt with in the consent order was therefore held to be an erroneous mode of procedure.

In the present case, on the contrary, respondent had no "vested right" in having the Commission proceed only by reopening the old order. Nothing in the record of this case limits the Commission's normal power to proceed either by reopening the old proceeding or issuing a new complaint, as the particular circumstances indicate to be appropriate. The Ninth Circuit having held that practices regarded as objectionable by the Commission did not fall within the prior order and respondent being unwilling to change them, the Commission was obliged to decide whether to proceed by reopening or by issuing a new complaint. The Commission's choice of procedure would seem to be a matter of indifference to respondent, since no substantial rights of his could possibly be impaired thereby. Under either procedure respondent would be, and is, entitled to a full evidentiary hearing to resolve disputed issues of fact and law, to a decision based on the record, and to judicial review of the Commission's decision in an appropriate court of appeals. More particularly, the procedure chosen by the Commission entitles respondent to an evidentiary hearing before a hearing examiner whose initial decision must be "based upon a consideration of the whole record and supported by reliable, probative, and substantial evidence," and must include "findings * * * and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record." Rules of Practice, Section 3.51(b). Respondent's right of review both before the Commission and before an appropriate court is also guaranteed. How respondent is, or could be, prejudiced by our choice of this procedure remains a mystery.

Moreover, while in the absence of prejudice to respondent the grounds for the Commission's discretionary selection of remedy seem to be irrelevant, they can be briefly set out here. In view of the decision in *In Re Floersheim* holding that the Commission's existing or-

der did not comprehend practices which the Commission had reason to believe violated Section 5 of the Federal Trade Commission Act, the Commission sought the most expeditious means for eliminating those practices. Reopening the old proceeding was of course possible (*cf. Mohr* v. *Federal Trade Commission*, 272 F. 2d 401, 404–06 (9th Cir. 1959)), but since the practices to be challenged were different in many respects from those involved in the prior proceeding—although some were admittedly similar[7]—the Commission thought it advisable to commence a new proceeding. Starting with a clean slate, the Commission could focus on the issues raised by Floersheim's current business practices, its analysis facilitated by a record that would be unencumbered by largely irrelevant side issues concerning, for example, the unrelated business practices that had given rise to the prior order, or the details of respondent's compliance with that order.

By way of illustration, suppose that a respondent was under a Section 5 order prohibiting him from utilizing bait and switch advertising techniques and that his compliance report disclosed that he had engaged in illegal price fixing also violative of Section 5. Any Commission attempt to have him penalized for violation of the order would surely be rejected by the courts, and the Commission would presumably then accept the compliance report on the ground that "the actions set forth therein constitute compliance with the order to cease and desist." If further investigation disclosed substantial evidence that the respondent had engaged in illegal price fixing, can it be seriously argued that the Commission could not issue a new complaint challenging the price fixing but would first have to revoke its acceptance of the report of compliance and then reopen the old order?

While the acts challenged in the instant complaint relate more closely to the acts forbidden by the existing order than did those in the illustration, the distinction is not a meaningful one. As in the illustration, the practices alleged in the instant complaint do not fall within the existing order. Given this fact, how we proceed is a matter of discretion with the Commission and a matter of indifference to respondent whose procedural and substantive rights are fully safeguarded. There is no merit to his suggestion on oral argument that the instance proceeding could lead to an order inconsistent with our earlier one. In drawing an order in this case, the Commission has been

[7] *Cf. S. Dean Slough, supra,* note 2, at 1363.

careful to avoid any conflict with the prior order that would make compliance with both orders impossible or unduly burdensome.[8]

V

We think the answer to the ultimate question in this case, whether respondent's forms are misleading or have the tendency and capacity to deceive, is clear. The question is not a narrow question of fact and its resolution does not turn on the credibility or demeanor of witnesses or similar factors. On the contrary, determination of this issue requires that inferences as to deception or capacity to deceive—questions of judgment falling within the specialized competence and experience of this agency—be drawn from virtually undisputed evidentiary facts. The members of the Commission have inspected the forms, all of which are in the record, upon which the charge of deception is based; our findings are based, not on the analysis in the initial decision, but on our independent first-hand examination of the forms. We therefore feel entirely free to review and modify the examiner's findings on this issue.[9]

On reviewing respondent's envelopes and forms, we think it clear that they are misleading, creating the impression that they come from the government or some other official source or third party, rather than from the creditor, and that they have the capacity and tendency to deceive those to whom they are sent. In particular, we agree with the examiner that respondent's envelopes, by their external appearance and format, simulate envelopes used by the United States Government for official purposes. Compare CX 23 with CX 46. That respondent may have rejected one lot of envelopes because of their similarity to envelopes used by the United States Treasury may perhaps bear on the question of his good faith but in no way compels the conclusion that the envelopes used are not deceptive.

We also find that the skip tracer forms used by respondent are deceptive. Without purporting to be an exhaustive catalog we find that among other factors their general appearance and similarity to

[8] Moreover, as will be seen, *infra*, if despite our efforts inconsistencies between the two orders are thought to exist which respondent is unable to adjust in informal consultation with the Commission's staff, a simple advisory opinion procedure is available to respondent enabling him to obtain a complete resolution of any such problem without running the risk that a civil penalty proceeding will be brought.

[9] See, *e.g.*, *The Papercraft Corp.*, Docket No. 8489 (Dec. 24, 1963) [63 F.T.C. 1965]; *cf. Stauffer Laboratories, Inc.* v. *Federal Trade Commission*, 343 F. 2d 75, 78 (9th Cir. 1965); *United States Retail Credit Ass'n.* v. *Federal Trade Commission*, 300 F. 2d 212, 216–17 & n. 7 (4th Cir. 1962); see also *Baranow* v. *Gibraltar Factors Corp.*, 366 F. 2d 584, 588–89 (2d Cir. 1966).

government checks, the use of fictitious names such as "Claimant's Information Questionnaire" or just "Questionnaire," [10] the prominent use of respondent's address, 748 Washington Building, Washington, D.C., on the forms and on the reply envelopes, the peremptory nature of the requests for information,[11] and the statement on the "Claimant's Information Questionnaire" asking the recipient to "Fill in this form for identification to aid collection in full for claimant," (CX 36) combine to conceal the true purpose of the request for information.

Nor are the effects of this subterfuge dispelled by the disclaimer in small print that "the purpose of this card is to obtain information concerning a delinquent debtor, and to further advise that this is not connected in any way with the United States Government." The examiner's finding that the recipients of such forms are often people of low income having minimal formal education (finding of fact 10) is amply supported by evidence in the record and finds independent corroboration in the Commission's extensive experience with this type of form.[12] Such persons would be unlikely to notice respondent's inconspicuous declaimer or to understand its import. Also significant is the fact, established by the testimony of the witness Mary Mossberg and by CX 48–A, that at least one user of the form blacked out the disclaimer leaving only the words "United States Government." [13] If respondent's forms did not so closely resemble government forms or otherwise purport to be something different from what they are in fact, no disclaimer would be necessary. To prevent this kind of deception from recurring, it seems clear that respondent's skip tracer forms should be revised to avoid creating any possible confusion in the mind of the recipient as to their purpose and that included in

[10] As respondent's counsel conceded on oral argument before the Commission, that these names were "cleared" with the Post Office Department—the nature and purpose of the Post Office's action in "clearing" these names is obscure on the present record—is irrelevant. Transcript pp. 32–34. *Cf. Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 143 F. 2d 676, 679 (2d Cir. 1944).

[11] For example, some of the forms demand that the recipient "Fill Out Reverse Side of This Form and Return Within 5 Days." *E.g.*, CX 27, 31. Others state "YOU HAVE CHANGED EMPLOYERS. COMPLETE QUESTIONNAIRE AND RETURN TO 748 WASHINGTON BLDG., WASHINGTON, D.C." *E.g.* CX 32–34.

[12] It is partly for this reason that we find inapplicable the statements made by the Court of Appeals for the Ninth Circuit in the penalty proceeding against respondent:

"We cannot assume that which is clearly expressed in plain English language on any form sent to any literate recipient in this country would *not* be read, or *not* be understood. If that were true, no notice of any kind would be sufficient. It may be difficult to make the American public heed or read a printed statement of fact, but it is there so that all who look and read may know." *In re Floersheim*, 316 F. 2d 423, 427 (9th Cir. 1963).

[13] Respondent's later attempt to show that any such action was unauthorized by the creditor involved does not refute complaint counsel's basic contention that the use of this inconspicuous disclaimer facilitated this kind of abuse.

the revised form should be a clear, explicit and prominent statement that the purpose is to obtain information concerning a delinquent debtor, that the form is sent by a private creditor, and that the United States Government is in no way involved.

We reach similar conclusions as to the deceptiveness of respondent's collection forms. Sent, like the skip tracer forms, in the brown window envelopes, these forms are also frequently directed to debtors who are uneducated or illiterate. While it is by now a commonplace that testimony as to actual deception or capacity to deceive is not essential,[14] the present record contains substantial testimony by debtors, well-educated as well as illiterate, and persons familiar with legal problems of the poor, indicating that the Payment Demand forms have the capacity to deceive, and have in fact deceived, persons to whom they are sent. For example, one witness, Mrs. Gonzalez, a Mexican American who had gone through the ninth grade testified that even after opening the Payment Demand form she believed the request for payment to have been made by the government. Record pp. 221–23, 227–28. Her belief that if the notice came from Washington, D.C., it must have come from the government is common among low income debtors, a fact that is apparent from the testimony of other debtors and from the testimony of one Donald W. Haynes, a legal aid attorney in the California poverty program, whose testimony in this respect was credited by the examiner. Finding of fact 10; record pp. 137, 144–46.[15]

Examination of the forms compels the conclusion that they are misleading. Prominent use of the Washington, D.C., address on the envelope and the form, the statement "NOTICE MAILED FROM WASHINGTON, D.C. BY PAYMENT DEMAND," repeated, in substance, on the reverse side of many of the Payment Demand forms,[16] the use of elaborate type styles on several forms to simulate legal documents,[17] all exploit the assumption of many low income debtors that anything emanating

[14] See, *e.g.*, *Double Eagle Lubricants, Inc.* v. *Federal Trade Commission*, 360 F. 2d 268, 270 (10th Cir. 1965); *S. Dean Slough, supra*, note 2, at 1355; *The Papercraft Corp.*, Docket No. 8489 (Dec. 24, 1963) [63 F.T.C. 1965, 1991]; *cf. Stauffer Laboratories, Inc.* v. *Federal Trade Commission*, 343 F. 2d 75, 78 (9th Cir. 1965), citing *Carter Products, Inc.* v. *Federal Trade Commission*, 268 F. 2d 461, 495 (9th Cir.), *cert. denied*, 361 U.S. 884 (1959); *United States Retail Credit Ass'n., Inc.* v. *Federal Trade Commission*, 300 F. 2d 212, 221–22 (4th Cir. 1962); *Zenith Radio Corp.* v. *Federal Trade Commission*, 143 F. 2d 29, 31 (7th Cir. 1944).

[15] That even a literate, educated debtor may be deceived, is clear from the testimony of a schoolteacher cited by the hearing examiner in his finding of fact 10.

[16] The examiner found that "there is a special effect in mailing from Washington, D.C. [which] is to contribute substantially to any misrepresentation as to governmental or official origin." Initial Decision p. 161.

[17] See CX 10–16, 18, 19.

from Washington, D.C., comes from the government and are intended to convey the impression that the government or some other third party has an interest in seeing that the debt is collected.[18]

Telling evidence of the use to which these forms may be put because of the false impression they convey, is found in exhibit 54–A, a letter from W. C. Birchfield, Credit Manager of Burstein-Applebee Company, Kansas City, Missouri, to a delinquent debtor in which he states:

> We have received your check dated September 30 in the amount of $73.00 as a result of our notification from Washington, D.C.
>
> * * * * * * *
>
> Had you made the $40.00 payment by May 21st as promised and a $40.00 post-dated check by June 21st as promised, during a telephone conversation with Mr. Bridgforth, it would not have been necessary for us to resort to the legal notice from Washington.

Whether or not this letter represents an unauthorized use of the forms, as respondent contends, we think it merely makes explicit the misleading idea that is implicit in the forms themselves, that is, the notion that a third party in Washington, D.C., has an interest in the debt. Indeed, some support for this view is provided by respondent's repeated testimony that his use, on the brown envelopes, of a different address from that of the creditor is necessary to deceive the debtor into opening the envelope:

> It's a foreign company envelope. It's a different concept to the debtor. He cannot recognize it as a creditor dunning him, so, therefore, he will open it and read the message. Record p. 313; see also pp. 83, 421.[19]

As we have stated, we do not think the effect of the deception is limited to getting the debtor to read the material; the debtor is also led to believe that the debt has been referred to the government or some other third party and that they have an interest in its collection.[20]

Two other charges of deception are made in the complaint. As to the first, concerning respondent's representations in his promotional literature that his forms have been approved by the Commission or have

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[18] Corroboration for the view that this misleading impression is intended may be found in exhibits 24 and 25 which inform the debtor that his "letter to Payment Demand, Washington, D.C. has been forwarded to [was accepted by] this office." See footnote 4, *supra*.

[19] Respondent's present insistence on the importance of his right to operate his business in Washington, D.C., evinces an attitude somewhat inconsistent with his view, repeatedly expressed at the hearing below, that, as long as the debt collection material bears an address other than that of the creditor, whether the address is Washington, D.C., or some other city is largely irrelevant. Record pp. 82, 330–33.

[20] *Cf. S. Dean Slough, supra*, note 2, at 1353, 1357.

been deemed to be in compliance with the prior order of the Commission, we adopt the findings of the examiner. The second charge involves the statement, on the Payment Demand forms, of a creditor's right under state law to attach his debtor's property before or after judgment.[21] It is not disputed that respondent's forms are sent to debtors in all parts of the United States. Yet, as exhibit 56, a summary of various state laws, demonstrates, the general statement on respondent's forms fails to take into account numerous variations in state law, for example, providing exemptions for particular kinds of property or imposing limitations on wage or salary attachments.[22] The statement "subject to the laws of the [state of]" to be filled in by the creditor does not adequately cure this infirmity since it is unlikely that most debtors would be aware of differences in their state's law, or qualifications that local law might impose, limiting the substantive rights of a creditor as set out on the form.

It seems clear that the sole purpose of including this catalog of creditors' rights is to intimidate and deceive the debtor, rather than to inform him of the legal rights of his creditor. Certainly any statement of a creditor's rights after judgment sent to a debtor against whom no judgment has yet been entered should include a notification that no judgment may be entered against the debtor unless he has first had an opportunity to appear and defend himself in a court of law.[23] Moreover, to the extent that an informative statement of a creditor's rights under local law is thought by respondent to be desirable, the least that can be expected is that the statement accurately represent those rights instead of depicting them in overly broad and threatening terms subject only to a vague reference to state law.

VI

It remains for us to formulate an order that will effectively terminate respondent's illegal practices, without preventing him from engaging in legitimate business activity, and, hopefully, bring to a close these protracted proceedings. Complicating this task is the examiner's ruling that the so-called "third party mailing" issue was not adequately pleaded. The complaint, after setting out in some detail respondent's

[21] Typical is the statement on CX 5:

"A Creditor may request an Attorney-at-Law to attach after Judgment Property such as Automobile, Jewelry, Boat, Live Stock, Crops, Machinery, House, Real Estate, Bank Account, Bank Vault, Stocks, Bonds and Earnings, Commission or Salary."

[22] See, *e.g.*, Md. Ann. Code art. 9 § 31 (Supp. 1967); N.Y. CPLR §§ 5205, 5231; Va. Code Ann. tit. 34 (Supp. 1962).

[23] This assumes, of course, that the debtor has not signed an enforceable confession of judgment.

method of business, including his use of the Washington, D.C., mailing address, alleges in pertinent part:

PARAGRAPH SEVEN: In truth and in fact, the information is not requested for any governmental agency or is not to be used for official purposes and the demand for payment is not made by any governmental or official agency, but on the contrary, the sole business of respondent, conducted as aforesaid, is to sell the various printed forms to others, to be used by them for the purpose of obtaining information concerning alleged delinquent debtors or for the purpose of obtaining payment of alleged delinquent accounts.

By selling and placing said forms in the hands of the purchasers, respondent thereby furnishes such purchasers with the false, misleading and deceptive means and instrumentalities by and through which they may obtain information as to delinquent debtors or the payment of delinquent accounts by subterfuge.

PARAGRAPH TEN: The use of said forms and other material as above set forth, has had, and now has, the tendency and capacity to mislead and deceive persons to whom said forms are sent into the erroneous and mistaken belief that the said representations and implications are true and to induce the recipients thereof to supply information or to do or perform acts which they might otherwise not have done.

The proposed order accompanying the complaint includes provisions prohibiting respondent from:

2. Using or placing in the hands of others for use, any form, questionnaire or other material:

* * * * * * *

b. Which appears to be, or simulates, an official or governmental form or document, either in the form itself or in the manner in which, or in the place from where, it is mailed;

c. Which contains an address or return address which is other than that at which the purchaser or user of such forms maintains a *bona fide* office or place of business;

d. Which is mailed from a post office other than the one where the purchaser or user of said forms is located or which is customarily used by the purchaser or user in the regular course of business.

We think it clear that the complaint comprehends a charge that respondent's forms represent that a third party, unrelated to the creditor, has an interest in the debt or in seeing that the debt is collected. It is true that complaint counsel declined the examiner's invitation, made at the prehearing conference (record pp. 25–39), to take steps to have the complaint amended to raise this issue more specifically. However, respondent was aware that complaint counsel's refusal to seek amendment of the complaint was based not on a decision to drop the charge of misrepresenting that a third party was interested in the debt but on counsel's conclusion that the charge was adequately pleaded in the original complaint. Indeed, adverting to complaint counsel's position and recognizing the possibility that the ultimate ruling on this pleading

issue might be adverse to his client, respondent's counsel introduced evidence as a defense against this charge. Record pp. 324–26.[24] Under these circumstances, no possible prejudice to respondent will be caused by our holding that the so-called "third party" issue was properly pleaded.

Moreover, the evidence establishes that respondent does not operate a collection agency,[25] but instead publishes and sells forms for use by others. While his forms do not state that the debt has been turned over to a third party engaged in the business of collecting past due accounts,[26] the collection envelope and forms do, as we have already held, create the misleading impression that a third party, located in Washington, D.C., is interested in having the debt collected. The skip tracer forms are similarly misleading in that they deceive the recipient into believing that they were sent by some governmental or official body. Since these findings of illegality are based on undisputed evidentiary facts in the record—facts which were plainly admissible under the allegations of the complaint—and since respondent was fully apprised of complaint counsel's case and had ample opportunity to meet it by introducing contrary evidence, we are free to draft an order that will be appropriate to terminate these deceptions, regardless of whether our order proscribes practices included by implication but not mentioned by name in the complaint.

The order entered by the examiner is too narrowly limited and will not eliminate the violations here found. The narrowness of the examiner's order is in part attributable to his concern with a dictum uttered by the Court of Appeals for the Ninth Circuit in the penalty proceeding brought by the Commission against respondent. The court stated:

> We cannot forbid an otherwise legitimate business from mailing its letters from the country's Capital, whether the sender lives or has his business there, or elsewhere. 316 F. 2d at 428.

As we have noted above, that case. involving an attempt by the Commission to have respondent cited for contempt, is clearly distinguishable from the present proceeding. Indeed, in dismissing the charges based on respondent's use of the Washington, D.C., address. the court said that "the short answer to these complaints is that the cease or

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[24] At the prehearing conference respondent's counsel stated:

"I will say we are prepared to meet the issue even if we were to proceed to trial today, so we will not be surprised." Record p. 39.

[25] At the prehearing conference respondent's counsel stated:

"So our record may be clear, it is not our contention the [sic] respondent is in the collection business. He is in a business with which the collection industry is connected but the respondent's business is not a collection business." Record p. 38.

Respondent testified to similar effect. Record p. 419.

[26] See Guide 1–6 of the Commission's Guides Against Debt Collection Deception.

desist order, as drawn, does not forbid such acts or use" and, while careful to avoid ruling on the issue, suggested that inadequacies in the Commission's order might be remedied by reopening and modifying it. *Ibid.* All that the court held is that these practices did not fall within the old order; it did not hold or even imply that under no circumstances, regardless of the showing of deception and violation of Section 5 that might be made in a new record, could the Commission order cessation of such practices. We are therefore not precluded by that decision from framing an order that will effectively terminate respondent's illegal practices.

Broadly stated, our order is intended to require respondent to cease using or selling forms that simulate governmental or official forms and to cease using or selling forms that are otherwise deceptive or misleading. The order directs him to cease and desist from publishing, using, or otherwise disseminating collection or skip tracer forms which falsely represent, directly or by implication, that some third party is attempting to collect the debt or is interested in its collection. Use of names such as Current Employment Records, Claimant's Information Questionnaire, Change of Address and Payment Demand [27] is forbidden as is the use of forms that do not prominently disclose both that the United States Government is not connected with the demand for payment or request for information and that the demand or request comes instead from an identified private creditor. Similarly, the order prohibits the use of envelopes that simulate envelopes used by the government or which contain a Washington, D.C., return address, unless the identity of the creditor and nongovernmental origin of the envelope is disclosed. Finally, the order proscribes forms that contain inaccurate representations as to creditors' rights under state law and, it bars respondent from misrepresenting that his forms have been approved by the Federal Trade Commission.

We do not agree with respondent that our order will put him out of business or will force him to move his operations from Washington, D.C.[28] This objection is largely hypothetical at the present time since

[27] Respondent's contention that this name was suggested to him by a member of the Commission's staff is largely irrelevant even if accepted as true since it is clear that oral statements by a Commission employee cannot bind the Commission. See *Double Eagle Lubricants, Inc.* v. *Federal Trade Commission*, 360 F. 2d 268, 270 & n. 5 (10th Cir. 1965).

[28] Respondent's related contention, that the services he provides are socially useful and that it is therefore not in the public interest for the Commission to proceed against him, was adequately answered in the former proceedings against him, in the opinion of the hearing examiner, later adopted by the Commission.

"If respondents' interpretation of what is in the public interest were to be accepted, our courts would be forced to embrace a policy almost exactly parallel to that proclaimed by a well-known three-member body: 'Fair is foul and foul is fair.' Such an interpretation would result in confusion worse confounded. The stability of business cannot be sustained

the order does not in terms require that respondent cease doing business in Washington, D.C., and since respondent has not shown that this will be the predictable result of the order. We do not hold that respondent is barred from doing business in Washington, D.C., or from using a Washington, D.C., mailing address if there is a business reason for so doing and if affirmative disclosures made in connection with its use prevent it from being misleading or deceptive; we hold only that on the congeries of facts adduced in this record, respondent's present use of that address is clearly deceptive and that he must take affirmative steps to terminate the deception. It is for respondent to comply in any way he deems fit. If his business judgment dictates that he cease doing business here rather than make the disclosures we require in connection with his use of a Washington, D.C., address, that decision is his and not ours; it is not required by our order.

Although we have attempted to make the order as clear and unambiguous as possible, we recognize that there may be some interstitial areas where questions of interpretation will inevitably arise. We are particularly mindful of that problem in this case because as the examiner found respondent is "violation prone" and has a "disconcerting proclivity to accomplish simulation, even without intending to." [29] Our order is intended to be so explicit as to preclude, as far as possible, inadvertent violations, but we note here that the Commission has established a simple procedural mechanism by which respondent may test the legality of any action that he wishes to take without subjecting himself to a civil penalty proceeding. Section 3.61 of the Rules of Practice, dealing with compliance procedures, provides:

> (c) Any respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order. * * * On the basis of the facts submitted, as well as other information available to the Commission, the Commission will inform the respondent whether or not the proposed course of action, if pursued, would constitute compliance with its order.

Similarly, while we see no inconsistency between the instant order and the order issued in the earlier proceeding, the advisory opinion

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by falsehood. The laudable purpose of assisting merchants to recover financial losses sustained by reason of defaulting debtors does not justify the perpetration of deceit upon those debtors. These principles are traditionally fundamental in American jurisprudence, and have been enunciated repeatedly by our courts." *Mitchell S. Mohr,* 52 F.T.C. 1466, 1474–75 (1956).

[29] Presumably it was this proclivity of respondent for violating the law, however inadvertently, that led the Court of Appeals to "hazard the hope that the respondent will take such a long step forward in voluntary compliance with the language and spirit of the order he is required to obey whether he likes it or not, that this seven year old litigation may be finally terminated, and will not be before us again." 316 F. 2d at 428.

procedure established by Section 3.61(c) is available to respondent if he finds that compliance with one order would place him in violation of the other or would otherwise create a dilemma as to how he should meet the requirements of the other order.[30]

The findings and conclusions of the hearing examiner are rejected to the extent they conflict with this opinion. The examiner's order is modified and an appropriate order will be entered in accordance with this opinion.

Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his taking the oath of office.

FINAL ORDER

This matter has been heard by the Commission on the cross-appeals of complaint counsel and respondent from the initial decision of the hearing examiner filed on June 2, 1967. The Commission has rendered its decision, denying respondent's appeal in all respects, granting complaint counsel's appeal, and adopting the findings of the hearing examiner to the extent consistent with the opinion accompanying this order. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be modified and, as modified, adopted and issued by the Commission as its final order. Accordingly,

It is ordered, That the respondent Sydney N. Floersheim, an individual trading and doing business as Floersheim Sales Company, National Research Company, or under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the business of obtaining information concerning delinquent debtors or assisting in the collection of delinquent accounts or the offering for sale, sale or distribution of forms, or other material, for use in obtaining information concerning delinquent debtors, or for use in the collection of, or attempting to collect, delinquent accounts in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "Claimants Information Questionnaire," "Current Employment Records," "Change of Address," "Questionnaire," "Payment Demand," or any other words of similar import or meaning, to refer to respondent's business or that of any of the purchasers or users of the forms sold by the respondent.

[30] See also Section 3.72(b) governing reopening of an order.

2. Using or placing in the hands of others for use, any form, questionnaire or other material:

a. Which appears to be, or simulates, an official or governmental form or document or which falsely represents, directly or by implication, that a party other than the creditor is attempting to collect the debt;

b. Which does not reveal in a prominent place, in clear language and in type at least as large as the largest type, exclusive of captions, used on said form:

(1) That the sole purpose is to obtain information concerning an allegedly delinquent debtor or that the sole purpose is to collect or attempt to collect an allegedly delinquent account;

(2) That the United States Government is in no way connected with the request for information or demand for payment;

c. Which does not reveal in a prominent place and in clear language the identity of the creditor to whom the debt is allegedly owed;

d. Which misrepresents or inaccurately states the rights of a creditor under state law to attach the real or personal property, income, wages or any other property of the debtor;

e. Which contains a statement of a creditor's right to attach after judgment the real or personal property, wages, income or other property of a debtor without disclosing that no judgment may be entered against the debtor unless he has first had an opportunity to appear and defend himself in a court of law: *Provided, however*, That it shall be a defense hereunder for respondent to establish that forms containing a statement prohibited by this paragraph (e) are sent only by or on behalf of a creditor who has obtained a final judgment against the debtor to whom the form is sent.

3. Using or placing in the hands of others for use, any envelope:

a. Which appears to be, or simulates, an official or governmental envelope;

b. Which purports to come from a party other than the creditor;

c. Which contains a Washington, D.C., return address without revealing in a prominent place, in clear language, and in type at least as large as the largest type used on said envelope, the identity of the creditor and the fact that the enclosed forms do not come from the United States Government;

d. Which contains the statement "The form enclosed is confidential, no one else may open" or any statement of similar purport.

4. Representing, directly, or by implication, that any of respondent's Payment Demand forms or any similar collection material sold by the respondent have been approved by the Federal Trade Commission or have been deemed to be in compliance with the requirements of the order to cease and desist entered by the Federal Trade Commission in Docket No. 6236, *In the Matter of Mitchell S. Mohr, et al.*

5. Misrepresenting Federal Trade Commission or court approval of any of respondent's envelopes, forms, or other material.

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

Commissioner Nicholson not participating for the reason that oral argument was heard prior to his taking the oath of office.

IN THE MATTER OF

AMERICAN MARKETING ASSOCIATES, INC., ET AL.

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

Docket 8727. Complaint, Jan. 17, 1967—Decision, Feb. 5, 1968

Order requiring a Phliadelphia, Pa., retail door-to-door seller of encyclopedias and other educational books, to cease misrepresenting that it is affiliated with the American Marketing Association or any other business group or that it is doing market research, that its employee applicants will be trained as junior executives and paid a salary, that it is affiliated with any educational or governmental agency, that it is selling its books at reduced prices, and using other deceptive sales tactics.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Marketing Associates, Inc., a corporation, and Stanley Kessler, individually and as a director of the said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing