IN THE MATTER OF

STANDARD EDUCATORS, INC., ET AL.

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

Docket 8807. Complaint, Dec. 30, 1969—Decision, Dec. 6, 1971

Order requiring door-to-door seller of encyclopedias of East Hartford, Conn., to cease misrepresenting to prospective purchasers that they were engaged in a national advertising campaign and offering a set of the New Standard Encyclopedia "free" or at a special price to specially selected persons who would endorse their products, and misrepresenting that certain books in a combination offer were free and the offer was limited to the time of the call.

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 Standard Educators, Inc., a corporation, and James A. Melley, Sr., 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 Standard Educators, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the state of Connecticut, with its principal office and place of business located at 100 Prestige Park Road, in the city of East Hartford, State of Connecticut.

Respondent James A. Melley, Sr., is an individual and 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 business 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 various books, including an encyclopedia named "New Standard Encyclopedia" and supplements and a consultation service in connection therewith 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 books including the New Standard Encyclopedia, when sold, to

be shipped from their suppliers, located in the State of Illinois and in various States of the United States, to purchasers thereof located in States of the United States other than the state of origination, and maintain, and at all times mentioned herein have 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 their aforesaid business, respondents now are, and at all times mentioned herein have been, in substantial competition with corporations, firms and individuals in the sale of books and encyclopedias and supplements and a consultation service in connection therewith of the same general kind and nature as those sold by respondents.

PAR. 5. In the course and conduct of their aforesaid business respondents sell said books, including the New Standard Encyclopedia, at retail to the general public. Sales are made by the said respondents' agents, representatives or employees who contact prospective purchasers in their homes.

Said respondents have formulated, developed and carried out a plan for the purpose of inducing the sale of said books. In furtherance of this plan the said respondents supply their agents, representatives or employees with a "sales pitch" and material in connection therewith and instruct them to use and follow same. Said agents, representatives or employees employ said sales presentation and material in orally soliciting the purchase of respondents' books.

Said respondents, in said sales' presentation and in the advertising, promotional literature and other printed materials, and respondents' agents, representatives or employees, in the course of their sales talks, make many statements and representations concerning the offer and price of respondents' books, the manner of payment for said books, including the New Standard Encyclopedia, and the legal responsibility of prospective purchasers and purchasers who contract for the purchase of said books. Some of these statements and representations are made orally by said agents, representatives or employees to prospective purchasers and some are contained in the correspondence of respondents with purchasers.

PAR. 6. Through the use of such statements and representations, and others similar thereto, but not specifically set forth herein, separately or in connection with the oral sales presentation of respondents' sales personnel as used variously by said respondents in the advertising and promotion of their products, said respondents now represent, and have represented, directly or by implication:

1. That respondents are conducting an advertising campaign

and are offering a set of the New Standard Encyclopedia "free" or at a special or reduced price to specially selected persons in return for:

a. A letter of endorsement regarding the said set of encyclopedias.

b. Display of the product in the prospect's home.

c. An agreement that the encyclopedia will be kept up to date by the prospective customer by the purchase of the annual yearbook for 10 years.

2. That the offer of the respondents' encyclopedia and other books is a special introductory or reduced price, not being made to the public generally; that it is being offered only to a specially selected group of people, *i.e.* members of the Armed Forces.

3. That certain books included in the respondents' "combination offer" are given free of cost with the purchase of a subscription of the annual yearbook for a period of ten years and that purchasers of respondents' "combination offer" pay only for a part of such books.

4. That the favorable price, terms and conditions of the "special introductory" price are limited to the time of the call on the prospective customer.

5. That the additional cost of $3.95 for the annual yearbook is for postage and handling charges.

PAR. 7. In truth and in fact:

1. Respondents' agents, representatives or employees are not conducting an advertising campaign and do not give a set of the New Standard Encyclopedia free or at a reduced price to specially selected persons in return for the considerations heretofore listed in Paragraph Six, 1, or for any other reasons or considerations. Said encyclopedias are offered and sold only at respondents' usual and customary prices.

2. Respondents' offer of said encyclopedia is not a "special introductory" offer to a specially selected group, *i.e.*, members of the Armed Forces. It had been offered and is being offered to the general public as a regular practice of the respondents' business.

3. Certain of the books included with the encyclopedia in respondents' "combination offer" are not free of cost with the purchase of a subscription of the annual yearbook for a period of ten years, or for any other reason, as the cost of all such books is included in the contract price of the combination offer. Further, purchasers pay the full price for all the books in the "combination offer."

4. The price, terms and conditions of the so-called "special introductory" offer are not limited to the time when the call is made on the prospective customer.

5. The annual cost of $3.95 for the annual yearbook is not for postage and handling but is a charge, payable directly to Standard Education Society, the publisher, and not to the respondents.

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

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the mistaken and erroneous belief that such statments and representations were and are true, and to enter into contracts for the purchase of respondents' products because of such erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the 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.

Mr. Anthony J. Kennedy, Jr. and *Mr. Michael C. McCarey* supporting the complaint.

Kirkland, Ellis, Hodson, Chaffetz, Masters & Rowe, by *Mr. Ronald J. Wilson* and *Mr. Richard C. Lowery* for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

OCTOBER 12, 1970

PRELIMINARY STATEMENT

The complaint in this proceeding, issued on December 30, 1969, charges that Standard Educators, Inc., a corporation, and James A. Melley, Sr., individually and as an officer of said corporation, hereinafter called respondents, have violated the provisions of the Federal Trade Commission Act in the sale of encyclopedias and books. After service of the complaint, respondents, through their counsel, filed an answer denying the charging allegations in the complaint, including the allegation that respondent James A. Melley, Sr., "formulates, directs, and controls" the acts and practices of the corporate respondent.

Three prehearing conferences were held, two of which were stenographically reported, on February 26, 1970, and April 23, 1970, re-

spectively, and one unreported, held on May 28, 1970. At the conference held on April 23, 1970, an order was entered on the record by the hearing examiner, setting July 7, 1970, as the date for the hearing to begin, and further providing that complaint counsel should, on or before May 13, 1970, deliver to respondents' counsel the names and addresses of each of their proposed witnesses, and a brief statement of the general nature of the testimony expected from each witness, and a copy of each exhibit which complaint counsel expected to offer in evidence at the hearing. The prehearing order further provided that, on or before May 27, 1970, respondents' counsel would furnish to complaint counsel the names and addresses of their expected defense witnesses, and a statement of the general nature of the testimony expected from each, and a copy of each exhibit which respondents expected to offer in evidence at the hearing (Tr. 59).

The hearing has been held, at which time evidence and testimony were received in support of and in opposition to the allegations of the complaint. Proposed findings of fact, conclusions of law, and a proposed order, and replies thereto, have been submitted by counsel for the parties. These have been considered. All proposed findings of fact and conclusions of law not found or concluded herein are denied.

Upon the basis of the entire record, the hearing examiner makes the following findings of fact and conclusions of law, and issues the following order:

FINDINGS OF FACT

1. Respondent Standard Educators, Inc. is a corporation organized and doing business under the laws of the State of Connecticut, with its office and principal place of business located at 100 Prestige Park Road, East Hartford, Connecticut. The individual respondent, James A. Melley, Sr., is the president of the corporate respondent and his business address is the same as that of the corporation (Ans., Par. 1).

2. Standard Educators, Inc. was organized and incorporated in April 1957, by the individual respondent, James A. Melley, Sr., without the aid or assistance of an attorney. Mr. Melley prepared and drafted the papers and articles of incorporation which he filed and presented to the State of Connecticut (Melley, Tr. 118). The incorporators were the individual respondent, James A. Melley, Sr., who became president and treasurer; his wife, Margaret J. Melley, who became vice president and secretary; and his father, James J. Melley, who resided in Scranton, Pennsylvania, and became assistant secretary and assistant treasurer (Melley, Tr. 118–19, 122; CX 19). Standard Educators, Inc. has an authorized capital stock of $15,000, equally

divided into 300 shares of common stock, with a par value of $50 per share (CX 19Z, 22–28). After the incorporation, 153 shares of the 300 authorized common shares were allotted to the individual respondent, James A. Melley, Sr., 141 shares to his wife, Margaret J. Melley, and six shares to his father, James J. Melley. There has never been any public issue of the capital stock, and the only change in stockholders was brought about by the death of James J. Melley in 1958. Mr. James A. Melley, Jr., son of the individual respondent, James A. Melley, Sr., is now the holder of the six shares of capital stock originally issued to his grandfather, James J. Melley. There has been no change in the number of shares of stock held by the individual respondent, James A. Melley, Sr., and his wife, Margaret J. Melley. At the time of the hearing, the individual respondent, James A. Melley, Sr., owned 51 percent of the capital stock of Standard Educators, Inc.; his wife, Margaret J. Melley, owned 46 percent, and their son, James A. Melley, Jr., 3 percent. The directors were James A. Melley, Sr., Margaret J. Melley, Robert L. Atwood, and James A. Melley, Jr. The officers were as follows: James A. Melley, Sr., president and treasurer; Robert L. Atwood, vice president; Margaret J. Melley, secretary; and James A. Melley, Jr., assistant secretary and assistant treasurer (Melley, Tr. 122–24, 465; CX 19). Throughout the life of the corporate respondent, the individual respondent, James A. Melley, Sr., has held the offices of president and treasurer, and his wife, Margaret J. Melley, has held the office of secretary. Mrs. Melley also held the office of vice president until March 1967, when Robert L. Atwood was elected as a Director of Standard Educators, Inc., and given the title of vice president, Sales (CX 19).

3. The respondents are now and have been engaged in the sale and distribution of various books, including an encyclopedia called "New Standard Encyclopedia," and supplements thereto, to the public (Ans., Par. 2). As a book distributor, Standard Educators, Inc. buys encyclopedias and other books from publishers and resells them on a retail basis to householders by door-to-door canvass (Ans., Par. 5; Melley, Tr. 117, 125).

4. In the course and conduct of said business, the respondents cause and have caused their said books, including the New Standard Encyclopedia, when sold, to be shipped from the suppliers, located in the State of Illinois and in various States of the United States, to purchasers thereof located in States of the United States other than the states of origination, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act (Ans., Par. 3).

5. In the conduct of their business, respondents are now and have been in substantial competition with corporations, firms, and individuals in the sale of books, encyclopedias, and supplements thereto, and a consultation service of the same general kind and nature as those sold by respondents (Ans., Par. 4).

6. Prior to the organization and incorporation of Standard Educators, Inc., the individual respondent, James A. Melley, Sr., had engaged in selling magazines for Crowell-Collier, Inc., and then for National Educators, Inc. (Tr. 115–16). When Mr. Melley decided to go into business for himself, he organized and incorporated the corporate respondent and made arrangements with Standard Education Society, Inc. of Chicago, Illinois, to purchase its line of encyclopedias for resale to the public. He also made arrangements with New Century Dictionary of New York and Hammond Atlas Company of Maplewood, New Jersey, and J. G. Ferguson of Chicago, to purchase dictionaries, atlases, and other books for resale to the public. These publishers provide Standard Educators, Inc. with broadsides, which are large paper foldouts, usually in color, depicting and explaining the books offered for sale. These broadsides are used by salesmen in their sales presentations (Melley, Tr. 65, 117, 126–130, 182; CX 9).

7. The respondents, Standard Educators, Inc., and James A. Melley, Sr., began business in April 1957, by hiring two salesmen on a commission basis, Robert L. Atwood and Peter C. Hill, who had worked with and for Mr. Melley at Crowell-Collier, Inc. (Melley, Tr. 125). Mr. Atwood was trained by Mr. Melley in the selling of magazines at Crowell-Collier, Inc., prior to the incorporation of Standard Educators, Inc. (Melley, Tr. 458). As additional sales personnel were needed through the years, the training of new personnel has consisted of so-called "on-the-job" training, the recruit going along and observing the sales technique of the experienced salesman. As the recruit gained experience, he was allowed to canvass on his own, and, in turn, trained others (Melley, Tr. 191–92). As the business of the respondents has grown and increased, Mr. Melley no longer participates in door-to-door selling and now spends his time in the office supervising the over-all operations of Standard Educators, Inc. (Melley, Tr. 146–48). As president of Standard Educators, Inc., Mr. Melley determines the prices at which encyclopedias and other books are sold, and is largely responsible for the composition and preparation of contracts used by Standard Educators, Inc. (Melley, Tr. 126, 142, 162; CX 3).

8. Standard Educators' salesmen are compensated on a commission basis (Melley, Tr. 139–140). Each sales representative is provided with a sales kit, which includes, among other things, the broadsides

which Standard Educators, Inc. receives from its publishers, and a sample volume of the encyclopedia (Melley, Tr. 127–28, 130–34, 135–37, 193–95; CX 4–16). Each Standard Educators' sales representative also carries a contract form (CX 18), which he fills out and has the purchaser sign if a sale is made (Melley, Tr. 161–62). The books that are offered for sale by Standard Educators, Inc. are sold in various combinations (Melley, Tr. 124). The New Standard Encyclopedia offered for sale by Standard Educators, Inc. in 1967 carried a basic retail price of $149.50 (Melley, Tr. 140–41; CX 3). The total price of the combination varied, depending upon the other books purchased, and was computed according to a formula which assigned a designated number of points for each additional item and then equated a dollar value for each point (Melley, Tr. 141; CX3).

9. Standard Educators, Inc., in sales presentations and in the advertising, promotional literature, and other printed materials, and the agents, representatives, salesmen or employees of corporate respondent, in the course of their sales talks, make many statements and representations concerning the offer and price of corporate respondent's books, the manner of payment for said books, including the New Standard Encyclopedia, and the legal responsibility of prospective purchasers and purchasers who contract for the purchase of said books. Some of these statements and representations are made orally by said agents, representatives, salesmen or employees to prospective purchasers and some are contained in the correspondence of the corporate respondent with purchasers (Ans., Par. 5).

10. The complaint alleges that, through the use of such statements and representations, separately or in connection with the oral sales presentation of said salesmen, respondents represent and have represented, directly or by implication:

1. That respondents are conducting an advertising campaign and are offering a set of the New Encyclopedia "free" or at a special or reduced price to specially selected persons in return for:

   a. A letter of endorsement regarding the said set of encyclopedias.

   b. Display of the product in the prospect's home.

   c. An agreement that the encyclopedia will be kept up to date by the prospective customer by the purchase of the annual yearbook for 10 years.

2. That the offer of corporate respondent's encyclopedia and other books is a special introductory or reduced price, not being made to the public generally; that it is being offered only to a special selected group of people, *i.e.*, members of the Armed Forces.

3. That certain books included in the "combination offer" are given free of cost with the purchase of a subscription of the annual yearbook for a period of ten years and that purchasers of the "combination offer" pay only for a part of such books.

4. That the favorable price, terms and conditions of the "special introductory" price are limited to the time of the call on the prospective customer.

5. That the additional cost of $3.95 for the annual yearbook is for postage and handling charges.

11. Whereas, in truth and in fact:

1. Corporate respondent's agents, representatives, salesmen or employees are not conducting an advertising campaign and do not give a set of the New Encyclopedia free or at a reduced price to specially selected persons in return for the considerations listed in Paragraph 10, 1 above (Paragraph Six, 1, of the complaint) or for any other reasons or considerations. Said encyclopedias are offered and sold only at corporate respondent's usual and customary prices.

2. Corporate respondent's offer of said encyclopedias is not a "special introductory" offer to a specially selected group, *i.e.*, members of the Armed Forces. It had been offered and is being offered to the general public as a regular practice of corporate respondent's business.

3. Certain of the books included with the encyclopedia in corporate respondent's "combination offer" are not free of cost with the purchase of a subscription of the annual yearbook for a period of ten years, or for any other reason, as the cost of all such books is included in the contract price of the combination offer. Further, purchasers pay the full price for all the books in the "combination offer."

4. The price, terms and conditions of the so-called "special introductory" offer are not limited to the time when the call is made on the prospective customer.

5. The annual cost of $3.95 for the annual yearbook is not for postage and handling, but is a charge, payable directly to Standard Education Society, the publisher, and not to the corporate respondent.

12. Therefore, the complaint alleges, the statements and representations set forth in Paragraph Six of the complaint (Paragraph 10 hereof) were and are false, misleading, and deceptive, and have the capacity and tendency to mislead members of the purchasing public into the belief that such statements and representations were and are

true, and to enter into contracts for the purchase of corporate respondent's products because of such erroneous and mistaken belief.

