

IN THE MATTER OF

CONSUMERS PRODUCTS OF AMERICA, INC., ET AL.

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

Docket 8679. Complaint, Mar. 1, 1966—Decision, Sept. 7, 1967

Order requiring three affiliated Pennsylvania sellers of encyclopedias and other publications to cease using "bait and switch" tactics, using the word "free" deceptively, falsely representing that their offers to sell are limited, and that they are affiliated with established collection agencies or non-profit educational organizations.

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 Consumers Products of America, Inc., a corporation, Eastern Guild, Inc., a corporation, Keystone Guild, Inc., a corporation, and Jack Weinstock, Nat Loesberg, Jack Gerstel, and Louis Tafler, individually and as officers of said corporations, 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 Consumers Products of America, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 1315 Vine Street, in the city of Philadelphia, State of Pennsylvania.

Respondent Eastern Guild, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at the above stated address.

Respondent Keystone Guild, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 908 Penn Avenue, in the city of Pittsburgh, State of Pennsylvania.

Respondents Jack Weinstock, Nat Loesberg, Jack Gerstel and Louis Tafler are officers of the corporate respondents. Their office and principal place of business is located at 1315 Vine Street, in the city of Philadelphia, State of Pennsylvania. They formulate,

direct and control the acts and practices of the said corporate respondents, including the acts and practices hereinafter set forth.

In the course and conduct of their business operations, as hereinafter set forth, the respondents adopted and used various trade names. For example, respondents Consumers Products of America, Inc., and Keystone Guild, Inc., trade and do business as Educational Foundation and Consumers Educational Service. Respondent Eastern Guild, Inc., trades and does business as E-G Ltd. Other trade names also were employed.

All of the respondents, both corporate and individual, cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of encyclopedias, dictionaries and other books and publications to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their places of business in the State of Pennsylvania, or from the point of publication thereof, to purchasers thereof located in various States of the United States other than the States in which said shipments originate 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. The principal items offered for sale and sold by respondents, as aforesaid, are sets of encyclopedias. One set is advertised and sold under the name "World-Wide Encyclopedia." It consists of 10 volumes and sells for \$9.95—\$1.00 down and \$1.00 a week. The other set is sold under the name "New Standard Encyclopedia." It consists of 14 volumes and sells for \$159.50 and is described as a 3-in-1 deal. The deal includes the encyclopedia, an information service and a quarterly loose leaf extension service. This encyclopedia or 3-in-1 deal is not advertised.

PAR. 5. In the course and conduct of their aforesaid business and for the purpose of securing leads to prospective purchasers for their higher priced encyclopedia, the New Standard Encyclopedia, the respondents have made and are making numerous statements and representations in advertising inserted in newspapers and various other advertising media of interstate circulation concerning their "World-Wide Encyclopedia."

Among and typical of such advertisements is the following:

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Complaint

FREE

With this sensational offer
This 960-Page "Thumb-Indexed"
WEBSTER'S DICTIONARY

(Picture of)
()
(Dictionary)

YOURS AS A GIFT
To Introduce you to the New
WORLD-WIDE ENCYCLOPEDIA
(Picture of Set)
()
()

ALL 10 VOLUMES
\$9.95
\$1 Down

\$1 Week

YOU'VE ALWAYS WANTED TO
OWN A SET OF ENCYCLOPEDIA
—NOW YOU CAN AFFORD IT!

PLUS
Webster's New National
Dictionary Free of Charge!

Send No Money!
----- Here's All You Do!
Just fill in and
----- Mail the coupon at right.
We will immediately send
----- you a set of the WORLD-
WIDE ENCYCLOPE-
DIA, together with the
Free Dictionary. Exam-
ine them carefully. You
and you alone must be
fully satisfied. If you are
convinced, as we are
sure you will be, that this
is truly an amazing edu-
cational bargain, keep
the set and your Free
Dictionary, and pay for
the same on easy terms
of \$1.00 in 5 days and
the balance in convenient
installments of \$1.00 a
week, a total of only
\$9.95 (which includes de-
livery charges). Other-
wise simply return the
books—YOU ARE NOT
OBLIGED TO KEEP
THEM. So don't delay.
Be sure to take advan-
tage of this limited offer.

This Offer Expires in 10 days!

VALUABLE GIFT
CERTIFICATE

Educational Foundation Dept. J
1315 Vine St., Philadelphia 7, Pa.

Without any obligation to me,
please send me immediately, pre-
paid, for 5 DAYS FREE EXAMI-
NATION, the 10-volume set of the
new WORLD-WIDE ENCYCLO-
PEDIA. After 5 days I will either
return the set and owe you noth-
ing, or keep it and send you \$1.00
down, and the balance \$1.00 a
week until the special introductory
price of only \$9.95 has been paid
(no other charges).

FREE GIFT Also send me the
Thumb-Indexed WEBSTER'S
New National Dictionary as a
gift. The Dictionary is mine
FREE of charge.

NAME -----
STREET -----
Rural Route _____ Box Number _____
P.O. Box Number -----
City and State _____ Tel No. _____

PAR. 6. By and through the use of the above quoted statements
and representations, and others of similar import and meaning

not expressly set out herein, the respondents, directly or by implication, represented and now represent:

1. That they were making a bona fide offer to sell the said World-Wide Encyclopedia at the price and on the terms and conditions therein stated.

2. That said encyclopedia and dictionary will be delivered to prospective purchasers for a five-day free examination without further condition, obligation or requirement.

3. That said offer is limited and expires within ten days.

4. That the dictionary is "free" and is delivered to and may be retained by all prospective purchasers without charge, condition or obligation other than as set forth in said advertisement.

5. That said encyclopedia is comprehensive, complete, authoritative, new and up-to-date.

6. Through the use of the trade name "Educational Foundation," that they operate a nonprofit organization engaged in educational work.

PAR. 7. In truth and in fact:

1. Respondents' offer contained in said advertisement does not constitute a bona fide offer to sell the said World-Wide Encyclopedia at the price and on the terms and conditions therein stated. Said offer was and is made for the purpose of obtaining leads and information as to persons interested in the purchase of an encyclopedia. After obtaining said leads, respondents did not and do not simply mail or deliver said encyclopedia and dictionary to the prospective purchasers on the terms and conditions stated in the advertisement. On the contrary, respondents' salesmen call on said prospective purchasers and proceed to disparage and make numerous derogatory remarks respecting the completeness, quality, suitability, etc., of said World-Wide Encyclopedia. They make every effort to sell to the prospective purchaser respondents' "New Standard Encyclopedia" for the amount of \$159.50.

2. Said encyclopedia and dictionary are not delivered to prospective purchasers for a five-day free examination without further condition, obligation or requirement. As hereinabove described, prospective purchasers are subjected to a sales presentation for a wholly different and far more expensive encyclopedia.

3. Said offer is not limited and does not expire within ten days. It is a continuing offer repeatedly advertised by respondents.

4. Said dictionary is not "free" and is not delivered to and may not be retained by all prospective purchasers without charge, condition or obligation.

5. Said World-Wide Encyclopedia is not comprehensive, complete, authoritative, new or up-to-date.

6. Said offer made under the trade name "Educational Foundation" is not an offer made by a nonprofit organization engaged in educational work. Said name is only a trade name employed by respondents for a private enterprise operated for profit.

