

**STATEMENT OF COMMISSIONERS PAMELA JONES HARBOUR
AND JON LEIBOWITZ
(CONCURRING IN PART AND DISSENTING IN PART)**

*In the Matter of Kmart Corporation, Kmart Services Corporation,
and Kmart Promotions, LLC
File No. 062-3088*

Today, the Commission approves a consent agreement with Kmart Corporation and two of its subsidiaries (collectively, “Kmart”) to settle charges that Kmart misrepresented material aspects of its gift cards and failed to disclose that, after two years of non-use, Kmart would deduct a \$50 fee from the gift card and a \$2.10 monthly fee thereafter. We concur in the Commission’s decision to bring an action and impose certain injunctive provisions upon Kmart, but dissent in part from the consent agreement because we believe the remedy should include disgorgement of ill-gotten profits. Otherwise, Kmart remains unjustly enriched by a substantial amount of buried “dormancy fees” while many consumers will have lost the chance for reimbursement because they long ago threw out their seemingly worthless gift cards in frustration.¹

Gift cards have become enormously popular with consumers and generated nearly \$28 billion in sales during the 2006 holiday season.² Gift card dormancy fees and expiration dates are material restrictions that affect the value of the cards. These restrictions must be clearly disclosed so that consumers can make informed decisions, whether they are purchasing the cards or receiving them as a gift.

The final order settles the Commission’s allegations that Kmart deceptively advertised its gift cards by, among other things, misrepresenting the existence of any expiration dates or fees associated with the cards. Not only did Kmart claim that the gift cards could be used “like cash at all Kmart locations,” but its website also affirmatively misled consumers by stating that the Kmart gift cards “never expire.” We agree that Kmart’s alleged conduct justifies the order’s injunctive provisions.

But we believe the order should go further. It should require Kmart to disgorge the profits of its unlawful behavior, provide more complete consumer redress, or a combination of

¹ Kmart applied a dormancy fee of \$2.10 per month to the balance of every Kmart gift card that went unused for 24 months – both retroactively (\$50.40) and prospectively. Consequently, cards worth \$50 or less were rendered worthless if unused for two years. Imagine stashing a \$10, \$25, or \$50 gift card in a drawer and then pulling it out two years later for a trek to shop at Kmart, only to learn at the check-out counter that the card had no value. Kmart recently discontinued charging this dormancy fee after learning about the FTC’s investigation, but only on a prospective basis.

² Press Release, Nat’l Retail Fed’n, *Gift Card Spending Surpassed Expectations as Last-Minute Shoppers Looked for Quick, Easy Gifts; Most Consumers Have Spent Less Than Half of Card Values* (Jan. 23, 2007).

both.³ More than three decades ago, in sponsoring the Magnuson-Moss Act extending the Commission's authority under Section 19 to obtain monetary remedies, Senator Magnuson explained that the Commission cannot "rely merely upon a slap of the violator's wrist to maintain fair play in the marketplace" and that "[a] mere cease-and-desist order has frequently let a wrongdoer keep his ill-gotten gains."⁴ The same rationale holds true today.

In this case, Kmart deducted dormancy fees from consumers' gift cards. It failed to give adequate notice. In many instances, Kmart's actions rendered unused or partially used cards valueless, at significant monetary benefit to Kmart but considerable monetary detriment to consumers. Today's final order, in our opinion, stops the deceptive practices but does not completely cure the consumer injury or fully excise Kmart's ill-gotten gains. Pursuant to the order, Kmart may not assess additional dormancy fees on previously activated gift cards and must reimburse previously assessed dormancy fees *if* consumers complain *and* can provide the gift card number. Many consumers no doubt already have thrown out their gift cards and will have no remedy under this settlement. Moreover, the order does not require Kmart automatically to restore previously deducted dormancy fees (absent consumer inquiries) or disgorge the windfall profits it made from these fees. Although Kmart's reimbursement practices have been improved by the Commission's efforts, in our opinion the refund policy, without additional monetary relief, is still too little, too late.

We commend staff for pursuing Kmart's failure to disclose its gift card dormancy fees and for challenging Kmart's affirmative misrepresentations that its gift cards do not expire. For the foregoing reasons, however, we respectfully dissent in part from the final order.

³ Commission consent orders have required advertisers to pay redress, offer refunds, or disgorge profits, and it is appropriate to do so here. *See, e.g., Hi-Health Supermart Corp.*, FTC Dkt. No. C-4136 (May 12, 2005) (requiring \$450,000 in redress); *ValueVision Int'l, Inc.*, FTC Dkt. No. C-4022 (Aug. 24, 2001) (requiring company to offer refunds to all purchasers of the challenged products); *Weider Nutrition Int'l, Inc.*, FTC Dkt. No. C-3983 (Nov. 17, 2000) (requiring \$400,000 in redress); *Dura Lube, Inc.*, FTC Dkt. No. D-9292 (May 5, 2000) (requiring \$2 million in redress); *Apple Computer, Inc.*, FTC Dkt. No. C-3890 (Aug. 6, 1999) (requiring company to honor representation that customers would receive free support for as long as they own the product); *Azrak-Hamway Int'l, Inc.*, 121 F.T.C. 507 (1996) (requiring toymaker to offer refunds); *L & S Research Corp.*, 118 F.T.C. 896 (1994) (requiring \$1.45 million in disgorgement).

⁴ 119 CONG. REC. 29480 (1973).