

Complaint

81 F.T.C.

IN THE MATTER OF

SUNSHINE ART STUDIOS, INC., ET AL.*

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket No. 8825. Complaint, Dec. 8, 1970—Decision, Nov. 30, 1972*

Order requiring three Springfield, Massachusetts, sellers of greeting cards and an affiliated collection agency, among other things to cease shipping and seeking payment for unordered merchandise; making deceptive "free" offers; using misleading order forms; sending substitute shipments without offering refunds; and collecting delinquent accounts through subterfuge.

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 Sunshine Art Studios, Inc., Junior Sales Club of America, Inc., Sales Leadership Club, Inc., and Guardian Collection Agency, Inc., corporations, and Ryland E. Robbins, individually and as an officer 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. Respondents Sunshine Art Studios, Inc., Junior Sales Club of America, Inc., Sales Leadership Club, Inc., and Guardian Collection Agency, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with their principal office and place of business located at 45 Warwick Street, Springfield, Massachusetts.

Respondent Ryland E. Robbins is an individual and an officer of each of the corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondents.

Respondents cooperate and act together in carrying out respondents' business as 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 greeting cards to the public and to retailers for resale to the public

*The complaint is reported as amended by the hearing examiner's order of Feb. 12, 1971, reflecting the change of name of Trans-American Collection Agency, Inc. to Guardian Collection Agency, Inc.

and in the collection of allegedly delinquent accounts arising therefrom.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their products, when sold, to be shipped from their place of business in the Commonwealth of Massachusetts to purchasers and prospective purchasers thereof located in various other States of the United States, 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 business, respondents ship greeting cards to many persons who have neither requested nor consented to the shipment of respondents' greeting cards to them. Respondents also ship greeting cards to many persons who have specifically requested that respondents not ship greeting cards to them.

Enclosed with the greeting cards sent as aforesaid is an "approval invoice" which sets forth the price which respondents expect to obtain for the cards and bears the following language:

Your Special Price Bill

Here are the beautiful new money-making Sunshine Christmas Assortments you requested, sent to you on approval and billed at a Special Offer Price of only \$3.75. Save money by sending your payment now. Pay only \$3.75 and return this invoice to us within ten days and we will mark this bill Paid In Full. SAVE TODAY.

PAR. 5. By and through the use of the statements and representations as set forth in Paragraph Four and other statements and representations contained in form letters and notices sent to persons who fail to respond to such approval invoices, respondents represent, directly or by implication, that:

1. Some contract, agreement or understanding exists between respondents and the recipient of the greeting cards.
2. The recipient of the cards is under an obligation to pay for the cards or return them to respondents.

PAR. 6. In truth and in fact:

1. No contract, agreement or understanding exists between respondents and the persons to whom respondents have sent cards under the circumstances set forth in Paragraph Four hereof.
2. Such persons are not under any obligation to return the aforesaid cards to respondents or to pay for them unless the recipient decides to purchase them or use them and not then if the law of the recipient's state permits him to use unsolicited merchandise without payment.

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

PAR. 7. In the further course and conduct of their business, respondents send, or cause to be sent, to persons to whom respondents have shipped greeting cards and from whom respondents have not received payment, various form letters and notices seeking payment from such allegedly delinquent debtors. Among and typical, but not all inclusive, of the statements and representations contained in such letters and notices are the following:

- (a) Guardian Collection Agency, Inc.
 45 Warwick Street
 Springfield, Massachusetts 01101
- | | |
|----------------|-----------------|
| Collections | Repossessions |
| Tracing | Personal Calls |
| Credit Reports | Wages Garnished |

Your account with Sunshine Art Studios, Inc., of Springfield, Massachusetts, has been referred to us due to nonpayment of your 1967 All-Occasion Sample Assortment.

The sample assortments were sent to you on approval; since you did not return them, it has been assumed that you were using the samples and that you intend to pay for them.

The Sunshine Art Studios have sent you five notices which you have not acknowledged. It now becomes our task to insist upon payment.

- (b) Guardian Collection Agency, Inc.
 45 Warwick Street
 Springfield, Massachusetts 01101

The Junior Sales Club of America of Springfield, Massachusetts has placed your long overdue account with us for IMMEDIATE SETTLEMENT.

If we do not receive your payment of \$9.50 within 15 days, action may be started by our attorney without further notice.

- (c) Guardian Collection Agency, Inc.
 45 Warwick Street
 Springfield, Massachusetts 01101

FINAL NOTICE

You have failed to settle your long-overdue account with our client, Junior Sales Club of America, Springfield, Massachusetts, although we previously wrote to you a detailed letter concerning this important obligation.

To avoid action by our attorney, we urge you to immediately send a \$9.50 money order or check made payable to the Junior Sales Club of America. DO IT TODAY.

PAR. 8. By and through the use of the aforesaid statements and representations contained in Paragraph Seven hereof, and others of

similar import and meaning but not specifically set forth herein, respondents represent, directly or by implication, that:

1. Allegedly delinquent accounts have been assigned to an independent, bona fide collection agency, Guardian Collection Agency, Inc.
2. If payment is not received, Guardian Collection Agency, Inc. will refer the customer's account to an attorney for institution of legal or such other legal steps as may be necessary to collect the account.

PAR. 9. In truth and in fact:

1. The accounts of those persons who receive form letters and notices on the letterhead of Guardian Collection Agency, Inc. have not been assigned to an independent bona fide collection agency. Guardian Collection Agency, Inc. is a name used by respondents for the purpose of disseminating collection letters.
2. If payment is not received, allegedly delinquent customers' accounts are not referred to an attorney for institution of legal action or other legal steps. Respondents make no further efforts to collect from persons receiving such letters who do not remit the sum of money demanded.

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

PAR. 10. In the further course and conduct of their business, respondents publish, in magazines and other periodicals intended to be read by children, advertisements using the name of respondents Sales Leadership Club, Inc. Through such advertisements, respondents solicit children to sell respondents' greeting cards, such cards being shipped to the children upon receipt of pre-paid orders therefor.

In connection with their efforts to induce children to sell respondents' cards under the name of the Sales Leadership Club during the 1969 Christmas season, respondents made the following statements and representations in advertisements and other printed material:

IT'S EASY TO BE A SALES LEADER GET FABULOUS PRIZES OR CASH

* * * * *

For many years, thousands like you have followed the Sales Leadership Club plan to success, just by showing our easy-to-carry personalized Christmas Card Album to friends, relatives, neighbors and businessmen—

EACH CARD WITH NAME IMPRINTED FREE!

* * * * *

AMAZING VALUE. TOP QUALITY CARDS WITH NAME IMPRINTED FREE FOR LESS THAN 6¢ EACH.

YOUR CUSTOMERS WILL RECEIVE EITHER 25, 30, 40 or 50 IMPRINTED CARDS OF ONE DESIGN IN EACH BOX ORDERED.

PAR. 11. By and through the use of the statements and representations as set forth in Paragraph Ten hereof, and others of similar im-

port and meaning but not specifically set forth herein, respondents represented, directly or by implication, that:

1. All customers ordering cards from sales representatives of Sales Leadership Club would receive imprinted cards.

2. The imprinting was free.

PAR. 12. In truth and in fact:

1. During the 1969 Christmas season, respondents shipped a substantial number of cards without imprinting to sales representatives who had submitted prepaid orders for imprinted cards. Before making such shipments, respondents failed to advise their sales representatives that their orders for imprinted cards would not be filled and failed to offer those sales representatives a refund. Respondents' failure to take these actions had the capacity and tendency to mislead and deceive such sales representatives into the mistaken belief that they had no choice but to accept the non-imprinted cards shipped to them and were not entitled to a cash refund.

2. The imprinting was not free because the price of the cards included provision for the cost of imprinting.

Therefore, the statements, representations and practices as set forth in Paragraphs Ten and Eleven hereof were, and are, false, misleading and deceptive.

PAR. 13. Respondents' practice of sending merchandise to persons who have not requested it and respondents' efforts to collect therefor has the capacity and tendency to mislead many persons, to create doubts in their minds as to their rights and legal obligations in respect to such merchandise and caused many persons to pay for the merchandise because of the confusion and doubt so generated. The practice now has, and has had, the capacity and tendency to harass, inconvenience, intimidate and coerce persons into purchasing and paying for merchandise sent by respondents.

PAR. 14. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of products of the same general kind and nature as those sold by respondents.

PAR. 15. The use by respondents of the aforesaid false, misleading statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

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Initial Decision

PAR. 16. 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. John McCarty, Mr. Martin J. Dolan, Jr., and Mr. Richard J. Walsh, Boston, Mass. supporting the complaint.

Mr. Edward J. Barry, Robinson Donovan Madden & Barry, Springfield, Mass. for respondents.

INITIAL DECISION, BY DONALD R. MOORE, HEARING EXAMINER

DECEMBER 20, 1972

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¹ Name changed to Guardian Collection Agency, Inc. See Order Amending Complaint dated February 12, 1971.

PRELIMINARY STATEMENT

The complaint in this proceeding, charging unfair and deceptive practices in the sale of greeting cards, was issued on December 8, 1970, and was duly served on respondents. Thereafter, the complaint was amended to reflect the change of name of the respondent Trans-American Collection Agency, Inc., to Guardian Collection Agency, Inc. (Order Amending Complaint, February 12, 1971). Respondents filed their answer on March 1, 1971, in which they admitted certain of the factual allegations of the complaint but denied generally any violation of law. The complaint was further amended by Pre-Hearing Order filed on March 24, 1971, and respondents filed their amended answer on March 25, 1971.

After a prehearing conference and various prehearing procedures, 23 days of hearings were held between August 17, 1971, and September 17, 1971, at Springfield, Massachusetts.

At the hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. During the course of the case in support of the complaint, respondents offered the testimony of two witnesses and offered in evidence certain documents, but did not otherwise avail themselves of the opportunity to present a defense; they rested their case at the close of the Government's case-in-chief. The testimony and evidence presented have been duly recorded and filed.

The parties were represented by counsel and were afforded full opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence bearing on the issues.

After the presentation of evidence, proposed findings of fact and conclusions of law and a proposed form of order were filed by counsel supporting the complaint and by counsel for respondents, together with briefs in support thereof. Reply briefs were also filed. Those proposed findings not adopted, either in the form proposed or in substance, are rejected as lacking support in the record or as involving immaterial matters.

Having heard and observed the witnesses and having carefully reviewed the entire record in this proceeding, together with the proposed findings and briefs filed by the parties, the hearing examiner makes the following findings of fact, enters his resulting conclusions, and issues an appropriate order.

As required by Section 3.51(b)(1) of the Commission's Rules of Practice, the findings of fact include references to the principal supporting items of evidence in the record. Such references are intended

to serve as convenient guides to the testimony and to the exhibits supporting the findings of fact, but they do not necessarily represent complete summaries of the evidence considered in arriving at such findings. Where references are made to proposed findings submitted by the parties, such references are intended to include their citations to the record unless otherwise indicated.

References to the record are made in parentheses, and certain abbreviations are used as follows:

- CB—Brief of Counsel Supporting the Complaint in Support of Proposed Findings of Fact, Conclusions of Law and Order.
 CPF—Proposed Findings of Fact, Conclusions of Law and Order filed by Counsel Supporting Complaint.
 CRB—Reply Brief of Complaint Counsel.
 CX—Commission Exhibit.
 RB—Respondents' Brief.
 RPF—Respondents' Proposed Findings of Fact and Conclusions of Law.
 RRB—Respondents' Reply Brief.
 RX—Respondents' Exhibit.
 Tr.—Transcript.

References to the proposed findings and briefs of counsel are to page numbers, preceded by one of the abbreviations listed above. References to testimony sometimes cite the name of the witness and the transcript page number without the abbreviation "Tr."—for example, Robbins 134.

FINDINGS OF FACT

I. Respondents and Their Business²

Respondents Sunshine Art Studios, Inc. (Sunshine); Junior Sales Club of America, Inc. (JSC); Sales Leadership Club, Inc. (SLC); and Guardian Collection Agency, Inc. (Guardian), are corporations organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Massachusetts.

The principal office and place of business of all the respondents is located at 45 Warwick Street, Springfield, Massachusetts.

Respondent Ryland E. Robbins is an individual who serves as an officer (treasurer) and director of respondents Sunshine, JSC, and

²The facts found herein are essentially undisputed and are supported by the record as follows: Complaint, as amended, and Respondents' Answer, as amended; Order Amending Complaint (February 12, 1971); CXs 157, 730 A-H; Robbins 134-172, 410-16, 1910-42, 1950, 1953-2014, 2020-24, 2035-2198; O'Hara 1791-92; Ward 1399-1423, 1557-58; Pray 1622-24, 1681-82, 1694-95, 1704-08, 1769-71, 1823-25.

SLC and as a director of respondent Guardian.³ He is also a principal stockholder in Sunshine, JSC, and SLC.

Respondents Sunshine, JSC, and SLC are now, and for more than 10 years have been, engaged in the advertising, offering for sale, sale, and distribution of greeting cards to the public, and respondents Sunshine and JSC, in the collection of allegedly delinquent accounts arising from such sales. Each such respondent ships greeting cards from its place of business in the Commonwealth of Massachusetts to prospective purchasers and to purchasers thereof located in various other States of the United States. Each such corporate respondent maintains and for more than 10 years has maintained a substantial course of trade in greeting cards in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent Guardian Collection Agency, Inc., is now, and for more than 10 years has been, engaged in the collection of outstanding accounts arising from transactions involving shipments of greeting cards by respondent Sunshine and respondent JSC and maintains and for more than 10 years has maintained a substantial course of trade in such services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

In the course and conduct of their business, respondents Sunshine, JSC, and SLC have been and now are in substantial competition in commerce with corporations, firms, and individuals engaged in the sale of products of the same general kind and nature as those sold by respondents.

More detailed information about each of the respondents is set forth in the findings that follow.