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

PAR. 8. In the course and conduct of their business as aforesaid, the respondents, for the purpose of servicing and collecting their accounts, adopted and used various fictitious trade names such as Metropolitan Credit Bureau, The First Fidelity Company, and Voght Collection Service. In addition to the use of the aforesaid trade names, respondents wrote letters to the purchasers of their encyclopedias on the stationery of said agencies. For example, on the letterhead of The National Fidelity Company the following letter was sent to said purchasers:

Dear Customer:

We have approved your application for credit in the amount of \$159.50 for 23 months for purchase of THE NEW STANDARD ENCYCLOPEDIA as presented to us by E. G. LTD.

We are enclosing your coupon book which you should use when making payments on this transaction. Please read carefully the instructions on the cover of the book and make payments as specified by mail or directly at the time sales office.

In financing your installment purchase through us you are building additional credit for yourself that will be useful in all sorts of future transactions. Prompt payment is important, affixing this measure of character and dependability with your name. Consequently, if any emergency arises that may upset your payment schedule, please call. We may be able to help you avoid a situation that can mar your credit record.

We hope you will find your association with us pleasant and profitable.

Very truly yours,

THE FIRST NATIONAL FIDELITY CO.

/s/ George Marchand

Time Sales Division

Another letter on the letterhead of Metropolitan Credit Bureau sent to delinquent accounts reads in part:

All affiliated members report to this Bureau the names of their customers who have become delinquent in payment of their accounts. Such information is recorded in our files and under proper conditions is available to all credit corporations.

FIRST NATIONAL FIDELITY CO., Re. E.G. INC. informs us that you have failed either to settle or to adjust your account to which your attention was directed in a recent letter.

PAR. 9. By and through the use of the above quoted statements and representations and trade names, and others of similar import and meaning not expressly set out herein, the respondents represented and now represent, directly or by implication:

1. That the First National Fidelity Company is a bona fide, independent financial institution engaged in financing, servicing and collecting installment purchases.

2. That the Metropolitan Credit Bureau is a bona fide, independent credit reporting agency and collection agency engaged in keeping records and reporting on the credit standing or rating of persons, firms or corporations and engaged in the collection of delinquent accounts which have been referred to them by third parties.

PAR. 10. In truth and in fact:

1. The First National Fidelity Company is not a bona fide, independent financial institution engaged in financing, servicing and collecting installment purchases. It is simply a fictitious name used by respondents in their financing and servicing of installment contracts.

2. The Metropolitan Credit Bureau is not a bona fide, independent credit reporting agency and collection agency engaged in keeping records and reporting on the credit standing or rating of persons, firms and corporations and engaged in the collection of delinquent accounts which have been referred to them by third parties. It, too, is simply a fictitious name used by respondents in their efforts to collect money owed to them by purchasers of merchandise on credit.

3. As indicated above, respondents also use various other fictitious names which create the false impression that the referenced organization is a bona fide business engaged in financing, servicing, credit reporting or collections.

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

PAR. 11. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of encyclopedias, dictionaries and other books and publications of the same general kind and nature as those sold by respondents.

PAR. 12. The use by respondents of the aforesaid false, deceptive and misleading statements and representations and practices has had, and now has, the capacity and tendency to mislead and deceive a substantial number of members of the purchasing public

into the erroneous and mistaken belief that such statements and representations were and are true, and to cause substantial numbers of the purchasing public to purchase substantial quantities of respondents' products because of such erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Charles W. O'Connell and *Mr. Fauster Vittone* supporting the complaint.

Goodis, Greenfield, Marin & Mann, Philadelphia, Pa., by *Mr. Theodore R. Mann* for respondents.

INITIAL DECISION BY ANDREW C. GOODHOPE, HEARING EXAMINER

JANUARY 10, 1967

The Federal Trade Commission issued its complaint against respondents on March 1, 1966, charging them with violations of Section 5 of the Federal Trade Commission Act as a result of their advertising, sales methods and procedures used in collecting delinquent accounts in connection with their sale of the World-Wide Encyclopedia and the New Standard Encyclopedia. The respondents filed an answer in which they admitted certain allegations of the complaint but denied that they had violated Section 5 of the Federal Trade Commission Act in any manner.

This matter is before the hearing examiner for final consideration on the complaint, answer, evidence and the proposed findings of fact and conclusions and memoranda and briefs filed by counsel for respondents and counsel supporting the complaint. Consideration has been given to the proposed findings of fact and conclusions and briefs submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom and issues the following order:

FINDINGS OF FACT

1. Respondent Consumers Products of America, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office

and principal place of business located at 1315 Vine Street, Philadelphia, Pennsylvania.

2. Respondent Eastern Guild, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 1315 Vine Street, Philadelphia, Pennsylvania.

3. Respondent Keystone Guild, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 908 Penn Avenue, Pittsburgh, Pennsylvania.

4. Respondents Jack Weinstock, Nat Loesberg and Louis Tafler are officers and stockholders of the corporate respondents. Their office and principal place of business is located at 1315 Vine Street, Philadelphia, Pennsylvania. They formulate, direct and control the acts and practices of the said corporate respondents, including the acts and practices hereinafter set forth (Tr. 422-424).

5. Jack Gerstel was an officer and stockholder of the corporate respondents until September 1965 engaged in teaching and training new salesmen and handling salesmen in the field. His function was that of sales manager (Tr. 422). He is no longer in any way connected with the business activities of the respondents except as a stockholder (Tr. 424).

6. Respondents have adopted and used various trade names, discussed hereinafter, including the names: Educational Guidance Service (CX 15A); Consumers Educational Service (CX 15F); Educational Foundation (CX 4A, CX 16); E. G. Ltd. (CX 22), and E. G. Inc. (CX 23).

7. All of the respondents described above, both corporate and individual, have been active in and are responsible for all of the business activities discussed hereinafter.

8. Respondents are now, and since at least 1960, have been engaged in advertising and selling encyclopedias, dictionaries and other books and publications to the public. In the course and conduct of this business, respondents have caused their products to be advertised, sold and shipped in interstate commerce and have maintained a substantial course of trade in such commerce, as "commerce" is defined in the Federal Trade Commission Act (Resp. Ans., Par. 3; Tr. 418).

9. The principal publications offered for sale and sold by respondents are two sets of encyclopedias: World-Wide Encyclopedia and New Standard Encyclopedia. The World-Wide Encyclopedia consists of ten volumes and sells for \$9.95. The New Standard Encyclopedia consists of fourteen volumes and sells for \$159.50.

Included with the New Standard Encyclopedia is an information service and a quarterly loose-leaf extension service. The World-Wide Encyclopedia is sold by Consumers Products of America, Inc. (Tr. 415), and the New Standard Encyclopedia is sold by Eastern Guild, Inc. (Tr. 427).

10. Consumers Products advertises World-Wide Encyclopedia primarily through newspaper advertisements, car cards for use in transit systems, TV Guide and television (Tr. 416-417). Consumers Products expends approximately \$4,000 a month in advertising World-Wide Encyclopedia (Tr. 425). Eastern Guild, Inc., does no advertising of the New Standard Encyclopedia. No salesmen are employed by Consumers Products in selling World-Wide Encyclopedia (Tr. 516). An average of 12 salesmen per year are employed by Eastern Guild, Inc., to sell the New Standard Encyclopedia (Tr. 426). Respondents' advertising budget for World-Wide is approximately \$48,000 a year but sales of World-Wide average approximately \$11,000 per year (Tr. 544-545).