13. Before discussing the evidence and testimony offered in support of and in opposition to the allegations of the complaint, mention should be made of some of the various motions and applications filed by respondents' counsel shortly before the hearing was scheduled to begin on July 7, 1970.

14. On June 9, 1970, less than 30 days prior to the date scheduled for the start of the hearing on July 7, 1970, counsel for respondents filed an application to take the depositions upon written interrogatories of 14 consumer witnesses, although their names, along with others, had been furnished to respondents' counsel by complaint counsel on March 27–30, 1970, and May 13, 1970, pursuant to the order on the record at the prehearing conference on April 23, 1970. No reason was given why the request was filed less than 30 days prior to the date scheduled for hearings to begin, although respondents first received the names of those witnesses from complaint counsel on March 27–30, 1970. The application stated that depositions by written interrogatories were requested from these particular witnesses because their addresses were too far distant from Washington, D.C., for respondents' counsel to interview prior to the trial. All of the Commission's proposed consumer witnesses were either members of the armed forces of the United States or wives of members, and their addresses and duty stations were constantly changing. Actually, only four of the 14 proposed consumer witnesses from whom respondents sought to take depositions by written interrogatories testified at the hearing. These were Messrs. Michael G. Martin, Larry E. Riggs, Leonard R. Wilt, and Fred G. Bryant, Jr. Another proposed consumer witness, whose deposition respondents sought to take by written interrogatories was Daniel E. Olson, a member of the U.S. Army stationed at Fort Richardson, Alaska (Tr. 219–220; CX 21). However, Mr. Olson did not testify at the hearing. Instead, his wife, Mrs. Linda J. Olson was the first consumer witness who testified in support of the complaint.

15. The written interrogatories are the same for each proposed witness, and relate to the contract, if any, signed by the proposed witness at the time of the purchase of encyclopedias and books from corporate respondent's salesmen. It is evident that the original contract, if any, signed by each proposed witness was in corporate respondent's files and available to corporate respondent and its attorneys for their use in preparing for the hearing. The evidence adduced at the hearing demonstrates that most of the information requested in the written interrogatories was contained in the contract. This being so, the im-

portant thing to corporate respondent for discovery purposes prior to the hearing was the name of the proposed consumer witness, regardless of his correct address. With the name of the witness, respondents or their attorneys could then examine their files and locate the signed contract, if any, of each proposed witness, and obtain from the face of the contract all of the information sought in the written interrogatories relating to the contract of that particular witness.[1] On June 22, 1970, complaint counsel filed an answer opposing respondents' application for the depositions by written interrogatories. On June 25, 1970, the hearing examiner denied respondents' application for the depositions.

16. On June 16, 1970, counsel for respondents filed a Motion for Summary Decision with Supporting Memorandum. This motion was opposed by complaint counsel and denied by the hearing examiner on July 2, 1970.

17. On June 30, 1970, counsel for respondents filed a "Motion to Postpone Hearings Now Scheduled for July 7, 1970," which was denied by an order of the hearing examiner filed on July 6, 1970.

18. On July 7, 1970, the date on which the hearing was scheduled to begin, counsel for respondents filed a "Motion to Suppress Documentary and Testimonial Evidence Originating from April and May 1967 Investigation." This motion alleged, in substance, that the information and documents obtained by the Commission investigator from Mr. Melley during his investigation of corporate respondent at its offices in East Hartford, Connecticut, in April and May 1967, were taken without the consent of Mr. Melley. Counsel for respondents contend that this constituted illegal seizure and, therefore, the information and documents obtained from Mr. Melley should be suppressed. After hearing evidence and testimony by the Commission investigator who conducted the investigation of corporate respondent, which ultimately resulted in the issuance of the complaint herein, and also testimony from Mr. James A. Melley, Sr., president and stockholder of the corporate respondent, and an individual respondent herein, and also the testimony of Mr. Robert L. Atwood, general sales manager and vice president of corporate respondent, on respondents' claim

[1] Mr. Gary G. Broach, the fourth consumer witness who testified at the hearing, was the only consumer witness who did not sign a contract. Since there was no signed contract in respondents' files for Mr. Broach, the deposition of Mr. Broach would have been of assistance to respondents in preparing for the hearing. For this reason, the hearing examiner has not considered the testimony of Mr. Broach in this decision. There is ample testimony by the other consumer witnesses to establish the allegations of the complaint with respect to alleged false, misleading, and deceptive statements and representations by corporate respondent's salesmen or representatives. However, a recital of the testimony of Mr. Broach has been incorporated in the decision for the benefit of the Commission in the event it should decide to consider the testimony of Mr. Broach.

of illegal seizure, the hearing examiner was of the opinion that the information and documents were not "seized" by the investigator, but were voluntarily delivered by Mr. Melley to the investigator in a spirit of cooperation with the Commission in its investigation of corporate respondent. Accordingly, the hearing examiner denied respondents' motion to suppress (Tr. 100). Following a recess for counsel to discuss a possible consent agreement, which was not successful, complaint counsel then began the presentation of their direct case-in-chief.

19. The first consumer witness offered by complaint counsel to support the allegations of the complaint with respect to alleged misrepresentations by respondents' salesmen in their sales presentations to customers was Mrs. Linda J. Olson, 705 Muldoon Road, Anchorage, Alaska. At this point, counsel for respondents objected to the testimony of Mrs. Olson on two grounds: (1) that the address for Mrs. Olson furnished to respondents' counsel on May 13, 1970, in compliance with the prehearing order of the hearing examiner issued at a prehearing conference on April 23, 1970, listed Mrs. Olson's address as South College Avenue, Fort Collins, Colorado, which was not her correct address; and (2) that, because of the hearing examiner's refusal to permit respondents' counsel to take the deposition of Mrs. Olson upon written interrogatories, respondents' counsel did not have any "notion of what facts she had in this case" (Tr. 218). To the contrary, respondents had the signed contract of Mr. and Mrs. Olson in their office files and, by examining the contract (CX 21), could have obtained a "notion of what facts she had in this case." Actually, respondents' application did not request to take the deposition of Mrs. Olson, but sought to take the deposition of Daniel E. Olson, husband of Mrs. Olson. It was further developed by complaint counsel that, on March 27, 1970, complaint counsel had given respondents' counsel a tentative witness list, and again on May 13, 1970, pursuant to the prehearing order of the hearing examiner, complaint counsel filed with the Secretary a final list of witnesses, on each of which lists the address for Mr. and Mrs. Olson was also listed as Fort Collins, Colorado, which was the address that complaint counsel had "received from the Department of Defense as being the home of record or a home of record of one of the parents of Mr. Olson" (Tr. 219). Thus, respondents and their counsel were aware of the name of each consumer witness for at least three months prior to the hearing and, with this information, could examine the signed contracts of these witnesses in their files, with the exception of Mr. Gary G. Broach, who did not sign a contract (see the footnote in Paragraph 15 above). Complaint counsel later obtained Mr. Olson's present duty status and,

on June 27, 1970, complaint counsel supplied to Mr. Wilson, counsel for respondents, the address in Alaska where Mr. and Mrs. Olson can now be reached. Upon listening to this explanation concerning the address of Mr. and Mrs. Olson, the hearing examiner denied the motion of Mr. Wilson, respondents' counsel, and permitted Mrs. Olson to testify (Tr. 219).

20. Mrs. Olson testified that her husband is an enlisted man in the U.S. Army, stationed at Fort Richardson, Alaska, and that on April 19, 1967, she resided in Ayer, Massachusetts, with her husband who was also at that time in the U.S. Army (Tr. 219–220). On the evening of April 19, 1967, a representative of corporate respondent, Standard Educators, Inc., called at their residence and requested that he be permitted to place encyclopedias in their home "at no cost to us and this was a special deal and then went on to explain. * * * He explained that the company would place the encyclopedias in our home and they were doing this because they needed people to write letters saying that they liked the encyclopedias or to give their opinion of the encyclopedias and these would be used for advertising purposes" (Tr. 221). Mrs. Olson further testified that the set of encyclopedias, literature books, children's books, dictionaries, and a medical encyclopedia were to be free (Tr. 222), but that Mr. and Mrs. Olson were to pay for the yearbooks for a period of ten years in payments within a two to three year period (Tr. 223). The payment for the yearbooks "would come to a total of $349. * * * He explained it could be paid in cash then; like if we had the money to pay $349 to him right then, we could; or if we couldn't afford that, we could pay $12 a month until it was paid off" (Tr. 224–25). Mrs. Olson further testified that she and her husband decided to buy the yearbooks and signed a contract, which was received in evidence as CX 21. Mr. and Mrs. Olson made a down payment of $12, and the books were sent to Mr. Olson's parents' address in Colorado (Tr. 227). Mrs. Olson further testified that:

> When the next yearbook came out, we received a paper in the mail saying that if we wanted to receive the yearbook, to send in $3.95 but that we could not receive that yearbook unless we paid the $3.95 (Tr. 227–28).

In spite of the offer of the hearing examiner to permit counsel for respondents to interview and question the witness in private, counsel declined to cross-examine the witness (Tr. 228).

21. The second consumer witness called by complaint counsel was Mrs. Jacqueline Wilt of Salem, Ohio. Respondents' counsel objected to the testimony of Mrs. Wilt on the stated grounds that the hearing examiner had refused to permit counsel for respondents to take the deposition of Mrs. Wilt's husband by written interrogatories. The

objection was overruled and the witness was permitted to testify (Tr. 230). Mrs. Wilt testified as follows: On May 27, 1968, Mr. and Mrs. Wilt resided at 66 Mumford, Groton, Connecticut, during the time that her husband was a Radioman Second Class, U.S. Navy. On that evening, two men called at their home and stated that they would place a new edition of encyclopedias, two dictionaries, a Bible or a medical book, a bookcase, and a set of Child Horizon books in their home free of charge and, after the Wilts had kept the books for ninety days, the Wilts were to write a letter to the company to be used for sales promotions. The only payment to be made by the Wilts was $299.95 for the yearbooks to be received over a ten-year period (Tr. 231–33). Mr. and Mrs. Wilt signed a contract, which was received in evidence as CX 20 (Tr. 234–35). Mrs. Wilt read the contract, her husband was given an opportunity to read the contract, and Mr. and Mrs. Wilt made a $12 down payment toward the purchase (Tr. 236). Counsel for respondents refused to cross-examine the witness on the grounds that he was not permitted to take "a written deposition as requested" (Tr. 237). Complaint counsel stated that complaint counsel supplied Mr. Wilson, respondents' counsel, with the correct address of Mrs. Wilt, and Mr. Wilson has had that address since March 27, 1970 (Tr. 238).

22. Mr. Leonard Richard Wilt, husband of Mrs. Jacqueline Wilt, was the third consumer witness called by complaint counsel. Mr. Wilt testified substantially as follows: While in the service of the U.S. Navy and residing at 66 Mumford Avenue, Groton, Connecticut, on May 27, 1968, he and his wife entered into a contract with Standard Educators, Inc., and, several days later, received a telephone call from a lady who stated that she was calling to confirm his order for a set of encyclopedias, a medical book, Child Horizons, and a dark mahogany type bookcase (Tr. 240–41). At the conclusion of Mr. Wilt's testimony, respondents' counsel refused to cross-examine the witness "on the grounds as stated for the prior witnesses" (Tr. 243).

23. The fourth consumer witness called by complaint counsel was Gary G. Broach, an Interior Communications Technician, United States Navy, who gave his official address as USS JAMES K. POLK, SSBN 645. Respondents' counsel objected to any testimony from Mr. Broach as follows: On the witness list submitted by complaint counsel to respondents' counsel on May 13, 1970, the address for Mr. Broach was listed as RFD Number 6, Box 3B, Ledyard, Connecticut. Counsel for respondents attempted to communicate with Mr. Broach by telephone and by letter in an effort to interview him, but was not successful (Tr. 244). The hearing examiner offered to permit Mr. Wilson,

respondents' counsel, to interview Mr. Broach in private or in the hearing room, but counsel refused (Tr. 245). Complaint counsel then proceeded to question Mr. Broach concerning his address. Although the official address and duty station of Mr. Broach was the USS JAMES K. POLK, the off-crew home station being New London, Connecticut, his address ashore at the time of the hearing was 60 Washington Street, Mystic, Connecticut. In April 1967, Mr. Broach had a shore address where he resided on Linton Avenue in Groton, Connecticut. While residing on Linton Avenue in Groton (he did not remember the street number) in April 1967, a man came to the door of his home and stated that Standard Educators, Inc. would be placing encyclopedias in the homes of military personnel at no cost, and that the only obligation of Mr. Broach would be a charge of $29.95 per year for a period of 10 years for the yearbook and Mr. Broach was to write a letter to the company within 30 to 60 days expressing his opinion of the encyclopedia. Mr. Broach did not purchase the yearbook but, at the request of the salesman, Mrs. Broach gave the salesman the name and address of Mr. and Mrs. Wilt as prospects who might be interested in purchasing the yearbook. The two couples lived in the same neighborhood and Mr. Wilt was stationed on the same ship with Mr. Broach (Tr. 249–250). At the conclusion of Mr. Broach's testimony, respondents' counsel declined to cross-examine the witness. Counsel made an additional objection to his testimony on the ground that, since Mr. Broach did not sign a contract, Standard Educators, Inc. had no record in its files concerning Mr. Broach and the nature of his testimony and counsel was not prepared to cross-examine (Tr. 251). In view of respondents' objections, the hearing examiner will not consider the testimony of Mr. Broach in this decision. There is ample testimony from other witnesses to establish the allegations of the complaint without the testimony of Mr. Broach. The substance of his testimony has been set out for the convenience of the Commission should it decide to consider his testimony.

24. The fifth consumer witness called by complaint counsel was Mrs. Catherine Taylor, 65 Woodlawn Avenue, Kittery, Maine. Mrs. Taylor testified as follows: On March 28, 1967, Mrs. Taylor and her husband, who was then in the United States Navy, resided at 186 Marcie Street, Portsmouth, New Hampshire. On that evening, a man visited their residence, stating that he was a salesman for Standard Educators, Inc., and asked that he be permitted to show his books (Tr. 253–54). The salesman told Mr. and Mrs. Taylor that the encyclopedias, a Bible, a medical book, children's books and an atlas would be placed in their home free in exchange for the use of their name for advertising. Mr.

and Mrs. Taylor were to write a letter to Standard Educators, Inc., telling them what the Taylors thought about the books (Tr. 254–55). The salesman "told us that we could get the yearbook to keep the encyclopedias up to date and that was for around $29 a year, that we could pay it up within two years" (Tr. 256); that the Taylors would receive the yearbooks for 10 years, but, instead of paying for the full 10 years, the Taylors would pay $12 per month for two years (Tr. 256). Mrs. Taylor's husband signed the contract which was received in evidence as CX 23 (Tr. 257). After the contract was signed, Mr. and Mrs. Taylor made a downpayment, but Mrs. Taylor did not remember the exact amount. Subsequently, the books were received and, at the time of the hearing, the amount of the contract had been paid in full (Tr. 258).

25. Mr. Allen G. Taylor, the husband of Mrs. Catherine Taylor, was the sixth consumer witness called by complaint counsel. After stating that he was in the United States Navy on March 28, 1967, the date on which he executed the contract with corporate respondent, Mr. Taylor testified that he did not receive any telephone call from corporate respondent to either confirm or verify the contract (Tr. 277). On cross-examination by Mr. Wilson, respondents' counsel, Mr. Taylor testified, among other things, that he did not read the contract completely before he signed it (Tr. 280).