A. *Sunshine Art Studios, Inc.*

Sunshine Art Studios, Inc., is the successor corporation to a company founded in 1926 under the direction of E. I. Robbins, who was the grandfather of respondent Ryland E. Robbins. In about 1933, Willard S. Robbins, the father of respondent Ryland E. Robbins, joined the company. The business was conducted by these two men until about 1944, when E. I. Robbins died. Respondent Ryland E. Robbins became associated with the company in 1946. On January 29, 1953, respondent Sunshine was incorporated under the laws of the Commonwealth of Massachusetts. It is engaged in the business of manufacturing and selling greeting cards and related paper products.

The officers of respondent Sunshine are Willard S. Robbins, president; Grace B. Robbins (wife of Willard S. Robbins and mother of

³ Compare Respondents' Answer, Paragraph One; CX 730 C; and Robbins 1930, 1937, 2086-88.

respondent Ryland E. Robbins), vice-president; and respondent Ryland E. Robbins, treasurer and general manager. These individuals also constitute the board of directors of respondent Sunshine and are the only stockholders. Of a total of 350 shares of stock outstanding, respondent Ryland E. Robbins owns 140 shares, with the remaining 210 shares held between Willard S. Robbins and Grace B. Robbins.

In addition to general offices at 45 Warwick Street, Springfield, Massachusetts, respondent Sunshine has a manufacturing plant in East Longmeadow, Massachusetts. Most of the greeting cards sold by respondent Sunshine are manufactured, folded, boxed and shipped from the East Longmeadow plant.

Sunshine sells greeting cards to respondents JSC and SLC; to some 200 wholesalers; to 2,700 organizations, including schools and churches; and to 11,000 "direct dealers," consisting primarily of individuals—including housewives and children—who are seeking supplemental income. In addition, it sells to 18,000 business and professional accounts for their own use rather than for resale.

Although Sunshine annually enrolls some 20,000 dealers, who request samples on approval, about half of these are lost each year. In other words, half of them make no sales other than of the samples. Thus, there are about 11,000 active dealers, who have placed one or more orders for cards after receiving samples. These continuing dealers account for 75 percent of total dealer business.

Most dealer customers are obtained through magazine advertising, with about 5 percent resulting from direct mail solicitation.

Total annual sales of Sunshine have ranged from \$3.5 million in fiscal 1967 to more than \$5 million in fiscal 1971. Sales to direct dealers account for approximately 15 percent of total Sunshine sales.

B. Junior Sales Club of America, Inc.

Junior Sales Club of America, Inc., was incorporated under the laws of the Commonwealth of Massachusetts on June 2, 1955. Its officers are Willard S. Robbins, president; Ryland E. Robbins, treasurer; and Grace B. Robbins, clerk. These individuals also constitute the board of directors, and two of them are stockholders. There are 100 outstanding shares of stock distributed as follows: Willard S. Robbins, 40; Ryland E. Robbins, 40; and Arthur O'Hara, 20.⁴

JSC sells all-occasion cards and Christmas cards on a national basis, with annual sales of approximately \$1 million. As indicated by the corporate name, it operates as a club that appeals to children from age 10 to early teen age to sell cards in order to win prizes or to earn

⁴ The record identifies this stockholder as B. P. O'Hara (Robbins 1926), but see O'Hara 1800; RPF 9; CPF 3.

cash. Its solicitations for club membership are made through published advertising in comic books and in such magazines as Boys' Life and American Girl and through direct mail literature. Boxes of cards to be sold are shipped only on specific written order and are accompanied by an invoice specifying that the cards are to be paid for or returned within 30 days.

In each of the years 1967 through 1970, JSC had 50,000 names in its active file and 200,000 names in its inactive file. The inactive file includes those who have sold and paid or who have returned the cards.

Complaint counsel do not challenge any aspect of the JSC operation other than its use of the Guardian Collection Agency device in dealing with delinquent accounts (see *infra*, p. 23 [p. 859, herein]).

C. Sales Leadership Club, Inc.

Respondent Sales Leadership Club, Inc., was incorporated under the laws of the Commonwealth of Massachusetts on October 21, 1958. Its officers are Willard S. Robbins, president; Ryland E. Robbins, treasurer; and Grace B. Robbins, clerk. These three individuals also constitute the board of directors. The outstanding capital stock (110 shares) is equally divided between Willard S. Robbins and Ryland E. Robbins.

By means of published advertising and direct mail solicitations, respondent SLC enrolls children to sell Christmas cards in order to win prizes or to earn money. Such advertising has appeared in American Girl, a magazine published by the Girl Scouts of America; in Boys' Life, a magazine published by the Boy Scouts of America; and in Gold Key Comics. The cards are sold pursuant to prepaid orders.

The business of SLC is substantial, with approximately 35,000 to 50,000 customers and a total annual sales volume ranging from \$4 million to \$5 million.

D. Guardian Collection Agency, Inc.

Guardian Collection Agency, Inc., was incorporated under the laws of the Commonwealth of Massachusetts on July 10, 1961. It was originally known as Trans-American Collection Agency, Inc., but its name was changed to Guardian Collection Agency, Inc., in October 1970. Its stock is wholly owned by respondent Sunshine. Respondent Ryland E. Robbins was treasurer from 1961 to 1965,⁵ but the present officers are his father and mother. These three individuals also constitute the board of directors.

⁵ See footnote 3, p. 4 [p. 844 herein].

E. *Related Corporations*

Other related corporations (not named as respondents) include the following:

Sunshine Art Studios of California, Inc. (Sunshine of California), all of the stock of which is owned by respondent Sunshine. Its principal office is at El Monte, California, with plants there and at Livermore, California. It is engaged in the manufacture and sale of greeting cards and engages in business transactions with respondents Sunshine and SLC.

Sunshine Realty Corporation (Sunshine Realty), which owns the land and the building where the offices of the respondents are located. Its officers include Willard S. Robbins as president and Ryland E. Robbins as treasurer. The board of directors consists of Ryland E. Robbins and his parents, and these three also constitute the only stockholders. Ryland E. Robbins owns 220 shares, and the remaining 780 shares are owned by his parents.

Windsor Art, Inc. (Windsor), a corporation of which Willard S. Robbins is president and respondent Ryland E. Robbins is treasurer. These two individuals are directors of Windsor along with Grace B. Robbins. The outstanding capital stock of 1,000 shares is equally divided between Willard S. Robbins and Ryland E. Robbins. Windsor sells greeting cards, some of which are purchased from respondent Sunshine.

Northeast Land Development Trust (Northeast Land), which owns the premises that houses the Sunshine plant at East Longmeadow, Massachusetts. Shareholders are respondent Sunshine, respondent SLC, Sunshine Realty, and possibly Windsor. The trustees are respondent Ryland E. Robbins and his parents.

F. *Cooperation of Respondents in a Single Enterprise*

In the words of the complaint (Paragraph One), respondents "cooperate and act together in carrying out respondents' business." Despite the corporate forms utilized, respondents constitute a single economic entity—a unitary enterprise—designed to sell greeting cards manufactured by respondent Sunshine.

Just as Guardian constitutes a Sunshine subsidiary as a matter of law, so JSC and SLC constitute Sunshine subsidiaries as a matter of fact. They are, in effect, sales subsidiaries of Sunshine.

More broadly, all the corporate respondents are instrumentalities of the Robbins family. The only stockholders of the greeting card companies (Sunshine, JSC, and SLC) are Ryland E. Robbins and his parents, except for a 20 percent stock ownership in JSC held by a former employee. The distribution of the profits realized on the opera-

tions of the corporate respondents is not detailed in this record, but there is no dispute that such profits have necessarily inured to the benefit of respondent Ryland E. Robbins and to his father and his mother (Robbins 163-72; Tr. 2197-98). And these 3 members of the Robbins family constitute the officers and directors of all the respondent corporations.

With such close family ownership and control, corporate formalities have not been observed. Meetings of stockholders and of directors, as such, have been infrequent and informal, with no minutes kept (Robbins 142-48; 2128-29; O'Hara 1800-01).

Although each corporation has separate general ledgers and subsidiary financial records, these are maintained by the Sunshine comptroller under the supervision of Ryland E. Robbins (Robbins 1986-92, 2110-13; Pray 1702-03). These records reflect financial transactions between respondents and between respondents and other Robbins-owned entities, that warrant a finding that they have been using a common treasury (Robbins 2083-2105, 2116-70, 2190-92).

In these transactions, as well as in other joint arrangements, respondents and other family-owned entities cooperate with one another on an informal basis. In effect, they have pooled their physical and financial resources in conjunction with other family-owned enterprises.

Employees of one corporate respondent perform work for another—sometimes for 2 others. Salaries are paid out of a consolidated payroll account, and they are not necessarily allocated in proportion to the duties performed by various personnel for two or more of the respondent corporations (Robbins 1934-36, 1982-83, 1991-92, 1997-98, 2037-44, 2113-16, 2135-36, 2142; Ward 1389-90, 1399, 1539-43, 1551-52; Pray 1607-17, 1690-94, 1720-31, 1867-68, 1906; O'Hara 1776-77, 1804-05).

Supplies for each corporation are ordered on a consolidated basis through Sunshine (Robbins 1987-91; Pray 1618-20).

Moreover, in view of the common ownership and control of the corporate respondents, it is clear that respondents do not deal at arms length with one another.

For example, when the Sunshine printing plant found it impossible to deliver all the name-imprinted Christmas cards ordered by SLC in 1969 (*infra*, p. 27 [p. 861, herein]), there was a conference to determine what course of action to follow. The decision to ship the cards without the names imprinted was made jointly by Willard S. Robbins and Ryland E. Robbins in conjunction with the manager of the Sunshine printing plant. According to Ryland E. Robbins, his

father (Willard S. Robbins) was participating as president of SLC, although he was also president of Sunshine, whereas Ryland E. Robbins was involved as general manager of Sunshine, although he was also treasurer of SLC (Tr. 2053). Some of the name-imprinting was also being done by Sunshine of California, and Ryland E. Robbins directed that company to ship the SLC cards without names imprinted. He said he issued this order in his capacity as treasurer of SLC (Tr. 2036).

An even more striking anomaly was developed in testimony concerning financial transactions between SLC and Sunshine. Ryland E. Robbins testified that as treasurer of SLC, he authorized SLC to make a "progress payment" to Sunshine and that, as general manager and treasurer of Sunshine, he did not object to—in fact, he welcomed—receiving the money on behalf of Sunshine (Tr. 2123–24).

The unitary nature of the operation and the blurring of corporate lines of demarcation are also suggested in the lack of concern over the allocation of costs as among the various corporate respondents.

Another evidentiary fact that sheds light on the family and corporate relationships is that Ryland E. Robbins was not sure whether he was currently an officer of respondent Guardian (see footnote 3, p. 4 [p. 844, herein], *supra*).

Although, in selling greeting cards to the public, Sunshine, JSC, and SLC each has its own distinguishable type of sales and advertising program, each is designed to sell greeting cards printed by respondent Sunshine (Robbins 2006; Pray 1620–21). All three share in Sunshine arrangements and facilities for shipping by mail or by United Parcel Service the cards that they sell (Robbins 1999–2000, 2055–56; Pray 1686–88, 2043, 2054–58).

The manner in which Sunshine bills its affiliates for products and services furnished and the manner in which such intra-enterprise accounts are handled emphasize the unitary nature of the operation. (Compare RPF 7–8.)

Each greeting card company utilizes the same advertising agency. When two or more of them advertise in the same publication, each is treated as an "affiliate" of the other, and as a result, each knowingly enjoys a lower advertising rate as a result of volume discounts or frequency discounts based on the cumulation or the combination of the separate advertisements placed by both or by all 3. (Musen 1181–84, 1189, 1193–A, 1219–1317, 1379–85; Eiger 246, 1642–43; Johnson 269–71, 325–33, 353–55, 361; Dorr 1451–84; Pray 1737–38; CXs 69 A–F, 80–94, 113, A–D, 116, 119, 120, 124, 127, 128, 132, 134, 135, 137, 138, 140.)

Sunshine and JSC both utilize Guardian as a means of collecting

allegedly delinquent accounts, and SLC has used it in efforts to collect on bad checks. Guardian has no separate employees or office facilities, and its functions are carried out by employees of Sunshine and JSC. (Robbins 1930-31, 1992-97, 2118-20; Ward 1389-90, 1399, 1539-40, 1551-52; Pray 1720-31, 1765-67, 1875-78)

The respondent corporations have their offices in the same office building which is owned by another Robbins family corporation (Sunshine Realty), and they are served by a common telephone switchboard. All utilities for this building are billed to Sunshine. (CX 730 A-C; Robbins 148, 1931-33, 2006-07)

Ryland E. Robbins is the general manager of Sunshine, while Wilder T. Pray is the general manager of both JSC and SLC and is in turn subject to the supervision and control of Ryland E. Robbins (CX 730 A-D; Robbins 1985; Pray 1609-10, 1659, 1903-04).

Sunshine is the only corporate respondent that is a member of the regional Better Business Bureau, but the executive director of the bureau considers that such membership also includes JSC and SLC. The Better Business Bureau has operated on the assumption that JSC and SLC are subsidiaries or divisions of Sunshine and has so indicated in communications to the public, apparently with the knowledge of respondents. (Webb 1065-67, 1088-1109; Robbins 2012-14; CX 727)

The principal circumstance suggesting corporate separateness rather than togetherness is the fact that the respondent corporations file separate income tax returns rather than a consolidated tax return (Robbins 2179-83). This is a factor to be taken into account, but it does not negate the finding, based on numerous other factors, that respondents essentially constitute a single enterprise.

G. Role of Individual Respondent

The evidence does not permit a finding that respondent Ryland E. Robbins alone formulates, directs, and controls the acts and practices of the corporate respondents as alleged in Paragraph One of the complaint, or that the corporate respondents are his alter ego, as contended by complaint counsel (CPF 44). However, the evidence does permit such a finding as to Ryland E. Robbins jointly with his father, Willard S. Robbins.

Even without uncontradicted evidence that Willard S. Robbins, as president of all the corporate respondents, participates in and has the final word as to corporate decisions, the examiner would have to assume that respondent Ryland E. Robbins, as his son and as a subordinate officer, is subject to the direction and control of Willard S. Robbins. Nevertheless, Ryland E. Robbins has played a key role. While his decisions are subject to veto, it is clear that they are frequently

final. Moreover, the record indicates a division of responsibility between father and son that is significant for the purposes of the proceeding: Willard S. Robbins is "active in the creative end of the business" whereas Ryland E. Robbins is more active in the business and financial end (Tr. 1985-86).

It is undisputed that Ryland E. Robbins has established the sales policies of Sunshine and that as treasurer, director, and general manager, he bears a large measure of responsibility for its operations. And although he may have delegated more authority to subordinates in JSC and SLC, the record as a whole indicates that, as a stockholder, officer, and director, he likewise bears a large measure of responsibility for their business operations, as well as for the use of the Guardian collection letters.

Ryland E. Robbins has been deeply involved in the important business affairs of all the corporate respondents—in the hiring of personnel, in the fixing of salaries, in the financial transactions, in the purchase of supplies, in the handling of advertising, and in the capacity of corporate spokesman. And although Arthur O'Hara was largely responsible for the organization and development of JSC, SLC, and Guardian, he operated under the supervision and control of Ryland E. Robbins, whom he considered to be the general manager of the entire operation. Mr. O'Hara's tenure was from 1949 to 1965, but the role of Ryland E. Robbins has not materially changed, except in detail, in the ensuing 6 years.

(Record references: CX 730 A-D; Robbins 134-37, 418-20, 1935-42, 1950-63, 1981-87, 2005, 2019-22, 2036-37, 2051-53, 2089-90, 2099-2100, 2104-05, 2128-29, 2149-50; O'Hara 1773-98, 1802-03, 1807, 1813-17; Pray 1609-10, 1625, 1659, 1676, 1727-28, 1903-04; Ward 1389-95; Musen 1189-93, 1317, 1382; Johnson 299-304, 356-58; CX 461; Dorr 1453-54, 1458-61; McIntyre 202-06, 213; Webb 1065-76, 1086, 1095-1106)

II. The Challenged Practices

A. *Unordered Merchandise and Dunning Communications*

Respondent Sunshine has not only shipped cartons of greeting cards "on approval" to many persons who had neither requested nor consented to the receipt of such cards, but has also made shipments to persons who had specifically requested that Sunshine not send any more cards to them. The recipients of such unordered shipments were persons who had responded to advertisements published by Sunshine in youth magazines such as *Boys' Life*, *American Girl*, *Teen*, and *Young Miss*, as well as in a variety of magazines for adults. These advertisements represented that persons who sold Sunshine greeting

cards could earn substantial amounts of money in their spare time. The readership of some of the publications carrying Sunshine advertisements had an age level that ranged from 10 to 15 years, and the circulation of such publications was substantial. (CX 730 D-E; CXs 1-3, 5, 6, 8, 9, 13, 15, 22, 728; Musen 1320-23, 1334, 1338-40; McIntyre 184; CXs 16-21, 64-67, 69 A-F; Ward 1404, 1575-76; O'Hara 1777-78)

Typical advertisements published by Sunshine before December 1968 had contained coupons ("old coupons") in which the would-be dealer requested that Sunshine send "box assortments on approval" (CXs 2, 3, 6, 481) or "Sample Boxes on approval" (CXs 5, 156).

Subsequent to December 1968, Sunshine advertisements typically included coupons ("new coupons") in which the request was not only for specific sample box assortments, but also for "other seasonal samples on approval as they are [or become] available" (CXs 8, 9, 13, 15, 22, 473, 479, 483, 485, 486, 728; RX 189).

This new coupon was instituted in Sunshine advertising after an investigational visit by a Federal Trade Commission representative, probably because he raised questions about the language of the old coupons (Ward 1424-27, 1559-62, 1572-75; Robbins 1943-53).

To individuals who submitted either type of coupon, Sunshine shipped sample boxes of greeting cards which were intended to be sold by the recipient. Each carton contained an invoice designated as a "Special Price Bill." But that was just the beginning. Without any further request, Sunshine continued to send box assortments twice a year, alternating between Christmas cards and all-occasion cards (also known as "everyday" cards). Christmas cards were shipped in June and July, and all-occasion cards, in December and January.

The "Special Price Bill" that accompanied each carton shipped was an invoice which listed the cards shipped with their price and offered a discount for payment within 10 days.⁶ Some invoices noted that the cards had been sent "on approval" (CX 186), but others did not contain such language (CXs 565, 601, 621). The invoice used in 1971 contained the statement: "It is payable only if you decide to keep the merchandise" and requested notification if the recipient did not want the cards (CXs 515, 584, 635).

If payment was not received or if the cards were not returned, Sunshine then dispatched a series of inquiries and reminder notices, culminating in a collection letter on the letterhead of Guardian Collection Agency, Inc.

Except for a charge of misrepresentation in connection with the Guardian letters (which is considered *infra*), no challenge is made to

⁶ Approximately 10 percent of Sunshine's dealers take advantage of the discount for prompt payment (Ward 1436).

the efforts of Sunshine to obtain payment for or return of the first shipment of cards (CB 7). But this proceeding does challenge Sunshine's practice of sending subsequent shipments of cards without any further request on the part of the dealer and then leading the dealer to believe that he has an obligation to pay for or return the cards.

Although the follow-up procedures and the text of the letters to allegedly delinquent dealers have varied from year to year, the timing and the basic thrust of Sunshine's dunning communications from 1967 to 1969 were essentially the same. However, beginning in 1970, after respondents knew that they were under Commission investigation, Sunshine made significant changes in the language purporting to explain the rights and duties of its dealers.

Essentially, the procedure has been as follows: If no payment was received within 30 days, an inquiry letter was mailed to determine whether the shipment was received and whether the recipient intended to pay or wanted Sunshine to pick up the cards. This first inquiry letter was followed at 30-day intervals by a series of from four to six additional notices that sought payment for or return of the cards.⁷

One of the first in a series of collection letters used with reference to the Christmas assortment in 1967 was primarily a sales promotion letter that contained a suggestion that the recipient could still get the special discount for early payment, even though the 10-day discount period had expired (CX 227).

Another collection letter used in connection with 1967 Christmas samples noted that the sample kit had neither been returned nor paid for and requested that payment be made by return mail (CX 252).

In 1967, persons who had neither paid for nor returned the all-occasion sample assortment received a series of statements demanding payment. The first (CX 228) characterized the bill as "past due" and asked for remittance within 7 days. The second (CX 229) contained the following statement: "According to our records, the above amount is due for sample boxes mailed to you weeks ago. Your cooperation in paying this invoice by return mail will be greatly appreciated."

This was followed by a statement (CX 230) on which was printed in large bold face capital letters the following:

Please—Please Send us your check or money order now! Thank you.

The next statement (CX 231), which purported to come from the Credit Department, contained the following language:

Our records show that you have not responded to our several prior notices advising that the above amount is due for sample cards shipped weeks ago. It is

⁷ The findings in this Section A are based not only on Sunshine documents in evidence but on the testimony of Sunshine's office manager, Richard E. Ward (Tr. 1388-1446, 1486-1552, 1556-81).

rapidly becoming impossible for us to continue to contact you in an amiable manner. We urgently request that you pay this invoice by return mail.

By the time this statement (CX 231) was received, 95 percent of the "everyday" sample kits had been returned or had been paid for. The payment or return factor for Christmas card samples was not so favorable, amounting to 65 or 70 percent.

The dunning letters used in 1968 for recipients of both the Christmas card samples and the all-occasion card samples involved a somewhat different format. Although the first communication (CX 234) was comparable to the first 1967 reminder (CX 227), the follow-up communications were in the form of letters rather than in the form of billing statements. The first of these 1968 letters (CX 235) referred to the billed amount as "overdue" and requested payment or prompt return of the goods.

This was followed by a letter (CX 236) noting that the samples had neither been returned nor paid for and requesting the recipient to indicate on a preprinted tear-off form whether the samples had been received, whether they had been returned, or whether the remittance was being transmitted.

The next letter (CX 237) urged payment for the all-occasion cards so that the recipient might be eligible to receive sample Christmas cards.

This was followed by another letter (CX 238) stating that Sunshine was "entitled to an explanation or payment."

In 1969, the third in a series of dunning letters relating to 1969 Christmas cards (CX 253) requested payment or return of the samples or some explanation as to the status of the matter, for which a tear-off form was included similar to CX 236. The letter stated: "Our understanding was, that if you were not going to use them, you would return them at our expense. If you have used them, we, naturally, expected payment for them." A similar letter (CX 245) was used with respect to 1970 all-occasion cards.

Collection letters used by Sunshine in connection with 1970 Christmas cards are in the record as CXs 248, 251, 725, 709. CX 248, although primarily a sales letter, also contained a mild request for payment. This letter, in addition, indicated that the dealer was "obligated in no way" and should pay for the sales kit only if he decided to use or sell the sample boxes. Contrariwise, a preprinted tear-off reply form indicated that the dealer was "not obligated to return these boxes" and might "consider them a gift." And not only was the dealer also told that he had authorized the shipment for advance examination, but the tear-off form purported to renew such authorization.

Certain dealers received a letter relating to unpaid 1970 Christmas samples (CX 251) in which they were told that the cards might be returned at Sunshine's expense but that payment was "expected" if the cards were not returned, and that Sunshine "assumed" the samples had been used so that payment was due.

Another dunning letter used in 1970 (CX 725)—the third in a series for signers of the new coupon—demanded payment for or return of the sample boxes. The letter threatened "strong collection action" if there was not a prompt response.⁸

The third in a series of collection letters used in 1970 for signers of the old coupon requested payment for or return of the cards but contained the statement:

Legally speaking, you are under no obligation to return or pay for this kit. We were aware of this when we sent it to you, but frankly, as one of our older dealers, I did not think that you would duck behind that technicality. (CX 709)

In 1971, the first dunning letter for all-occasion cards (CX 259) was similar to CX 248 (used in 1970) in advising the customer that he was "obligated in no way" except to pay for the kit if he decided to use or sell the boxes. It contained the same contradictory statement that the customer was "not obligated to return these boxes" and might "consider them a gift."

A follow-up letter used in 1971 with respect to all-occasion samples (CX 726) stated that the cards might be returned at Sunshine's expense if the customer decided against using them but that payment was expected if the cards were not returned. In the absence of any word from the customer, Sunshine "assumed" that the samples had been used and that therefore payment was due. This was virtually identical to CX 251, used in 1970.

If these collection letters on the Sunshine letterhead failed to get results, the accounts were "transferred" to Guardian Collection Agency, Inc., as Sunshine's office manager phrased it (Ward 1517). This simply meant that Sunshine employees dispatched to the allegedly delinquent dealer a collection letter on the Guardian letterhead.⁹ Such letters represented that Sunshine, as "claimant creditor," had referred the dealer's account to Guardian because of nonpayment for sample greeting cards. The letter stated that sample assortments had been sent to the dealer on approval and that since he had not returned them, it was assumed that he was using them and intended to pay for them.

⁸ At the time of hearing, there had been no collection action taken against dealers who did not remit in response to CX 725 (Ward 1515).

⁹ Unless the context indicates to the contrary, references to Guardian should be understood to include Trans-American Collection Agency, Inc., which was the name of Guardian until October 1970.

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After referring to the number of Sunshine communications that had not been acknowledged, the letter stated that it had become Guardian's "task to insist upon payment." The letter concluded by expressing the hope that "this friendly reminder will be enough" to result in the settlement of the account with Guardian's "client." (CXs 232, 239 and 255, used in 1967; CXs 242 and 257, used in 1969)

The picture created by the foregoing documentary exhibits was given life and color by the testimony of 15 Sunshine dealers—most of them youthful—supplemented in some cases by the testimony of their parents. In addition, the testimony of eight other dealers was stipulated by counsel (Tr. 2205-19).

This testimony shows that ten individuals who submitted the old coupon received not only the initial card shipment requested, but also from two to seven additional shipments that they said they had not requested. Most of these individuals also continued to receive card shipments despite their having notified Sunshine that they did not want to receive additional samples. (Artman 371-72, 387, 394-98; Dusablon 427-32; Turner 447-51, 462-68; C. Darsigny 523-35, 541; E. Darsigny 553-56; S. Donahue 885-92; M. LeFebvre 925-32; S. LeFebvre 935, 944-45; L. Lips 952-55; S. Lips 964; D. Feighery 973-76; T. Feighery 988-90; Pettison 1153-56; Ventry 2218)

Testimony illustrative of continuing shipments¹⁰ to 13 dealers who signed new coupons after December 1968 included the following: N. McLaughlin 473-78; R. McLaughlin 495-96; Brown 509-21; Magnano 560-71; 579-82; Pelton 591-95; Butterfield 639-42; L. Spitzer 818-23; J. Spitzer 825-29; Swenerton 2205-06; Milewski 2207; Christie 2209; Udall 2211; Schriilo 2213; Blanchard 2215; Stack 2217. Several of these 13 dealers who had specifically notified Sunshine to discontinue shipping samples continued to receive them.

None of the signers of the new coupons who testified specifically articulated the manner in which they interpreted the language purporting to request other seasonal samples as they became available. Nevertheless, the record demonstrates that these individuals thought they were ordering a single shipment and did not understand that they were committing themselves to receive successive shipments and to return or to pay for them. (N. McLaughlin 474, 489-92; Brown 509-11, 518; Magnano 560, 566, 574-76, 583-86; Pelton 590-91, 598-601; Butterfield 640-45)

¹⁰ Shipments to persons who had previously signed coupons constitute the bulk of Sunshine's sample kit distribution. In 1970, for example, samples of all-occasion cards were mailed to approximately 10,000 persons, 80 to 85 percent of whom were so-called continuing dealers. The 1970 Christmas sample kit went to more than 20,000 persons, and it may be inferred that the continuing dealers constituted a similarly high percentage of this total. (Ward 1427-30)

The dealer witnesses not only told about the repeated shipments they had received after submitting to Sunshine either the old coupon or the new coupon, but they also recounted the dunning communications they had received from Sunshine and from Guardian.

Although some of the dealers neither returned the cards nor paid for them, others—uncertain of their rights and obligations—remitted payment or returned the cards (Mrs. F. Donahue 911, 918-19; L. Lips 952-55; S. Lips 963-70; E. Darsigny 554).

The number of instances in which cards were sent despite requests to Sunshine to discontinue such shipments is sufficient to negate the testimony that Sunshine's policy was to terminate shipments on request (Ward 1421) and also to refute respondents' argument (RRB 3) that any exceptions to such policy were due to clerical error. The fact that the sworn testimony regarding "stop orders" was not supported by documentation does not require that it be disregarded. It was not contradicted by respondents.

Persons who signed the old coupon, intending to order *only* the particular seasonal greeting cards that were the subject of the coupon and of the accompanying advertisement, did not intend thereby to—nor did they—authorize Sunshine to send successive shipments of cards in the future. In fact, the old coupon did not in any way put them on notice that they might be authorizing future shipments. Sunshine's representatives virtually conceded this (Ward 1423-27, 1559-62, 1572-75; Robbins 1943-53), as do respondents' proposed findings and briefs, with their emphasis on the new coupon.

The language of the new coupon that purports to authorize future shipments of other seasonal samples as they become available, does not require a different finding and constitutes no defense to the charges in the complaint. Again, the persons signing such coupons intended to order only the particular seasonal greeting cards that were the subject of the coupon and of the accompanying advertisement. They did not intend thereby to—nor did they—authorize Sunshine to send successive shipments of cards in the future. The language of the new coupon might alert the ultra-careful reader to the fact that he might be authorizing successive shipments, but there is sufficient ambiguity to warrant a finding that the new coupon has the capacity and tendency to mislead and deceive the public as to the obligations a person might assume by signing the coupon. As stated in the amended complaint (Paragraph Four (2)), a "prospective customer not only indicated that he is requesting present merchandise, the nature of which is generally known to him, but he is also unknowingly or unwittingly

requesting the forwarding of merchandise, the nature of which is unknown to him, at later dates."¹¹

This finding is particularly applicable in view of the fact that much of Sunshine's advertising containing such coupons is addressed to children and youths.

Whether shipments subsequent to the first shipment were made pursuant to the old coupon or to the new coupon, the statements and representations contained in the invoices (Special Price Bills) accompanying such subsequent shipments and in the reminders and dunning communications dispatched by Sunshine, including the Guardian letters, in which Sunshine requested (or demanded) payment for or return of such shipments, represented, contrary to fact, that:

1. Some contract, agreement, or understanding existed between Sunshine and the recipient of the greeting cards.

2. The recipient of the greeting cards was under an obligation to pay for the cards or to return them to Sunshine.

3. Money was due and owing for the unordered greeting cards.

Neither of the coupons described in the foregoing findings constituted a contract, agreement, or understanding whereby the signers authorized Sunshine to send more than one shipment of greeting cards. Such additional shipments constituted unordered merchandise, and the recipients were not under any obligation to pay for them nor to return them, unless they decided to purchase the cards or to use them—and not even then the applicable law permitted them to use unordered merchandise without payment therefor.¹²

Because of the ambiguous and consequently deceptive nature of the new coupon, its literal language purporting to authorize successive shipments may be disregarded, and shipments by Sunshine pursuant thereto constituted unordered merchandise.

Therefore, the statements and representations of Sunshine, as described herein, were false, misleading, and deceptive.

On the basis of the foregoing findings and the record as a whole, the conclusory finding is that respondent Sunshine's use of a coupon purporting to authorize future shipments of greeting cards, its practice of sending greeting cards to persons who had not requested them, and its representations in connection with efforts to collect therefor, have had the capacity and tendency to mislead and confuse many

¹¹ Testimony that beginning in 1971 Sunshine sent an advance mailing asking dealers whether samples should be shipped (Ward 1424) was not documented nor otherwise corroborated. (Compare RPF 5, par. n, with CRB 4.)

¹² See *infra*, pp. 35-37 [pp. 866-68 herein]. The fact that some of the witnesses had used the cards does not absolve Sunshine from its deceptive representations as to others who had not.

persons and to create doubts in their minds as to their legal rights and obligations in respect to such merchandise, and have caused many persons to pay for the merchandise because of the confusion and doubt so generated. These practices have had the capacity and tendency to harass, inconvenience, intimidate, and coerce persons into purchasing and paying for unordered merchandise sent by Sunshine.

B. Collection Practices

Recipients of cards from Sunshine or from Junior Sales Club who fail to pay or to return the cards as a result of the dunning communications from each of these respondents have then been sent letters on the letterhead of Guardian Collection Agency, Inc.¹³ Through the use of the name Guardian Collection Agency, Inc., and the text of the letters, respondents have represented that allegedly delinquent accounts have been assigned to an independent, bona fide collection agency and that if payment was not received or if the cards were not returned, Guardian would refer the customer's account to an attorney for the institution of legal action or such other legal steps as might be necessary to collect the account.

The use of the Guardian letters as a means of collecting delinquent accounts is the only charge against JSC specifically. CX 325 and CX 278 are typical of the Guardian letters utilized by JSC.¹⁴

The first of two Guardian letters used by JSC (CX 325) begins with the words "TAKE NOTICE THAT" and continues with a statement that Junior Sales Club "has placed your long overdue account with us for IMMEDIATE SETTLEMENT." It sets forth the details of the transaction, refers to the repeated efforts of JSC to obtain payment or return of the cards, and then states:

Our client assumes, therefore, that you have used the cards for your own purposes and has filed an overdue charge with us in the amount of.* * *

Next, the letter offers an "additional opportunity to the debtor to pay the amount due" and specifies that the letter is the "final notice to this effect." It then warns that if payment is not received within a specified number of days, "action may be started by our attorney without further notice."

The second Guardian letter (CX 278) bears the words "FINAL NOTICE!" The first two paragraphs read as follows:

You have failed to settle your LONG OVERDUE ACCOUNT with our client, the Junior Sales Club of America, Springfield, Massachusetts, although we previously wrote you a detailed letter concerning this important obligation.

¹³ See footnote 9, *supra*, p. 19 [p. 855 herein].

¹⁴ CX 325 and CX 278 are on the letterhead of Trans-American Collection Agency, Inc. Although the name has now been changed to Guardian, the text of the letters is substantially similar.

Before taking any legal action our client has authorized us to extend this final opportunity for you to make immediate settlement by sending a money order or check in the amount of * * * which will clear your account in full.

The letter then reviews the account and the prior efforts to obtain payment or return of the cards, and it urges immediate settlement of the account to "avoid action by our attorney."

Preceded by a series of five communications on the JSC letterhead, Guardian letters are dispatched if the JSC letters fail to produce the desired result. The Guardian letters are sent to about 30 percent of JSC members each year. The dispatch of the letter exemplified by CX 325 reduces the delinquency rate to about 26 percent, and the letter exemplified by CX 278 brings it down to about 22 percent. Neither JSC nor Guardian takes any further action against the remaining delinquent accounts, which are then written off.

The text of the Guardian letter used by Sunshine (as exemplified by CXs 232, 239, 242, 255, and 257) has already been summarized (*supra*, p. 19 [p. 855 herein]) and need not be repeated here. The elapsed time between Sunshine's shipment of cards to a dealer and the dispatch of the Guardian collection letter, when necessary, is usually between 9 and 12 months. As in the case of JSC, if the Guardian device produces no results, there are no further efforts to collect.

Thus, contrary to the representations of respondents, the accounts of persons who receive form letters and notices on the Guardian letterhead have not been assigned to an independent, bona fide collection agency. Although Guardian is a separate corporation duly licensed as a collection agency, it is a wholly-owned subsidiary of Sunshine; it has no employees of its own; and, except for incidental collection efforts on behalf of SLC (and also Windsor, another Robbins family affiliate), its sole function is to disseminate collection letters on behalf of Sunshine and JSC. In essence, it is simply a name used by these respondents for the purpose of attempting to collect allegedly delinquent accounts, and the Guardian letters are processed entirely by Sunshine and JSC employees.

Until 1969, when the letterhead was modified, Sunshine and JSC heightened the deceptive representation that Guardian was an independent, bona fide collection agency by representing on the Guardian letterhead that Guardian was engaged in collections, tracing, credit reports, repossessions, personal calls, and garnishment of wages. Guardian has never engaged in such activities except for collection efforts on behalf of Sunshine, JSC, and other Robbins family affiliates.

Contrary to representations that if allegedly delinquent accounts were not properly settled, they would be referred to an attorney for

institution of legal action, no such steps have ever been taken, nor is such action contemplated.¹⁵ As a matter of fact, neither Sunshine, JSC, nor Guardian makes any further efforts to collect from persons who fail to settle after receiving the so-called final notice on the Guardian letterhead.

Therefore, the statements and representations made by respondents Sunshine, JSC, and Guardian, as described in the foregoing findings, were false, misleading, and deceptive.

In defense of the use of the Guardian letters, Sunshine and JSC explained that, as a practical matter, independent collection agencies refused to handle accounts of the minimal monetary value involved in the Sunshine and JSC transactions.

Another defensive fact adduced was that Guardian modified its letterhead in 1969 to eliminate the overt misrepresentation that it was engaged in a variety of activities associated with bona fide, independent collection agencies. (Compare CX 278 with CX267 and CX 268.) (Besides the exhibits cited, other record references include Ward 1399, 1436, 1488-92, 1517-23, 1533-40, 1562-63; Pray 1713-31, 1765-67, 1875-78; Robbins 1930-31, 1992-97, 2118-20; Luce 1591-1605; CXs 272-79; King 664-82; Ficcardi 696, 707-11; N. Wilson 724-31; Silva 753-57; Scott 783-84; O'Brien 792-95, 806-09; F. Donahue 913-14; S. LeFebvre 937; Pettison 1159-62.)

C. Refunds for Nondelivery of Merchandise as Ordered

The facts respecting the failure of SLC to deliver name-imprinted Christmas cards to thousands of its sales representatives in 1969 are not in dispute. In summary, the evidence shows that in 1969 SLC received such an unexpected number of orders for the name-imprinted cards that it was impossible for SLC to imprint all the orders in time for pre-Christmas delivery. Between 15,000 and 30,000 orders for name-imprinted cards were filled by the delivery of cards without any names imprinted.¹⁶

The imprinting problem in 1969 was a one-time occurrence. It had never happened before, and it has not happened since. The record indicates that SLC and Sunshine took all reasonable steps to fill the deluge of orders, which exceeded advance estimates by 20 percent. The

¹⁵ Other than possibly three instances relating to bad checks, Guardian has never referred any Sunshine dealer accounts to attorneys for collection or for the institution of lawsuits. Before 1967, some 30 accounts had been annually referred by Sunshine to an outside collection agency, but these accounts did not involve dealers' sample kits. (Ward 1533-36)

¹⁶ The record is conflicting as to the number of orders delivered without names imprinted. Ryland E. Robbins estimated that the total was about 15,000 (Tr. 2015-16); whereas, the general manager of SLC estimated that it was about 30,000—10 percent of a total of 300,000 orders (Pray 1623-24, 1632-33, 1887-88). These were orders submitted by sales representatives, each involving multiple boxes for a number of customers.

complaint does not question the reason for the nondelivery of the name-imprinted cards but charges SLC with deceptively failing to advise its sales representatives in advance that their orders would not be filled and failing to offer them a refund.

The cards without names imprinted were delivered to SLC sales representatives for delivery to their customers, who had submitted prepaid orders for imprinted cards. The record supports the charge (Complaint, Paragraph Twelve) that SLC did not advise these sales representatives in advance that their orders for name-imprinted cards would not be filled,¹⁷ nor did it specifically offer a refund or any price adjustment. Instead, each such order was accompanied by an explanatory letter for each box of cards. The letter expressed regret that the cards did not have names imprinted and explained that this situation resulted from the fact that the orders received had far exceeded the anticipated demand and that there was also a "drastic shortage of skilled labor." The letter suggested that customers "give these cards that extra personal touch" by signing the cards themselves. The letter then stated:

However, we want to emphasize that we are sincere in our willingness to stand behind our guarantee to give you complete satisfaction. (CX 333)

This was intended as a reference to the term "Satisfaction Guaranteed" prominently displayed on the inside front cover of the sample album (RX 30) that sales representatives were supposed to show to their customers.

Many of the sales representatives, as well as many of their customers, did accept the cards without names imprinted. However, a substantial number of sales representatives, and also some of their customers, complained to SLC, to publications in which SLC advertising had appeared, to Better Business Bureaus, and to law enforcement agencies. To every such complaint that it received, directly or indirectly, SLC responded by offering a cash refund of \$1 for each box of cards or a full cash refund (including return postage) if the unwanted cards were returned.

Although one witness testified that she complained to SLC but received no reply (Prentice 1035-43; CX 455 A-B), the evidence warrants a finding that SLC satisfactorily adjusted all the complaints it received. However, the gravamen of the charge against SLC is that it failed to offer its sales representatives a refund on or before delivery of the cards. And, contrary to respondents' contentions, the reference

¹⁷ The evidence indicates that the timing problem was such as to make it impracticable to so notify SLC sales representatives and then to await word of their decision on acceptance of the cards or election of a refund (Robbins 2020-21, 2029).

to the guarantee of “complete satisfaction” in the explanatory letter (CX 333) did not constitute a refund offer.

Although some complaining customers cited the guarantee in seeking refunds (CXs 451, 455 A–B), it is evident that a substantial number of sales representatives, as well as their customers, did not understand that SLC was offering to refund their money (M. Geehan 1019; D. Geehan 1024–25, 1029–32; Cronin 1047–60; P. DiPietro 1115–16; M. DiPietro 1136–43; CXs 451, 455 A–B).

Against this background, it is significant that SLC wrote only 4,000 or 5,000 refund checks (Robbins 2015) whereas between 15,000 and 30,000 orders were not properly filled.¹⁸ The assumption by respondents that noncomplaining customers “understood the situation and accepted the cards” (Robbins 2027) is simply not tenable.

Once SLC knew that it would be unable to deliver the name-imprinted cards to certain sales representatives, it was under a duty to give these sales representatives and their customers the option of accepting the cards or receiving a full cash refund. In any event, SLC was obligated to make clear from the outset the exact nature of the guarantee of full satisfaction—that is, that customers might accept the cards and receive a price adjustment of \$1 per box or that they might return the cards and receive a full cash refund. If SLC was ready and willing to make refunds to all dissatisfied recipients of cards that did not meet customers’ specifications, it could have and should have said so without equivocation or dissimulation.

Because of the failure of SLC to make these options known to its sales representatives and their customers, many dissatisfied sales representatives and many of their customers who were dissatisfied failed to complain to SLC, directly or indirectly, and thus were denied either a price adjustment or a full cash refund. This failure on the part of SLC led its sales representatives, as well as their customers, into the mistaken belief that they had no choice but to accept the cards without names imprinted and that they were not entitled to any price adjustment or cash refund.

Accordingly, the examiner finds that the notice accompanying the cards was false, misleading, and deceptive in creating such mistaken belief. (Record references in addition to those cited include Pray 1623–33, 1662–81, 1698–1700, 1831–37, 1886–1904; Robbins 2015–37, 2048–53; Webb 1063–87; Johnson 298–324, 335–48, 359–61; CXs 334–339, 451–453, 455 A–B, 460, 461; Debra Heroux 842–49, 852–53; Donald

¹⁸ Neither the number of complaints received nor the total amount of refunds was known (Pray 1699; Brunsell 1584–85).

Heroux 856-61; McGinnis 871-74, 877; W. Milford 996-97, 1002-03; D. Milford 1006-09.)

D. *Use of the Word "Free"*

In its published advertising since 1966 and in its sales literature, including albums displaying sample cards, SLC has represented that the imprinting of names on Christmas cards was free. SLC's advertisements have emphasized the legend "Name Imprinted Free." This representation has also been featured on the cover of the sample album. (CXs 141, 150, 151, 153, 155, 729 A-B; RX 30)

The inside front cover of the sample album (RX 30)—which was for the information of the ultimate customer—stated that "Cards are the same price, with or without name imprinted." And sales literature advised the juvenile sales person to explain to customers that the price per box included the printed name (CX 729 B).

Just as these facts are beyond dispute, so is it undisputed that:

1. For each Christmas season since 1966, SLC has solicited sales and sold its Christmas cards at one fixed price per box,¹⁹ although prices may have changed from year to year.

2. SLC has never established a different price for Christmas cards ordered without names imprinted, nor has it established a separate price for the service of imprinting names on the cards.

3. For more than 10 years, all Christmas cards, whether imprinted with names or not, have been sold for the same price as that advertised for the name-imprinted cards in the advertising and sales literature of SLC. In other words, there was no extra charge or additional cost for the name-imprinting.²⁰

4. There have been "many orders for cards without the names." (Pray 1636-38, 1652-58, 1769-71, 1823-33, 1880-83, 1886-87; Robbins 2031)

Complaint counsel made no real effort to prove that the "free" offer deceived either the sales representatives or their customers, and they have cited no testimony to support this aspect of the charge. Instead, they have relied on a *per se* theory (CPF 34; CB 32-34). However, there was some testimony bearing on the question of public understanding of the representation that names were imprinted free on the Christmas cards sold by SLC:

The offer of free name-imprinting "enticed" the mother of one SLC sales representative (D. Geehan 1021). Another mother bought the cards from her son "primarily because the printing was free." De-

¹⁹ The number of cards in a box varied.

²⁰ An additional charge was made for more than two lines, but this limitation is not in issue.

scribing herself as "being of a lazy nature" she said that it was the "free imprinting" that "sold" her (M. DiPietro 1136).

One SLC sales representative understood that the imprinting of names was "free," and he so advised his customers (P. DiPietro 1121, 1126). Two of his customers understood that the imprinting was included in the price, but one of them did not know that nonimprinted cards were being offered at the same price (Prentice 1035; Cronin 1045-46, 1053-54, 1057). Other witnesses did not specifically address themselves to the question.

This proves that the word "free" still has sales appeal, despite growing consumer skepticism about such advertising claims. It demonstrates too that customers understood that "free" imprinting meant what SLC said it meant—that the cards were the same price with or without names imprinted (RX 30) or that the price per box included the printed name (CX 729 B).

Complaint counsel are in error when they contend (CPF 31, CB 29) that SLC "has never established a separate regular price for Christmas cards ordered without name imprints." And, they confess such error when, in the same paragraph of CPF 31, they state:

All Christmas cards, whether name imprinted or not, are sold for the price advertised for the name imprinted cards. * * *

Thus, SLC has established a separate regular price for Christmas cards ordered without name imprints, but it is no different from the price for Christmas cards ordered with name imprints. The name-imprinting is "free" to the customer.

The representations of SLC as to "free" imprinting were not false, misleading, or deceptive.

III. Summary and Analysis

Most of the issues posed in this proceeding have been essentially resolved by the foregoing findings of fact, but this summary and analysis will serve to indicate the legal principles upon which the examiner has relied and thus will satisfy the requirement (Rule 3.51(b)) that this initial decision shall contain a statement of the "reasons or basis" for the findings and conclusions.

A. *Unordered Merchandise and Dunning Communications*

One of the principal legal issues is whether respondent Sunshine has engaged in the practice of shipping unordered merchandise and subsequently misleading and confusing the recipients as to their rights and obligations with respect to such merchandise. The answer to this question turns on the further question whether coupons or similar

order forms that had been signed by the recipients took the shipments out of the category of unordered merchandise and thus authorized Sunshine to seek payment for or return of its greetings cards.

As reflected in the findings of fact (*supra*, p. 14 [p. 850 herein]), this question may be divided into two subsidiary parts because of the change in the coupons used by Sunshine. Before December 1968, interested individuals utilized coupons ("old coupons") clipped from advertisements to request Sunshine to send "box assortments on approval" or "Sample Boxes on approval."²¹ After December 1968, the coupons ("new coupons") requested that Sunshine send not only samples and other material specifically referred to in the accompanying advertisement but also "other seasonal samples on approval as they become [or are] available."

It must be understood at the outset that there is no issue as to the *first* shipment of cards sent by Sunshine in immediate response to either type of coupon. Complaint counsel concede that the receipt of this first shipment "creates a legal obligation on the part of the recipient to either pay for the cards or to return them" (CB 7). The issue arises as to successive shipments subsequent to the first one and as to representations made by Sunshine in an effort to bring about payment for or return of such cards.

Respondents do not seriously contend that the old coupon created any legal obligation upon the signer with respect to the cards received after the initial shipment. By their testimony, by their abandonment of the old coupon, and by their emphasis on the new coupon in their proposed findings and briefs, respondents have virtually conceded that successive shipments pursuant to the old coupon constituted unordered merchandise as to which the recipients were under no obligation whatsoever.²² But there is no need to rely on any concession by respondents. The old coupon showed on its face that it created no legal obligation on the signer as to shipments after the first shipment that he specifically authorized. Accordingly, it was a false, deceptive, and misleading practice for Sunshine to represent, directly or indirectly, that signers of the old coupons were obliged to pay for or return any cards received after the initial shipment.

The use by Sunshine of the new coupon since December 1968 raises a further question, but with the same conclusion. The language of

²¹ The sample boxes referred to were not simply for display or inspection but were designed to be sold.

²² See, p. 21 [p. 858 herein], *supra*. However, respondents retreat to a claim that old coupon dealers who sold some cards and who are still on Sunshine's list of samples, assumed contractual obligations by virtue of a course of dealing after signing the old coupon. Yet, inconsistently (and not altogether accurately), they also insist that Sunshine tells such dealers that they are under no obligation (RB 11-12; RRB 1).

the new coupon does not constitute the "expressed request or consent" of the signer for Sunshine to send him additional shipments of cards following the initial shipment specifically requested. From both a practical and a legal standpoint, the shipments subsequent to the initial shipment constitute "unordered merchandise."

Sunshine contends that the language of the new coupon emphasized the continuing dealer relationship, made the signer aware that more than one season was involved, and discouraged individuals who might have responded to the old coupon out of curiosity. This rationalization however, has no evidentiary support beyond the self-serving testimony of Sunshine's officials, and the contention that coupon signers were made aware that more than one season was involved is contradicted by dealer testimony. Although careful reading of the coupon text may put a careful reader on notice that not only is he ordering merchandise specifically described in the accompanying advertising and in the text of the coupon, but that he may also be ordering future shipments of other unknown merchandise, this record demonstrates that, as alleged by the complaint, any such allegedly additional commitment was made "unknowingly or unwittingly" (*supra*, pp. 20-22 [p. 856-58 herein]). This conclusion is particularly applicable in the numerous instances involving children and youths. Respondents' suggestion (RPF 3, par. g) that Sunshine was "not generally soliciting children" is based on self-contradictory testimony and is otherwise refuted by the record (*supra*, pp. 6, 14 [pp. 845, 851 herein]).

The new coupon did not constitute the "expressed consent" of the signer for more than one shipment of sample card assortments. Accordingly, it was false, misleading, and deceptive for Sunshine to represent to signers of the new coupon that they must pay for the cards or return them.

Thus, successive shipments pursuant to either type of coupon now constitute "unordered merchandise" within the meaning 39 U.S.C., Sec. 3009.²³ The recipient is entitled to treat the cards as a gift, with "the right to retain, use, discard, or dispose of [them] in any manner he sees fit without any obligation whatsoever to the sender." Under this statute, respondents are required to apprise the recipient of unordered merchandise "that he may treat the merchandise as a gift to him," and that he has the rights enumerated in the previous sentence. In addition, respondents are forbidden to mail to any recipient of such merchandise a bill for such merchandise or any dunning communications.

This new statute, which is incorporated by reference in the Federal Trade Commission Act, makes academic the argument of respondents'

²³ Approved August 12, 1970, effective July 1, 1971 (CCH Trade Reg. Rep. ¶ 26,700).

counsel (RB 9-12; RRB 1-4) that contractual obligations may arise from a course of dealing. No legal obligation attaches to the recipient of merchandise unless it has been sent to him pursuant to his "expressed request or consent."

Moreover, even before the effective date of the unordered merchandise statute, a similar argument respecting obligations arising from a course of dealing had been rejected in *Joseph L. Portwood*, Dkt. 8681 (Final Order January 19, 1968), *aff'd*, 418 F. 2d 419, 422-23 (10th Cir. 1969 [73 F.T.C. 68]).

The examiner's reliance on the new Federal statute governing unordered merchandise (approved August 12, 1970, effective July 1 1971) should not be interpreted as *ex post facto* application of this law to the practices of respondent Sunshine. Essentially, the statute codified the case law developed by the Commission²⁴ and enunciated in a 1968 policy statement ("Rights and Duties of Consumers Receiving Shipments of Unordered Merchandise and Obligations of Business men Shipping such Merchandise," FTC Release, June 25, 1968, CCH Trade Reg. Rep. ¶7559.75 at pp. 12,131-12,132), except that the statute lays down a more onerous standard. The Commission's 1968 policy specified that the recipient of unordered merchandise was required to pay for it if he used it, whereas the statute relieves the recipient of any obligation whatsoever.

Moreover, although the statute, by its terms, applies only to mail shipments, nevertheless, as a Congressional expression of public policy, its restrictions may properly be imposed on any interstate shipments. In any event, it is altogether appropriate to fashion an order for the future on the basis of these new statutory requirements.

The examiner concludes not only that Sunshine's new coupon fails to constitute the "expressed request" of the signer, but that the use of such a coupon is itself a deceptive act and practice and should be prohibited.

These conclusions find support in *White Industries, Inc.*, Dkt. C-1861 (February 16, 1971 [78 F.T.C. 317]), in which the Commission outlawed the use of a similar coupon, even though its reference to subsequent shipments was plainer than Sunshine's new coupon.

The *White* coupon contained a request for the shipment of specific merchandise and coupled this with a request that "next season" White's "new offerings" be sent "for advance preview with never any

²⁴ *Joseph L. Portwood v. FTC*, 418 F. 2d 419 (1969), *modifying and aff'g*, FTC Dkt. 8681 (Final Order, January 19, 1968; Modified Order, March 27, 1970 [77 F.T.C. 337]); *S. & S. Pharmaceutical Co., Inc. v. FTC*, 408 F. 2d 487 (5th Cir. 1969), *aff'g* FTC Dkt. 8696 (Final Order, October 9, 1967 [72 F.T.C. 765]); *House of Plate, Inc.*, 47 F.T.C. 1411 (1951); see CCH Trade Reg. Rep. ¶7143, which comprises the "long line of Commission precedents" referred to at CB 9 (see RRB 2).

obligation to buy," and, in some instances, with a further request that the signer be kept on the list for White's "see-before-you-buy" service.

Not only did the Commission determine in effect that shipments pursuant to such coupons constituted unordered merchandise, but it banned the use of forms purporting to authorize future shipments.

* * * unless such authorization is set forth in a completely separate and distinct paragraph (or, at respondents' option, a completely separate and distinct document) which separate paragraph (or separate document) contains no words, statement, or information not necessary to such authorization and which does not clearly and conspicuously state the following:

- a. that the document is an authorization for respondents to send merchandise at a future date; and
- b. the period of time for which the authorization will be operative shall not exceed one year, or one offering whichever is less; and
- c. the description of the merchandise contemplated by the authorization form.

The *White* order was entered by consent of the respondents, and the case was not litigated. Although consent-settled cases do not have the precedential weight of litigated cases, they do constitute an authoritative determination by the Commission as to the illegality of the practices covered by the order. (Compare RRB 2-3.) Thus, White supports the examiner's conclusions (1) that, as alleged in the amended complaint (Paragraphs Five (3) and Six (3)), Sunshine's new coupon does not constitute an order for more than one shipment of cards because the recipient "was unknowingly or unwittingly duped" into signing and submitting it, and (2) that any shipment subsequent to the first was the "same as unsolicited or unordered merchandise" because the signature on the purported request for subsequent shipments was "obtained by deception."

Moreover, *White* provides precedential authority for an order prohibiting the continued use of such a coupon. In their brief, complaint counsel urge an order similar to Paragraphs 1-3 of the order entered in *White* (CB 14-22), but no such provision is contained either in the tentative form of order attached to the complaint or in the revised form of order proposed by complaint counsel (CPF 51-53).

To remedy this deficiency, the examiner has included as Paragraph 4 of the order a qualified prohibition against the continued use of the new coupon or the use of any similar coupon or order form. This provision is modeled after the *White* order, and, by requiring certain disclosures, is designed to cure the deceptive nature of the Sunshine coupon as found herein. But, unlike the *White* order, it does not

deal with the format of the coupon because, in the examiner's opinion, that was not an issue in this proceeding, as it was in *White*.²⁵

Respondents' reliance on technical principles of contract law, as enacted and interpreted in the State of Massachusetts (RB 9-11), is misplaced. Irrespective of such state laws, the Commission, in administering a remedial statute such as the Federal Trade Commission Act, may look to the realities of a transaction. It is well established that to obtain by deception a signature to a contract of whose terms, nature, and effect the signer is ignorant is an unfair practice violative of that Act. The deception need not be of such a nature as to constitute "fraud" sufficient to vitiate a purported contract. (*Independent Directory Corp.*, 47 F.T.C. 13, 30 (1950), *aff'd* 188 F.2d 468 (2nd Cir. 1951); *Dorfman v. FTC*, 144 F.2d 737, 739 (8th Cir. 1944), *aff'g* 39 F.T.C. 700).

The order actually proposed by complaint counsel (CPF 51-53) leaves uncertain the status of merchandise that may be shipped pursuant to the request in the new coupon for "other seasonal samples as they become [or are] available." Although complaint counsel urge that all shipments of cards subsequent to the initial shipment are equivalent to unordered merchandise—and the examiner so finds and concludes—the order they propose does not deal with the question whether such coupon language constitutes "the expressed request or consent" of the coupon signer. In other words, Paragraphs 1 and 2 of the order would be subject to interpretation in the course of compliance proceedings as to whether a signer of the new coupon had given his expressed consent to the shipment of additional merchandise. Even though the findings and conclusions herein (if upheld) would be controlling, an order that is silent on the issue would not square with the Supreme Court's admonition that Commission orders should be "sufficiently clear and precise to avoid raising serious questions as to their meaning and application." *FTC v. Henry Broch & Co.*, 368 U.S. 360, 368 (1962).

Conceivably, the order might simply prohibit any representation that the signers of such a coupon are obligated to pay for or return merchandise shipped to them pursuant thereto. But it seems preferable to meet the issue head-on and to prohibit the continued use of such a coupon unless it is modified so as to eliminate its deceptive nature and to make clear its import and effect.

²⁵ It may be a nice question whether the amended complaint herein questioned the format of Sunshine's new coupon, but there are sufficient distinctions between the *White* complaint and the instant complaint (see CB 14-16) to satisfy the examiner that the format is not a proper issue. Regardless of the pleading, however, the evidentiary record herein is silent on the subject.

The proposed findings and briefs of respondents suggest that, regardless of Sunshine's previous practices, its present practices are in accord with the law (RPF 1, 5; RB 9-12, 17; RRB 1-4). But in 1971, Sunshine was still insisting in its invoices that recipients had to pay if they kept the cards and also representing that although the recipient might consider the cards a "gift," Sunshine expected payment if they were not returned (*supra*, pp. 15, 18-19 [pp. 852, 854-55]; see CRB 1-5). This was not in compliance with the applicable law.

B. Collection Practices

The law respecting the collection practices engaged in by respondents Sunshine, JSC, and Guardian (*supra*, pp. 23-27 [pp. 859-61 herein]) is so clear and so well established that it requires no elaborate citation of authority to support the order being entered on this subject. The fact that bona fide, independent collection agencies will not handle respondents' small claims does not justify the establishment of a "dummy" corporation whereby respondents adopt a disguise designed to lead allegedly delinquent debtors to believe that the account has been transferred to an entity other than one of the respondents, *Wm. H. Wise Co., Inc. v. FTC*, 246 F. 2d 702 (D.C. Cir. 1957); *cert. denied*, 355 U.S. 856; *International Art Co. v. FTC*, 109 F. 2d 393, 396-97 (7th Cir. 1940), *cert. denied*, 310 U.S. 632; *Wilson Chemical Co., Inc.*, 64 F.T.C. 168, 186 (1964). (The cases are collected in CCH Trade Reg. Rep. ¶ 7825.)

Similarly, the Commission has consistently held with Court approval that it is unfair and deceptive to represent falsely that accounts have been or will be turned over to an attorney for collection, particularly when the claim for the money allegedly owed is not well-founded, *Dorfman v. FTC*, 144 F. 2d 737 (8th Cir. 1944); *Wilson Chemical Co., Inc.*, 64 F.T.C. 168, 180-86 (1964); see CCH Trade Reg. Rep. ¶ 7825.

Guardian is a corporation without substance, a "legal fiction" that was established for the purpose of coercing and intimidating allegedly delinquent debtors—many of them children and youths—into paying for respondents' cards or returning them. This device was particularly reprehensible when it was used to seek payment for or return of unordered merchandise.

C. Refunds for Nondelivery of Goods as Ordered

The facts regarding SLC's delivery of nonimprinted cards to persons who had ordered name-imprinted cards (*supra*, pp. 27-29 [pp. 861-63]) compel a conclusion, almost without reference to legal authority, that this constituted an unfair and deceptive act. The vice

lay in SLC's failure to disclose clearly that its sales representatives and their customers had the option of rejecting the nonimprinted cards and receiving a refund or accepting them and receiving a price adjustment, thereby leading them into the mistaken belief that they had to accept them and were not entitled to a cash refund.

Such a conclusion would be appropriate even if all the parties involved were adults, but it is particularly applicable when SLC's sales agents ranged in age from 10 to 15 years. However high-sounding it may be, a promise to stand behind a guarantee of satisfaction is not necessarily translated as a promise of refund. Respondent SLC has given no reason for failing to make explicitly clear the availability of refunds or price adjustments. It is a reasonable inference that the vague reference to SLC's guarantee of "satisfaction" was designed to minimize the number of applicants for such relief. It certainly had that result.

In addition to general principles of fair dealing, two other tenets of trade regulation law come into play here:

First, it is an unfair practice to deliver, without authorization, merchandise different from that ordered, even if the substitute goods are equivalent in quality, *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934); CCH Trade Reg. Rep. ¶ 7147.

Second, although a guarantee of satisfaction is, in law, a commitment to refund the full purchase price at the option of the purchaser, the Commission's "Guides Against Deceptive Advertising of Guarantees" (April 26, 1960), CCH Trade Reg. Rep. ¶ 7895, require that the advertiser of a guarantee must disclose (1) its nature and extent, (2) the manner in which the guarantor will perform, and (3) the obligations of a person claiming under the guarantee.²⁶

In the 1969 fiasco, SLC was out of step on both counts, even though the circumstance that led to the instant complaint distinguishes this case from many cases in which sellers have engaged in the practice of delivering substitute merchandise. The initial good faith of SLC in this isolated occurrence is not questioned. It is understandable why SLC undertook to deliver nonimprinted cards when an unexpected deluge of orders overwhelmed the name-imprinting facilities (even though extra facilities had been called into service) and prevented delivery of the name-imprinted cards in time for Christmas use. And, even though strict and literal adherence to controlling law would have required SLC to obtain from its customers advance approval of the

²⁶ The Guides represent a codification of a long line of cases establishing the principles set forth; see CCH Trade Reg. Rep. ¶ 7705.

shipment of the nonimprinted cards, its noncompliance with this requirement might have been excused in view of the timing realities involved.

But the crux of this proceeding is the deceptive manner in which SLC undertook, with considerable success, to belatedly foist upon its juvenile sales representatives and their customers Christmas cards that did not conform to the orders that it had accepted. Instead of forthrightly stating what it professes to be its policy—money back or a price adjustment if the customer was not satisfied—SLC urged customers to accept the cards and to give them a “personal touch” by signing them themselves (a delicate rationalization for SLC’s slip-up). And then it attempted to conceal its liability by expressing “sincere * * * willingness to stand behind” its “guarantee * * * [of] complete satisfaction.”²⁷ Many sales representatives and many of their customers obviously did not realize that SLC would refund the full purchase price if the cards were rejected or would refund \$1 per box if the cards were retained. They were misled by SLC’s equivocal and ambiguous reference to its guarantee of satisfaction—its failure to reveal its own obligations and the rights of its customers.

An order should issue to prevent any repetition.

However, in Paragraph 10 of the order, the examiner has modified complaint counsel’s proposed order (CPF 52, par. 9) by deleting the requirement that in instances in which respondents may be unable to deliver merchandise as ordered (*e.g.*, name-imprinted cards), they must advise the customer of his options in advance and obtain permission in writing to ship substitute merchandise. Such an order might be appropriate in a case where a respondent made a practice of shipping substitute merchandise without authorization. Here, however, there is evidence of only one such occurrence, apparently caused by unusual circumstances. The procedure proposed by complaint counsel would have been impracticable in connection with the 1969 printing problem. By the time such notice had been given and an effort made to get responses from all customers, Christmas would have come and gone (*supra*, p. 28, footnote 17 [p. 862 herein]).

In the opinion of the examiner, the public interest will be protected by a requirement that customers be clearly advised of their rights to reject the substitute merchandise and to receive a full refund, or to accept it and to receive an appropriate price adjustment.

Paragraph 11 of complaint counsel’s proposed order (CPF 53) has also been deleted as unwarranted. Although the record indicates some

²⁷The emptiness of this slogan was pointed up by the testimony of a disappointed customer that even a full refund did not afford “complete satisfaction” (Cronin 1057-58).

cases of delay in the receipt of refunds, the evidence does not show any calculated policy by SLC to drag its feet in making refunds. On the contrary, it appears that such delays as there were may be attributed to the unprecedented volume of refund requests in 1969-70.

Nor has the examiner adopted the first "FURTHER ORDERED" paragraph following Paragraph 11 of complaint counsel's proposed order (CPF 53), which would require SLC to offer refunds to all persons to whom it wrongfully shipped nonimprinted cards in 1969—both the sales representatives and their customers. The primary basis for the rejection of this proposal is that it is unrealistic and would amount to an empty gesture.

The uncontradicted testimony of SLC representatives was to the effect that there were no records available to show the identity of either the sales representatives or the ultimate customers who received nonimprinted cards in response to orders for name-imprinted cards (Pray 1663-66; Robbins 2027-29; Brunsell 1586). Refunds or price adjustments have been made to all those who complained directly or indirectly to SLC, and it does not appear that, as a practical matter, the relief sought by the paragraph in question can be enforced. Accordingly, this proposed provision of the order is regretfully rejected.

D. Use of the Word "Free"

The charge that SLC deceptively represents that it imprints names on its Christmas cards "free" opens another chapter in the history of the Commission's policy toward the use of the word "free" (see CCH Trade Reg. Rep. ¶ 7695, ¶ 7699).

Without undertaking to review the shifting tides that have engulfed this promotional device from time to time, the examiner simply holds that this record does not warrant a finding or conclusion that SLC's use of the term is false, misleading, or deceptive. The facts may be briefly stated:

For many years, SLC has featured in advertisements and promotional literature the sale of Christmas cards at a uniform price per box,²⁸ with names imprinted "free." It has sold the same cards without names imprinted at the same price. There has never been a price differential or a stated charge for the name-imprinting. Uncontradicted testimony was to the effect that there have been many sales of cards without names imprinted. (See *supra*, pp. 30-32 [pp. 864-65 herein]; compare CPF 31, 34; CB 29.)

On the basis of these facts, SLC appears to be in compliance not only with rules promulgated by the Commission in 1953 (CCH Trade Reg. Rep. ¶ 7695), but also with the latest statement of Commission

²⁸The price has changed from year to year, and the boxes contain varying numbers of cards, depending on style and design.

policy—"Guide Concerning Use of the Word Free and Similar Representations" ("Guide"), promulgated November 16, 1971, effective December 16, 1971. Although SLC's practices must be judged in the light of the law applicable prior to the complaint, any order that might be entered herein would look to the future, as does the new Guide. Since the examiner has concluded that under either standard, SLC is not in violation, considerations of space and time commend assessment of SLC's practices in the light of the current Guide, which does not appear to differ materially from the 1953 standard.

SLC's use of the word "free" appears to be in accord with Section (b) of the Guide in that the offer of free imprinting "is based upon a regular price for the merchandise * * * which must be purchased by consumers in order to avail themselves of that which is represented to be 'Free.'" In line with Section (b), the purchaser is paying no more than the regular price for the Christmas cards, and he is paying nothing for the imprinting. There has been no showing that SLC has directly and immediately recovered, in whole or in part, the cost of the free service "by marking up the price of the article which must be purchased, by the substitution of inferior merchandise, or otherwise."

There is no question that the terms, conditions, and obligations for the receipt of the "free" service are "set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood" (Guide (c)). It is clear that the imprinting may not be purchased separately, that the Christmas cards may be purchased at a stated price, and that names will be imprinted thereon without additional charge.

The repetition of the offer of "free" imprinting year after year is the only basis on which the representations might be challenged under the Guide. This is suggested by Guide (h) which reads in part as follows:

So that a "Free" offer will be special and meaningful, a single size of a product or a single kind of service should not be advertised with a "Free" offer in a trade area for more than 6 months in any 12-month period.

Guide (h) specifies other timing and frequency restrictions, as well as a restriction on the volume of sales involved in the "free" offer.

Since the sale of Christmas cards is on a seasonal basis from year to year, and since different Christmas cards are sold each year,²⁹ there is

²⁹ Complaint counsel's theory respecting the word "free" is based in part on the concept that Christmas cards are fungible (Tr. 1895). But just as the Supreme Court (in *Ballard v. United States*, 329 U.S. 187, 193-94 (1946)), held, happily, that the sexes are not fungible (before the days of the women's lib' and the "gay lib" movement), so this examiner has determined that this record does not warrant a finding that Christmas cards are fungible.

serious doubt that the timing restrictions specified by Guide (h) are properly applicable to the practices of SLC. In any event, the requisite facts were not developed in this record.

Similarly, this record affords no basis for a determination, as urged by complaint counsel, that the offer of free imprinting has been so long continued that it does not now constitute a free service and has become part of a package deal, with provision for the cost of imprinting included in the price of the cards (CPF 34; CB 32). This case is distinguishable from such cases as *Kalwajtys v. FTC*, 237 F. 2d 654 (7th Cir. 1956), and *Basic Books v. FTC*, 276 F. 2d 718 (7th Cir. 1960), which involved flagrant misrepresentations that included clear deception as to the usual prices of the items in a combination offer, as well as the usual price of the combination.

Complaint counsel rely principally on the case of *FTC v. Mary Carter Paint Co.*, 382 U.S. 46 (1965), but this reliance is misplaced. In the *Mary Carter* case, a paint company advertised and sold every second can of paint "free," whether by the gallon or by the quart. The Commission decided, and the Supreme Court agreed, that the offer was illusory because there never had been a usual or customary price for a single can of paint. In effect, it was held that the price represented as the price of a single can was in fact the price for a combination of two cans.

Although the instant case affords a superficial analogy with the *Mary Carter* case the two may be readily distinguished by quoting from the *Mary Carter* opinion:

* * * Mary Carter had no history of selling single cans of paint; it was marketing twins, and in allocating what is in fact the price of two cans to one can, yet calling one "free," Mary Carter misrepresented. (382 U.S. at 48)

In the instant case, SLC had a history of selling nonimprinted cards. It was not "marketing twins." It was coupling a service with its cards. The cards were sold separately at a stated price, and the imprinting was added on order without any increase in price. The fact that SLC never established a separate regular price for the service of imprinting would seem to be testimony to the fact that such imprinting was free. The refund of \$1 when SLC was unable to deliver name-imprinted cards to all its customers in 1969 (*supra*, p. 28 [p. 862 herein]) suggests the same conclusion.

The lack of substance in the challenge to SLC's representation of free imprinting is pointed up by the fact that the proposed order (CPF 53, par. 10) would literally have no effect on what SLC is now doing. The order would prohibit respondents from:

Representing * * * that Christmas cards will be imprinted free unless the price charged for imprinted cards is respondent's regular, bona fide retail selling price for such cards without imprinting.

An added catch-all provision prohibiting misrepresentation "that any product or service is free" would leave up in the air just what respondents must do or refrain from doing.

Similarly, the modified order entered by the Commission in the *Mary Carter* case, 70 F.T.C. 528 (1966), if made applicable to SLC, would require no change in its representations or operations. The order is quoted below, with the word "service" added in brackets to take account of the factual distinctions between the two cases. The order prohibits any representation :

That any article of merchandise [service] is being given free or as a gift, or without cost or charge, in connection with the purchase of other merchandise, unless the stated price of the merchandise required to be purchased in order to obtain said article [service] is the same or less than the customary and usual price at which such merchandise has been sold separately for a substantial period of time in the recent and regular course of business in the trade area in which the representation is made.

Accordingly, the charge against SLC involving its representation of free imprinting is being dismissed.

E. Coverage of the Order

To the extent that an order is warranted against any one of the corporate respondents, the question arises whether such order should be directed against all of the corporate respondents, as well as the individual respondent Ryland E. Robbins. The examiner has concluded (1) that the corporate respondents constitute one economic entity, so that an order warranted against one corporate respondent should be directed against all and (2) that the order should run against Ryland E. Robbins individually, as well as in his official capacity, because of his involvement in the activities of each corporate respondent, whether viewed separately or as part of a single economic entity.³⁰

These conclusions are predicated on the determination that all the corporate respondents have been proved to constitute a single enterprise, with the family stockholders so dominating and controlling the acts of all that they are merely alter egos of one another and of the

³⁰ Respondents have raised as a threshold issue the question whether the complaint is "defective" because of its failure to deal with the named respondents as separate legal entities and its failure to identify which of the alleged respondents is responsible for which of the alleged acts (RB 1, 3-8). The examiner here disposes of the ultimate issue raised by this contention. But against the possibility that respondents thereby intend to allege that they were not given due notice of the charges or an opportunity to defend against them, the examiner now rules that, through prehearing procedures, as well as in the course of trial, respondents were on notice as to these matters and had an opportunity to defend.

family stockholders. Thus, the violations shown to have been employed individually by one corporate respondent may be deemed those of the enterprise.

Despite some degree of corporate separateness, the corporations that constitute elements of the Robbins family of corporations have not dealt with one another as independent commercial entities. They have interchanged business functions as the circumstances warranted in a manner wholly inconsistent with any purported corporate separation between the affiliated corporations and between each such corporation and its family stockholders.

The Robbins family—particularly, father and son—has so dominated and controlled the acts of the corporate respondents that their corporate identities may be ignored. Thus, for purposes of fashioning an order, each corporate respondent, together with Ryland E. Robbins as an officer, director, and one of the controlling stockholders, may be held vicariously responsible for the practices of each.

The general rule, of course, is that ordinarily the law does not disregard corporate entities. Nevertheless, where corporations are so controlled by the same stockholders as to constitute mere agencies or instrumentalities in a single enterprise, the Commission and the courts are not blinded or deceived by mere forms of law and, regardless of legal fictions, will deal with the substance of the transactions involved as if the corporate entities did not exist and as the justice of the case may require.

These principles have been distilled primarily from the decisions of the Commission and the Court in *Crowell-Collier Publishing Co.*, Dkt. 7751 (Final Order February 4, 1969 [75 F.T.C. 241]), *aff'd sub nom. P. F. Collier & Son Corp. v. FTC*, 427 F.2d 261 (6th Cir. 1970), *cert. denied*, 400 U.S. 926. That case dealt with a parent-subsidiary relationship, but the principles there enunciated are fully applicable to the fact pattern found in the instant case.

To conclude that the order in this case should be directed against all the respondents is not necessarily inconsistent with the general principles of corporate law, as established and interpreted in the State of Massachusetts, upon which respondents rely (RB 6-7). The validity of these principles as abstract propositions of law need not be questioned in determining that they are overridden by other legal principles that are equally valid.

It is established that where the public interest is involved, as it is in the enforcement of Section 5 of the Federal Trade Commission Act, strict adherence to common law principles is not required in the determination of whether affiliated corporations under common

ownership and control should be treated as a single enterprise. Each may be held for the acts of its affiliate if strict adherence to the fiction of corporate separateness would circumvent the policy of the statute.

The picture here is essentially similar to that described in *Delaware Watch Co., Inc. v. FTC*, 332 F.2d 745, 746 (2d Cir. 1964)—a “case in which the same individuals were transacting an integrated business through a maze of interrelated companies.” In such a case, “the pattern and framework of the whole enterprise must be taken into consideration” (citing *Art National Mfrs. Dist. Co. v. FTC*, 298 F.2d 476, 477 (2d Cir. 1962)). Otherwise, said the Court, respondents might be “provided with a clear mechanism for avoiding the terms of the order.”

There is a basis for concluding that there has been such complete control of the corporate respondents by their common owners as to render each a mere tool of the owners, with the result that their separate corporate identities constitute a mere fiction that may properly be disregarded to carry out the remedial purposes of the Federal Trade Commission Act. (Cf. *National Lead Co. v. FTC*, 227 F.2d 825, 829 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957); see *American News Co.*, 58 F.T.C. 10, 22-23 (1961), *modified on other grounds*, 300 F.2d 104 (2d Cir. 1962); compare *H. J. Heinz Co.*, 52 F.T.C. 1607, 1642-44 (1956) (see dissent at 1647), *rev'd on other grounds sub nom Stockely Van Camp v. FTC*, 246 F.2d 458 (7th Cir. 1957); *Ohmlac Paint & Refining Co., Inc.*, 60 F.T.C. 419, 427-28 (1962).)

On the basis of the facts found as to the role of Ryland E. Robbins in the management of each of the corporate respondents, and on the authority of *FTC v. Standard Education Society*, 302 U.S. 112, 120 (1937), and a long line of Commission and court cases in accord therewith, the examiner has no doubt as to the propriety of naming Ryland E. Robbins in the order both as a corporate officer and in his individual capacity.

Here, as in *Standard Education*, the record discloses “closely held corporations owned, dominated and managed” by individuals who “acted with practically the same freedom as though no corporation had existed.” Here, as there, it is necessary to include the individual respondent for the order to be fully effective and to ensure against its evasion.

CONCLUSIONS

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

2. The complaint herein states a cause of action, and this proceeding is in the public interest.

3. The record supports all the allegations of the complaint with the exception of the charges in Paragraph Twelve that the representations of respondent Sales Leadership Club, Inc., regarding the "free" imprinting of Christmas cards were false, misleading, and deceptive.

4. The use by respondents of the statements, representations, and practices herein found to be false, misleading, and deceptive has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such representations were and are true and, by reason of such erroneous and mistaken belief, into the purchase of substantial quantities of respondents' products. Such statements, representations, and practices have had the further capacity and tendency to confuse and mislead many persons as to their rights and obligations with respect to respondents' merchandise and to unfairly harass and inconvenience them.

5. The acts and practices of respondents, as herein found, 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.

6. The record establishes the allegations of Paragraph One of the complaint to the effect that respondents "cooperate and act together in carrying out respondents' business." As a matter of fact and of law, they constitute a single economic enterprise. In these circumstances, it is necessary that the order as to practices engaged in by one corporate respondent be made applicable to all the respondents.

7. The record establishes that respondent Ryland E. Robbins, as a corporate officer, as an individual, and jointly with his father, Willard S. Robbins (president of the corporate respondents but not himself a respondent herein, formulates, directs, and controls the acts and practices of the corporate respondents and that his personal participation in the acts challenged by the complaint has been sufficient to hold him individually liable. Moreover, the history of the corporate respondents and the role that he has played therein, together with his participation in other related corporations—some engaged in the same line of business—compel the conclusion that it is necessary that he be named in the order both as a corporate officer and as an individual, so as to make the order fully effective and to prevent its evasion.

Initial Decision

ORDER

It is ordered, That respondents Sunshine Art Studios, Inc., Junior Sales Club of America, Inc., Sales Leadership Club, Inc., and Guardian Collection Agency, Inc., corporations, their successors and assigns, and Ryland E. Robbins, individually and as an officer of each such corporation, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of greeting cards or any other product, or in the collection of accounts arising therefrom, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Sending any merchandise without the expressed request or consent of the recipient unless such merchandise shall have attached to it a clear and conspicuous statement that the recipient may treat the merchandise as a gift to him and that he has the right to retain, use, discard, or dispose of it in any manner that he sees fit without any obligation whatsoever to the sender.

2. Sending any communication (including bills, invoices, reminders, letters, notices, or dunning communications) that in any manner seeks to obtain payment for or return of merchandise shipped without the expressed consent or request of the recipient.

3. Sending any merchandise to any person without first obtaining a specific order therefor after respondents have been notified by such person that no further merchandise shipments are to be made.

4. Using any coupon, order form, or other document that not only requests a single shipment of specific merchandise but also purports to authorize the shipment of "other seasonal samples on approval as they become [or are] available" (in those words or in words of similar import) or that otherwise purports to authorize future shipments of merchandise, unless such coupon, order form, or other document (1) clearly and conspicuously discloses that it is an authorization for respondents to send merchandise at a future date and that such authorization will be operative for a stated period of time or for a stated number of offerings, and (2) contains a clear disclosure of the merchandise contemplated by the authorization form.

5. Resorting to any subterfuge or coercion to sell respondents' merchandise.

6. Representing, directly or by implication, that delinquent accounts will be, or have been, turned over to an independent, bona fide collection agency.

7. Representing, directly or by implication, that Guardian Collection Agency, Inc., is an independent, bona fide collection agency; or that any other organization or trade name owned or controlled wholly or partially by respondents is an independent, bona fide collection agency.

8. Representing, directly or by implication, that delinquent accounts will be referred to an attorney if payment is not received.

9. Using any subterfuge or deceptive scheme or device in connection with the collection of delinquent accounts.

10. Shipping to any customer greeting cards, or any other merchandise, that differ in a material respect from the greeting cards or the other merchandise ordered without informing the customer that he is entitled to a full cash refund if he does not wish to accept the substitute merchandise or a partial refund of a stated amount if he is willing to accept merchandise of lesser quality or value than that ordered.

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

It is further ordered, That corporate respondents distribute a copy of this order to each of their operating divisions or departments.

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

It is further ordered, That the charges in the complaint (Paragraph Twelve) relating to the use of the word "Free" by respondent Sales Leadership Club, Inc., be, and they hereby are, dismissed.

OPINION OF THE COMMISSION

BY MACINTYRE, *Commissioner*:

This matter is before the Commission upon the cross-appeals of complaint counsel and the respondents from the initial decision of the administrative law judge, which holds respondents to be in violation of law as charged in the complaint in all respects except one and which

contains an order requiring respondents to cease and desist the practices found to be unlawful.

The complaint, issued December 8, 1970, charges respondents with unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act in connection with the sale of greeting cards. The practices charged are, in substance, as follows: the sending of unordered merchandise, misrepresentation in connection with collection practices, the failure to make refunds for the nondelivery of ordered merchandise, and falsely representing as free the service of the printing of names on greeting cards.

Respondents are four corporations, organized under Massachusetts law, and one individual, all located at 45 Warwick Street, Springfield, Massachusetts. The corporations are: Sunshine Art Studios, Inc. (Sunshine), Junior Sales Club of America, Inc. (Junior Sales), Sales Leadership Club, Inc. (Sales Leadership), and Guardian Collection Agency, Inc. (Guardian).¹ The named individual is Ryland E. Robbins, who is treasurer and director of the first three corporations and a director of Guardian.

The corporations, except Guardian, are engaged in the business of advertising and selling greeting cards to the public. The cards are shipped from Massachusetts to customers and prospective customers throughout the United States. Guardian is engaged in the collection of accounts for other respondent corporations. Certain of the respondent corporations are also engaged in collecting their own accounts.

Respondent Sunshine sells greeting cards to its affiliates, Junior Sales and Sales Leadership, as well as to wholesalers, organizations, businesses and individuals, including housewives and children. Junior Sales sells all-occasion cards and Christmas cards nationally. It operates as a club, appealing to children from age ten to early teens. It solicits membership for the selling of cards in comic books and such magazines as "Boys Life," "American Girl," and it also solicits by direct mail. Respondent Sales Leadership enrolls children to sell Christmas cards to win prizes or earn money. Its advertising appears in such magazines as "American Girl," "Boys Life," and in comic books. This corporation also solicits by direct mail.

The administrative law judge found and concluded that the record supported all of the allegations of the complaint with the exception of a charge in Paragraph Twelve that representations in Sales Leadership's advertisements of the "free" imprinting of Christmas cards are false, misleading and deceptive. He dismissed the complaint as to the charge on free imprinting. He further held that the corporate

¹ Name changed to Guardian Collection Agency, Inc. See administrative law judge's Order Amending Complaint, dated February 12, 1971.

respondents constitute one economic entity and that an order warranted against one of the corporate respondents should be directed against all; also, that the order should run against Ryland E. Robbins both as a corporate officer and as an individual because of his individual responsibility for the acts and practices of the corporate respondents and to make the order fully effective.

As indicated above, respondents and complaint counsel have both filed appeals and in considering these appeals we conclude that the initial decision is appropriate to dispose of the charges in the complaint and all of the issues raised on the appeals except for two items, which we will discuss in detail below.

Use of the word "free"

The complaint charges that the phrase "EACH CARD WITH NAME IMPRINTED FREE!" and similar phrases contained in advertising disseminated by Sales Leadership represents that the imprinting was free whereas it was not free because the price of the greeting card includes a provision for the imprinting cost and that therefore this representation is false, misleading and deceptive. ("Imprinting" is the term used in this case to refer to the printing of a customer's name on greeting cards.) The administrative law judge dismissed the complaint as to this charge because he found from the evidence that respondent Sales Leadership had "many orders" for greeting cards without names and he reasoned that because the price for the cards with imprinting was the same as that for cards without, the imprinting was in fact free. Complaint counsel have appealed this part of the initial decision.

We hold that the administrative law judge erred in his dismissal of such charge. We disagree with his finding that respondent Sales Leadership had many orders for cards without names imprinted. He relies for his finding on the testimony of Wilder T. Pray, general manager of Sales Leadership, and respondent Ryland E. Robbins, both of whom testified to the effect that many orders were received for non-imprinted cards. It is reasonably clear from the whole record, however, that these witnesses were referring to shipments of nonimprinted cards at Christmas-time 1969, when respondent Sales Leadership, for lack of adequate facilities, was unable to fill all of the imprinted card orders and for about 10 percent of the orders received, which orders were for imprinted cards, supplied nonimprinted cards. Witness Pray, after stating that he had seen orders for nonimprinted cards, testified:

Q. Would the 10 percent that you referred to shipped out without names on them be orders in which those people asked that their names, in fact, be put on them?

A. Yes.

(Tr. 1888)

The record otherwise supports a conclusion that Sales Leadership received few, if any, orders for cards without names. Its promotional program is geared entirely to selling imprinted Christmas cards. Its advertising throughout stresses the fact that the cards are imprinted or "personalized" (CX 151). On the other hand, there is no effort made to sell cards without imprinting. Thus, it is a reasonable conclusion that Sales Leadership sold few if any cards which it did not promote.

Based on the whole record, therefore, that is, the testimony of witnesses Pray and Robbins, which we conclude refers to shipments made in a special situation rather than regular orders, and the inference to be drawn from the advertising theme stressing the sale of cards with name imprinted, it is found that Sales Leadership received few, if any, orders for nonimprinted cards.

Thus, the situation falls within the rule spelled out in the case of *Federal Trade Commission v. Mary Carter Paint Co., et al.*, 382 U.S. 46 (1965). In that case Mary Carter had no history of selling single cans of paint. It marketed twins and allocated what was in fact the price of two cans to one can and called the other "free." The Court upheld the Commission's finding that this was a misrepresentation. Likewise, in this case there is a combination offer of imprinting and cards, and since there have been no sales or no significant sales and thus no regular price established for cards without imprinted names the imprinting cannot be said to be "free."

Moreover, here Sales Leadership made the combination offer of the greeting cards with the imprinting continuously and for an indefinite term. In this circumstance, even if some sales were made without imprinting that fact would not justify representing the imprinting as free because it is not free in any meaningful sense. The real offer is that of the combination. Those taking less are not getting full value. Thus, there is no significance in comparing the price of the imprinted with that of the nonimprinted cards. If the price for a ham and egg special on a restaurant menu is a set figure even though a customer does not take the ham, it can hardly be concluded from this that the ham is free to someone else. The cost is included in the price for the combination.

In this instance the cost of the imprinting is reflected in the price of the greeting cards in the same way that all other costs are reflected therein. The quoted price is the regular price of the whole package, including the cost of the imprinting. The customer pays for the imprinting cost because it is included in the total price.² The imprint-

² The fact that an additional charge was made for an extra line (in 1969, for instance, a third line was available for an extra charge of 25 cents per box—RX 30) indicates that the imprinting is a specific item of cost.

ing is thus not free. This situation may be distinguished from those in which free offers are continued only for a limited period. See the Commission's "Guide Concerning The Use Of The Word 'Free' And Similar Representations" promulgated November 16, 1971.³

In summary, Sales Leadership has represented a service as free when it is not giving away this service but is charging for it by including the cost in the regular price. Thus it is found that respondent Sales Leadership's use of the word "free" in connection with the imprinting on its greeting cards is false, misleading and deceptive. Complaint counsel's appeal on this issue is granted and an appropriate order prohibiting such misrepresentation will be entered.

Scope of the order

Complaint counsel urge that the Commission issue in this matter a stronger order than that proposed by the administrative law judge in Paragraph 4 of his initial decision concerning the sending of unordered merchandise. They request that this provision be fashioned along the lines of the order used in *White Industries, Inc.*, Docket C-1861 (consent order issued February 16, 1971 [78 F.T.C. 317]).

The administrative law judge's provision in Paragraph 4 is essentially a requirement for clear disclosure of the terms of the commitment in connection with the use of coupons authorizing future shipments, whereas the *White Industries* order goes further and requires not only that the authorization be in a separate document or a separate paragraph without extraneous material but also, among other things, that it be limited in period of time to not exceeding one year or to one offering.

The administrative law judge, discussing the remedy (pages 38 and 39, initial decision [pp. 869-71 herein]), concludes that a strong prohibition is needed to correct the practice of sending unordered merchandise but he determined to include only a qualified prohibition because he believed that the "format" of the coupon was not in issue or at least not a proper issue and that the evidentiary record in the case is silent on the subject.

³ Guide (h)—"Frequency of offers.

"So that a 'Free' offer will be special and meaningful, a single size of a product or a single kind of service should not be advertised with a 'Free' offer in a trade area for more than 6 months in any 12-month period. At least 30 days should elapse before another such offer is promoted in the same trade area. No more than 3 such offers should be made in the same area in any 12-month period. In such period, the offeror's sale in that area of the product in the size promoted with a 'Free' offer should not exceed 50% of the total volume of his sales of the product, in the same size, in the area."

A typical current authorization coupon used by respondent Sunshine reads in part as follows:

I would like to earn extra money. Please send free catalog, sales tips, everyday sample boxes and other seasonal samples, on approval, as they are available.

Name

Address

City..... State..... Zip.....

(CX 9.)

Coupons with this or similar wording are contained in respondent Sunshine's magazine advertisements (*e.g.*, CXs 9, 13, 15). The coupon is designed to be cut out of the advertisement and sent to respondent Sunshine as an order for greeting cards.

Witnesses, mostly youths, testified that after sending in the coupons they received continuing shipments after the initial shipment. Some testified that they received shipments even after notifying respondent Sunshine to discontinue the order. The administrative law judge found that a number of witnesses thought they were ordering a single shipment and did not understand they were committing themselves to receiving successive shipments (page 20, initial decision [p. 856 herein]). At one point in the initial decision the administrative law judge states in part: "Although careful reading of the coupon text may put a careful reader on notice that not only is he ordering merchandise specifically described in the accompanying advertising and in the text of the coupon, but that he may also be ordering future shipments of other unknown merchandise, this record demonstrates that, as alleged by the complaint, any such allegedly additional commitment was made 'unknowingly or unwittingly' (*supra*, pp. 20-22 [pp. 856-58 herein]). This conclusion is particularly applicable in the numerous instances involving children and youths." (Initial decision, page 35. [p. 867 herein]). He held in effect that successive shipments after the initial shipment in such circumstances was unordered merchandise.

It is clear, therefore, that the practice of sending unordered merchandise in this instance was the direct result of the format or general make-up of the coupon employed by respondent Sunshine. Thus, the format is in issue since it is an integral part of the abuse of sending unordered merchandise, which subject was central to the pleadings and to the trial in this case. We accordingly disagree with the administrative law judge to the extent he ruled otherwise.

Respondent Sunshine's advertisements appearing in such magazines as "Boys Life" and "American Girl" are plainly directed to youth, and the record shows that many of Sunshine's customers are children. The administrative law judge refers to testimony from young witnesses that they did not understand they were committing themselves to

future shipments, particularly unlimited future shipments (pages 20, 35, initial decision [pp. 856, 867 herein]). In the circumstances we do not believe Paragraph 4 of the administrative law judge's order is adequate to correct the abuse of sending unordered merchandise. Such order basically would require only specific disclosures but it is not likely this will adequately protect Sunshine's youthful customers. In this age group there are, we believe, a substantial number of children who even with the disclosures required by the administrative law judge's order could not be expected to understand that they would be committing themselves to continuous shipments for an indefinite period. Accordingly, an order with more restrictive provisions is warranted and we will modify Paragraph 4 in the order in the initial decision so as to include the elements of the prohibitions contained in the *White* order, *supra*, *i.e.*, a requirement that the authorization for continuous shipments be separated from other material, and a limit as to time period and number of shipments.

Complaint counsel's appeal will be granted and the appeal of respondents will be denied. The initial decision is modified to conform with the views expressed in this opinion and as so modified will be adopted as the decision of the Commission. An appropriate order will be entered to accompany this opinion.

FINAL ORDER

This matter having been heard upon the cross-appeals of complaint counsel and respondents from the administrative law judge's initial decision and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having rendered its decision determining that complaint counsel's appeal should be granted and respondents' appeal denied and that the initial decision as modified to conform with the views expressed in the Commission's opinion should be adopted as that of the Commission:

It is ordered, That the appeal of complaint counsel be, and it hereby is, granted and the appeal of respondents be, and it hereby is, denied.

It is further ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

ORDER

It is ordered, That respondents Sunshine Art Studios, Inc., Junior Sales Club of America, Inc., Sales Leadership Club, Inc., and Guardian Collection Agency, Inc., corporations, their successors and assigns, and Ryland E. Robbins, individually and as an officer of each such corpor-

ation, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of greeting cards or any other product, or in the collection of accounts arising therefrom, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Sending any merchandise without the expressed request or consent of the recipient unless such merchandise shall have attached to it a clear and conspicuous statement that the recipient may treat the merchandise as a gift to him and that he has the right to retain, use, discard, or dispose of it in any manner that he sees fit without any obligation whatsoever to the sender.

2. Sending any communication (including bills, invoices, reminders, letters, notices, or dunning communications) that in any manner seeks to obtain payment for or return of merchandise shipped without the expressed consent or request of the recipient.

3. Sending any merchandise to any person without first obtaining a specific order therefor after respondents have been notified by such person that no further merchandise shipments are to be made.

4. Using any coupon or order form by which purchasers purport to authorize or authorize (either of which is referred to herein as "authorization") respondents to send merchandise at a future date unless the authorization is set forth in a completely separate and distinct paragraph in such document, which separate paragraph contains only words or information necessary to the authorization and which clearly and conspicuously states the following:

(1) that the document is an authorization to send merchandise at a future date; and

(2) that such authorization shall apply only to one offering other than an initial shipment, if any, which offering is to be shipped within one year; and

(3) a description of the merchandise covered by the authorization.

5. Resorting to any subterfuge or coercion to sell respondents' merchandise.

6. Representing, directly or by implication, that delinquent accounts will be, or have been, turned over to an independent, bona fide collection agency.

7. Representing, directly or by implication, that Guardian Collection Agency, Inc., is an independent, bona fide collection

agency; or that any other organization or trade name owned or controlled wholly or partially by respondents is an independent, bona fide collection agency.

8. Representing, directly or by implication, that delinquent accounts will be referred to an attorney if payment is not received.

9. Using any subterfuge or deceptive scheme or device in connection with the collection of delinquent accounts.

10. Shipping to any customer greeting cards, or any other merchandise, that differ in a material respect from the greeting cards or the other merchandise ordered without informing the customer that he is entitled to a full cash refund if he does not wish to accept the substitute merchandise or a partial refund of a stated amount if he is willing to accept merchandise of lesser quality or value than that ordered.

11. Representing, directly or by implication, that imprinting or other service in connection with the sale of greeting cards or other products is given "free" or as a gift or without cost or charge in connection with:

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

(2) any offer not covered by (1), above, excluding introductory offers, unless as to such limited offer:

(a) a regular bona fide retail price is established for the product without the imprinting or service;

(b) a regular bona fide retail price is established for the imprinting or service, or in the absence of such price a determination is made of the cost to respondents of providing the imprinting or service; and

(c) the price of the greeting cards or product is reduced at least as much as the price or cost of the imprinting or service.

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

It is further ordered, That corporate respondents distribute a copy of this order to each of their operating divisions or departments.

It is further ordered, That the respondents herein shall, within sixty (60) days after the effective date of this order, file with the Commis-