11. Typical of the advertisements for the sale of World-Wide Encyclopedia placed by respondents in the newspapers, car cards and TV Guides since 1960 is the following:*

12. Based upon this advertisement and others of a similar nature (CX 15-21), counsel in support of the complaint contend that the respondents have made a number of false and misleading statements. (1) That the ads constitute a bona fide offer to sell World-Wide Encyclopedia at the price and on the terms stated in the ads. (2) That the World-Wide Encyclopedia and the dictionary will be delivered to prospective purchasers with a five-day free examination without any further condition, obligation or requirement. (3) That the offer in the ads is limited and expires within ten days. (4) That the dictionary is "free" and is delivered to and may be retained by all prospective purchasers without charge, condition or obligation other than as set forth in the advertisement. (5) That World-Wide Encyclopedia is comprehensive, complete, authoritative, new and up-to-date. (6) That through use of the trade name "Educational Foundation" that respondents operate a nonprofit organization engaged in educational work.

13. Respondents' advertisements of the World-Wide Encyclopedia are quite clearly made for the purpose of obtaining the names and addresses of people who are interested in the purchase of an encyclopedia principally for the use and education of their children. When the coupon is filled out by a prospective buyer and sent into the respondents' place of business, the encyclopedia is not shipped

* Pictorial exhibit omitted in printing.

prepaid or any other way to the prospective purchaser, nor is the dictionary. Instead, a salesman calls upon the prospective customer, demonstrates at the most one copy of the World-Wide Encyclopedia and quickly introduces the purchaser to the more expensive New Standard Encyclopedia and bends every effort to sell the New Standard Encyclopedia. This is nothing more than an age old bait and switch operation with the advertisement of the World-Wide Encyclopedia being the bait to get the prospective purchaser's name and address and thereafter switch him to the New Standard Encyclopedia. Respondents urge that the evidence of actual disparagement of the World-Wide Encyclopedia is lacking. In the examiner's opinion, it is not necessary that to constitute a successful bait and switch scheme that the disparagement need be any more than is demonstrated by this record. A bait and switch operation, when used by a skillful operator, can be so effective that the victim is practically unaware of what has happened to him until his name is on a contract and the salesman gone and he has some time to reflect upon what has happened to him.

14. A comparison of the annual sales of the two encyclopedias further demonstrates that virtually no attempt is made to sell the World-Wide. Sales from 1962 to 1965 are as follows:

	New Standard	World-Wide
1960	\$600,000	\$2,680
1962	528,000	8,460
1963	646,400	12,610
1964	631,200	12,060
1965	600,800	18,870 (TR. 541-542; 544-545.)

15. Furthermore, when one compares respondents' total sales of the World-Wide Encyclopedia with its annual advertising expense on the World-Wide of \$48,000 per year, it is quite apparent what the plan of operation is. Respondents do no advertising whatsoever of the New Standard Encyclopedia. In addition the fact that respondents employ no salesmen to sell the World-Wide Encyclopedia but do to sell the New Standard is convincing proof that this is simply a bait and switch plan. The salesmen receive no commission or salary for selling or delivering the World-Wide Encyclopedia. Their entire sales commissions are based upon their sales of New Standard Encyclopedia. It appears that their only contact with the World-Wide Encyclopedia is to carry a somewhat worn copy in their brief case to attempt to establish a facade of complying with the terms of the advertisements quoted above, but in

reality, is nothing more than a lead in to the bait and switch operation.

16. The witnesses who appeared and testified in this matter were unanimous that no serious attempt was made to sell them the World-Wide Encyclopedia, that only brief reference was made thereto and the entire sales presentation by respondents' sales organization was directed to selling the New Standard Encyclopedia (Tr. 70, *et seq.*; 86, *et seq.*; 103, *et seq.*; 120, *et seq.*; 134, *et seq.*; 168, *et seq.*; 179, *et seq.*; 206, *et seq.*; 313, *et seq.*; 369, *et seq.*; and 462, *et seq.*). Consequently, it must be concluded that respondents' ads do not constitute bona fide offers to sell the World-Wide Encyclopedia on the terms set forth in the advertisements.

17. The testimony of the witnesses was also unanimous that respondents never mailed or delivered prepaid as the ads state any copies of the World-Wide Encyclopedia for a 5-day free examination. No such opportunity was ever given any of the witnesses who appeared and testified. Instead, a salesman called with one copy of the World-Wide Encyclopedia and immediately began to discourage its purchase and encourage the purchase of the New Standard Encyclopedia.

18. Respondents' advertisements have been run in various newspapers, TV Guides, car cards and television for a number of years. There has been no limitation as to time ever enforced by the respondents. Indeed, in Paragraph 7 of the respondents' answer, respondents admitted that they will deliver the World-Wide Encyclopedia to a prospective customer "even if the response to the advertisement is not mailed within said ten-day period, if its salesmen are still within the community after said ten days has expired."

19. The entire sense of respondents' advertisements is that if anyone mails in the coupon which is a part of the advertisement, he will receive prepaid for a 5-day free examination the World-Wide Encyclopedia and a copy of "Webster's Dictionary." The ads leave no doubt that anyone may keep the Webster's Dictionary even though he may decide after examination not to purchase the World-Wide Encyclopedia. The terms of this advertisement are never carried out since the dictionary is only given to a customer who actually purchases the World-Wide Encyclopedia or the New Standard Encyclopedia. In addition, since the condition is imposed by the respondents that one or the other set of encyclopedias must be purchased before the dictionary is given to anyone, it cannot be considered to be a free gift as the ad asserts. Rather, it is given on

the condition that another purchase be made and is therefore not a free gift.

20. Respondents' claims in their advertising that the World-Wide Encyclopedia is comprehensive, complete, authoritative, new and up-to-date are also false and deceptive. An examination of the World-Wide Encyclopedia makes it quite obvious that it is at best a very cheap set, poorly printed on poor paper. A brief study of some of the entries demonstrates the lack of accurate and complete information. An expert was called by counsel in support of the complaint to criticize the World-Wide Encyclopedia. Her testimony was quite confused but she nevertheless amply demonstrated that the World-Wide Encyclopedia is a very poor set (Tr. 35, *et seq.*; 593, *et seq.*). Respondents' advertising claims cannot be considered to be merely harmless puffing since the claims are so extreme and are distinctly a part of respondents' bait and switch method of sales.

21. In their advertisements, respondents from time to time have used the name "Educational Foundation." The use by respondents of this term constitutes false and deceptive advertising since it clearly imports that the respondents are engaged in some sort of nonprofit operation. The respondents are in no way engaged in an eleemosynary program but are strictly in business for profit. *In the Matter of American Photographic Society, et al.*, 54 F.T.C. 524; see also *In the Matter of Atlantic Research Foundation, Inc., et al.*, 46 F.T.C. 558. Consequently, their use of this term constitutes false and misleading representations.

22. At the time respondents make a sale of the New Standard Encyclopedia through their sales force, the purchaser signs a contract with the Eastern Guild, Inc. (CX 22). Within a very short time the customer receives a payment booklet with a covering letter from The First National Fidelity Co. (CX 23A and B). The letter to the customer advises that The First National Fidelity Co. has approved the customer's application for credit and states that this company is handling the financing of the installment purchase of the New Standard Encyclopedia. In the event a payment is not sent in to The First National Fidelity Co. by the customer, a number of follow-up letters are used on the letterhead of The First National Fidelity Co. (CX 24A-C, 25). The First National Fidelity Co. is a fictitious name used by the respondents for collection purposes. It is not an independent corporation or organization, but is completely owned, operated and controlled by the respondents (Tr. 439, *et seq.*).

23. In the event there are further non-payments of the amounts due for the purchase of a New Standard Encyclopedia, the customer then receives letters from the Metropolitan Credit Bureau soliciting payment of the delinquent account. The import of these letters (CX 26A and B) is that the Metropolitan Credit Bureau is separate and distinct both from The First National Fidelity Co. and from the respondents, corporate and individual. In fact, the Metropolitan Credit Bureau is merely a fictitious name used by respondents in attempting to collect delinquent accounts. The Metropolitan Credit Bureau is owned, operated and controlled completely by the respondents.

24. The next step in attempting to collect delinquent accounts is the use of a number of letters from the Vogt Collection Agency (CX 27A and B, 28A and B). These letters clearly import that the Vogt Collection Agency or Vogt Collection Service is a separate and distinct collection agency from The First National Fidelity Co. and any of the respondents, corporate or individual. The fictitious trade name, Metropolitan Credit Bureau, is also used in connection with the Vogt Collection Agency or Service correspondence. In fact the Vogt Collection Agency is merely a fictitious name used by the respondents to collect delinquent accounts. The Vogt Collection Agency is owned, operated and controlled by the respondents.

25. Through the use of these fictitious names, the respondents have represented that The First National Fidelity Company, the Metropolitan Credit Bureau and the Vogt Collection Agency are independent financial institutions or credit reporting and collecting agencies engaged in the collection of accounts and delinquent accounts which have been referred to them by a separate and distinct third party.

26. The First National Fidelity Co., the Metropolitan Credit Bureau and the Vogt Collection Agency are not bona fide, independent financial institutions engaged in financing, servicing and collecting installment or delinquent accounts. They are simply fictitious names used by the respondents in financing and collecting accounts and delinquent accounts (Tr. 439, *et seq.*). Consequently, their use by respondents constitutes false and misleading representations.

27. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of encyclopedias, dictionaries and other books and publications of the same general kind and nature as those sold by respondents. (Admitted in Resp. Ans., Para. 11.)

28. Counsel for respondents urged that conducting of the hearing in his absence and denial of his request for a 24-hour continuance of hearings violated the Fifth and Sixth Amendments of the Constitution and Section 6 of the Administrative Procedure Act (Resp. Proposed Finding 42, p. 14; Part VI, p. 35, Resp. Br.). This contention by counsel for the respondents is rejected.

29. The hearings in this matter were scheduled to commence September 26, 1966, in Philadelphia, Pennsylvania. The hearing rooms had been reserved and the hearing examiner had issued subpoenas for hearings throughout the week of September 26, 1966, for the case-in-chief. Late on Friday afternoon September 23, 1966, counsel for the respondents contacted the hearing examiner and advised him that he was engaged in a trial before the Philadelphia Common Pleas Court and that the matter would not be completed on the 23rd of September and would be carried over until September 26, 1966. The hearing examiner immediately contacted counsel in support of the complaint who agreed to contact their witnesses subpoenaed and scheduled for Monday, September 26, and cancel the hearing on that day. This was done. On Monday, September 26, 1966, the hearing examiner contacted counsel for respondents who was engaged in trial and was advised by him that the Common Pleas trial would probably continue over until Tuesday September 27. The examiner at that point could neither contact counsel in support of the complaint nor any of the witnesses scheduled for Tuesday and counsel for respondents was advised that the hearings would undoubtedly have to commence on Tuesday and to have another attorney appear at the hearing Tuesday morning. This was done and Mr. Robert K. Greenfield, a member of the respondents' law firm, appeared at the hearing (Tr. 25, *et seq.*). Counsel in support of the complaint were unable at this late date to cancel the witnesses called for that day, the majority of whom came from areas a considerable distance from the City of Philadelphia. The hearing examiner made arrangements on his own motion for procuring a daily copy of the transcript of hearings for the use of counsel for the respondents. No attorney was present representing respondents nor were any of the respondents or their officials nor employees present at the hearing on September 27. On September 28 counsel for respondents was given a copy of the transcript of the preceding day's hearings and was advised that any of the witnesses who appeared and testified on the preceding day would be recalled for cross-examination at the request of counsel for the respondents. Counsel for respondents later requested the right to cross-examine two of the witnesses who had appeared in his ab-

sence. They were recalled and fully cross-examined by counsel for the respondents (Tr. 582, *et seq.*; 593; *et seq.*). Counsel for respondents has made no specific objections to any of the questions or answers appearing in the transcript of hearing for September 27, 1966, but merely moved that the entire hearing for that day be stricken from the record. This motion was denied by the hearing examiner. Under these circumstances and while the examiner is well aware that a respondent can only be represented if his counsel is present, no harm, injury, or prejudice has resulted from the manner in which these hearings were conducted. Counsel for the respondents has failed to demonstrate with any specificity as to how the respondents have possibly been prejudiced by the conduct of these hearings.

CONCLUSIONS

1. The use by respondents of the false, deceptive and misleading statements and representations and practices as set forth in these findings has had, and now has, the capacity and tendency to mislead and deceive a substantial number of members of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true, and to cause substantial numbers of the purchasing public to purchase substantial quantities of respondents' products because of such erroneous and mistaken belief.

2. The aforesaid acts and practices of respondents, as herein found in these findings, 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.

ORDER

It is ordered, That respondents Consumers Products of America, Inc., a corporation, and its officers, Eastern Guild, Inc., a corporation, and its officers, Keystone Guild, Inc., a corporation, and its officers, and Jack Weinstock, Nat Loesberg, Jack Gerstel and Louis Tafler, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of encyclopedias, books or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme or device wherein false, misleading or deceptive statements or represen-

tations are made in order to obtain leads or prospects for the sale of merchandise or services.

2. Discouraging the purchase of, or disparaging, any products or services which are advertised or offered for sale.

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

4. Representing, directly or indirectly, that said merchandise will be delivered to prospective purchasers for a five-day free examination or for any other period of time without clearly and conspicuously revealing all of the conditions, obligations or requirements, pertaining to said offer.

5. Representing, directly or indirectly, that any merchandise is "free" or is delivered to or may be retained by purchasers or prospective purchasers without clearly and conspicuously revealing all of the terms, conditions or obligations necessary to the receipt and retention of said merchandise.

6. Representing, directly or indirectly, that respondents' World-Wide Encyclopedia is comprehensive, complete, authoritative, new or up-to-date.

7. Using the trade name "Educational Foundation" in connection with respondents' enterprises or representing, in any other manner, that respondents operate any non-profit organization engaged in educational work.

8. Representing, directly or indirectly, that any offer is limited as to time: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that such time restriction or limitation was actually imposed and in good faith adhered to by respondents.

9. Representing, directly or indirectly, that The First National Fidelity Co., Metropolitan Credit Bureau, or Vogt Collection Agency or any other fictitious name, or trade names owned in whole or in part by respondents or over which respondents exercise any direction or control are independent, bona fide financing, collection or credit reporting agencies; or representing in any other manner that delinquent accounts have been turned over to a bona fide, separate collection agency or to a credit reporting agency for collection or for any other purpose unless respondents in fact have turned such accounts over to an agency of the nature represented.

10. Misrepresenting, in any manner, the kind of offer made to sell merchandise, the terms, limitations or conditions of

any offer, the quality, composition or characteristics of respondents' merchandise, or the nature or status of respondents' business or of their collection operations.

OPINION OF THE COMMISSION

SEPTEMBER 7, 1967

By DIXON, *Commissioner*:

This case comes before the Commission upon respondents' appeal from the initial decision wherein the hearing examiner found that the evidence supports all of the allegations of the complaint, and issued his order to cease and desist.

The respondents are three corporations and four individuals who are named in their official capacities and individually. At the time complaint issued, these individuals were the officers and stockholders of the corporate respondents. One of these individuals, Jack Gerstel, retired in 1965 but retained his stock ownership. The respondents are charged with engaging in certain unfair and deceptive practices in the sale of encyclopedias in violation of Section 5 of the Federal Trade Commission Act.

As found by the hearing examiner and not disputed on this appeal, respondents are engaged in the sale of two sets of encyclopedias. One set, known as World-Wide Encyclopedia, consists of ten volumes and is sold by respondent Consumers Products of America, Inc., at a price of \$9.95. The other set, New Standard Encyclopedia, which, for a price of \$159.50, includes fourteen volumes and an information and quarterly extension service, is sold by respondent Eastern Guild, Inc.

Also undisputed are the examiner's findings that Consumers Products spends about \$4,000 monthly in advertising World-Wide Encyclopedia through newspaper advertisements, car cards for use in transit systems, TV Guide and television, and that it does not employ any salesmen in selling this encyclopedia. Eastern Guild, Inc., does no advertising of the New Standard Encyclopedia and employs an average of 12 salesmen a year to sell this set.

The complaint charges that through advertisements for the World-Wide Encyclopedia respondents have falsely and deceptively represented (1) that they were making a bona fide offer to sell the World-Wide Encyclopedia at the price and on the terms and conditions stated in the ads, (2) that the World-Wide Encyclopedia and a dictionary would be delivered to prospective purchasers for a five-day free examination without further condition, obligation or requirement, (3) that the offer is limited and expires in ten

days, (4) that a dictionary is given "free" and is delivered to and may be retained by all prospective purchasers without charge, condition or obligation other than as set forth in the ads, (5) that the World-Wide Encyclopedia is comprehensive, complete, authoritative, new and up to date, and (6) that through the use of the trade name "Educational Foundation," they operate a nonprofit organization engaged in educational work. Additionally, the complaint charges respondents with falsely representing that certain trade names under which they operate are bona fide, independent financial and credit reporting institutions.

We consider first respondents' argument that the hearing examiner erred in conducting the first day's hearing in the absence of respondents' counsel. The facts on this issue are likewise not disputed.

In summary, these facts show that hearings in this matter were set to begin on Monday, September 26, 1966, in Philadelphia, Pennsylvania. On Friday, September 23, 1966, respondents' counsel contacted the hearing examiner and advised him that he was engaged in a trial before the Common Pleas Court in Philadelphia, and that the trial would be carried over to September 26. For this reason, the initial hearing set for Monday was cancelled and reset for September 27. On September 26, the examiner learned that respondents' counsel would not be available on September 27, as the Common Pleas Court trial would extend through that date. The examiner states that he could not contact complaint counsel or any of the witnesses scheduled to appear on September 27. He, therefore, told respondents' counsel that hearings would begin as scheduled and to have another attorney appear at the hearing.

A member of respondents' counsel's firm appeared at the initial hearing. He informed the examiner that only respondents' counsel was prepared to proceed, and requested a continuance until the following morning. When this was denied, he left before any witnesses were called.

On the following morning, respondents' counsel was furnished with a transcript of the previous day's hearing and was informed that he had the right to recall for cross-examination any witness who had testified. Subsequently, pursuant to his request, respondents' counsel did fully cross-examine an expert witness and one of five consumer witnesses who testified at the initial hearing.¹

The hearing examiner states that respondents' counsel made no

¹ consumer witnesses testified in the absence of respondents' counsel, the testimony of one of these witnesses was stricken on the joint motion of complaint counsel and respondents' counsel.

specific objection to any of the questions or answers appearing in the transcript of the first day's hearing, and concluded that respondents' counsel failed to demonstrate with any specificity as to how respondents have possibly been prejudiced by the conduct of the hearings.

In their appeal on this issue, respondents are particularly concerned with the testimony of the expert witness. While respondents claim to have shown prejudice as a result of this witness' testimony, they argue that even were they not able to do so, the question is usually so impossible to answer in retrospect that provable prejudice cannot be a determinative factor.

During oral argument before the Commission, respondents' counsel stated that a determination as to whether prejudice has been shown, as well as a determination on the motion to strike the evidence, could be made on the basis of the expert's testimony on cross-examination. We have closely reviewed the testimony of the expert witness, both on direct and cross-examination, as well as the testimony of the five consumer witnesses who appeared in the absence of respondents' counsel, and find no substance in respondents' claim of demonstrated prejudice. For example, respondents contend that the expert testified concerning an earlier edition of the World-Wide Encyclopedia and had never seen the edition under attack. The latest edition of this set of encyclopedias was copyrighted in 1962. We have examined the set of encyclopedias (CX 7) upon which the expert based her testimony. Of this set of 10 encyclopedias, only two volumes were not copyrighted in 1962 (Volumes 1 and 8). The expert's testimony concerning the inadequacy of the set is not limited to the two earlier editions but encompasses the entire set.

Also as to the alleged prejudice, respondents state that one of the volumes had been misbound by the binder. We are not convinced from this record that, as respondents contend, the expert's testimony would have been altogether different if the binding error in this volume had been brought to her attention. In any event, the other volumes were properly bound and we fail to see how respondents could possibly be prejudiced by her testimony concerning the other volumes.

Respondents' counsel, during oral argument, took the position that the examiner's findings predicated on the expert's testimony "go to the heart of this case" and therefore the bait and switch charge, which is the principal issue under the complaint, cannot be sustained without those findings. This is clearly in error. The advertising representation to which the expert's testimony is

directed is only a part of the bait aspect of respondents' sales scheme. Other claims were allegedly used to lure persons interested in buying an encyclopedia to respond to respondents' offer. The examiner's findings are not based solely on the testimony of the expert but take into consideration the entire record, including the testimony of consumer witnesses who testified in the presence of respondents' counsel. Although we think that respondents have failed to demonstrate prejudice,² we will grant their request and will base our decision exclusively on the testimony of the witnesses who testified after the first day of the hearings.

We turn, therefore, to a consideration of respondents' argument that the weight of the evidence does not support the examiner's finding that their advertisements did not present a bona fide offer to sell the World-Wide Encyclopedia. Specifically, the examiner found that the advertisements were used as bait to get the prospective purchaser's name and address and thereafter switch him to the New Standard Encyclopedia.

Respondents first contend that the representations in their advertising for the World-Wide Encyclopedia are not false or misleading and therefore cannot constitute bait advertising.

The record contains numerous examples of the advertisements used by respondents. All follow the same format. In each newspaper advertisement there is a certificate which a prospective purchaser completes by filling in his name and address, and returns to respondents. The first sentence in this certificate states: "Without any obligation to me, please send me immediately, pre-paid, for 5 DAYS FREE EXAMINATION, the 10-volume set of the new WORLD-WIDE ENCYCLOPEDIA." We think the obvious meaning of this sentence is that the set will be *mailed* to the prospective customer to permit him five days to decide if he wants to keep it. While the Commission is entitled to draw upon its own experience to determine what meaning is conveyed to the public by particular advertisements,³ this interpretation is supported by a preponderance of the evidence. Of the nine consumer witnesses who testified on this point, seven stated that they expected the set to be mailed to them.⁴

² In *N.L.R.B. v. American Potash & Chemical Corp.*, 98 F. 2d 488 (9th Cir. 1938), respondents attorney's request on the morning of the hearing for a 24 hour continuance, on the ground that he had to be in Federal District Court on another matter, was denied by the Board. As a result, the Board's case went on for about one hour in the absence of any attorney for respondents. The court pointed out that the denial of a motion to postpone the commencement of a hearing may be necessitated by the presence of the assembled witnesses of the Board. The court held that "In the absence of a showing of *prejudicial* error in the exercise of the Board's discretion, we cannot set aside the Board's findings." (Emphasis in original.)

³ *E. F. Drew & Co. v. Federal Trade Commission*, 235 F. 2d 735 (2d Cir. 1956).

⁴ Tr. 183, 210, 268, 313, 332; CX 50, pp. 22, 38.

It is undisputed that it is respondents' practice not to mail the set but to have it delivered to a prospective purchaser's residence by a salesman. Moreover, the salesman does not work for Consumers Products of America, Inc., which sells the World-Wide Encyclopedia, but is an employee of Eastern Guild, Inc., which sells the more expensive New Standard Encyclopedia. The salesman receives no commission or salary for selling or delivering the World-Wide Encyclopedia. His sales commission is entirely dependent upon the sale of the expensive encyclopedia. Not only is the prospective customer misled into believing that he will receive the World-Wide set by mail but, as will be later shown, he does not get a five day free examination of the set, as specifically promised in the advertisement. Instead, he is immediately subjected to a sales pitch for the New Standard Encyclopedia.

With further reference to whether respondents' advertisements constitute a bona fide effort to sell World-Wide, the complaint alleges that a dictionary is not given free to prospective purchasers, as represented.

Respondents' advertising for its World-Wide Encyclopedia is always headlined in very large letters with a "FREE!" offer of a Webster's Dictionary. The certificate which the reader is invited to complete and send in, after stating that the set can be returned in five days without obligation, further states: "FREE GIFT. Also send me the Thumb-indexed Webster's New American Dictionary as a gift. The dictionary is mine FREE without charge." Respondents contend that the advertising representations constitute only an offer to give the dictionary without additional charge to any person who actually purchases one of the two sets of encyclopedias. This argument has no merit, as the meaning attributed to the offer by respondents is clearly contrary to the language of the advertising. We think it obvious that the advertisement is meant to convey the impression that the dictionary may be retained without charge regardless of whether the prospective purchaser buys the encyclopedia. This is the interpretation placed on the advertising by five of the six witnesses who testified specifically on this issue.⁵ Since the evidence establishes that respondents gave the dictionary only on the condition that a person buys a set of encyclopedia, the advertised offer is deceptive and not bona fide.

Also going to the question of the sincerity of respondents' advertising is the specific allegation in the complaint that respondents falsely represent that the offer of the World-Wide Encyclo-

⁵ Tr. 210, 233, 238. CX 50, pp. 24, 37.

pedia for \$9.95 with the "free" dictionary is limited and expires within ten days. Each of the numerous advertisements in this record bears the conspicuous representation: "This Offer Expires In 10 Days!" The hearing examiner found this claim to be deceptive, relying in part on the admission in respondents' answer that they will deliver the encyclopedia "even if the response to the advertisement is not mailed within said ten-day period, if its salesmen are still within the community after said ten days has expired."

The record supports the examiner's findings without relying on respondents' answer. Commission Exhibit 15A-J are copies of respondents' newspaper ads published in the Philadelphia Daily News. These ads, each featuring the ten day limited offer, were published in the months of February, March, May, June and November, 1960, and in April, May, July, August and September, 1961. Obviously, this was a continuing offer and respondents' effort to enhance the value thereof by representing that it was limited to ten days is deceptive.

The complaint further alleges that through the use of the trade name "Educational Foundation," respondents have falsely represented that they operate a nonprofit organization engaged in educational work. The hearing examiner, on the undisputed fact that respondents are engaged in business for profit, found that their use of this trade name has a tendency and capacity to mislead the public. We fully agree with this finding.

The complaint also specifically challenges one other advertising representation. It is alleged that the World-Wide Encyclopedia is not comprehensive, complete, authoritative, new and up to date as claimed. Complaint counsel's proof in support of this charge is the testimony of the expert witness who testified in the absence of respondents' counsel. Contrary to respondents' contention, we do not find that this witness told an "entirely different story" on cross-examination. However, since we have decided not to consider the testimony of this witness, we must conclude that there has been a failure of proof as to this charge.

We have found that respondents have falsely represented that the advertised set of World-Wide Encyclopedia would be mailed to a prospective purchaser, that he would be allowed a five-day free examination of the set before deciding whether to purchase, that he would be allowed to retain the dictionary without charge whether or not he purchased a set of encyclopedia, and that the offer was limited to ten days. These findings fully support the

conclusion that respondents were not making a sincere attempt to sell the World-Wide Encyclopedia through their advertising.

Respondents contend that there must be evidence of actual disparagement of or refusal to deliver⁶ the advertised product in order to establish the bait and switch scheme found by the examiner.

In making this argument, respondents concede that nine of the witnesses testified that the salesmen disparaged the advertised product. However, they contend that the testimony of nine other witnesses fully supports their own description of their sales technique which they describe as follows: The salesman is taught never to disparage the product and to introduce the New Standard Encyclopedia to the customer only if he is given the customer's permission to do so. The customer is advised that a more expensive encyclopedia is available, and if the customer expresses interest in seeing it, it is shown to him. Respondents contend that this does not constitute bait and switch and that the greater weight of the evidence supports respondents' description of their practices.

We have read the record and it is beyond doubt that the examiner's findings on this issue are supported by the evidence. In fact, the particular means of disparagement generally employed by respondents' salesmen clearly stand out.

Not considering the testimony of the consumer witnesses who appeared in the absence of respondents' counsel,⁷ we have in this record the testimony of sixteen witnesses concerning their dealings with respondents' salesmen. Two of these, husband and wife, testified concerning the same transaction. Only four witnesses,⁸ whose testimony we will discuss later, did not testify as to actual disparagement by the salesmen.

The most prevalent method of disparagement stems from the repeated reference in respondents' advertising to the educational value of the World-Wide Encyclopedia for children. Thus, respondents' ads contain such claims as "college education in itself" and

⁶ Respondents state that 5,470 World-Wide Encyclopedias were sold from 1960 through 1965 as compared to 11,937 New Standard Encyclopedias. (This does not include 1961 for which comparable figures were not available.) In our view, these figures support the bait and switch scheme. However, this record clearly establishes that respondents were aware of the investigation initiated in this matter in 1961 and were fully informed as to their practices under consideration. In the previous year, they had sold 268 World-Wide Encyclopedias as compared to 2,334 New Standard. Under these circumstances, we attach little significance to the subsequent increased sales of the World-Wide Encyclopedia.

⁷ To avoid any misunderstanding, the testimony of all of these consumer witnesses fully supports the pattern of disparagement established by the other witnesses.

⁸ Mrs. Wajda, Mrs. Barbara Hawkins, Mr. Oros and Mrs. Lee.

"is especially valuable where children of school age use these notable volumes as an aid in their studies."

The following is typical of the testimony of eight consumer witnesses:⁹

Then he [salesman] brought the older books [World-Wide] in and then he told me, he said, you owe it to your child. These books here, I will be truthful with you, these books are outdated. It wouldn't pay for you to buy these books. It won't do your child any good. You can't find the information for what they are teaching in school today. (Tr. 168.)

I told him [salesman] I had two older grandchildren [in high school] and that the \$10 set of books, he said, was for lower grade of school. (Tr. 253.)

He [salesman] said, first of all, let me ask you how high are your children in school. I told him the only one I had was one girl that goes to Junior High School. He said, that these we have advertised wouldn't be good for her because she is in Junior High, but I have a set I will show you. (Tr. 463.)

He [salesman] said, "What grade is your son in?" I said, "In the sixth grade," and he said, "Well, apparently this won't do him very much good because it is only good up until the fifth grade, but we have another one." (CX 50, p. 39.)

In this last transaction, the salesman was Jack Gerstel, one of the respondent-owners. He was sales manager and it was his duty to train new salesmen. This would appear to explain the same pattern followed by the salesman involved in the other transactions.

In addition to these eight transactions, two other witnesses testified that the salesmen disparaged the advertised set. In one of these instances, the witness testified that the salesman took one volume of the World-Wide Encyclopedia out of his briefcase "And as he handed it to me, he ruffled through the pages, like you do, and he said, 'As you can see, these books aren't complete.'" (Tr. 314.) In the other case, the salesman didn't even show the advertised set to the prospective customer. This witness stated that "He [salesman] mentioned about it, I believe, for a couple of seconds, but said there was no comparison to this set [New Standard]. He knew I would not want it." (Tr. 337.) It is to be noted that in three other transactions, the prospective purchasers were never shown the World-Wide Encyclopedia by the salesmen.

The complaint charges that respondents were not making a bona fide offer to sell the World-Wide Encyclopedia, that the purpose of the offer was to obtain leads as to persons interested in buying an encyclopedia, that respondents do not deliver the encyclopedia on the terms stated in the advertisement, and that

⁹ Mrs. Boyer, Tr. 168; Mrs. Walker, Tr. 206; Mrs. Carhart, Tr. 253; Mrs. Sandelier, Tr. 370; Mrs. Ruth, Tr. 463; Mrs. Buch, CX 50, p. 6; Mrs. Morrow, CX 50, p. 39; Mr. Shire, CX 50, p. 93.

their salesmen disparage the advertised set and make every effort to sell a more expensive set. This is exactly the sales scheme described by ten witnesses in the fourteen transactions documented in this record.¹⁰

As previously mentioned, there were four consumer witnesses who did not testify as to any oral disparagement of the advertised product by respondents' salesmen. However, the testimony of two of these fully supports the bait and switch scheme found by the examiner.

Both of these witnesses were interested in encyclopedias for their children. One of them stated that the book the salesman showed her was "very handled and rough looking" and when she looked at it she told the salesman "right then" that she was not interested. She further testified "And when I looked at the book, that's when I told him, I don't think that book would do her [child] any justice because it was just like a third grade reader. I said, she's in the fifth grade and I don't think that would do her any good, so I wouldn't be interested in it."¹¹

The testimony of another witness is similar. He stated that after the salesman showed him the book "we found that they weren't, you know, books for our child anyway. She was going to high school. And they were a smaller set of books for younger children."¹²

Both of the above witnesses were switched to the more expensive New Standard Encyclopedia. The advertised set was offered to assist children in school without limitation. In our view, respondents' practice of demonstrating a book which in itself discouraged persons from buying for the purpose advertised is sufficient to warrant a finding that respondents' offer was not bona fide.

On this record, we find that the bait and switch charge has been established by substantial evidence, and respondents' appeal on this issue is denied.¹³

¹⁰ We do not include one transaction, testified to by a husband and wife, since there was no disparagement by the salesman. In that instance, the salesman who called in response to the World-Wide coupon offer, delivered the New Standard set to the husband who did not know what his wife had ordered. The salesman had the husband sign the contract, and refused to take the set back when the wife arrived on the scene.

¹¹ Tr. 186.

¹² Tr. 360.

¹³ We find no substance in respondents' argument that the evidence is not sufficient to support the charge for the reason that complaint counsel called only twenty witnesses out of about 58,000 transactions over a six year period. As stated by the court: "The fact that petitioners had satisfied customers was entirely irrelevant. They cannot be excused for the deceptive practices here shown and found, and be insulated from action by the Commission in respect to them, by showing that others, even in large numbers, were satisfied with the treatment

Respondents have also appealed from the examiner's finding that they have used fictitious names and representations in connection therewith which create the false impression that the named organizations are bona fide businesses engaged in financing, servicing, credit reporting or collection services.

The facts concerning respondents' use of fictitious names are not disputed. A purchaser of a set of New Standard Encyclopedias signs a contract which bears the name of the corporate respondent, Eastern Guild, Inc. Shortly thereafter, the purchaser receives a coupon booklet for installment payments together with a covering letter, each of which bears the name of The First National Fidelity Co. The covering letter contains statements such as "We have approved your application for credit * * *" and "In financing your installment purchases through us * * *."

If a purchaser fails to make a payment, he receives a series of three letters on the letterhead of The First National Fidelity Co. The first of these letters makes reference to "the time we purchased your note."

A purchaser who does not respond to The First National Fidelity Co. letters receives letters from the Metropolitan Credit Bureau. These letters state that Metropolitan is a credit reporting agency, that it has been informed by First National Fidelity Co. that the purchaser has not paid as required and that if the account is not adjusted, the purchaser's credit rating will be recorded in its files.

A purchaser who still fails to pay receives letters from Vogt Collection Service (or Agency). The first of these letters states that "the above-named Creditor [First National] claims that you are indebted to them." It further advises the purchaser that "you have the opportunity to deal direct with the claimant [First National]" for a period of three days.

Obviously, the import of these letters is that each of the named organizations is separate and distinct from the others and from the respondents. The testimony of the consumer witnesses fully supports that finding by the examiner.¹⁴

The examiner further found, and it is not disputed on this appeal, that The First National Fidelity Co., Metropolitan Credit Bureau and Vogt Collection Agency are all fictitious names used by respondents and that each is fully owned, operated and con-

petitioners accorded them." *Independent Directory Corp. v. Federal Trade Commission*, 188 F. 2d 468, 471 (2d Cir. 1951).

¹⁴ Tr. 171, 189, 213, 216, 241, 242, 257, 278, 363, 365, 372, 477; CX 50, pp. 32, 69.

trolled by respondents. He concluded that the use of these names by respondents constitutes false and misleading representations.

Respondents present three arguments in their appeal on this issue. First, they contend that all of the fictitious names are properly registered under Pennsylvania law, and doing business in this fashion is permitted and encouraged in that State. Respondents do not go so far as to argue that a fictitious name registered under state law may be used if it has a capacity to deceive the public. Unfair or deceptive acts or practices in commerce are declared unlawful under Section 5 of the Federal Trade Commission Act. We find no authority for the proposition that compliance with a penal state statute, such as is here involved, constitutes a legal defense in a proceeding under the Federal Trade Commission Act. Accordingly, respondents' first argument on this point is rejected.¹⁵

Respondents next argue that the use of the three fictitious names served an obvious and legitimate economic purpose. They state that the individual respondents control a number of other business organizations dealing in installment sales of articles having nothing to do with encyclopedias. They further state that it would be wasteful to maintain separate collection departments for each of these enterprises and therefore all three fictitious names served all of respondents' sales enterprises at a considerable saving of money. This argument requires little comment. The test of legality under Section 5 is whether or not the practice is unfair or deceptive. If it is, the practice must be prohibited regardless of the economies accruing to the perpetrator.

Finally, respondents contend that complaint counsel produced no evidence that they have used their fictitious names as shields against claims of consumers. The short answer to this argument is that such evidence is not necessary to establish a violation. As the Commission stated in answer to this same argument in the *Wm. H. Wise* case, *supra*, "The basis of the complaint against respondents is that they falsely represented PPS as being a bona fide independent collection agency, when, in fact, it was not, and that such misrepresentation has the tendency and capacity to deceive. Nothing more need be proved." It is established by the documents themselves and by the testimony of consumer witnesses that purchasers are led to believe that their accounts have been turned over to independent agencies for payment and collection. Proof that respondents actually forestalled claims through use

¹⁵ In the Matter of *Wm. H. Wise Co., Inc.*, 53 F.T.C. 408 (1956).

of such deception is not required to support an order to cease and desist. This argument by respondent is rejected.

Respondents have presented one final argument which we find to be wholly without substance. They state that as part of its investigation, the Commission mailed to respondents' customers a questionnaire containing leading questions. They argue that the use of such a questionnaire to refresh the recollections of witnesses destroys the reliability and probity of those witnesses and that the examiner erred in failing to strike their testimony.

It is not disputed that questionnaires were sent out by the Commission in the course of the investigation. RX 4 is an example of such questionnaire and the sample covering letter is dated in January 1962. However, there is no evidence from which it can be determined how many of the consumer witnesses even received such questionnaire. More importantly, there is not one shred of evidence that complaint counsel used a questionnaire to refresh the recollection of any witness. Complaint counsel expressly stated on the record that he did not use the questionnaire in talking with the witnesses. His statement is fully supported by the testimony of the only witness who was questioned by respondents' counsel concerning the use of the questionnaire. Accordingly, we reject respondents' argument on this issue.

With the exceptions previously noted, we will adopt the hearing examiner's order. However, on the facts of this case, we believe that the examiner's order should be implemented by an additional prohibition to insure enforcement of our findings of a violation.¹⁶

The evidence establishes that respondents maintain an average of twelve salesmen at any given time. However, in any given year, respondents employ from thirty-five to forty salesmen. Obviously, a strict degree of control is required over these transient employees. Moreover, these persons are employees of Eastern Guild, Inc., which sells the more expensive New Standard Encyclopedia. They receive no commission or salary for selling or delivering the World-Wide Encyclopedia. Their only remuneration is based on sales of the more expensive set. This sales technique requires an affirmative means of assuring that the order will be obeyed. Accordingly, respondents will be required to deliver a copy of our order to all present and future salesmen and to obtain a signed statement from these persons that they agree to refrain from engaging in the practices prohibited by the order and further agreeing that upon failure to do so, they may be dismissed or

¹⁶ *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419 (1957).

their commissions, salaries or other remuneration may be withheld.

On the basis of the foregoing, respondents' appeal from the examiner's ruling that the charge set forth in subparagraph 5 of Paragraph Seven of the complaint has been sustained, is granted. In all other respects, respondents' appeal is denied. An appropriate order will be entered.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the initial decision, and the Commission having determined that said appeal should be granted in part and denied in part, and having further determined that the initial decision should be modified to conform with the views expressed in the accompanying opinion:

It is ordered, That the initial decision be modified by striking therefrom finding number 20 on page 544 thereof and substituting the following:

20. The complaint alleges that respondents have falsely represented that the World-Wide Encyclopedia is comprehensive, complete, authoritative, new and up to date. The evidence adduced by complaint counsel in support of this allegation is the testimony of an expert witness who testified on the first day of the hearings in the absence of respondents' counsel. Although this witness was subsequently cross-examined by respondents' counsel, the Commission has determined not to consider the testimony of any witness who testified when respondents' counsel was not present. Accordingly, the Commission finds that there is not sufficient evidence to support this allegation of the complaint.

It is further ordered, That the initial decision be modified by striking therefrom the last sentence in finding number 28 on page 546.

It is further ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondents Consumers Products of America, Inc., a corporation, and its officers, Eastern Guild, Inc., a corporation, and its officers, Keystone Guild, Inc., a corporation, and its officers, and Jack Weinstock, Nat Loesberg, Jack Gerstel and Louis Tafler, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate

or other device, in connection with the offering for sale, sale or distribution of encyclopedias, books or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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

2. Discouraging the purchase of, or disparaging, any products or services which are advertised or offered for sale.

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

4. Representing, directly or indirectly, that said merchandise will be delivered to prospective purchasers for a five-day free examination or for any other period of time without clearly and conspicuously revealing all of the conditions, obligations or requirements, pertaining to said offer.

5. Representing, directly or indirectly, that any merchandise is "free" or is delivered to or may be retained by purchasers or prospective purchasers without clearly and conspicuously revealing all of the terms, conditions or obligations necessary to the receipt and retention of said merchandise.

6. Representing, directly or indirectly, that any offer is limited as to time: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that such time restriction or limitation was actually imposed and in good faith adhered to by respondents.

7. Representing, directly or indirectly, that The First National Fidelity Co., Metropolitan Credit Bureau, or Vogt Collection Agency or any other fictitious name, or trade names owned in whole or in part by respondents or over which respondents exercise any direction or control, are independent, bona fide financing, collection or credit reporting agencies; or representing in any other manner that delinquent accounts have been turned over to a bona fide, separate collection agency or to a credit reporting agency for collection or for any other purpose, unless respondents in fact have turned such

accounts over to an agency of the nature represented.

8. Using the trade name "Educational Foundation" in connection with respondents' enterprises or representing, in any other manner, that respondents operate any nonprofit organization engaged in educational work.

9. Misrepresenting, in any manner, the kind of offer made to sell merchandise, the terms, limitations or conditions of any offer, or the nature or status of respondents' business or of their collection operations.

10. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of the respondents' products to purchasers; and failing to secure from each such person a signed statement acknowledging receipt of said order and agreeing to abide by the requirements of said order and to refrain from engaging in any of the acts or practices prohibited by said order; and for failure so to do, agreeing to dismissal or to the withholding of commissions, salaries and other remunerations or both to dismissal and to withholding of commissions, salaries and other remunerations.

It is further ordered, That the charge set forth in subparagraph 5 of Paragraph Seven of the complaint be, and it hereby is, dismissed.

It is further ordered, That the hearing examiner's initial decision, as modified and as supplemented by the Commission's opinion, be, and it hereby is, adopted as the decision of the Commission.

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