26. The seventh consumer witness called by complaint counsel was Mr. Bruce David Campbell, who gave his present address as 14935 Shirley, Warren, Michigan. At this point, respondents' counsel objected to testimony by Mr. Campbell on the ground that the address for Mr. Campbell shown on the witness list furnished to respondents' counsel on May 13, 1970, was U.S. Naval Weapons Station, Yorktown, Virginia, which was not his correct address. Respondents' counsel stated that he attempted to communicate with Mr. Campbell, both by telephone and by letter, and was unable to do so (Tr. 283–84). Before ruling on the objection, the hearing examiner requested that complaint counsel question the witness concerning his address (Tr. 284). In answer to questions by complaint counsel, Mr. Campbell explained that, until April 6, 1970, he resided at the U.S. Naval Weapons Station, Yorktown, Virginia, where he was stationed with the United States Navy. Due to a reduction in the United States defense program, Mr. Campbell received an early release from the Navy, and, on April 6, 1970, moved to Warren, Michigan, where he now resides (Tr. 285). Mr. Campbell had originally believed that he would be discharged from the Navy on some date in July 1970, and had so advised complaint counsel in January or February 1970. On the date that he

testified, July 9, 1970, Mr. Campbell expected to be discharged from the Navy within about one week (Tr. 285–86). Following several questions by respondents' counsel on voir dire examination, the hearing examiner overruled the objections by respondents' counsel to testimony from Mr. Campbell (Tr. 287). Mr. Campbell then testified as follows: On the evening of April 5, 1967, while serving the United States Navy and residing at 1 Hunt Court, Newport, Rhode Island, with his wife, a man visited his residence and stated that he was working in cooperation with the local Navy base installation and had a special offer only for military personnel, and that the offer would only be given one time. The salesman exhibited literature, color pamphlets and foldouts, and told Mr. and Mrs. Campbell that the encyclopedias, medical encyclopedia, dictionary and literature were free, and that the Campbells would only have to pay for the annual yearbook, which they would receive each year, over a 10-year period. In return, Mr. and Mrs. Campbell were to write a letter to Standard Educators, Inc., expressing their opinion of the books. The salesman told them that the yearbooks would cost about $30 each, or a total of $300 for the 10-year period, and that Mr. and Mrs. Campbell could make payments of $10 per month until the $300 was paid (Tr. 288–89). Mr. Campbell signed a contract, which was received in evidence as CX 22. Mr. Campbell gave the salesman his personal check for $10 as the downpayment, and about two weeks later received the books through the mail (Tr. 290). Mr. Campbell made one payment of $30.95 and, after receiving the books and being of the opinion that the books were not of the quality represented, he packed the books and shipped them back to the corporate respondent. Mr. Campbell then wrote corporate respondent a letter and requested that his money be refunded, but did not receive any refund. Mr. Campbell did not receive a telephone call or letter from corporate respondent, requesting verification of the contract (Tr. 291). Respondents' counsel refused to cross-examine Mr. Campbell on the grounds previously stated, although offered an opportunity to question the witness outside the hearing room (Tr. 291–92).

27. The eighth consumer witness offered by complaint counsel was Mrs. April Maillet, who gave her present address as Sand Hurst Trailer Park, Swansboro, North Carolina. At that point, respondents' counsel objected to the testimony of Mrs. Maillet on the ground that the address of this witness furnished by complaint counsel to respondents' counsel on May 13, 1970, was 102 Dennett Street, Portsmouth, New Hampshire, which was not correct. The hearing examiner deferred a ruling on the objection until he heard an explanation from complaint counsel and the witness concerning the address furnished

to respondents' counsel (Tr. 293). Mrs. Maillet explained that her husband is in the U.S. Marine Corps and, prior to the end of April, 1970, Mrs. Maillet resided at their residence located at 102 Dennett Street, Portsmouth, New Hampshire, while her husband was stationed in Vietnam. At the end of April, 1970, Mr. Maillet was transferred to Camp LeJeune, North Carolina, thirty days earlier than he had expected. After Mrs. Maillet left her residence in Portsmouth, New Hampshire, some time elapsed before complaint counsel could locate Mrs. Maillet at her new address in North Carolina. After listening to this explanation, the hearing examiner overruled the objections of respondents' counsel to the testimony of Mrs. Maillet (Tr. 294–95). Following a short voir dire examination by respondents' counsel, complaint counsel pointed out that Mr. Wilson was furnished the correct address for Mrs. Maillet on June 29, 1970, as soon as complaint counsel had discovered her present address (Tr. 296–97). Mrs. Maillet then testified as follows: In the early evening of February 9, 1967, while residing at 9 Prospect Street, Portsmouth, New Hampshire, where her husband was then stationed at the Portsmouth Naval Shipyard, a representative of corporate respondent visited their home and told them that "we had been chosen to receive encyclopedias at a military discount" (Tr. 298). The price for the books, the encyclopedias, the yearbooks, the dictionaries, medical book, childcraft and Atlas was $299 (Tr. 297–98). The salesman stated to Mr. and Mrs. Maillet that the price of $299 included everything, and that "we were to display these in our home and to write a letter within 30 or 60 days, I believe, telling them that we enjoyed the books and how beneficial they were" (Tr. 299). Mr. and Mrs. Maillet decided to buy the books, and Mr. Maillet signed a contract, received in evidence as CX 27 (Tr. 299). The salesman stated that Mr. and Mrs. Maillet could pay at the rate of $12 per month on the budget plan, with a downpayment of $12. Mr. and Mrs. Maillet did not have the money for the downpayment at that time, and the salesman returned the following week and collected the downpayment (Tr. 300). Subsequently, Mr. and Mrs. Maillet received the books and, at the time of the hearing, had made payments totaling approximately $250. Mrs. Maillet testified that she had not received a telephone call or letter asking verification of the terms of the contract. Respondents' counsel refused to cross-examine the witness and declined to interview Mrs. Maillet outside the hearing room on the grounds stated previously (Tr.301).

28. The ninth consumer witness offered by complaint counsel was Mr. Larry Edward Riggs, who gave his present address as 814 Browning Street, Shreveport, Louisiana. At this point, Mr. Wilson, re-

spondents' counsel, objected to his testimony on the grounds that the address furnished for Mr. Riggs by complaint counsel to respondents' counsel was 448 Rutherford Street, Apartment 2, Shreveport, Louisiana, which address was not correct, and also on the grounds that respondents' counsel was denied the opportunity to take the deposition of Mr. Riggs by written interrogatories. The hearing examiner deferred ruling on the objections until he heard an explanation with respect to Mr. Riggs' address. Mr. Riggs explained that, prior to moving to his present address at 814 Browning Street, Shreveport, Louisiana, approximately two months ago, he resided at 448 Rutherford Street, Apartment 2, Shreveport, Louisiana, the address furnished to Mr. Wilson by complaint counsel on May 13, 1970, pursuant to the hearing examiner's prehearing order. Complaint counsel stated that this was the only address for Mr. Riggs known to complaint counsel at the time the witness list was furnished. The objections to the testimony of Mr. Riggs were overruled (Tr. 302–304). Mr. Riggs then testified as follows: On April 6, 1967, Mr. Riggs was married, a Petty Officer Third Class in the United States Navy, and resided with his wife at 122 Prospect, Apartment 2, Newport, Rhode Island (Tr. 304–305). During the evening of that day, a representative of corporate respondent visited his residence and stated that "for a written letter which could be used as an advertisement we would receive the encyclopedias as more or less payment for the letter plus then the children's books, dictionaries, and the medical set—there would be a reduction in price on them" (Tr. 306). The letter was to contain a statement from Mr. and Mrs. Riggs as to their opinion of the books, which letter was to be used for advertising purposes (Tr. 304–306). The price to Mr. and Mrs. Riggs was to be $299.50 for the children's encyclopedias, the medical books, and the dictionaries, but there would be no charge for the regular set of encyclopedias, and in addition Mr. and Mrs. Riggs would receive yearbooks four times per year with only a charge for the postage thereon. Mr. Riggs signed a contract, which was received in evidence as CX 28. Mr. Riggs read the contract before signing it (Tr. 307). The salesman stated that the offer was being made to young married military personnel (Tr. 308). Mr. Riggs made a $5 down payment for the books. Several days later, two representatives of Standard Educators, Inc. visited Mr. Riggs and inquired if he and Mrs. Riggs were happy with the books and if they had received all of them. Upon being told that all the books had not been received, the men left. A few days later, after the remainder of the books had been received, the men returned and inquired if all the books had been received. Upon being told that they had been received, the men left and Mr. and

Mrs. Riggs heard nothing further until they received a form requesting the payment of $3.95 before the yearbooks would be mailed. Mr. Riggs has paid the $299.50 in full, and testified he did not receive a telephone call or letter requesting verification of the contract which he signed (Tr. 309–310). Mr. Wilson, respondents' counsel, refused to cross-examine or interview Mr. Riggs outside the hearing room (Tr. 310–311).

29. The tenth consumer witness called by complaint counsel was Mr. Fred J. Bryant, Jr., who gave his address as 1329 Hibiscus Street, Columbia, South Carolina, Staff Sergeant, United States Army. At this point, Mr. Wilson, respondents' counsel, objected to the testimony of Mr. Bryant on the grounds that he was denied an opportunity to get information concerning Mr. Bryant's knowledge of the facts in this case and an application to take his deposition on written interrogatories was denied. The objection was overruled (Tr. 312). Mr. Bryant testified as follows: One evening during the month of February 1965, a man who stated he was a representative of Standard Educators, Inc. visited Mr. Bryant and his wife at their residence then located at 1901 Kiekie Place, Wahiawa, Oahu, Hawaii. The man told Mr. and Mrs. Bryant that their names had been given to him and that "we might be possible representatives for Standard Educators. If they placed the encyclopedias in our home they would be given to us free, if we would agree to show them to other people who might want to see them. That was on the basis if we liked them or not. He proceeded to show us the books" (Tr. 313). The salesman stated that Mr. and Mrs. Bryant could purchase other items, yearbooks, world books, "but it was not necessarily in conjunction with the encyclopedias, to my understanding at that time" (Tr. 313–14). Mr. Bryant signed a contract, which was received in evidence as CX 18, and the salesman told Mr. Bryant that he had to have the contract form in order—

> to run a background on myself and my wife, but it was not a binding agreement that we would accept the books because we told him that we wanted to talk it over and we would let him know if we wanted them. He said, "Fill this out anyway," for my references, I guess (Tr. 314).

While the contract recites that a downpayment of $10 was made with the order, Mr. Bryant testified that he did not pay the representative any money (Tr. 312–314). Although acknowledging that he signed the contract (CX 18), Mr. Bryant testified that he did not think he was entering into a contract to purchase the books, the salesman having "* * * told me I was not bound to any final agreements with Standard Educators at that time" (Tr. 315). Mr. Bryant did not telephone

corporate respondent and tell respondent that he wanted the encyclopedias, but corporate respondent shipped the encyclopedias to his residence. Mr. Bryant's wife refused to accept them and sent the encyclopedias back (Tr. 315). Corporate respondent returned the books to Mr. Bryant. Mr. Bryant stated that "We kept the books because we were afraid if we sent the books back we still might have to pay for the books without even having them, is the reason why we kept them" (Tr. 316). Mr. Bryant started making payments, but did not pay the amount of the contract in full (Tr. 316). Mr. Bryant has had the same address in South Carolina from 1966 to the date of the hearing (Tr. 318). Respondents' counsel refused to cross-examine the witness on the grounds that he was denied permission to take the deposition of Mr. Bryant by written interrogatories (Tr. 322).

30. The eleventh consumer witness offered by complaint counsel was Mrs. Streata Yarborough, a teacher in the second grade of the D.C. Public Schools. She testified as follows: In August 1965, she was residing at Colorado Springs, Colorado, with her husband, who was stationed at a nearby installation with the United States Army. One afternoon a man came to the door of their residence and introduced himself as a salesman for Standard Educators, Inc. The salesman came into the house and explained that he was selling yearbooks and, if the Yarboroughs purchased the yearbooks, they would receive a set of encyclopedias, a Bible, two dictionaries or two volumes of a dictionary free. The salesman also stated that, if the Yarboroughs decided to purchase the yearbooks, they would be able to receive them for the next ten years (Tr. 322–23). The salesman stated that the cost of the yearbooks was $349.50. The witness told the salesman that she and her husband were not prepared to make a downpayment, and the salesman told them they could make a downpayment as small as $5 (Tr. 325), and "* * * The salesman told us that the sale of the yearbook was for a limited period only and we should go ahead and accept it then because we would not be able to get it later" (Tr. 326). Mr. and Mrs. Yarborough signed a contract, which was received in evidence as CX 26. Mrs. Yarborough read the contract before she signed it. She did not pay the full amount of the contract "Because we did not receive any yearbooks or I did not receive any yearbooks" (Tr. 327–28). On cross-examination, Mrs. Yarborough testified that she did not receive a telephone call from Standard Educators, Inc. following the signing of the contract and, to her knowledge, neither did her husband (Tr. 328–29).

31. The twelfth consumer witness offered by complaint counsel was Mrs. James Render, who gave her present address as 8903 Hewitt, Garden Grove, California. Respondents' counsel then objected to any

testimony by this witness on the grounds that the witness list furnished by complaint counsel to respondents listed the address of Mrs. Render as 2002 Quincy Street, Apartment 16, Orange, California, and for the further reason that respondents were denied the opportunity to take the deposition of Mrs. Render by written interrogatories, which deprived respondents of what they believe to be their right to ascertain the facts before the witness took the stand.[2] Respondents' counsel refused the offer of the hearing examiner to permit counsel to interview the witness privately before she testified. Before ruling on the objection of respondents' counsel with respect to the address of the witness, the hearing examiner requested complaint counsel to question the witness concerning her address. When complaint counsel brought out from the witness that she moved to her present address at 8903 Hewitt, Garden Grove, California, two weeks ago, and, prior to that time, resided at 2002 Quincy, in Orange, California, which was the address furnished to respondents' counsel on May 13, 1970, for Mrs. Render, respondents' counsel withdrew his objection to the testimony of Mrs. Render based on "incorrect" address, and let stand his objection based on lack of deposition. Mrs. Render testified as follows: On January 16, 1967, Mr. and Mrs. Render resided at 332 South Street, Portsmouth, New Hampshire, where her husband was stationed at Pease Air Force Base, near Portsmouth, New Hampshire. Mr. Render's rank at that time was Airman First Class in the United States Air Force. On that evening, between 6:00 and 7:00 p.m., a man appeared at the door of their apartment and the following events transpired:

> He introduced himself as being from Standard Educators and asked if he could speak to us about buying a set of encyclopedias.
>
> * * * * * * *
>
> He came into the living room and was telling us about the encyclopedias, about a special deal for Air Force personnel, and that we were selected from a group in this area, in the area of New Hampshire.
>
> * * * * * * *
>
> Thirty days after we received the books, we were supposed to write a page letter stating that we liked the encyclopedias and recommended them for other people to buy them. [This letter was to be sent to corporate respondent, Standard Educators, Inc.]
>
> * * * * * * *
>
> He said we would be paying 3.98 for 10 years, a month, for the yearbook and that we would receive the encyclopedias and we would receive a set of two dictionaries, world atlas, Bible, and a Child Craft for free if we purchased the yearbooks for 10 years. (Tr. 340–41.)

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[2] Respondents' Applications For Depositions upon Written Interrogatories, filed June 9, 1970, did not request to take the deposition of Mrs. Render, but sought to take the deposition of James J. Render, her husband.

Mrs. Render's husband signed a contract, which was received in evidence as CX 25. Before signing the contract, the salesman told the Renders that they would have to make a downpayment of $12 that evening or they could not get the books. Mrs. Render further testified that

> We asked if we could let him know within a week, and the salesman informed us we had to take it that evening or the discount price would not be available to us later than that. (Tr. 343.)

Ten days after signing the contract, the encyclopedias were received through the mail, but Mrs. Render did not receive a telephone call or letter requesting verification of the contract. Mr. and Mrs. Render have paid the full amount stipulated in the contract (Tr. 342–43). Respondents' counsel declined to cross-examine the witness on the grounds that he was denied permission to take the deposition of this witness by written interrogatories.

32. The thirteenth consumer witness called by complaint counsel was Mr. Robert E. H. Ferguson, who gave his present address as Box 34, Route 1, Lake Placid, Florida. The address for Mr. Ferguson, which complaint counsel furnished to respondents' counsel on May 13, 1970, pursuant to the hearing examiner's prehearing order, was 136 West Main Street, Apartment 4, Ayer, Massachusetts, which was Mr. Ferguson's address while stationed at a school operated for the United States Army (Tr. 348). Subsequently, in January 1970, while stationed with the Army in southern Japan, Mr. Ferguson received a letter from complaint counsel requesting certain information, but, in his reply, Mr. Ferguson did not give complaint counsel any forwarding or return address (Tr. 345–47). Complaint counsel then communicated with the Department of Defense seeking Mr. Ferguson's current service address and was told that Mr. Ferguson was in Japan and would be discharged from the service at the end of June 1970. Complaint counsel then wrote a letter in early June to Mr. Ferguson in care of an address in Louisiana, requesting that Mr. Ferguson communicate with complaint counsel. Mr. Ferguson received this letter in late June and telephoned complaint counsel and informed counsel where he was residing in Florida (Tr. 350). As soon as complaint counsel received this information, complaint counsel included it on a witness list for Mr. Wilson, which complaint counsel hand-carried to Mr. Wilson's office on June 27, 1970 (Tr. 350–51). The objection of respondents' counsel concerning the address of the witness was overruled, and the witness was permitted to testify. Mr. Ferguson testified as follows: On May 16, 1967, while in the United States Army and stationed at Fort Devens, Massachusetts, Mr. Ferguson resided on Main Street in

Ayer, Massachusetts. On that day, a representative of Standard Educators, Inc. visited Mr. Ferguson's residence and stated that he had a new encyclopedia not yet on the market for public sale, which was being offered to servicemen prior to its being offered to the public. The price for the encyclopedias, including a bookcase and a choice of three or four sets of books, was around $300. If Mr. and Mrs. Ferguson purchased the encyclopedias, the money was to be explicity for the encyclopedias with a free gift set of books and the bookcase (Tr. 360–61). Mr. Ferguson further testified:

> * * * we were supposed to write a letter of testimony after we received and inspected the encyclopedias and the books as to our appraisal of them to the company. This letter was to be a testimony letter to the company which we agreed they may use in their advertising campaign if they so desired. (Tr. 362.)

Mr. Ferguson signed a contract, which was received in evidence as CX 24. Mr. and Mrs. Ferguson made a downpayment of $5 and another $5 payment in July. Mr. Ferguson was to be sent overseas and his wife was moving to Louisiana to live with her mother during his absence. The books were to be shipped to that address (Tr. 362). Subsequently, the books arrived, and Mr. Ferguson thereafter paid the agreed price (Tr. 363). Mr. Ferguson further testified that, to his knowledge, neither he nor his wife received a telephone call or a letter from the corporate respondent requesting verification of the contract (Tr. 364). Respondents' counsel declined to cross-examine "for the grounds previously stated." After a brief recess, Mr. Ferguson was recalled and further testified as follows: The price was a special price for servicemen, and was being offered to Mr. Ferguson because he was a member of the armed forces.

> * * * When he told us the price and the books which were free and the things that were included, which was a set of encyclopedias, which was very nice, I could not believe the price. We asked him about it, and he said it was because it was part of their promotional thing. (Tr. 367–68.)

33. The fourteenth consumer witness called by complaint counsel was Mr. Michael G. Martin, who gave his present address as 1084 Jefferson Street, Vermilion, Ohio. Counsel for respondents objected to any testimony from Mr. Martin on the grounds that respondents were not permitted to take the deposition of Mr. Martin by written interrogatories. The objection was overruled and the witness permitted to testify. Mr. Martin testified as follows: In November 1966, Mr. Martin was married, a member of the United States Navy, and living at Havre de Grace, Maryland (Tr. 370). One evening during November of that year, a man came to the door of their apartment and stated that he had a free gift, and Mr. Martin permitted the man to

enter. The salesman displayed literature concerning the encyclopedias children's set of books, a two-volume dictionary, and a medical encyclopedia. A free bookcase came with it. "* * * Our only obligation was to buy yearbooks for 10 years, over a 10-year period" (Tr. 371). The free gift that the salesman mentioned when he first entered their apartment was the full set of encyclopedias, to be placed in the Martin apartment as an advertisement for friends and relatives (Tr. 371). The price of the yearbook for 10 years was about $349.50. Mr. Martin signed a contract, which was received in evidence as CX 29. Mr. Martin made a down payment of $5.50 that evening, and the salesman came to their apartment about two weeks later and collected the other $6.50 (Tr. 372). Subsequently, Mr. Martin received a telephone call while at work on the Navy base from a lady who requested verification of the contract which he had signed. He stated:

> * * * A girl or a woman asked me if I had ordered these books. I told her I did. She asked me if everything on the contract was true and correct to the best of my ability, and I told her yes. (Tr. 373.)

At the time Mr. Martin executed the contract, he was 20 years of age and his wife eighteen. The books were delivered, and Mr. and Mrs. Martin kept them until May of 1967 (Tr. 373). In May of 1967, Mr. Martin's mother-in-law sent the books back to Standard Educators, Inc., because Mr. and Mrs. Martin could not afford them (Tr. 374). Respondents' counsel refused to cross-examine Mr. Martin "on the grounds previously stated." At this point, complaint counsel rested their direct case-in-chief (Tr. 375).

34. The first witness who testified in defense against the allegations of the complaint was Mr. James A. Melley, Sr., president of Standard Educators, Inc., and an individual respondent herein. Mr. Melley testified that he has been in the book business for 20 years, starting as a salesman, and the steps he has taken as president of Standard Educators, Inc. to improve the business practices of corporate respondent, such as: eliminating the possibility of misrepresentation by its salesmen (Tr. 380–84); the execution and submission to the Commission in January 1969, of a signed Affidavit and Assurance of Voluntary Compliance (RX 1A–X; Tr. 385; RX 2A–D; RX 3A–E; RX 4A–K); and revisions of its contract forms (RX 5A–D), including a provision for a three-day "cooling off" period, whereby a purchaser may now cancel the contract which he or she has signed by notifying Standard Educators, Inc. by certified mail within 72 hours after signing the contract. Mr. Melley further testified as follows: The corporate respondent was organized about April 1, 1957, and began with three salesmen and one office clerk, and has grown from $130,000 worth of business

the first year to more than $2,000,000 in sales during 1969 (Tr. 408), with about 20 people in the office, including 2 part-time employees, and about 50 salesmen (Tr. 419). Since the provision for the "cooling off" period of 72 hours became effective in corporate respondent's contracts in February 1969, 480 customers have taken advantage of this provision and have cancelled their contracts within the 72-hour period (Tr. 407). Within Mr. Melley's knowledge, corporate respondent has never considered abandoning its corporate form for doing business (Tr. 409). Corporate respondent now makes a thorough check before hiring salesmen, and requires that all salesmen file a written statement that they have read and will abide by the Trade Practice Rules of the Federal Trade Commission (Tr. 423–24).

35. Mr. Robert L. Atwood, vice president and general sales manager of Standard Educators, Inc., was the second witness to testify on behalf of corporate respondent. Mr. Atwood described the current procedures of corporate respondent in the hiring of salesmen and in checking out references given by prospective sales personnel, and identified a memorandum (RX 6) which he sent to all of corporate respondent's regional sales managers on November 5, 1969. Currently, corporate respondent requires all applicants for sales positions to sign an application form, giving his name, residence, previous employer, social security number, and a signed statement acknowledging that he has received a copy of the Trade Practice Rules of the Federal Trade Commission pertaining to the book subscription industry and a document setting out the responsibility of corporate respondent's salesmen (Tr. 427–28; RX A, B–29A, B). Mr. Atwood also described the procedures followed by corporate respondent at the present time after signed contracts have been received at the home office from salesmen in the field, as follows: An attempt is made to make a phone verification with the husband who signed the contract, going over the items contained in the contract with him, and ascertaining if the information in the contract is correct, etc. (Tr. 430). Mr. Atwood further testified as follows: Prior to 1967, Standard Educators, Inc. did not verify all contracts, but at the present time corporate respondent attempts to do so either by telephone or by mail. If a contract has been verified, the fact of verification is shown on the face of the contract by the letters "O.K.," followed by the initials of the person who made the verification (Tr. 431–32). The letters "O.K." on CX 20 followed by the initials "B.M." indicate that the contract was verified by Barbara Melley. The contract, CX 18 (signed by Mr. Bryant) and received by corporate respondent from Mr. Letson in Hawaii was not verified (Tr. 432). CX 21 was verified and bears the letters "O.K."

and the initials "B.M." CX 22 was not verified. CX 23 was verified, and CX 24 and 25 were not verified (Tr. 435). CX 26 was verified. CX 27 and 28 were not verified (Tr. 436). CX 29 was verified (Tr. 437).

36. Mr. Atwood estimated that he had made approximately 80 or 90 sales for corporate respondent since 1966, but could not remember the dates of each transaction. However, he was able to ascertain the name of the salesman who made each sale by examining the contract. Each contract of corporate respondent contains the name of the salesman who sold the contract (Tr. 438–39). Mr. Atwood made the sale to Mr. Robert E. H. Ferguson, represented by the contract dated May 16, 1967 (CX 24; Tr. 441). (This is the same Robert E. H. Ferguson who testified as a Commission witness and whose testimony is set out in Paragraph 32 hereof). Mr. Atwood remembered his interview at Mr. Ferguson's apartment in Ayer, Massachusetts, and denied making a statement to Mr. and Mrs. Ferguson that he represented Standard Educators, Inc., from Chicago (Tr. 442). Mr. Atwood testified that he told Mr. and Mrs. Ferguson that Standard Educators, Inc., of East Hartford, Connecticut sold an educational program consisting of an encyclopedia with other material at a cost of approximately $299.50, and allowed Mr. Ferguson to make the first two mail payments of $5 per month, and the balance of the account at $25 per month (Tr. 442–45). Mr. Atwood made some circles around certain numbers on the contract so as to indicate that he had gone over the contract with Mr. Ferguson (Tr. 445–46). Mr. Atwood testified that he did not tell Mr. Ferguson that the new Standard Encyclopedia was a new one not yet on the market, and did not tell Mr. Ferguson that any of the books in the offer were free (Tr. 451). Mr. Atwood denied that he told Mr. Ferguson that the offer was a special price available only to servicemen (Tr. 452).

37. Mr. Atwood testified further as follows: Approximately one month following the sale of the encyclopedias to Mr. Ferguson, Mr. Atwood made a courtesy call at Mr. and Mrs. Ferguson's apartment and received a hospitable welcome. Mr. Ferguson advised Mr. Atwood that he had been interrogated by a representative of the Federal Trade Commission (Tr. 453). In February 1969, Standard Educators, Inc., made substantial revisions in its contract form, deleting the words "legal age" and "combination offer," adding a 72-hour "cooling off" period, and adding a provision to the effect that no oral promise or statement by the salesman would be binding on Standard Educators, Inc., unless expressly included and written in the contract. The words "NOTHING IS FREE" were added to the contract form in large letters. The wording of the provision relating to the $3.95 charge for

yearly supplements to the encyclopedias was reworded so as to provide that the customer should remit $3.95 directly to the publisher of the encyclopedias in Chicago, which is the annual accommodation price (Tr. 454).

38. On cross-examination, Mr. Atwood testified as follows: He has been in the business of selling books and encyclopedias for approximately 17 years, and graduated from Trinity College, Hartford, Connecticut, in 1954 (Tr. 456). While attending college, Mr. Atwood sold magazines for Mr. Melley, who was at that time the sales manager for P. F. Collier & Son for the sale of magazines in the Hartford area. Mr. Atwood began work for Standard Educators, Inc., at the time of its organization by Mr. Melley in April 1957. Mr. Atwood is the general sales manager for Standard Educators, Inc., and became its vice president in March of 1967 (Tr. 458–59). Following the testimony of Mr. Atwood, respondents' counsel moved for the production of all correspondence and telephone memoranda between complaint counsel and all prospective witnesses named on the witness list filed by complaint counsel on May 13, 1970, and which related to the address of the witnesses, except with respect to the witness Mrs. Taylor, which was requested and produced at the time she testified (Tr. 467–470). Respondents' motion was denied (Tr. 472), and each counsel rested their respective cases.

39. It is thus seen that respondents offered rebuttal testimony as to only one consumer witness, Mr. Robert E. H. Ferguson, who was the thirteenth consumer witness and whose testimony is set out in Paragraph 32 herein. Mr. Robert L. Atwood, a vice president and general sales manager of Standard Educators, Inc., denied some of the testimony given by Mr. Ferguson. The testimony of the other consumer witnesses, especially that of Mrs. Linda J. Olson, Mrs. Jacqueline Wilt, Mrs. Catherine Taylor, Mr. Bruce David Campbell, Mrs. April Maillet, Mr. Larry Edward Riggs, Mr. Fred J. Bryant, Jr., Mrs. Streata Yarborough, Mrs. James Render, and Mr. Michael G. Martin remains unrebutted in the record.

40. Upon the basis of the entire record, and expressly excluding the testimony of Mr. Gary G. Broach, the hearing examiner finds that the allegations of the complaint, including subparagraphs 1, 2, 3, 4, and 5 of Paragraphs Six and Seven thereof, have been established by a preponderance of the reliable, probative, and substantial evidence, and that the statements and representations as alleged in Paragraph Six of the complaint, and established by the evidence and testimony, are false, misleading, and deceptive.

41. The use by respondents of the aforesaid false, misleading, and deceptive statements and representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the mistaken and erroneous belief that such statements and representations were and are true, and to enter into contracts for the purchase of respondents' products because of such erroneous and mistaken belief.

CONCLUSIONS

It is concluded that the aforesaid acts and practices of the respondents, as found herein, were, and are, 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. This proceeding is in the public interest.

Respondents object to the request by complaint counsel that an order to cease and desist be issued against the respondent James A. Melley, Sr., individually, as well as against the officers of corporate respondent. Complaint counsel do not point to any evidence—and there is none in the record—that Mr. Melley committed any illegal act in his individual capacity, or that Mr. Melley is likely to violate the Act in the future in his individual capacity, or that he will attempt to evade any order which may be issued against the corporate respondent. Complaint counsel's sole basis for requesting an order against Mr. Melley, individually, is the allegation in the complaint and counsel's claim that Mr. Melley "formulates, directs and controls the acts and practices" of corporate respondent. Even so, there is no evidence in the record that Mr. Melley formulates, directs and controls the acts and practices of corporate respondent in any capacity other than as an officer of corporate respondent. As a matter of fact, in his answer to the complaint, Mr. Melley specifically denied the allegation that he (Mr. Melley) formulates, directs and controls the acts and practices of corporate respondent. In the case of *The Lovable Co.*, FTC Docket No. 8620 [67 F.T.C. 1326 at 1336, (1965)], which is controlling here, the Commission held:

> In the case of the applicability of the order to the individual respondents, we feel that respondents' argument has merit. There is nothing in the record justifying an assumption by the Commission that these individual respondents might in the future violate Section 2(d) *in their individual capacities.* Respondents admit only that the individual respondents formulate, direct and control the policies, acts and practices of respondent corporation. There is no warrant in the record for finding that they do any of these things except in their capacities

as officers. To justify naming an officer as an individual there must be something in the record suggesting that he would be likely to engage in these practices in the future as an individual. To argue otherwise would be to hold that in every order running against a corporation the officers who control its policies, acts and practices should be named. If acts are done as an officer they are done for the corporate respondent, and the order against the corporation will run against the officer as officer. That is all that is required in this case on this record. (Emphasis in original.)

In *Flotill Products, Inc.* v. *F.T.C.*, 358 F. 2d 224, 233 (9th Cir. 1966), [8 S. & D. 69 at 80–81], where the hearing examiner had dismissed the complaint against the Flotill officers in their individual capacities since there was nothing to indicate that the individual respondents would cause an evasion of any order which might be entered against the corporation, but the Commission had entered an order including the officers in their individual capacities on no other fact than that the three individuals owned and controlled the corporate respondent, the Court held that the Commission had abused its discretion in framing the order to include the officers in their individual capacities. The Court said that the so-called "alter ego" doctrine (that the corporation is merely the alter ego of the individuals) had no support in the record, and

* * * the order points to no evidence to challenge the findings of the hearing examiner that the corporate entity has ever been used in such a way as to justify treating it as the "alter ego" of its owners. We agree with petitioners that naming them individually in the order is tantamount to a finding on the evidence that they have personally violated, or can be expected to violate, the Clayton Act. We have not been shown the evidence in the record, if any there be, which supports such a conclusion. Accordingly, the Commission order to be enforced should not refer to the petitioners in their individual capacities. Authority for such deletion is to be found in Coro, Inc. v. F.T.C., 338 F. 2d 149 (1st Cir. 1964) and Rayex Corp. v. F.T.C., 317 F. 2d 290 (2d Cir. 1963).

Here, the evidence shows that the corporate respondent is and has been a stable one since its organization by Mr. Melley in 1957. There is no evidence of record to indicate that the corporate entity is a sham or that Mr. Melley organized the corporation in an attempt to evade any order which may be issued by the Federal Trade Commission against the corporate respondent. For all of these reasons, and upon the basis of the entire record, it is concluded that an order should not be issued naming Mr. Melley as an individual.

ORDER

It is ordered, That respondent Standard Educators, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the

advertising, offering for sale, sale or distribution of encyclopedias, books or publications or supplements in connection therewith or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication:

1. That respondent's representatives or salesmen are conducting an advertising campaign; or that the purpose of the call or interview by respondent's representatives or salesmen is other than to sell encyclopedias, books, publications or supplements or services with respect thereto.

2. That purchasers may obtain a set of the New Standard Encyclopedia free, or at a reduction in price, merely by writing a letter of recommendation therefor, or an opinion thereon, displaying the product or keeping it up to date, or that any of the books sold by the respondent may be obtained by any means, other than the payment of respondent's then current price.

3. That any price at which respondent's books or publications are offered for sale is a special or reduced price, unless such price constitutes a substantial reduction from the price at which such publications were sold in substantial quantities for a reasonably substantial period of time by the respondent in the recent regular course of its business; or representing that any price is an introductory price.

4. That the opportunity to purchase respondent's books at a special introductory, special or reduced price is not available to the public generally; or that the purchasers of respondent's books are a specially selected group.

5. That certain books are given "free" with purchase of respondent's combination offer; or that purchasers from respondent of any combination offer only pay for part of such books.

6. That the payment of $3.95 or any other amount for respondent's annual yearbook or any other similar publication is an amount for handling and postage unless such stated amount is no more than the actual cost of the handling and postage.

7. That respondent's offer of books or other publications is limited as to time.

B. Falsely representing, in any manner, that savings are available to purchasers or prospective purchasers of respondent's

products; or misrepresenting, in any manner, the amount of savings available to purchasers or prospective purchasers of respondent's products.

It is further ordered, That the respondent herein shall, in connection with the offering for sale, the sale, or distribution of encyclopedias, books, or publications or supplements in connection therewith or any other article of merchandise, when the offer for sale or sale is made in the buyer's home, forthwith cease and desist from:

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

(2) Failing to disclose, orally prior to the time of sale and in writing on any trade acceptance, conditional sales contract, promissory note or other instrument executed by the buyer with such conspicuousness and clarity as likely to be observed and read by such buyer, that the buyer may rescind or cancel the sale by directing or mailing a notice of cancellation to respondent's address prior to midnight of the third day, excluding Sundays and legal holidays, after the date of the sale. Upon such cancellation the burden shall be on respondent to collect any goods left in buyer's home and to return any payments received from the buyer. Nothing contained in this right-to-cancel provision shall relieve buyers of the responsibility for taking reasonable care of the goods prior to cancellation and during a reasonable period following cancellation.

(3) Failing to provide a separate and clearly understandable form which the buyer may use as a notice of cancellation.

(4) *Provided, however*, That nothing contained in this part of the order shall relieve respondent of any additional obligations respecting contracts made in the home required by federal law or the law of the state in which the contract is made. When such obligations are inconsistent respondent can apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon proper showing, shall make such modifications as may be warranted in the premises.

It is further ordered, That the respondent herein shall forthwith deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondent's products or services, and shall secure from each such salesman or other person a signed statement acknowledging receipt of said order.

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

FINAL ORDER

This matter having been heard by the Commission upon respondent Standard Educators' appeal from the initial decision, and upon complaint counsel's appeal from that part of the initial decision dismissing as a respondent, James A. Melley, Sr., and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having concluded that on this record and the facts and circumstances set forth therein, it is necessary to hold respondent James A. Melley, Sr., a party to this proceeding and that the order should be directed against him both as an officer of the corporation and as an individual;

It is ordered:

(1) That the initial decision be, and it hereby is, adopted as the decision of the Commission to the extent consistent with, and rejected to the extent inconsistent with, the accompanying opinion;

(2) That the following paragraph be, and it hereby is, substituted for the initial paragraph of the order contained in the initial decision:

> *It is ordered*, That respondents, Standard Educators, Inc., a corporation, and its officers, successors or assigns, and James A. Melley, Sr., 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 advertising, offering for sale, sale or distribution of encyclopedias, books or publications or supplements in connection therewith or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:;

(3) That the word "respondents" be, and it hereby is, substituted for the word "respondent" wherever it appears in the order contained in the initial decision, and that the word "respondents' " be similarly substituted for the word "respondent's;"

(4) That the order contained in the initial decision, modified as herein provided, be, and it hereby is, adopted as the 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.

OPINION OF THE COMMISSION

DECEMBER 6, 1971

BY JONES, *Commissioner:*

In January 1970, the Commission filed a complaint against Standard Educators, a corporation, and James A. Melley, Sr., as individual and officer of said corporation, charging violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45 (1964), in the door-to-door sale of encyclopedias through the use of various false and deceptive statements relating to the terms and conditions in the sale of books.[1]

The complaint charged that respondents made many false and deceptive statements and representations concerning the offer and price of their books, the manner of payment and the legal responsibility of prospective purchasers who contract for these purchases. Essentially, the complaint charged that:

1. Respondents misrepresented to prospective purchasers that respondents were engaged in a national advertising campaign and were offering a set of the New Standard Encyclopedia "free" or at a special or reduced price to specially selected persons who would endorse the products by displaying the books in their homes and agree to keep the encyclopedia up-to-date for 10 years through the purchase of the annual yearbook (Compl. paras. 6(1)-(2), 7(1)-(2));

2. Respondents misrepresented to prospective purchasers that certain books in the combination offer were included free of cost and that this special introductory offer was limited to the time of the call (Compl. paras. 6(3)-(4), 7(3)-(4)).

Respondents denied the allegations and the matter proceeded to hearing on July 7, 1970. The hearing examiner concluded that the allegations had been proven with respect to the corporate respondent but determined that it was not necessary to enter an order against Mr. Melley in his individual capacity and that the complaint against him should be dismissed.

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[1] The following abbreviations will be used for citations: Transcript of proceedings, "Tr."; complaint counsel's exhibits, "CX;" and Examiner's Initial Decision, "ID." Briefs of either the respondent (Res.) or complaint counsel (C.C.) will be cited as follows: Brief on appeal, "App. Br.;" answering brief, "Ans. Br.;" and reply brief, "Rep. Br."

In its appeal, respondent [2] does not challenge the findings and conclusions of the examiner with respect to the factual basis underlying the allegations of violation. Rather, respondent rests its appeal on these principal contentions:

1. Respondent contends that evidence secured by the Commission investigator in 1967 was in violation of the Fourth Amendment and that the hearing examiner committed error in failing to order the production of memoranda in the Commission's files dealing with the allegedly illegal investigation;

2. Respondent contends that its right to cross-examine was curtailed and, therefore, it was denied due process in the course of the hearing because: (a) counsel supporting the complaint failed to make timely delivery to it of the final witness list with correct addresses as required by pre-trial order, and (b) the hearing examiner refused to grant respondent's request for depositions on written interrogatories;

3. Respondent challenges the propriety of the entry of an order against it because of alleged errors on the part of the examiner in rejecting evidence with respect to the claimed ruinous effect of one of the order provisions and for lack of public interest because of the alleged abandonment by respondent of the practices complained of.

We will deal with each of these contentions *seriatim*.

I.

THE PARTICIPATION OF RESPONDENT JAMES A. MELLEY, SR.

The examiner found that the respondent Standard Educators, Inc., had been organized by respondent James A. Melley, Sr., in April 1957 (ID 3). Melley had been a salesman in the book and magazine industry since 1945 and organized Standard Educators when he decided to go into business for himself (Tr. 116–17).

Melley did all the work, including the filing of legal documents necessary to begin operations. He personally made the arrangements with the publishers, drafted the incorporation papers and mortgaged his home to raise the needed money (Tr. 117–18). Melley, his wife (Margaret) and his father were the incorporators (Tr. 119). The officers of Standard Educators in 1957 were: James A. Melley, president and treasurer; Margaret Melley, vice president and secretary; and James A. Melley, Sr. (respondent's father), assistant secretary and assistant treasurer (Tr. 119; ID 3). The respondent owned 51

[2] Throughout this opinion, whenever the term "respondent" is used in the singular, it refers to the corporate respondent and not respondent Melley in his individual capacity, since only the corporate respondent has appealed the examiner's decision.

percent of the stock, his wife 46 percent and his father 3 percent (Tr. 122; ID 3).

Melley's title in the corporation and his share of stock ownership have remained unchanged to the present.[3] Melley continues as president of the corporation, although the officers and the board have been reconstituted.[4]

In the early years of Standard Educators' formation, Mr. Melley with the aid of two other salesmen did the selling himself. His wife did the clerical work in the office (Tr. 125). All of the expertise in putting the business together and in determining the pattern of its operations was Melley's (Tr. 117, 19–92, 458, 126; ID 4). He set the retail price structure and sales techniques for the business and determined what options would be included in the combination offer (Tr. 126, 145). He devised the contract form which was used by Standard Educators as part of the alleged misrepresentations and deceptive sales practices which the examiner found to have taken place here (Tr. 149; CX 18).

Standard Educators' business has grown considerably since 1957. In 1957, with three salesmen, including Melley, and one clerical assistant in the office, Standard Educators grossed about $130,000 (Tr. 408). In 1969, with about 20 people in the office and some 50 salesmen, Standard Educators grossed over $2 million (Tr. 408, 420). In the past three years alone, Standard Educators has employed over 500 salesmen (Tr. 135).

Melley's role as founder and chief executive officer of the corporation over the years is best summarized in the following exchange during Melley's testimony at the hearing:

Q. What are your duties as president of this corporation?

A. My duties—I don't seem to have too many duties any more to be frank with you.

Q. What were your duties? When you established this corporation, what were your duties?

A. To sell and help train people, other people, mostly to stay in the business, initially.

Q. What did you do to stay in business?

A. I went out and wrote business myself.

HEARING EXAMINER POINDEXTER. What do you do now?

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[3] Stock ownership did change in 1958 with respect to the 3 percent owned by Melley's father. This 3 percent is now owned by his son, James A. Melley, Jr. In 1958, James A. Melley, Sr., respondent's father, died and his stock was passed to Melley's mother. Mrs. Melley, Sr. died in 1962, at which time the respondent's son inherited her 3 percent (Tr. 122).

[4] Mrs. Melley remains a director, but now serves only as secretary. James A. Melley, Jr., now serves as assistant secretary and assistant treasurer, and Robert Atwood a former salesman for the company has been promoted to vice president and member of the board (Tr. 124; ID 3).

A. Now I go to the office and I check with the sales manager to see how things are going; and I check with the office manager to see how things are going. I check with the collection manager to see how things are going in that department, and I check my collections each day to see how much money comes in, and I check to see how much money is being spent, and I check the quality of the business from time to time. I ask if there is [sic] any problems.

HEARING EXAMINER POINDEXTER. If there are what do you do?

A. Then I discuss it with the people involved. I never interfere in the office.

* * * * * * *

HEARING EXAMINER POINDEXTER. Do you have a boss? Does the company Standard Educators?

A. Have a boss? Well, I mean, I am the president of the company; I am supposed to be the boss.

Q. Do you act as the boss?

A. Oh, I act as the boss when the opportunity affords itself. (Tr. 146–48.)

The record is clear that Mr. Melley himself no longer engages in any selling duties (Tr. 137).[5] It is also clear that Mr. Melley is still the principal moving force behind the operations of the corporation—the only other officers actively employed being Atwood, Melley's sales manager, and Melley's son, one of Standard Educators' salesmen.

The examiner based his dismissal of Mr. Melley as an individual respondent on his conclusion that there was no evidence that Mr. Melley personally committed any illegal act in his individual capacity, that the record contained no evidence that Melley "formulates, directs and controls the acts and practices of corporate respondent in any capacity other than as an officer," and that no evidence was introduced to show that the corporate respondent was a sham or organized in order to evade a Federal Trade Commission order (ID 29–31). Therefore, the examiner concluded that the complaint must be dismissed as respects Mr. Melley.

We do not agree. There is no support either in fact or in law for the examiner's conclusion. The record amply supports the complaint's allegations that respondent Melley formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in the complaint, and that an order against Mr. Melley is necessary in order to achieve effective relief in this case.

The evidence shows that Melley meets all of the standards for determining individual liability in Federal Trade Commission proceedings. *Fred Meyer, Inc.* v. *FTC*, 359 F. 2d 351 (9th Cir. 1966). In *Fred Meyer*, the court of appeals sustained the Commission's decision to hold two

[5] The hearing examiner summarized the role of Melley as follows:

> As the business of the respondents has grown and increased, Mr. Melley no longer participates in door-to-door selling and now spends his time in the office supervising the overall operation of Standard Educators, Inc. (Melley, Tr. 146–48). (ID 5.)

officers of the corporate respondent liable in their individual capacities, based on the following considerations: (1) respondents owned and controlled the closely held, family corporation; (2) they set the policies and reviewed the practices of the corporation; and (3) they knew of and authorized the alleged illegal practices.

Fred Meyer involved violations of Sections 2(a) and 2(f) of the Clayton Act in connection with the use of a "coupon book promotion." The individual respondents were Fred G. Meyer, chairman of the board of directors of the corporation, and Earle A. Chiles, president. Neither party owned a majority of the corporate stock, but in combination with their immediate families, they owned almost all of the common voting stock.

The Commission concluded that under such circumstances the corporation was the "alter ego" of the individual respondents and that this justified subjecting them to the order, otherwise it could be easily circumvented. *Fred Meyer, Inc.*, 63 F.T.C. 1, 70–1 (1963). The court of appeals affirmed the Commission's conclusion and noted further, as did the Commission in its opinion, that "Meyer was originally responsible for instituting the coupon book promotion," and that "Chiles himself testified that 'we set the policies and review the practices' " of the company. 359 F. 2d at 368.

A key issue in the case before the Commission was whether Meyer, in fact, knew of and authorized the unlawful promotion. In his testimony Meyer stated that:

> [H]e had been in the industry 50 years; that he had been president until 4 or 5 years ago; that his "duties are vague", that he has "no specific duties;" that he now has nothing to do with advertising or sale policies (he was active in them until about 10 years ago); that he doesn't know how many buyers the company has * * *. 63 F.T.C. at 71.

The Commission found that the respondent would not have permitted the challenged promotion to continue if he had not personally approved it. The court agreed, finding that "despite Meyer's denials of knowledge of the operations of the business, the Commission was justified in concluding that 'if a majority of Portland's 120,000 families were apprised of the details of these programs, we think it is fair inference that the Chairman of the Board also knows about them' * * *." 359 F. 2d at 368 (footnote omitted).

The facts critical to a finding of individual liability in *Fred Meyer* are also present in the instant case. Standard Educators is a closely held, family corporation. Respondent Melley owns a majority of the corporate stock, and is both the chairman of the board of directors and president of the corporation (in these respects, Melley would appear

to have even greater control over the corporate entity than Meyer who owned less than a majority of the stock and was not president of the corporation). The only other major owner of Standard Educators is Mrs. Melley, who apparently has no role in the management of the business. The other active officers are Atwood, who owns no stock, and Melley's son, who owns only 3 percent of the stock. Melley thus emerges as the principal figure in terms of management and control of the corporation.

Further, it is evident from the record that Melley formulates and directs the policies and practices of the corporation, although he specifically denied this allegation in his answer to the complaint.

The examiner found that Melley continues to supervise the over-all operation of Standard Educators (ID 5). Melley's own testimony reveals that he acts as "the boss," and regularly supervises the corporate business and that problems which arise are brought to him for resolution (Tr. 146–48). He personally oversees the corporation's price list and pricing structure to keep it updated (Tr. 145). Further, he is largely responsible for the preparation of the contracts used by Standard Educators (Tr. 149, 162).

Although Melley no longer trains salesmen himself, he does the hiring of sales managers who in turn hire the salesmen (Tr. 148, 195–96). In fact, Melley himself hired the sales manager responsible for the contract with complaint counsel's witness, Fred Bryant, and Melley personally accepted that contract (Tr. 149; CX 18). On the basis of this evidence it is fair to conclude that Mr. Melley formulates and directs the corporate policies and practices to a sufficient extent to warrant including him in the Commission's order.

Further, it is clear from the record, that Mr. Melley knew of and approved many of the challenged practices. He admitted that he personally developed the form contract used by Standard Educators' salesmen in the period covered by the litigation (Tr. 149). We find that this contract was an integral part of the deceptive sales practices challenged in the complaint, and that Melley's development of the contract, which was so closely tied to these illegal practices, makes it obvious that he was not unaware of the sales tactics of his salesmen and that he approved their use.

The contract called for the purchaser to agree to "cooperate with [Standard Educators] in [its] National Program in expressing my opinion of the New Standard Encyclopedia." (CX 18.) This contract provision gave support to the alleged misrepresentations by respondent's salesmen that Standard Educators was conducting a national

advertising campaign in which specially selected persons would obtain encyclopedias at a reduced price in return for their endorsement of the books. Further, the contract was specifically designed for sales to military personnel, with spaces provided to collect information on name, rank, serial number, and duty station. These provisions correspond to the deceptive sales pitch that the offer was a special introductory offer for a specially selected group, *i.e.*, members of the Armed Forces. In addition, the contract referred to the sale as part of the "National Combination offer," which corresponds to the alleged deceptions by salesmen that purchasers would pay less than the full price for each book when the "combination" of books was purchased. And finally, the contract provided that a charge of $3.95 would be made each year "for delivery" of an extension service and binder, which corresponds to the sales pitch that the additional cost was merely for postage and handling charges (CX 18, 20–29).

In our opinion, the contract designed by Melley strongly suggests that the salesmen were authorized to sell encyclopedias in the deceptive manner charged, since it is unlikely that such contracts could be supplied for any other purpose. In our view, therefore, the evidence amply supports the conclusion that Melley personally was aware of and approved the sales practices of his salesmen and that the examiner erred in his conclusion that there was no evidence of personal involvement by Melley. It was unnecessary to find that Melley himself engaged in the door-to-door selling misrepresentations, or that he personally trained the salesmen in these techniques. *Steelco Stainless Steel* v. *FTC*, 187 F. 2d 693 (7th Cir. 1951); *Sebrone Co.* v. *FTC*, 135 F. 2d 676 (7th Cir. 1943).

In dismissing the complaint against Mr. Melley, the examiner indicated that there was no evidence that the corporate respondent was a sham or organized to evade a Commission order. We do not believe such evidence is necessary to hold an individual as a party respondent. In *Fred Meyer* there was no finding that the corporation was a sham, nor has a similar finding been considered a requisite to individual liability in other cases. See *Standard Distributors, Inc.* v. *FTC*, 211 F. 2d 7 (2nd Cir. 1954); *Benrus Watch Co., Inc.* v. *FTC*, 352 F. 2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Coran Bros. Corp.*, FTC Docket No. 8697 [72 F.T.C. 1] (July 11, 1967).

The rationale for subjecting respondents in their individual capacities to Commission orders is to assure that such orders will be fully effective in preventing the unlawful activities. However, it is not necessary to find specifically that a respondent intends to violate the

Commission's order in his individual capacity. In *Coran Bros. Corp.*, FTC Docket No. 8697 (July 11, 1967); [72 F.T.C. 1 at 24–25], the Commission stated:

> Where proof of possible or intended evasion [of an order] is demonstrated, an even stronger case is made for holding an individual personally liable. Such a factor is not, however, controlling.
>
> * * * * * * *
>
> The public interest requires that the Commission take such precautionary measures as may be necessary to close off any wide "loophole" through which the effectiveness of its orders may be circumvented. Such a "loophole" is obvious in a case such as this, where the owning and controlling party of an organization may, if he later desires, defeat the purposes of the Commission's action by simply surrendering his corporate charter and forming a new corporation, or continuing the business under a partnership agreement or as an individual proprietorship with complete disregard for the Commission's action against the predecessor organization.

The individual respondent in *Coran Bros.*, as in the instant case, was the major stockholder in a closely held, family corporation, who could easily reorganize the corporation and continue the illegal practices.

In dismissing the complaint against Mr. Melley, the examiner relied upon two cases which we do not find controlling in the instant case. The first is *Lovable Co.*, 67 F.T.C. 1326 (1965). The standard for determining the liability of individual respondents which was set forth in that case was designed to cover corporate officers. There was no indication that the officers were also the major stockholders in control of a closely held corporation, as in the instant case. We believe the difference in the positions of the respondents in *Lovable* and in the case at hand is crucial. Unlike mere officers, controlling owners of a corporation have it within their power to evade a Commission order by reorganizing the corporation or by forming a partnership to continue the business.

The second case relied upon by the examiner was *Flotill Products, Inc.* v. *FTC*, 358 F. 2d 224 (9th Cir. 1966) [8 S. & D. 69]. In this case, the individually named respondents were the officers and owners of a closely held, family corporation. The Commission found them individually liable and the court of appeals reversed. The court determined that proof merely of respondents' ownership and control of the corporation did not warrant including them as individuals in the order. Additional record evidence must show, the court said, that such respondents were personally involved in the violations charged or would be likely to evade a future order. As indicated above, we have found that the record in this case does disclose more than mere ownership and control of the corporation by Mr. Melley. We have

found substantial personal involvement by the respondent in authorizing and approving the illegal practices of the corporation, thereby requiring the imposition of individual liability in order to assure an effective order.

II.

RESPONDENT'S CONTENTIONS WITH RESPECT TO ILLEGAL SEARCH AND SEIZURE

Respondent contends that the evidence on which counsel supporting the complaint relied, first came to the Commission's attention as a result of an illegal search and seizure by a Commission investigator, and that the hearing examiner erred in refusing to grant respondent's motion to suppress both the documentary and testimonial evidence originating from the alleged illegal investigation.

Respondent's contention rests solely on the testimony of its president, respondent Melley, and its vice president and sales manager, Robert Atwood. Complaint counsel countered this testimony by placing on the witness stand the original Commission investigator, David DiNardi, whom respondent alleged engaged in the challenged improper investigatory tactics. Respondent sought to require production of various memoranda, field reports and notes which DiNardi testified he had prepared and signed reflecting his activities and summaries of his investigation (Tr. 27, 29, 30, 34). The examiner—erroneously in our opinion—refused to require production of those memoranda, and respondent cites this refusal as additional grounds for error. We have no doubt that this error on the part of the examiner would require either that we strike the testimony of DiNardi or direct a remand of this case to afford respondent an opportunity to examine the documents and re-examine DiNardi on the search and seizure issue. We conclude, however, that a review of Melley's testimony on this point makes it clear that relying solely on respondent's version of the facts and disregarding entirely any of the testimony offered by DiNardi that no unreasonable search and seizure took place. Accordingly, we will strike the testimony of DiNardi in its entirety thereby rendering unnecessary and immaterial the production of his notes and memoranda for the purpose of enabling respondent to conduct an effective cross-examination of this witness.[6]

[6] Respondent contends that the documents were required not only to cross-examine DiNardi but also to permit Melley to refresh his own memory. We find no basis whatsoever for respondent's contention that an investigator's work product must be turned over to the respondent to jog the memory of its own witness. *See Hickman* v. *Taylor,* 329 U.S. 495 (1947).

Mr. Melley testified that on the morning of April 10, 1967, Mr. DiNardi appeared at his office and identified himself as an FTC attorney-investigator (Tr. 64, 65, 77, 86, 89, 91). He informed Mr. Melley that he was investigating Standard Educators and would like to obtain some information. Mr. Melley replied he would be happy to give him any information he wanted and then answered a number of questions about the company's business. He showed DiNardi some sales materials and two tax statements which were kept in his office (Tr. 65–66). Mr. Melley then testified:

> Up to this time I was very, very happy to cooperate with [DiNardi].I felt that was the thing to do, but then I sensed a little bit of a feeling of dispair or I felt that things were going to get a little bit rough from here on in.* * * Then [DiNardi] said, "Well, I would like to go downstairs and look through your records." I said, "Well, I don't think you should be allowed to go through my records." I said, "In fact, I think I need some advice; maybe I should get advice from an attorney or something." He says, "I am an attorney * * * and frankly if I wanted to, I could get a court order and back up a truck and take all the records that I needed." (Tr. 66–67, 70–78.)

When asked if this was said in a threatening manner, Melley answered:

> I don't think he raised his voice; I think it might have been as a matter of information * * * I can't recollect his complete demeanor at the time. I remember mine, I was pretty warm at that particular instant. (Tr. 78–79.)

Mr. Melley testified that DiNardi then went on to explain that the Federal Trade Commission also helps business and that if irregularities are uncovered, a business is given an opportunity to correct them voluntarily, but if they are not corrected a cease and desist order may be issued (Tr. 67).

After DiNardi mentioned voluntary compliance, Melley suggested to DiNardi that it would probably pay to be cooperative and DiNardi agreed. Melley then told DiNardi that he could proceed with the investigation (Tr. 68).

Melley further testified that he was "shook" by DiNardi's comment that he could get a court order, but that he ultimately decided to let DiNardi go through the records because DiNardi's statement that the Commission was "lenient" made him feel that DiNardi represented both the businessman and the Federal Trade Commission. He stated:

> I looked on it [sic] more as a mediator than an investigator, to be frank with you. The only reason I consented after I rebelled, sort of, was when he mentioned the fact that a voluntary compliance was a possibility. He did not promise me a voluntary compliance, but he said this was a definite possibility in cases where this is your first investigation, and the Federal Trade Commission often gives you a chance to get your house in order. (Tr. 69–70.)

DiNardi's visit on the morning of April 10, lasted about an hour, during which time Melley showed him the tax forms mentioned above and examples of contracts (Tr. 71, 77).

On the evening of April 10, Melley attempted to contact his attorney, and failing to reach him called a business friend who advised him to cooperate with the investigator (Tr. 72).

Melley then testified:

> So I weighed the thing myself and I figured, well, one way or the other they are going to get all the information they need, so it would be just as well if I went right ahead and planned my little trip out of town and so forth. (Tr. 72.)

The following day, April 11, DiNardi returned to the office and continued his investigation. Melley invited him to lunch and cooperated with the investigation (Tr. 72, 73).

Melley testified:

> At this time, I had resolved that things were going to be all right, I took a liking to him [DiNardi]. * * * I felt he had a job to do. * * * I felt that I had made a wise decision, in a sense. (Tr. 73.)

On April 12, Melley went out of town on a golfing trip, and DiNardi continued his investigation on April 12 and 13, with the cooperation of the office manager whom Melley had directed to be of assistance (Tr. 74).

DiNardi returned in the last week of May seeking additional records, and Melley instructed the office manager to cooperate in providing him with what he wanted. Again, Melley and DiNardi had lunch together (Tr. 75–76).

Mr. Atwood then testified as to the events surrounding DiNardi's visit to Standard Educators. He stated that he had been introduced to DiNardi on April 10, and that following DiNardi's departure that morning, Mr. Melley told him DiNardi was from the Federal Trade Commission, had been asking him questions and was going to investigate the company. He testified that Melley was "emotionally shaken" on that morning (Tr. 89). On the following day, Atwood saw DiNardi in the offices of Standard Educators but had no conversation with him. The next time Atwood saw DiNardi was the last week in May when he joined Melley and DiNardi for lunch (Tr. 90).

The question posed in this case is whether, in view of this evidence, Melley voluntarily consented to DiNardi's search of the files. Respondent argues that DiNardi "coerced" Melley into giving him access to the corporate files by a "combination of threats and promises." The threat consisted of DiNardi's statement that he could get a court order and take all the records; the promise was that if Melley co-

operated, this would "perhaps result in a voluntary compliance." (Res. App. Br. at 26, 27.)

It is clear that a search and seizure may be made without a search warrant where the individual "freely and intelligently gives his unequivocal and specific consent to the search, uncontaminated by any duress or coercion, actual or implied." *Channel* v. *United States*, 285 F. 2d 217, 219 (9th Cir. 1960); *United States* v. *Vickers*, 387 F. 2d 703 (4th Cir. 1967), *cert. denied*, 392 U.S. 912 (1968); *Judd* v. *United States*, 190 F. 2d 649 (D.C. Cir. 1951). The burden of proving that the consent was given freely and voluntarily rests with the party claiming consent. *Bumper* v. *North Carolina*, 391 U.S. 543 (1968).

We do not think that Melley's testimony as a whole warrants our finding that DiNardi's statements had a coercive effect upon him or that his consent to the search was other than voluntary. The voluntariness of a consent is a question of fact, *Maxwell* v. *Stephens*, 348 F. 2d 325, 336 (8th Cir. 1965), *cert. denied*, 382 U.S. 944 (1965), to be decided in light of all the attendant circumstances. The criterial factors to be weighed include, "the setting in which the consent was obtained, what was said and done by the parties present, with particular emphasis on what was said and done by the individual consenting to the search, and his age, intelligence and educational background." *United States ex rel. Harris* v. *Hendricks*, 423 F. 2d 1096, 1099 (3rd Cir. 1970).

We note at the outset that Melley "need not have had a positive desire that the search be conducted in order for his consent to have been voluntary and effective." *United States* v. *Thompson*, 356 F. 2d 216, 220 (2nd Cir. 1965), *cert. denied*, 384 U.S. 964 (1966). The fact that he had some qualms at first about permitting DiNardi to search the files is thus not grounds for finding his consent was involuntary. Some expression of reluctance to a search is to be expected and does not necessarily signify coercion.[7]

The critical determination is whether Melley knew he was being asked rather than ordered to permit the search. *United States* v. *Vickers*, 387 F. 2d 703, 707 (4th Cir. 1967), *cert. denied*, 392 U.S. 912 (1968).

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[7] Consider the following exchange which was not considered coercive by the court in *United States* v. *Morton Provision Company*, 294 F. Supp. 385, 389 (D. Del. 1968):

"A. Mr. Cowgill [a Department of Agriculture investigator] came in, and after preliminary greetings he told me that he was there to get the records of the past six months of my books.

"Q. And what did you say to that?

"A. 'Well, do I have to give them to you?'

"Q. And what was his reply?

"A. 'Look, we can get the records so you might as well not fight it because we can get them.'"

It is clear from his testimony that Melley knew he had a choice in this matter. He sought advice from others, and in his own words "weighed" the entire matter in his mind following DiNardi's departure on April 10th. By the next day, he concluded that he had made "a wise decision." He did not merely acquiesce to DiNardi's request because he thought he had no alternative. He testified that ultimately the reason he consented to the file search was the possibility of voluntary compliance, although he unequivocally stated that a settlement through voluntary compliance had never been promised (Tr. 69–70). In short, Melley considered the alternatives and decided that his cooperation would be beneficial to his case. That Melley was capable of a voluntary and intelligent consent to the search is supported by the fact that he was a high school graduate and had been in business for himself for ten years (Tr. 115, 117).

It should be noted that at no time did DiNardi deceive or misinform Melley as to his purpose or authority. Melley was told that a cease and desist order might ultimately result from the investigation (Tr. 67). Nor did DiNardi mislead Melley into believing that the premises could be searched without a search warrant. In fact, he made clear that a "court order" would be required if any documents were to be taken without Melley's consent (Tr. 66, 67, 70, 78). DiNardi's assertion that he could get the court order did not render the search illegal since Melley thereafter decided to permit the search without requiring the court order. *Hamilton* v. *North Carolina*, 260 F. Supp. 632 (E.D. N.C. 1966), *aff'd*, 382 F. 2d 296 (4th Cir. 1967); *Kershner* v. *Boles*, 212 F. Supp. 9 (N.D. W.V. 1963). It was not necessary for DiNardi to specifically advise Melley of his right to refuse the inspection without a warrant. *United States ex rel. Harris* v. *Hendricks*, 423 F. 2d 1096 (3rd Cir. 1970); *Gorman* v. *United States*, 380 F. 2d 158 (1st Cir. 1967).

There was never any evidence that DiNardi raised his voice or acted in a threatening manner (Tr. 78). When he spoke of using a truck to take away the records, Melley testified, in fact, that DiNardi "implied that maybe he would not do that but 'this is how far we could go'." (Tr. 70.)

Considering all of the circumstances surrounding Melley's consent to the search, we find that it was voluntarily given. Melley was never coerced or threatened, nor was he misinformed as to the nature of the search. He had an adequate opportunity and was sufficiently experienced in business matters to freely and intelligently give his consent. From his own testimony, we conclude that he did so.

The respondent cites four cases to support its contention that Melley's consent was involuntarily given (Res. App. Br. at 26). However,

the decisions in these cases turn on critical factors not present in this case. In *United States* v. *Slusser*, 270 F. 818 (S.D. Ohio 1921), the defendant agreed to a search after a law enforcement officer displayed his badge and declared he was there to search the premises. The court found this was not a consent to waive constitutional rights but a "peaceful submission to officers of the law." 270 F. at 819.

The second case cited by respondent was *United States* v. *J. B. Kramer Grocery Co.*, 294 F. Supp. 65 (E.D. Ark.), *aff'd*, 418 F. 2d 987 (8th Cir. 1969), in which the court found no voluntary consent had been given to an inspector who asserted he had the authority to inspect without a warrant and the person consenting to the search believed that a refusal might result in criminal prosecution. In *Bumper* v. *North Carolina*, 391 U.S. 543 (1968), the court found that a voluntary consent was not given when the officer conducting the search asserted that he possessed a warrant. Consent under such circumstances, the court found, amounted to mere acquiescence to a claim of lawful authority. Finally, respondent relies upon *Pennsylvania* v. *Wright*, 411 Pa. 81, 190 A. 2d 709 (1963), in which the court held a consent was involuntary when it was elicited through deceit and misrepresentations by the searching police officers. They had falsely told the woman who permitted the search that her husband had admitted committing a crime and had sent them for the evidence.

None of these cases supports respondent's contention that the circumstances in the instant case reflect a lack of voluntary consent. As noted above, there is nothing in Melley's testimony to indicate that DiNardi ever asserted he had the authority to search the premises without a warrant. In fact, the opposite is true. He indicated that a court order would be necessary to obtain the files. There was no threat of arrest or criminal prosecution. Nor did DiNardi deceive Melley about his authority or the purpose of his investigation. On the basis of Melley's own testimony we can only conclude that his consent was voluntarily given without coercion or duress, actual or implied. We find, therefore, that no unreasonable search and seizure took place in violation of respondent's Fourth Amendment rights.

III.

RESPONDENT'S ALLEGATIONS OF DUE PROCESS DENIAL

Respondent also seeks reversal of the examiner's findings of liability on the claim that its due process rights to a fair trial were violated during the pre-trial stage of this proceeding.

Essentially, respondent's claims of unfairness rest on its contention that it had been deprived of an adequate opportunity to prepare its defense with respect to the testimony of 10 of the 13 consumer witnesses who testified as to the representations made to them by respondent's salesmen which were charged in the complaint as deceptive.[8] As a result, respondent argues that the hearing examiner erred in not striking the testimony of these witnesses.

With respect to five of these witnesses, respondent claims that their addresses had been incorrectly listed on the witness list which complaint counsel had been required by pre-trial order to furnish respondent. With respect to seven of the consumer witnesses called by complaint counsel, respondent contends it had been incorrectly denied an opportunity by the examiner to take their depositions upon written interrogatories.[9]

A. Witnesses' Addresses

The facts underlying respondent's contention concerning the witnesses' addresses are not substantially in dispute. By letter of March 3, 1970, respondent's counsel requested complaint counsel to supply them with a list of the witnesses they intended to call (Res. App. Br., app. A). In response, complaint counsel provided respondent on March 27, 1970, with a tentative witness list containing 49 names of possible Commission witnesses, consisting of 21 couples and seven individuals (C.C. Ans. Br., app. 1). The list indicated the names and addresses of the witnesses and the paragraphs and subparagraphs of the complaint with which the testimony of each of the named witnesses would deal.

On May 13, 1970, complaint counsel submitted to respondent their final list of witnesses as required by the examiner's pre-trial order of April 13, 1970. This list confirmed the earlier list, but omitted two names and added the names of six new consumer witnesses, three of respondent's employees, and one Commission investigator. The list was thus expanded to 57 names, which included 24 couples and seven individuals who had purchased respondent's books. Complaint counsel again identified each witness by address and complaint paragraph to which he would testify (C.C. Ans. Br., app. II).

[8] Although complaint counsel called 14 consumer witnesses, we are concerned here with only 13 witnesses, since the examiner did not consider in his decision the testimony of one consumer witness, Mr. Broach. He had not signed a contract and there was no signed contract in respondent's files from which respondent could ascertain the facts surrounding the particular sale in order to prepare its defense in advance of trial. (ID 9.)

[9] Two of these seven consumer witnesses were also among the five witnesses whose addresses respondent claims had been inaccurately listed. Thus, there was a total of 10 witnesses for whom respondent claims it was unable to prepare its defense.

Respondent sought unsuccessfully to require complaint counsel to limit the number of witnesses on the list.[10]

On June 17, respondent sent a letter to complaint counsel indicating that it was encountering difficulty in locating some of the Commission's witnesses. One June 27th, complaint counsel sent respondent's counsel a revised witness list which contained all of the 57 names but with revised addresses for five of the couples and two of the individuals. Upon receiving this list, respondent moved on June 30th for the postponement of the hearing which was denied by the examiner on July 6th. The hearing commenced on July 7th.

Respondent claims that the testimony of five of the 13 Commission witnesses should be stricken from the record on the ground that the addresses originally provided for these witnesses by complaint counsel on March 27, 1970, and repeated on May 13, 1970, were inaccurate. Accurate addresses for these witnesses were not provided respondent's counsel until June 27.

Respondent relies for its contentions of due process violations primarily on the recent decision of the Fifth Circuit in *Pacific Molasses Co.* v. *FTC*, 356 F. 2d 386 (5th Cir. 1966). We agree that this decision establishes the applicable law on the issue, but we disagree that the facts in this case in any way raise the same issues of due process which the Fifth Circuit found to exist in the *Pacific Molasses* case.

In *Pacific Molasses*, the Commission brought suit in 1962 for alleged violations of Section 2(a) of the Clayton Act in the sale of "blackstrap" molasses for the first nine months of 1955. The Commission issued its complaint in April 1959, and, in the fall of 1959, counsel representing both sides requested a pre-hearing conference.

On July 14, 1960, the conference was held, at which time the examiner entered an order requiring complaint counsel to present to respondent's counsel a list of the witnesses and documentary evidence to be relied upon at the hearing. The examiner did not set a day certain for this material to be provided but rather ordered that it be provided fifteen days before the date fixed for the hearing. On May 2, 1962, the examiner notified the parties that the settlement negotia-

[10] Respondent wrote complaint counsel a letter on May 20, 1970, urging him to reduce the witness list and after counsel refused, filed a motion on May 27th with the examiner seeking the same relief. Respondent urged that the number of witnesses should be limited in order to reduce its burden of preparing for cross-examinations and also to eliminate unnecessary duplication of testimony since it was clear that many of the witnesses would be called to testify about the same paragraphs and subparagraphs of the complaint. Complaint counsel pointed out that under the Commission's Rules of Practice, Section 3.21(d), he would be precluded by the examiner's pre-hearing order from calling any witness who had not previously been identified as such and, thus, it would be prejudicial to his case to make such a reduction.

The examiner denied the motion on May 28, 1970.

tions which had consumed two years must be terminated and directed that the hearing start on May 28th.

Complaint counsel's witness and document list was due under the terms of the examiner's order on May 15th. Counsel failed to provide any witnesses' names on this date. A subpoena for one witness was issued on May 18th. The names of four more witnesses were communicated to respondents on May 24th, and the identity of the remaining three witnesses was not furnished respondents until Monday, May 28th, the first day of the hearing.

Respondents' motion for a continuance was denied by the examiner on the ground that all of the witnesses were customers and employees of the respondents and the issues in the case were simple and straightforward. Respondents did proceed to cross-examine complaint counsel's witnesses and after the case-in-chief was concluded they were granted a 40-day continuance with the right to recall witnesses. The Commission found no prejudice in these actions although it viewed counsel's failure to comply with the original pretrial order as "regrettable." The circuit court reversed.

The court based its reversal squarely on the fact that Commission counsel had violated the examiner's pre-trial order which according to the Commission's Rules of Practice must control the proceedings (16 C.F.R. Section 3.10 (1960)). The Court rejected the Commission's reasoning that any surprise was overcome by the 40-day continuance since respondent's right to effective cross-examination was not satisfied by the subsequent continuance and right to recall. As the court put it:

> Effective cross-examination requires thorough preparation by counsel before trial. * * * To phrase the proper question on cross-examination requires a sound knowledge of the witness, his business, records, books and activities. And although petitioners might have gone ahead and guessed at who the witnesses might be when no word was received, this would hardly seem adequate. 356 F. 2d at 390.

In the instant case, respondent's counsel did not even attempt cross-examination of the five witnesses for which he claimed he had not received timely notice of accurate addresses.

For each of the witnesses called to which the respondent raised this objection, the examiner did two things: (1) he directed a voir dire examination to determine the reason for complaint counsel's failure to list accurate addresses for these witnesses, whether by inadvertence, carelessness or impossibility, and (2) after ruling on the admissibility of the witness' testimony, he permitted respondent's counsel the opportunity to interview the witness privately in a separate room before

commencing cross-examination. Respondent not only declined to so interview the witnesses but also declined to cross-examine.

The testimony elicited at the hearing revealed that so far as the Commission's witnesses were concerned, the failure to supply the correct addresses on May 13, was for the most part unavoidable and the May 13 addresses were, in fact, the best available.

To wit:

1. Witness Linda J. Olson: A Colorado address was given for Mrs. Olson on May 13. At the time of the hearing, Mrs. Olson resided in Alaska. The Colorado address was the address of record received from the Department of Defense in preparation of the March 27 tentative witness list (Tr. 217–19; ID 10–11).[11]

2. Witness April Maillet: The May 13 witness list contained a Portsmouth, New Hampshire, address; however, at the time of trial, Mrs. Maillet was living in North Carolina. The witness testified that she had moved at the *end of April* when her husband was unexpectedly returned from Viet Nam 30 days ahead of schedule and transferred to Camp Lejeune (Tr. 292–94; ID 16–17).

3. Witness Bruce David Campbell: Mr. Campbell testified that he moved unexpectedly on April 6, 1970, from the Yorktown, Virginia, address on the witness list to his present address in Warren, Michigan. He received an early release from the Navy although his discharge and release had been scheduled for July. He had informed complaint counsel he would be in Virginia until July (Tr. 283–86; ID 15).

4. Witness Larry Edward Riggs: While both addresses on the list and at the time of trial are in Shreveport, Louisiana, the street addresses differ. The witness testified he moved in May (Tr. 302; ID 18).

5. Witness Robert E. H. Ferguson: Mr. Ferguson was discharged from the service on April 28, prior to which time he was stationed in Japan. Although he had corresponded with complaint counsel, he never sent a forwarding address (Tr. 344–47; ID 23). He returned stateside in June.

Thus, the issue is squarely presented as to whether complaint counsel's failure to supply accurate addresses for each of the witnesses constitutes a "violation" of the examiner's order within the meaning of the court's decision in *Pacific Molasses*. This precise question is one of first impression. Nevertheless, the issue is essentially one of fairness and reasonableness. Under the facts as they are presented in this case,

[11] In all cases, the addresses on the March 27, and May 13, lists are identical unless otherwise indicated.

we are of the view that no such flat refusal to comply with the pretrial order governing this proceeding took place here as it did in *Pacific Molasses*. In the instant case, complaint counsel complied with the hearing examiner's order by providing both the names of the witnesses he intended to call as well as the addresses of those witnesses as he knew them. The record indicates that as soon as he learned that the addresses were inaccurate, he so notified respondent.

All of these five witnesses were customers of respondent who had executed contracts with respondent for the purchase of respondent's books. Communication of their names to respondent as required by the order provided respondent with full opportunity to prepare itself with respect to the possible testimony of these witnesses. By learning their names, respondent was able to turn to its own files to determine the nature and circumstances of their purchases, the salesmen involved and any other information pertinent to the particular complaint allegations as to which these witnesses would be testifying.

Certainly respondent's trial preparation would have been considerably eased if complaint counsel had been able or willing to pare his witness list down to more manageable proportions earlier than June 27, only ten days before hearing with an intervening holiday weekend. Nevertheless, complaint counsel was obviously laboring under considerable difficulty himself in view of the nature of the witnesses who must inevitably be called. In one sense, the problem was created by respondent because of its business policy of directing sales to military personnel. Indeed, recognizing the difficulty to itself caused by this policy, respondent's contracts provided space to secure data not only on the name, rank, serial number, present duty post and present address, but they also provided space for the home address of the purchaser and the name and address of a relative not living with the purchaser (CX 18 A–B). It seems clear that respondent had at least an equal opportunity, and perhaps a better one than complaint counsel, to locate the present whereabouts of these witnesses.

Moreover, during the proceeding, the examiner did everything in his power to assure that respondent had full opportunity to prepare for cross-examination. After having ascertained that the inaccurate address had in no way been the result of complaint counsel's carelessness or deliberate efforts to make access to their witnesses difficult for respondent, the examiner gave respondent the opportunity to interview these witnesses prior to cross-examination. Respondent's counsel refused to avail themselves of this opportunity and persisted in their refusal to avail themselves of their right to cross-examine as well.

We hold that the examiner did not err in refusing to strike the testimony of these witnesses. We do not believe that the inaccuracy of the addresses in this case constitutes a violation of the examiner's pretrial order such as to compel reversal of this case under *Pacific Molasses*. Nor do we believe that any prejudice, in fact, resulted to respondent under the procedures offered and made available to respondent once the final identity of the witnesses, together with their correct addresses, was made known to respondent.

B. Witness Depositions

After respondent's motion to reduce the number of witnesses on the May 13th witness list was denied by the examiner on May 28th,[12] respondent on June 9, 1970, filed a motion to take depositions upon written interrogatories of 14 of the witnesses listed on complaint counsel's May 13th list.

In support of its motion, respondent argued that it would be impossible to interview all of complaint counsel's witnesses in advance of trial, that it did not have the resources to pay for plane fares or lawyer's fees necessary to locate distant witnesses, and that it was necessary, therefore, to take depositions upon written interrogatories of 14 witnesses so distant that it would be impossible to interview them. The 14 witnesses were located in 12 different states outside the state of respondent's place of business.[13]

Complaint counsel opposed respondent's application on the grounds, *inter alia* (1) that respondent's assertion that interviewing the witnesses would be too costly was not a justifiable ground for permitting the depositions; (2) that respondent had not made any showing that it had made any efforts to obtain the desired information voluntarily as required by Commission rules; (3) that respondent had made no showing of having attempted to contact the witnesses by phone or letter; and finally (4) that much of the information to be sought from the witnesses was already in the possession of respondent (C.C. Ans. to Resp. Application for Depositions upon Written Interrogatories, June 25, 1970).

On June 27, 1970, the hearing examiner denied respondent's application for depositions upon written interrogatories on the grounds that the information sought could be obtained at the hearing, that the information sought was not "vital" to respondent, and that much

[12] *See* note 10 *supra*.

[13] Respondent was located in Connecticut; the witnesses lived in Illinois, Oklahoma, California, Michigan, Minnesota, Kentucky, Ohio, Alaska, Louisiana, New York, South Carolina, and Arkansas.

of the information sought through the interrogatories was already in respondent's possession.[14]

As noted earlier, the case proceeded as scheduled on July 9, 1970. Seven of the 14 witnesses whom respondent sought to depose were called to testify, and again respondent's counsel declined to cross-examine them. Respondent now contends that the examiner erred in failing to strike the testimony of these seven witnesses on the grounds that respondent had not been permitted to take the depositions of these witnesses in advance of the hearing.

The Commission's Rules of Practice are very clear on the rights of respondents to take depositions in advance of trial. Section 3.33(a) of these rules provides that the examiner may order the taking of depositions "upon a showing that the deposition is necessary for purposes of discovery and that such discovery could not be accomplished by voluntary methods."

Respondent made no showing of any kind as to why the discovery which it sought could not have been accomplished by voluntary methods, beyond its assertion that voluntary methods were unavailable because the witnesses were "scattered throughout the country," and that it did not wish to travel to the witnesses and interview them in person. Yet the need to interview these witnesses in person was not apparently the crux of respondent's trial preparation needs. In its motion respondent was seeking only written interrogatories. Thus, the ruling which respondent is now claiming violated its due process rights did not involve a denial of personal confrontation. Obviously, respondent did not believe it necessary to observe the demeanor of these witnesses or probe in personal question and answer form, the extent of their memories. Therefore, its claim of due process violation here rests solely on the alleged denial to it of an opportunity to obtain the desired information by compulsory process.

Respondent clearly could have telephoned or written these witnesses to at least explore their willingness to talk to respondent and to provide the information desired. With one exception, correct addresses for the seven witnesses called to testify were given to respondent well in

[14] Respondent's written interrogatories contained 28 questions which were aimed at obtaining *inter alia* the following information: the name of the Standard Educators' salesman who met with and sold books to the witness, the length of his visit and the substance of his conversation with the witness; whether the witness paid in full for his books and whether a Standard Educators' representative had called the witness to confirm that he had signed the contract; and whether the witness thereafter had been interviewed by a representative of the Federal Trade Commission, was shown any documents by that representative or signed any statement on his request.

advance of trial.[15] There is nothing in the record to indicate that respondent could not have ascertained what it needed or wanted to know from these witnesses by informal, voluntary means. The information sought through the interrogatories [16] involved such questions as the name of the salesman who contacted the witness, whether the witness had paid for the books in full, and whether a Standard Educators' representative had called the witness to confirm the sale. Much of it was in respondent's files.[17] Even if some of the information in respondent's files was inaccurate, respondent could have verified this information by a simple telephone call. Similarly, it would not have seemed impossible to have at least tried to ascertain by letter or telephone the other information in which respondent was interested concerning the substance of the salesman's conversation with the witness and whether the Commission had contacted the witness.

There was no evidence that such informal contacts to ascertain this limited and specific information would have proven fruitless.

As we pointed out in *Associated Merchandising Corp.*, FTC Docket No. 8651 (November 13, 1967) [72 F.T.C. 1020], the mere fact that witnesses are to be called by complaint counsel is not a sufficient basis for assuming that they will not cooperate voluntarily in providing information to respondent. Clearly respondent could have at least made a minimal and preliminary effort to secure the desired information by letter or telephone.

Yet respondent did none of these things. Rather it simply asserted to the examiner that it desired the deposition because it did not wish to expend the monies which would be required to travel to the witnesses' place of residence and interview them in person.

There is no doubt that cross examination is an important, perhaps vital, facet of the adversary process. Certainly interviewing witnesses to learn what it is they know about the issues to which they will be testifying is important in preparing one's defense. But none of these factors is in issue in this case. Instead, respondent, because it failed to make even a minimal showing of compliance with the Commission's

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[15] Mrs. Olson's address was incorrectly listed until June 27th so that respondent would have had some difficulty in reaching her by letter or telephone. Correct addresses were provided as early as March 27, 1970, for four of the witnesses respondent sought to depose, and the May 13th list provided correct addresses for the other two witnesses. Although respondent also objected to Mr. Riggs' testimony on the grounds that an incorrect address had been given for him, it was apparent from Mr. Riggs' testimony, noted earlier, that he did not move until May. Respondent had been given his correct address on the March 27th list and, thus, had sufficient time to reach him at the address supplied by complaint counsel.

[16] *See* note 14, *supra*.

[17] Samples of respondent's contracts entered into evidence during the trial did, in fact, contain the signature of the sales representative (CX 18, 20–29).

rules is in effect, presenting this Commission with a bare claim that it has an absolute right to compulsory process in order to interrogate prospective witnesses by means of written interrogatories.

The Commission's Rules of Practice are premised on the position that compulsory process is available and may indeed be necessary. However, Rule 3.33(a) requires that some showing be made that compulsory process is necessary. It is arguable that requiring such a showing is either unnecessary or unwise or both. But the issue before the Commission is not the wisdom of this rule. Respondent made no effort to comply with the Commission's rules, despite the fact that the circumstances surrounding respondent's discovery request indicate that respondent might have easily obtained the limited and specific information it was seeking through interrogatories by the very simple means of writing or telephoning the witnesses. Or at least, it could have been in a position to advise the examiner that it was unable to seek the information voluntarily as required by the rule. Had the witnesses been cooperative, these voluntary methods of discovery would have yielded the same information which respondent could have expected from the use of written interrogatories. Had they not been cooperative or were in some other way rendering this method of trial preparation inadequate, respondent had only to present the problem to the hearing examiner. But this is not what respondent did. Instead, it simply ignored the Commission's rule and sought instead to insist on discovery through written interrogatories without making any showing of any kind that the rule's standard was or should be regarded as inapplicable to it.

We find neither theoretical nor actual prejudice to respondent's rights as a result of the examiner's ruling. In view of respondent's failure to show that its requested discovery was unavailable through voluntary methods, as required by Section 3.33(a), and upon our own independent determination that we find no actual prejudice to respondent's rights, we conclude that the hearing examiner acted reasonably in denying respondent's request for Commission process to obtain discovery.

In reaching this conclusion, we do not depart from our holding in *Koppers Co., Inc.*, FTC Docket No. 8755 (July 2, 1968) [74 F.T.C. 1571]. *Koppers* in no way modified the requirement of Section 3.33(a) that discovery be attempted voluntarily before Commission process is granted. In that case, respondent explicitly set forth the steps it took to secure discovery by informal means. Respondent had by letter sought interviews with the witnesses, and only after counsel for these witnesses rejected the request and advised respondent to seek discovery

under the Commission's rules did respondent apply to the hearing examiner for Commission process (Resp. Interlocutory App. Br. at 5). Thus, it was evident that the respondent had fully satisfied that portion of Section 3.33(a) requiring that voluntary methods for obtaining discovery be attempted.

Respondent relies on *Koppers* to argue that its requested depositions were necessary to prepare for effective cross examination at trial. However, in the instant case we need not reach the issue of whether the information sought by respondent through the use of interrogatories was "necessary" for purposes of discovery within the meaning of Section 3.33(a).[18] Whether or not this information was necessary, in the absence of respondent's showing that the information could not have been obtained voluntarily, its application for depositions should have been denied. We, therefore, find no grounds for reversing the hearing examiner's ruling on respondent's application for depositions upon written interrogatories.

Taking all of the circumstances of this case into consideration, we believe it essential that we come to grips with the question of whether the handicaps under which respondent claims it labored in trying to prepare its case, in fact, constituted such irreparable harm and prejudice that the public interest—quite apart from the requirements of due process—compel either a remand, or as respondent urges, a dismissal of this case.

The examiner's findings that the challenged representations were in fact made as alleged in the complaint rested on the essentially identical testimony of 13 consumer witnesses. The testimony of three of these witnesses is not now challenged in any way by respondent. Respondent's contentions with respect to the prejudicial effect of the incorrect addresses affect only five of these witnesses. Its contentions with respect to the denial of its request to depose witnesses affect only seven of these witnesses, two of whom also fall in the group of five witnesses with allegedly incorrect addresses. Thus, it is important to note that even if the Commission determined to strike the testimony of all of the consumer witnesses to whom respondent is objecting, or only those involved in the examiner's refusal to permit depositions, there would still be both consumer testimony and documentary evidence in this record supporting the complaint allegations as to the types of representations which respondent's salesmen made in the course of their sales pitch. It is also important to note that the testimony of these

[18] The hearing examiner based his denial of respondent's application for depositions on the grounds that the discovery was not necessary. Having so concluded, he denied the application without considering whether the discovery could have been obtained by voluntary means.

witnesses constituted only one portion of the total evidence offered to prove the allegations in this complaint that respondent engaged in unfair and deceptive practices in violation of Section 5 of the Federal Trade Commission Act. The testimony of the consumer witnesses was offered to prove that the allegedly false representations had, in fact, been made by respondent's salesmen. Their testimony and the making of these representations was corroborated by documentary evidence offered by complaint counsel, consisting of the sales contracts themselves which respondent's customers executed (CX 18, 20–29). Finally, evidence of the falsity of these representations did not depend in any sense on the testimony of these consumer witnesses. It rested entirely on testimony of respondent's own employees and on documents contained in respondent's files (Tr. 145, 156–8, 175–A, CX 3, 35).

But we do not rest our conclusion about the outcome of this case on this basis. We must also examine carefully the issues in this case on which these customer witnesses were called to testify.

The issues in the case were relatively simple. They involved essentially the sales methods by which respondent was alleged to have conducted its business. Obviously, respondent was fully cognizant of the facts surrounding the conduct of its own business. Moreover, respondent had in its own files the basic information surrounding the sales transactions to which these consumer witnesses would testify—the dates of the contracts, the names of the salesmen who made the sales, the types of materials purchased and the terms of the transactions.[19] Thus, we are not dealing here with facts in issue which are wholly unknown to respondent and do not relate to its business.

It is also clear that respondent was confronted by complaint counsel with a relatively long list of consumer witnesses, 24 couples and seven individuals. Understandably, it wanted to contact the witnesses before trial in order to prepare its case. Respondent was reluctant, for its own reasons, to expend the money involved in personally interviewing these 24 couples and seven individuals. Again it can hardly be disputed that it could have been quite costly for respondent or its counsel to travel from Connecticut, respondent's place of business, to Alaska, Louisiana or California, to mention only the most distant states in which some of the witnesses lived.

Balanced against these problems of trial preparation is the fact that respondent was engaged in a national sales operation. Thus, the selection of witnesses and the distances at which they lived was solely the result of the nature of respondent's business. While trial preparation is inevitably a costly process, the ultimate decision as to how to

[19] *See* notes 8 and 17, *supra*.

trade off the needs of trial preparation and the costs involved is essentially a personal decision of the respondent. Again it is respondent's own business conduct which set these proceedings in motion, and the personal costs involved must be considered against the potential injury to the public which flowed from respondent's activities, if in fact the complaint allegations are finally supported. Moreover, respondent's counsel was not rendered completely helpless in their preparation for trial by the financial constraints which they imposed on themselves and by the obstacles which they encountered in trying to interrogate these witnesses by written interrogatories. The hearing examiner made every effort to provide counsel with the opportunity to interview these witnesses while the trial was proceeding. It was respondent's counsel who elected to stand on what they regarded as their legal rights. They, therefore, consciously assumed the risk which could flow to their client of entering no defense to these witnesses' testimony. This was a risk which they were entitled to take but it is also relevant to our consideration of whether they had any options to avoid the irreparable harm which they claim arose from the obstacles purportedly placed in their way by the examiner's ruling. It is clear that the obstacles, such as they were, could have been ameliorated by respondent's counsel. They elected not to do so. This was surely their right. But our responsibility is a broader one. The Commission is charged with the responsibility of ensuring that the public is protected against unfair acts and practices.

In this case the unfair and deceptive practices charged in the complaint involved respondent's methods of selling encyclopedias to members of the armed forces. At the trial, the hearing examiner weighed the evidence, observed the demeanor of the witnesses and concluded that the complaint allegations had been proven. Respondent participated fully in the trial, cross-examining those witnesses whom it chose to cross-examine and offering its own defense and witnesses. Three of the 13 consumer witnesses called by complaint counsel to testify as to the representations of respondent's salesmen were fully cross-examined by respondent. The other 10 consumer witnesses respondent by its own volition elected not to cross-examine. It is significant here that the examiner's refusal to allow the depositions on written interrogatories affected only seven of the consumer witnesses called.

As to the remaining three witnesses, respondent's basis for not cross-examining them rested not on its inability to interrogate or interview them but simply on the fact that their addresses had been incorrectly listed.

This case was first investigated in April 1967. Complaint was filed in January 1970. Weighing the right and interest of the public in the protection of the law against the handicaps which respondent claims it encountered as a result of the conduct of this proceeding, we do not believe that respondent's rights to prepare its defense and present its evidence were so irreparably crippled by the recited events as to require us to remand this case with all of the attendant delay and fading of memories inevitably involved.

Accordingly, we deny respondent's claims of unfairness and due process violations in the proceedings of this case.

IV.

THE SCOPE AND NECESSITY FOR AN ORDER

Respondent contends that no order should be entered here because the practices found to have violated the law have now been abandoned by respondent (Res. App. Br. 33). The examiner made no specific findings of fact on the issue of abandonment. Rather, he concluded that the proceedings were in the public interest and that an order was necessary (ID 29).[20]

Whether or not abandonment is a defense sufficient to mandate dismissal of a complaint depends entirely on the timing and the circumstances surrounding the abandonment. *Eugene Dietzgen* v. *FTC*, 142 F. 2d 321, 330 (7th Cir. 1944). It has long been the rule that mere discontinuance of the practice by itself is not enough to warrant automatic dismissal. *FTC* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260 (1938). The standards the courts have established look to a spontaneous and voluntary cessation of some duration prior to the complaint.

An examination of the facts in this case show cessation of questionable business practices only under the pressure of law enforcement proceedings.

The Commission began its investigation into the practices of Standard Educators in the spring of 1967 (Tr. 10). The evidence presented at the trial dealt with alleged sales techniques and contract forms in use up until at least May 1968 (Res. App. Br. 37). It is respondent's own admission that no attempt was made to revise the offending contract forms until after the Commission had begun its investigation in 1967, and that, in fact, changes were not implemented until late 1968 and early 1969 (Res. App. Br. 37).

[20] Respondent offered evidence at the hearing on the various steps taken by it to revise its practices and contracts in order to eliminate the deceptions involved in the case (Tr. 380–84, 427–28, 430).

Respondent's business is one of a long-standing and continuing nature. There is no evidence in the record that respondent intends to change its manner of doing business in the future, *i.e.*, via door-to-door sales of encyclopedias. Therefore, unlike many of the cases cited by respondent in its brief, its behavior in the complained of instances is not an unusual circumstance unlikely to reoccur. Nor is there any evidence of a new management as in some of the cases relied upon by respondent which would disassociate the corporation from past practices. The record is, however, replete with evidence that respondent's method of business was only discontinued upon pressure from law enforcement officers. This is clearly not "abandonment" sufficient to obviate the necessity for a Commission order.

We agree with the examiner's conclusion that an order must be entered here in order to insure that the public interest will be adequately protected against a resumption of these practices.

Finally, respondent objects to one provision in the order entered by the hearing examiner requiring a three-day "cooling-off" period for all of respondent's contracts. Under the examiner's proposed order, the prospective customer is to be advised of his unqualified right to cancel and, in addition, is to be provided with a separate cancellation form (ID 34).[21]

Respondent contends that the record in this case "and subsequent developments at the Commission" demonstrate that there is no need for such a separate cancellation form (Res. App. Br. 38). The "subsequent developments" referred to are the announcement by the Commission of public hearings to be held to determine the necessity for a trade regulation rule which would require a three-day cooling-off period for all contracts entered into as a result of door-to-door sales. Respondent argues that the order provision to which it is objecting should not be imposed upon the respondent alone, while the rest of the industry waits for the results, if any, of the hearings on the trade regulation rule (Res. App. Br. 41).

In our view, respondent's argument is without merit. Respondent would have the Commission, in effect, place a moratorium on its use of the three-day cooling-off period as a remedy in adjudicative proceedings. However, the proposed rule-making cannot be construed as a limitation on the Commission's ability to order effective relief

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[21] The order provision requires respondent:

[T]o provide a separate and clearly understandable form which the buyer may use as a notice of cancellation.

in individual cases. As the Commission pointed out in *Permanente Cement Co.*, 65 F.T.C. 410, 494 (1964):

> In the interim between the institution of a Trade Regulation Rule proceeding and the actual promulgation of any Trade Regulation Rules, the Commission, if it is to enforce the statutes within its jurisdiction, may be obliged to rely on the case-by-case adjudicative method. Commencement of a rule-making proceeding is not tantamount to declaring a moratorium on all enforcement activities with respect to transactions consummated before the effective date of the rules.

The deceptive practices found to exist in the instant case clearly call for the imposition of a three-day cooling-off period, and we believe the proposed rule-making in this area in no way impairs the Commission's authority to order such a remedy to assure the cessation of these practices.

IN THE MATTER OF

THE CREDIT BUREAU, INC. OF WASHINGTON, D.C., ET AL.

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

Docket C-2113. Complaint, Dec. 7, 1971—Decision, Dec. 7, 1971

Consent order requiring a credit reporting service of Washington, D.C., which includes the operation of a new resident information-reporting service under the franchised name of Welcome Newcomer, to cease securing personal and financial information from new area residents through subterfuge and selling it without their knowledge.

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 The Credit Bureau, Inc. of Washington, D.C., a corporation, and Edward F. Garretson, individually, and as manager of The Credit Bureau, Inc. of Washington, D.C., 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 The Credit Bureau, Inc. of Washington, D.C. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal