

AMERICAN HOME PRODUCTS CORP., ET AL.

Complaint

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION, ET AL.

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

Docket C-2298. Complaint, Oct. 6, 1972—Decision, Oct. 6, 1972.

Consent order requiring a New York City seller and distributor of household products and its New York City advertising agency, among other things to cease advertising any consumer commodity by the use of or referral to a demonstration, test or experiment that appears or purports to prove superiority of such products over competitive products when such demonstration, test or experiment does not constitute proof thereof.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Home Products Corporation, a corporation, and Cunningham & Walsh, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent American Home Products Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 685 Third Avenue, in the city of New York, State of New York.

Respondent Cunningham & Walsh, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 260 Madison Avenue in the city of New York, State of New York.

PAR. 2. Respondent American Home Products Corporation now, and for some time last past, has been engaged in the sale and distribution of a household window cleaning product known as "Easy-Off Window Cleaner," a household spray starch product known as "Easy-On Speed Starch," a household floor wax known as "Aerowax," and an insecticide product known as "Black Flag Ant and Roach Killer with Baygon," which, when sold are shipped to purchasers located in various States of the United States. Respondent

Complaint

81 F.T.C.

maintains and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent Cunningham & Walsh, Inc., is now and for some time last past has been, an advertising agency of American Home Products Corporation, and now prepares and places, and for some time last past has prepared and placed, advertising material, including but not limited to the advertising referred to herein in Paragraphs Four, Ten, and Thirteen.

PAR. 3. Respondent American Home Products Corporation at all times mentioned herein has been and now is in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of household window cleaning products, household spray starch, household floor waxes and insecticide products of the same general kind and nature as those sold by this respondent.

PAR. 4. In the course and conduct of their business and for the purpose of inducing the sale of "Easy-Off Window Cleaner" respondents have advertised said product by means of a demonstration and various statements used in connection therewith in television broadcasts transmitted by television stations located in various States of the United States and in the District of Columbia having sufficient power to carry such broadcasts across state lines.

Said demonstration and the statements used in connection therewith depicts the following: In the commercial an application of a "leading brand" of window cleaner and an application of "Easy-Off Window Cleaner" are sprayed onto separate halves of a window. Both applications are spread and allowed to dry. The half of the window sprayed with "Easy-Off" is clear but the half sprayed with the "leading brand" contains spots. The voice-over in the commercial states "See the leading brand left spots * * * but Easy-Off dried spotless and streakless."

PAR. 5. Through the use of the aforesaid demonstration and the statements and representations used in connection therewith, respondents represent and have represented, directly or by implication, that such demonstration is actual proof of the superiority of Easy-Off Window Cleaner over competitive products in preventing streaking and spotting of windows when the products are used in their intended manner.

PAR. 6. In truth and in fact, the aforesaid demonstration, including the statements and representations used in connection therewith, is not actual proof of the superiority of Easy-Off Window Cleaner

over competitive window cleaners in preventing the streaking and spotting of windows, when used in the intended manner and under ordinary conditions of use and said demonstration tends to falsely disparage competing products. In the demonstration the directions for use of the "leading brand" of window cleaner were not followed in that if the application of the "leading brand" spray had been wiped as directed, no spots or streaks would have formed.

Therefore, the said demonstration, including the statements and representations used in connection therewith, is false, misleading and deceptive.

PAR. 7. In the further course and conduct of its business and for the purpose of inducing the sale of its product Aerowax floor wax, respondent American Home Products Corporation has advertised said product by means of a demonstration and various statements used in connection therewith in television broadcasts transmitted by television stations located in various States of the United States and in the District of Columbia having sufficient power to carry such broadcasts across State lines:

Said demonstration and the statements used in connection therewith depict two crystal bowls, one filled with Aerowax and the second with another leading wax. The waxes are allowed to dry and the bowl into which the Aerowax was poured is clear while the second bowl is cloudy. The audio portion of the commercial says, in part, "Crystal Clear Aerowax * * * the wax that doesn't dry cloudy, won't turn yellow. Here's proof. In two crystal bowls * * * pour Aerowax * * * and this other leading wax. Let them dry * * * look. The other wax dried cloudy. Could turn yellow. Aerowax doesn't dry cloudy * * * won't turn yellow."

PAR. 8. Through the use of the demonstration and the statements and representations used in connection therewith, as set out in part in Paragraph Seven above, respondent American Home Products Corporation represents and has represented, directly and by implication, that Aerowax floor wax is superior to other competitive waxes in polishing floor surfaces, and that such demonstration is actual proof of the superiority of Aerowax floor wax over other competitive floor waxes in polishing floor surfaces when the products are used in their intended manner.

PAR. 9. In truth and in fact, Aerowax is not superior to other competitive floor waxes in polishing floor surfaces and that the aforesaid demonstration, including the statements and representations used in connection therewith, is not actual proof of the superiority of Aerowax over competitive floor waxes in polishing floor surfaces when the prod-

Complaint

81 F.T.C.

ucts are used in their intended manner and said demonstration tends to falsely disparage competitive products. In the demonstration Aero-wax, a polishing wax, was compared with a cleaning wax and the waxes were not used in their intended manner.

Therefore, the said representation and demonstration, including the statements and representations used in connection therewith is false, misleading and deceptive.

PAR. 10. In the further course and conduct of their business and for the purpose of inducing the sale of "Black Flag Ant and Roach Killer with Baygon" respondents have advertised said products by means of a demonstration and various statements used in connection therewith in television broadcasts transmitted by television stations located in various States of the United States and in the District of Columbia having sufficient power to carry such broadcasts across state lines.

Said demonstration and the statements used in connection therewith show cockroaches being placed into two separate containers. One container had been treated with a leading brand insecticide while the other container had been treated with Black Flag. The roaches placed in the container treated with Black Flag die but the roaches placed in the other container do not. The audio portion of the commercial states that Black Flag with Baygon killed the roaches while the other spray did not.

PAR. 11. Through the use of the aforesaid demonstration and the statements and representations used in connection therewith, as set out in part in Paragraph Ten above, respondents represent and have represented, directly or by implication, that such demonstration is actual proof of the superiority of Black Flag Ant and Roach Killer with Baygon over competitive products in killing all types of roaches.

PAR. 12. In truth and in fact, the aforesaid demonstration, including the statements and representations used in connection therewith, is not actual proof of the superiority of Black Flag Ant and Roach Killer with Baygon over competitive insecticides in killing all types of roaches, and said demonstration tends to falsely disparage competing products. In the demonstration, certain roaches known to be resistant to dieldrin, the active ingredient in the competitive product, were used.

Therefore, the said demonstration, including the statements and representations used in connection therewith, is false, misleading and deceptive.

PAR. 13. In the further course and conduct of their business and for the purpose of inducing the sale of Easy-On Speed Starch, respondents have advertised said product by means of a demonstration and various

statements used in connection therewith in television broadcasts transmitted by television stations located in various States of the United States and in the District of Columbia having sufficient power to carry such broadcasts across state lines.

Said demonstration and the statements used in connection therewith depict a woman spraying Easy-On Speed Starch on one side of a white shirt and another leading starch on the other side. Then hot irons are placed on the areas sprayed and when the irons are lifted, the area of the shirt area sprayed with Easy-On remains white while the area of the shirt sprayed with the other starch is scorched. The audio portion of the commercial says, in part, "We'll prove Easy-On Speed Starch, the no build-up starch is really different. Starches can build-up—cause scorching. But Easy-On has the special GE Silicone formula to prevent build-up—resist scorching. Now, look. What a difference! Easy-On resists scorching * * *."

PAR. 14. Through the use of the demonstration and the statements and representations used in connection therewith, as set out in part in Paragraph Thirteen above, respondents represent and have represented, directly or by implication, that such demonstration is actual proof of the superiority of Easy-On Speed Starch over competitive products in preventing starch build-up and resisting scorching when the products are used in their intended manner.

PAR. 15. In truth and in fact, the aforesaid demonstration, including the statements and representations used in connection therewith, is not actual proof of the superiority of Easy-On Speed Starch over competitive products in preventing starch build-up and resisting scorching because in the demonstration, had the shirts been ironed in the normal and customary manner, no scorching would have taken place.

Therefore, the said demonstration, including the statements and representations used in connection therewith, is false, misleading and deceptive.

PAR. 16. The use by the respondents of the aforesaid demonstrations and the statements and representations used in connection therewith has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said demonstrations including the statements and representations used in connection therewith did and does constitute actual proof of the superiority of Easy-Off Window Cleaner, Easy-On Speed Starch, Aerowax floor wax, and Black Flag Ant and Roach Killer with Baygon, over competitive products, and to induce the purchase of a substantial quantity of American Home Products Corpora-

Decision and Order

81 F.T.C.

tion's Easy-Off Window Cleaner, Easy-On Speed Starch, Aerowax floor wax and Black Flag Ant and Roach Killer with Baygon insecticide, because of such erroneous and mistaken belief.

PAR. 17. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

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

1. Respondent American Home Products Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 685 Third Avenue, in the city of New York, State of New York.

Respondent Cunningham & Walsh, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business

located at 260 Madison Avenue in the city of New York, State of New York.

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

ORDER

I

It is ordered, That respondent American Home Products Corporation, a corporation, its successors and assigns and respondent's 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 (i) any ironing aid or fabric conditioner including Easy-On Speed Starch or any other household consumer commodity consumed or expended in the laundering, ironing or treatment of garments or other fabrics usually found in the house; (ii) any insecticide including Black Flag Ant & Roach Killer used in whole or in part within the house or any other household consumer commodity consumed or expended to control insects, pests or weeds or to fertilize earth in and around the house; (iii) any household consumer commodity consumed or expended to freshen or deodorize the air within the house or to light fires in and around the house; (iv) any product used to cool foods or beverages; (v) any household window cleaner including Easy-Off Liquid Window Cleaner or any household floor polish, including Aerowax Floor Wax; or (vi) any other household consumer commodity consumed or expended in cleaning, maintaining, repairing or polishing the house and its usual furnishings, fixtures or objects; or (vii) any aerosol shaving cream product; or (viii) any shoe care product; in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Advertising any such consumer commodity by presenting or referring to a demonstration, test or experiment that appears or purports to be proof of any fact or product feature that is material to inducing the sale of the commodity, such as but not limited to comparative superiority of one commodity over another, when, in fact, such demonstration, test or experiment does not constitute actual proof thereof.

II

It is further ordered, That respondent Cunningham & Walsh, Inc., a corporation, its successors and assigns and respondent's officers, agents, representatives, and employees, directly or through any corpo-

ration, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of (i) any ironing aid or fabric conditioner including Easy-On Speed Starch or any American Home Products Corporation household consumer commodity consumed or expended in the laundering, ironing or treatment of garments or other fabrics usually found in the house; (ii) any insecticide including Black Flag Ant & Roach Killer used in whole or in part within the house or any American Home Products Corporation household consumer commodity consumed or expended to control insects, pests or weeds or to fertilize earth in and around the house; (iii) any American Home Products Corporation household consumer commodity consumed or expended to freshen or deodorize the air within the house or to light fires in and around the house; (iv) any American Home Products Corporation product used to cool foods or beverages; (v) any household window cleaner including Easy-Off Liquid Window Cleaner; or (vi) any American Home Products Corporation household consumer commodity consumed or expended in cleaning, maintaining, repairing or polishing the house and its usual furnishings, fixtures or objects; or (vii) any American Home Products Corporation aerosol shaving cream product; or (viii) any American Home Products Corporation shoe care products; in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Advertising any such consumer commodity by presenting or referring to a demonstration, test or experiment that appears or purports to be proof of any fact or product feature that is material to inducing the sale of the commodity, such as but not limited to comparative superiority of one commodity over another, when, in fact, such demonstration, test or experiment does not constitute actual proof thereof, and respondent knew or should have known that such was the case.

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

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

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

Complaint

IN THE MATTER OF

REGAL WARE, INC., ET AL.

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

Docket C-2299. Complaint, Oct. 6, 1972—Decision, Oct. 6, 1972.

Consent order requiring a Kewaskum, Wisconsin, distributor and seller of cooking utensils, among other things to cease misrepresenting the nature and properties of its products; representing respondents' sales personnel as members of its advertising department; and representing its guarantees as unconditional without revealing, in advertising, any conditions to which they are subject.

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 Regal Ware, Inc., a corporation, and James D. Reigle, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Regal Ware, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business located at Kewaskum, Wisconsin.

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

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of stainless steel cookware and teflon coated aluminum cookware to dealers and distributors for resale to the public. The said cooking utensils are represented by respondents as utilizing the "waterless" method of cooking in which no water or a small amount of water is used depending upon the nature of the food to be cooked.

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

State of Wisconsin to dealers, distributors and purchasers thereof located in various other States of the United States, and maintained, and at all times mentioned herein have maintained, 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 as aforesaid, respondents have furnished and supplied to dealers and distributors and to the agents and representatives thereof, who sell said products to the public, various types of advertising literature, including, but not limited to, sales manuals, charts, leaflets, cookbooks and brochures.

The method of sale chiefly employed by said dealers, distributors, and their agents and representatives, is the display and demonstration of respondents' products accompanied by sales talks, the material for which has been supplied by respondents. Statements and representations made by said dealers and distributors and their agents and representatives are therefore, suggested by, and have expressed or implied approval of the respondents, and sales made in the course, or as a result of said sales talks, displays or demonstrations inure to the benefit of the respondents.

PAR. 5. In the further course and conduct of their business as aforesaid, respondents cause persons who respond to offers of free gifts seeking leads to prospective purchasers to be visited by respondents' salesmen. For the purpose of inducing sale of respondents' stainless steel cooking utensils, respondents through their said advertising material and through said dealers and distributors and their agents and representatives, as outlined in Paragraph Four herein, and otherwise, have represented directly and by implication that:

1. When their cooking utensils are covered for cooking, with the lids supplied therewith a vapor "seal" or "lock" is formed, and as a result no vapor loss occurs during the cooking of food in said utensils.

2. The use of respondents' cooking utensils will enable users to realize substantial savings in time spent in the kitchen.

3. The sales agents and representatives of respondents' dealers and distributors are members of respondents' advertising department, and that said persons are conducting an advertising campaign on behalf of the respondents and in regard to respondents' products.

PAR. 6. In truth and in fact:

1. The so-called vapor "seal" or "lock" formed by placing a cover or lid, on respondents' stainless steel cookware does not prevent all vapor loss during the cooking of food in said utensils.

2. The use of respondents' cooking utensils will not enable users to save any substantial amount of time, from the time spent daily in the kitchen in the cooking of food.

3. The agents and representatives of respondents' dealers and distributors who sell respondents' cooking utensils to the public are not members or employees of respondents' advertising department, nor are they conducting an advertising campaign on behalf of respondents. On the contrary, they are salesmen whose sole purpose is to sell such products to the public.

Therefore, the representations referred to in Paragraph Six hereinabove were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products, the respondents have made, and are now making, numerous statements in advertisements inserted in magazines and in promotional materials with respect to their product guarantees.

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

FULLY GUARANTEED

A written guarantee by the manufacturer is included with each set.

PAR. 8. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, the respondents have represented that their products are guaranteed without any conditions or limitations.

PAR. 9. In truth and in fact, respondents' guarantees of their products are subject to conditions and limitations which are not revealed in their advertised guarantees. Typical and illustrative of such conditions, but not all inclusive thereof are :

- (a) The nature and extent of the guarantee is not revealed; and
- (b) The identity of the guarantor and the manner in which the guarantor will perform under the guarantee is not revealed.

PAR. 10. In the course and conduct of their business, at all times mentioned herein, respondents have been in substantial competition with corporations, firms and individuals likewise engaged in the business of selling and distributing cooking utensils of the same general kind and nature as those sold by respondents.

PAR. 11. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices, has had, and now has, the tendency and capacity to mislead and deceive 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.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and

of respondents' competitors and constituted, and now constitute, unfair methods of competition, in commerce, and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

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

1. Respondent Regal Ware, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at Kewaskum, Wisconsin.

Respondent James D. Reigle is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his address is the same as that of the corporate respondents.

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

ORDER

It is ordered, That respondents Regal Ware, Inc., a corporation, its successors and assigns and officers, and James D. Reigle, individually and as an officer of said corporation, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale, distribution or advertising of stainless steel or aluminum cookware, coated or uncoated, presently in respondents' line of products, or any other cookware products of substantially similar properties which they may offer for sale in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, orally or in writing, that:

(a) When their cooking utensils are covered with the lids supplied therefor, a vapor "seal" or "lock" is formed or that no vapor loss occurs during the cooking of food in said utensils, except that such representations may be used when expressly limited to that portion of the cooking time after the heat is turned down in the method of cooking recommended by respondents.

(b) The use of said cookware products will enable users to realize substantial savings in time spent in the kitchen in connection with the cooking of food.

(c) The sales agents and representatives of respondents' dealers, distributors and franchisees are members of respondents' advertising department; that such persons are conducting an advertising campaign, or that such persons are other than salesmen whose purpose is to sell said cookware products.

2. Representing, directly or by implication, orally or in writing, that any product or service is guaranteed unless:

(a) The nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed, and

(b) The guarantor does in fact perform all of the actual and represented obligations under the terms of the guarantee.

3. Failing to disclose, clearly and conspicuously, in offers of free gifts or other promotional offers seeking leads to prospective purchasers of cookware products which are sold through sales representatives, that prospective purchasers may be visited by sales representatives.

4. Supplying to or placing in the hands of any distributor, dealer, franchisee or salesman, brochures, sales manuals, charts, pamphlets, or any other advertising material which are displayed or may be displayed to the purchasing public which contain any of the representations prohibited in Paragraphs 1, 2 and 3 hereof.

5. Failing to deliver a copy of this order to cease and desist to all of respondents' present and future salesmen, distributors, dealers and franchisees engaged in the sale of respondents' cookware products, and failing to secure from such persons a signed statement acknowledging receipt of said order.

It is further ordered, That the aforesaid respondents shall direct all of respondents' salesmen, distributors, dealers or franchisees possessing respondents' products to remove and destroy all brochures, sales manuals, flip-charts, pamphlets, or any other advertising material which are displayed, or may be displayed, to the purchasing public which contain any of the representations or practices prohibited in Paragraphs 1, 2 and 3 hereof; and in the event any such salesman, distributor, dealer or franchisee refuses to, or does not, cooperate fully with respondents in this regard, respondents shall in that event cease to furnish and supply such salesman, distributor, dealer or franchisee their products for resale to the public until such time as he does so cooperate.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of a subsidiary or any other change in the corporation which may affect compliance obligations arising out of the order; *Provided, however,* that if respondents do not have thirty (30) days lead time between proposal of such change and its consummation, respondents shall notify the Commission thereof at the earliest feasible time before consummation and any entity which may succeed to any part of the business covered by this order will have been advised of every provision of this order and will have agreed to be bound thereby.

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

Complaint

IN THE MATTER OF

PLAYFIELD INDUSTRIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS*Docket C-2300. Complaint, Oct. 6, 1972—Decision, Oct. 6, 1972.*

Consent order requiring a Chatsworth, Georgia, manufacturer and seller of carpets and rugs, among other things to cease selling and distributing carpeting which does not meet the acceptable criteria for carpeting under the Flammable Fabrics Act, as amended.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Playfield Industries, Inc., a corporation, and John B. Whisnant, Jr., individually and as an officer of the said corporation, hereinafter referred to as respondents, have violated the provisions of the said Acts and the rules and regulations promulgated under the Flammable Fabrics Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Playfield Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia. Respondent John B. Whisnant, Jr., is an officer of the said corporate respondent. He formulates, directs, and controls the acts, practices, and policies of the said corporation.

Respondents are engaged in the manufacture and sale of carpets and rugs, with their principal place of business located at P.O. Box 8, Murray Industrial Park, Chatsworth, Georgia.

PAR. 2. Respondents are now and for some time last past have been engaged in the manufacture for sale, sale and offering for sale, in commerce, and have introduced, delivered for introduction, transported and caused to be transported in commerce, and have sold or delivered after sale or shipment in commerce, products, as the terms "commerce" and "product," are defined in the Flammable Fabrics Act, as amended, which products fail to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the Flammable Fabrics Act, as amended.

Among such products mentioned hereinabove were carpets and rugs style Shagras, subject to Department of Commerce Standard For The Surface Flammability of Carpets and Rugs (DOC FF 1-70).

PAR. 3. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act, as amended, and the rules and regulations promulgated thereunder, and as such constituted, and now constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

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

1. Respondent Playfield Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia.

Respondent John B. Whisnant, Jr., is an officer of the said corporation. He formulates, directs, and controls the acts, practices and policies of the said corporation.

Respondents are engaged in the manufacture and sale of carpets and rugs, with the office and principal place of business of respondents located at P.O. Box 8, Murray Industrial Park, Chatsworth, Georgia.

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

ORDER

It is ordered, That respondent Playfield Industries, Inc., a corporation, its successors and assigns, and its officers, and respondent John B. Whisnant, Jr., individually and as an officer of said corporation and respondents' agents, representatives and employees directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from manufacturing for sale, selling, offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported in commerce, or selling or delivering after sale or shipment in commerce, any product, fabric, or related material; or manufacturing for sale, selling, or offering for sale, any product made of fabric or related material which has been shipped or received in commerce, as "commerce," "product," "fabric" and "related material" are defined in the Flammable Fabrics Act, as amended, which product, fabric or related material fails to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the aforesaid Act.

It is further ordered, That respondents notify all of their customers who have purchased or to whom have been delivered the products which gave rise to this complaint, of the flammable nature of said products and effect the recall of said products from such customers.

It is further ordered, That the respondents herein either process the products which gave rise to the complaint so as to bring them into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said products.

It is further ordered, That respondents herein shall, within ten (10) days after service upon them of this order, file with the Commission a special report in writing setting forth the respondents' intentions as to compliance with this order. This special report shall also advise the Commission fully and specifically concerning (1) the identity of the products which gave rise to the complaint, (2) the identity of the purchasers of said products, (3) the amount of said products on hand and in the channels of commerce, (4) any action taken and any further actions proposed to be taken to notify customers of the flammability of said products and effect the recall of said products from customers,

and of the results thereof, (5) any disposition of said products since April 29, 1972, and (6) any action taken or proposed to be taken to bring said products into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or to destroy said products, and the results of such action. Respondents will submit with their report, a complete description of each style of carpet or rug currently in inventory or production. Upon request, respondents will forward to the Commission for testing a sample of any such carpet or rug.

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

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business or employment in which he is engaged as well as a description of his duties and responsibilities.

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

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

IN THE MATTER OF

SANFORD LEVINSON, ALIAS MORRIS COHEN, STANLEY
LEWIS, AND OTHER ASSUMED NAMES, DOING BUSINESS AS
SHANGRI-LA INDUSTRIES, ETC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE TRUTH IN LENDING ACTS

Docket C-2301, Complaint, Oct. 6, 1972—Decision, Oct. 6, 1972.

Consent order requiring a retailer of swimming pools and other articles of merchandise, whose last known place of business was in Akron, Ohio, among other things to cease misrepresenting his stock on hand and willingness to perform advertised services; disparaging or refusing to sell any products or services advertised; using deceptive or misleading representations to

596

Complaint

obtain prospective customers; misrepresenting prices as usual or customary unless the representation is true; and failing to disclose to customers such information as is required by Regulation Z of the Truth in Lending Act. Respondent is also required to include on the face of its notes a notice that a subsequent holder may take over the note and the customer may still be required to pay the instrument of indebtedness even if the purchase contract is not fulfilled.

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 Sanford Levinson, also known as Morris Cohen, Stanley Lewis, and other assumed names, doing business as Shangri-La Industries, Modern Decorators, American Distributors and Decorators, and other trade names, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sanford Levinson, also known as Morris Cohen, Stanley Lewis, and other assumed names, is an individual trading and doing business as Shangri-La Industries, Modern Decorators, American Distributors and Decorators, and other trade names, with his last known office and principal place of business located at 2858 West Market Street in the city of Akron, State of Ohio.

PAR. 2. Respondent is now, and for sometime last past has been, engaged in the advertising, offering for sale, and sale of swimming pools and other articles of merchandise to the public.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations in Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of his business, as aforesaid, respondent now causes, and for sometime last past has caused, his said product, when sold, to be shipped from the place of manufacture in the State of Connecticut to purchasers thereof located in various other States of the United States other than the state of origination; has engaged in sales and advertising practices and activities in several states including, but not limited to, the States of Ohio and Indiana; and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Complaint

81 F.T.C.

PAR. 4. In the course and conduct of his aforesaid business, and for the purpose of inducing the purchase of his swimming pools and other merchandise, respondent has made, and is now making, numerous statements and representations in advertisements inserted in newspapers and magazines of general circulation and in oral sales presentations with respect to availability, quality, price, and the terms and conditions of sale.

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

Fabulous Savings on the Sensational 1970 Americana Swimming Pool, \$795.00 Full Price Completely Installed.

* * * * *

We Pledge That This Pool Can Be Delivered to Your Home and Completely Installed for Your Swimming Pleasure! Your Complete Satisfaction is Assured.

* * * * *

Pre-Season Pool Spectacular! Big Pool—Big Savings! A Giant 28' x 20' Outside Dimension 22' x 15' Swim Area, 4' Deep \$895.00 Full Price, Completely Installed.

* * * * *

The Shangri-La Pool Full Price Completely Installed \$795.00.

* * * * *

All Pools Include: Filter and Pump, Pool Ladder, Steel Bracing, Sun Decks, Vacuum Cleaner, Set-In Vinyl Liner, Safety Fence and Stairs.

* * * * *

Order Now! Immediate Installation Guaranteed!

* * * * *

Special Three Day Sale, Save an Extra \$100.00 Now! A Giant 28' x 20' Outside Dimension, 22' x 15' x 4' Deep Swim Area, Three Days Only, \$795.00 Full Price, The Shangri-La Pool, Full Price, Three Days Only \$695.00.

* * * * *

Larger and Smaller Pools Proportionately Low Priced.

* * * * *

Exclusive Optional Deck at Additional Cost.

* * * * *

Any Time Any Weather This Versatile Deck Can Be Enjoyed as a Unique Family Room Detached From the House * * *

* * * * *

Wanted! Five Residential Home Sites to Display Our New Advanced 1970 Swimming Pool.

* * * * *

We Believe That Good Business To Sacrifice on Five Homes in an Area To Gain The Volume We Require So Home Selected Will Have a Swimming Pool Installed at a Fantastic Price Consideration.

* * * * *

Special Three Day Sale—A Giant 28' x 20' Outside Dimension, 22' x 15' Swim Area, Now Only \$685.00.

* * * * *

We're Over Stocked! Bad Weather and a Late Sales Start Forces Us To Slash Prices To The Bone.

* * * * *

Select-A-Pool Choose From Our Complete Line of Pools Ranging In Price From \$695.00 For The "400" to \$2,995.00 For The "Suburban" And \$4,995.00 For The Pool Of The Century—The New AquaMate.

* * * * *

The Shape of Things To Come In Swimming Pools, The Magnificent New AquaMate Redwood Swim Club, \$4,995.00 Completely Installed, No Extras.

* * * * *

PAR. 5. By and through the use of the above-quoted statements and representations and others of similar import and meaning, but not expressly set out herein, separately and in connection with oral statements and representations of his salesmen and representatives, respondent has represented, and is now representing, directly or by implication:

1. That the advertised swimming pools, in different price ranges, are available for sale and can be purchased from respondent's salesmen or representatives.

2. That the special swimming pool decks which are advertised are available for sale from respondent's salesmen or representatives.

3. That the Aquamate Swimming Pool is nationally advertised in magazines of general circulation.

4. That respondent regularly sells the Aquamate Swimming Pool for \$4,995.

5. That the customer can purchase the Aquamate Swimming Pool at a special or reduced price if the customer agrees to allow the installed pool to be used as a model for demonstration purposes.

6. That the special or reduced price is available to the customer only at the time it is initially offered.

7. That the buyer of an Aquamate Swimming Pool will receive some form of commission or remuneration in the form of cash or pool accessories, for each Aquamate Swimming pool which is sold to a customer who is shown the buyer's model pool.

8. That the Aquamate Swimming Pool is maintenance-free.

9. That the Aquamate Swimming Pool is suitable to be used as an ice skating pond during the winter months.

10. That respondent gives a 20-year guarantee on the Aquamate Swimming Pool liner.

11. That respondent will honor the guarantee by providing service for any defects in the swimming pool or its related equipment.

12. That respondent will move the swimming pool cost-free if the customer moves anywhere within the continental United States.

PAR. 6. In truth and in fact:

Complaint

81 F.T.C.

1. The advertised swimming pools, in different price ranges, are usually not available for sale and cannot be purchased from respondent's salesmen or representatives. In fact, respondent usually sells only the "non-advertised" Aquamate Swimming Pool, after having discouraged customers from purchasing the advertised pool(s) by disparaging the quality of the pool(s). Moreover, respondent has failed to deliver advertised swimming pool models in instances where the customers have specifically ordered such models.

2. The swimming pool decks advertised in newspapers and magazines are usually not available for purchase from respondent.

3. The Aquamate Swimming Pool is not nationally advertised in magazines of general circulation. Moreover, the circulation of the magazines which contained the advertisement shown to many of respondent's customers was confined to a localized market area.

4. Respondent does not regularly sell the Aquamate Swimming Pool for \$4,995. In fact, respondent sells the Aquamate Pool at prices which are significantly lower than \$4,995.

5. The customer does not purchase the pool at a special or reduced price, and the installed pool is not used as a model for demonstration purposes.

6. The special or reduced price can be made available at times subsequent to the initial offer.

7. Respondent's customers usually do not receive the commission or remuneration which is promised them for each Aquamate Swimming Pool sold to a customer who is shown the buyer's pool.

8. The Aquamate Swimming Pool is not maintenance-free. In fact, it requires such maintenance as is usual and customary for swimming pools of this type.

9. The Aquamate Swimming Pool is not suitable to be used as an ice skating pond during the winter. In fact, there is the possibility of tearing or otherwise destroying the swimming pool liner if the pool is used as an ice skating pond.

10. Respondent does not give a 20-year guarantee on the Aquamate Swimming Pool liner. Moreover, the manufacturer's guarantee is for 10 years.

11. In a substantial number of instances, respondent has not performed under the guarantee and has failed to provide service for defects in the swimming pool or related equipment.

12. In a substantial number of instances, respondent has failed to honor the promise to move the swimming pool cost-free to anywhere within the continental United States.

PAR. 7. Respondent, many times in the ordinary course of his business, negotiates to third parties installment sales contracts or other

instruments of indebtedness executed in connection with credit purchases.

PAR. 8. In the course and conduct of his aforesaid business, and at all times mentioned herein, respondent has been, and is now, in substantial competition in commerce with corporations, firms, and individuals in the sale of products of the same general kind and nature as those sold by respondent.

PAR. 9. By the aforesaid practices, respondent places, and has placed, in the hands of salesmen the means and instrumentalities by and through which the respondent may mislead and deceive the public and in the manner and as to the things herein alleged.

PAR. 10. The use by respondent of aforesaid false, misleading and deceptive statements, representations, and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

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

COUNT II

Alleging violations of the Truth In Lending Act and the implementing Regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 12. In the ordinary course and conduct of his business as aforesaid, respondent regularly extends, and for sometime last past has regularly extended, consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth In Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 13. Subsequent to July 1, 1969, respondent, in the ordinary course and conduct of his business, and in connection with credit sales, as "credit sale" is defined in Regulation Z, has caused and induced, and is causing and inducing, customers to execute retail installment contracts, hereinafter referred to as the "contract."

PAR. 14. By and through the use of the contract, respondent has:

1. Failed to disclose the date on which the finance charge begins to accrue if different from the date of the transaction, as prescribed by Section 226.8(b) (1) of Regulation Z.

2. Failed to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as prescribed by Section 226.8(b) (2) of Regulation Z.

3. Failed to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as prescribed by Section 226.8(c) (2) of Regulation Z.

4. Failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as prescribed by Section 226.8(c) (3) of Regulation Z.

5. Failed to use the term "finance charge" to describe the sum of all charges required by Section 226.4 of Regulation Z to be included therein, as prescribed by Section 226.8(c) (8) (i) of Regulation Z.

6. Failed to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as prescribed by Section 226.8(c) (8) (ii) of Regulation Z.

7. Failed to obtain a specifically dated and separately signed, affirmative, written statement from the customer indicating his desire to obtain insurance coverage, after the customer received written disclosure of the cost of such insurance, as prescribed by Section 226.4(a) (5) (ii) of Regulation Z.

8. Failed to give notice of the customer's right to rescind the transaction by furnishing the customer with two copies of the Notice in the form as set forth in Section 226.9(b) of Regulation Z, as prescribed by Section 226.9 of Regulation Z.

9. Failed to delay performance of the subject matter of the transaction, as prescribed by Section 226.9(c) (4) of Regulation Z.

PAR. 15. Pursuant to Section 103(q) of the Truth In Lending Act, respondent's aforesaid failure to comply with Regulation Z constitutes a violation of that Act, and pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Cleveland Regional Office

proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Sanford Levinson, also known as Morris Cohen, Stanley Lewis, and other assumed names, is an individual trading and doing business as Shangri-La Industries, Modern Decorators, American Distributors and Decorators, and other trade names, with his last known office and principal place of business located at 7777 Exchange Street, in the village of Valley View, State of Ohio (shown in the complaint and consent order agreement as 2858 West Market Street, in the city of Akron, State of Ohio.

Respondent is now, and for sometime last past has been, engaged in the advertising, offering for sale, and sale of swimming pools and other articles of merchandise to the public.

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

ORDER

Count I

It is ordered, That respondent Sanford Levinson, also known as Morris Cohen, Stanley Lewis, or any other assumed name or names, an individual trading and doing business as Shangri-La Industries,

Modern Decorators, American Distributors and Decorators, or any other trade name or names, and respondent's agents, representatives, and employees, directly or indirectly, orally or in writing, or through any corporate or other device in connection with the advertising, offering for sale, sale, distribution and installation of swimming pools or any other product or service, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Advertising or offering any swimming pools or any other products or services for sale for the purpose of obtaining leads or prospects for the sale of different products or services, unless respondent maintains an adequate and readily available stock of said products or is ready, willing and able to perform said services.

2. Disparaging, in any manner, or refusing to sell, any swimming pool or any other products or services advertised by respondent.

3. Using any advertising, sales plan or procedure involving the use of false, deceptive or misleading statements or representations which are designed to obtain leads or prospects for the sale of swimming pools or any other product or service.

4. Representing that any swimming pools or other products or services are offered for sale when such offer is not a bona fide offer to sell said swimming pools or other products or services.

5. Representing that the special swimming pool decks which are advertised are available for sale from respondent's salesmen.

6. Representing that the swimming pools, or any other products or services are nationally advertised in leading magazines, unless magazine advertisements featuring such products are circulated to a national market.

7. Representing that any amount is respondent's usual and customary retail price of swimming pools or any other product or service, unless the amount is the price at which the merchandise has been usually sold at retail by respondent in the regular course of business.

8. Representing that the swimming pools, or any other products are maintenance free, or words of similar meaning and import.

9. Representing that the Aquamate Swimming Pool can be used as an ice skating pond during the winter months, or that any product can be used for other than its primary purpose, unless the respondent fully discloses all problems related to such secondary uses.

10. Representing that the home of any of respondent's customers or prospective customers for swimming pools or other products or services has been selected to be used or will be used as a "model home" or otherwise for advertising or sales purposes.

11. Representing that any allowance, discount or commission, in the form of cash, merchandise or services, is granted by respondent to purchasers of swimming pools or any other product or service in return for permitting the premises on which respondent's products are installed or services are performed to be used for "model home" or demonstration purposes.

12. Using the term "guarantee" or any term of similar import or meaning in any advertising or sales presentation for swimming pools or other products or services, unless the purchaser of such swimming pool or other products or services is accorded full satisfaction including the right to cancel the contract and obtain a full refund for failure to honor the guarantee.

13. Representing that any of respondent's products and installations are guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are fully and conspicuously disclosed in immediate conjunction therewith; or making any direct or implied representation that any of respondent's products or installations are guaranteed unless, in each instance, a written guarantee is given to the purchaser containing provisions fully equivalent to those contained in such representations, and unless respondent promptly fulfills all of his obligations under the represented terms of such guarantee.

14. Representing that respondent will honor the guarantee by providing service for any defects in the swimming pool or its related equipment, or any other product or service unless respondent has provided for the manpower, tools, equipment and other facilities necessary to honor such guarantees, and unless respondent does, in fact, honor such guarantees.

15. Failing to incorporate the following statement on the face of all sales contracts, all notes, or other instruments of indebtedness executed by or on behalf of respondent's customers with such conspicuousness and clarity as is likely to be read and understood by the purchaser:

NOTICE

If you are obtaining credit in connection with this purchase, you will be required to sign a promissory note, a sales contract or other instrument of indebtedness which may be purchased from the seller by a bank, finance company or any other third party. If such is the case, you will be required

Decision and Order

to make your payments to someone other than the seller. You should be aware that if this happens you may have to pay the note, contract, or other instrument of indebtedness in full to its new owner even if your purchase contract is not fulfilled.

It is further ordered, That respondent devote twenty-five percent (25%) of all advertising in newspapers, magazines and other such media as may be used to advertise swimming pools or any other product or service, to a statement that the Federal Trade Commission has questioned respondent's advertising practices, such statement to appear in all advertising for one year after the effective date of this order.

Count II

It is ordered, That respondent Sanford Levinson, also known as Morris Cohen, Stanley Lewis, or any other assumed name or names, an individual trading and doing business as Shangri-La Industries, Modern Decorators, American Distributors and Decorators, or any other trade name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device in connection with the extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, in any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. § 226) of the Truth In Lending Act (Pub. L. 90-321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. Failing to disclose the date on which the finance charge begins to accrue if different from the date of the transaction, as prescribed by Section 226.8(b)(1) of Regulation Z.
2. Failing to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as prescribed by Section 226.8(b)(2) of Regulation Z.
3. Failing to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as prescribed by Section 226.8(c)(2) of Regulation Z.
4. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as prescribed by Section 226.8(c)(3) of Regulation Z.
5. Failing to use the term "finance charge" to describe the sum of all charges required by Section 226.4 of Regulation Z to be included therein, as prescribed by Section 226.8(c)(8)(i) of Regulation Z.
6. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum

as the "deferred payment price," as prescribed by Section 226.8 (b) (8) (ii) of Regulation Z.

7. Failing to obtain a specifically dated and separately signed, affirmative, written statement from the customer indicating his desire to obtain insurance coverage, after the customer received written disclosure of the cost of such insurance, as prescribed by Section 226.4(a) (5) (ii) of Regulation Z.

8. Failing to give notice of the customer's right to rescind the transaction by furnishing the customer with two copies of the Notice in the form as set forth in Section 226.9(b) of Regulation Z, as prescribed by Section 226.9 of Regulation Z.

9. Failing to delay performance of the subject matter of the transaction, as prescribed by Section 226.9(c) (4) of Regulation Z.

10. Failing, in any consumer credit transaction or advertising, to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount prescribed by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That respondent shall forthwith deliver a copy of this order to cease and desist to all present and future personnel engaged in the offering for sale or sale of swimming pools, swimming pool accessories, services, or other products, and in the consummation of any extension of consumer credit, or in any aspect of preparation, creation or placing of advertising, and that respondent secure a signed statement acknowledging the receipt of said order from each such person.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged, as well as a description of his duties and responsibilities.

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

IN THE MATTER OF

U.S. HOMES, INCORPORATED, ET AL.

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

Docket C-2302. Complaint, Oct. 11, 1972—Decision, Oct. 11, 1972.

Consent order requiring a Des Moines, Iowa, firm selling custom-built homes and/or "package homes," among other things to cease representing that its products are guaranteed unless the nature, extent and duration of the guarantee and the identity of and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

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 U.S. Homes, Incorporated, a corporation, and Robert G. Sandler, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. U.S. Homes, Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its principal office and place of business located at 5390 Second Avenue, Des Moines, Iowa.

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

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale or distribution of custom built homes and/or "package homes" to the consuming public.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused their products, when sold, to be shipped from their place of business in the State of Iowa to purchasers thereof located in various other States in the United States and maintain, and at all times mentioned herein maintained, a substantial course of trade in said products in com-

Decision and Order

merce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products, respondents have made in catalogs and advertising in general circulation, statements and representations with respect to guarantees on said homes and/or various parts thereof.

Typical and illustrative of said statements and representations are the following:

GUARANTEED FOR LIFE

Your U.S. Home will be 100% Guaranteed * * *

locks * * * are unconditionally guaranteed

Lifetime Guaranteed Tub

Lifetime Guaranteed Elements

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning but not specifically set out herein, respondents have represented, directly or by implication, that their homes and/or various parts thereof are guaranteed without limitations or conditions.

PAR. 6. In truth and in fact, respondents' homes and parts thereof are not unconditionally guaranteed in every respect without conditions or limitations.

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

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements and representations has had 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 the products offered by respondents by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of the respondents, as here alleged, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the foregoing, and the respondents having been furnished thereafter a copy of a draft of complaint which the Bureau of Consumer

FEDERAL TRADE COMMISSION DECISIONS

Decision and Order

81 F.T.

tion proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in said complaint, and waivers and provisions as required by the Commission's rules; and

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

1. Respondent U.S. Homes, Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Iowa, with its principal office and place of business located at 5390 Second Avenue, Des Moines, Iowa.

Respondent Robert G. Sandler is an individual and an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his business address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents U.S. Homes, Incorporated, a corporation, and its officers, and Robert G. Sandler, individually and as officer of said corporation, and respondents' agents, representatives, employees, successors and assigns, directly or through any corporate or other device, in connection with the advertising, offering for sale, or distribution of custom built homes and/or "package homes," or products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing by any means, directly or by implication, that respondents' products are guaranteed unless the nature, extent and duration of the guarantee, the identity of the guarantor and

Complaint

the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; and unless respondents promptly and fully perform all of their obligations and requirements, directly or impliedly represented, under the terms of each such guarantee.

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

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

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

 IN THE MATTER OF

DANUBE CARPET MILLS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket C-2303. Complaint, Oct. 13, 1972—Decision, Oct. 13, 1972.

Consent order requiring a Fort Oglethorpe, Georgia, manufacturer and seller of carpets and rugs, among other things to cease manufacturing for sale, selling, importing, or distributing any product, fabric, or related material which fails to conform to an applicable standard of flammability or regulation issued or amended under the provisions of the Flammable Fabrics Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Danube Carpet Mills, Inc., a corporation and Carl D. Hagaman, individually and as an officer of the said corporation, hereinafter referred to as respondents, have violated the provisions of the said Acts and the rules and regulations promulgated under the Flammable Fabrics Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would

in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Danube Carpet Mills, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee. Respondent Carl D. Hagaman is an officer of the said corporate respondent. He formulates, directs, and controls the acts, practices, and policies of the said corporation.

Respondents are engaged in the manufacture and sale of carpets and rugs, with their principal place of business located at 212 First Street, P.O. Box 2298, Fort Oglethorpe, Georgia.

PAR. 2. Respondents are now and for some time last past have been engaged in the manufacturing for sale, sale and offering for sale, in commerce, and have introduced, delivered for introduction, transported and caused to be transported in commerce, and have sold or delivered after sale or shipment in commerce, products, as the terms "commerce" and "products," are defined in the Flammable Fabrics Act, as amended, which products fail to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the Flammable Fabrics Act, as amended.

Among such products mentioned hereinabove were carpets and rugs in style "Extravaganza," subject to Department of Commerce Standard For the Surface Flammability of Carpets and Rugs (DOC FF 1-70).

PAR. 3. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act, as amended, and the rules and regulations promulgated thereunder, and as such constituted, and now constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended; and

the respondents and counsel for the Commission having thereafter entered an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the aforesaid

draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

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

1. Respondent Danube Carpet Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee. Respondent Carl D. Hagaman is an officer of the corporation. He formulates, directs and controls the acts and practices and policies of the said corporation.

Respondent corporation is engaged in the manufacture and sale of carpets and rugs. Its office and principal place of business is located at 212 First Street, Fort Oglethorpe, Georgia.

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

ORDER

It is ordered, That respondent Danube Carpet Mills, Inc., a corporation, its successors and assigns, and its officers, and respondent Carl D. Hagaman, individually and as an officer of said corporation and respondents' agents, representatives and employees directly or through any corporation, subsidiary, division, or other device, do forthwith cease and desist from manufacturing for sale, selling, offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported in commerce, or selling or delivering after sale or shipment in commerce, any product, fabric, or related material; or manufacturing for sale, selling, or offering for sale, any product made of fabric-related material which has been shipped or received in commerce, "commerce," "product," "fabric" and "related material" are defined in the Flammable Fabrics Act, as amended, which product, fabric related material fails to conform to an applicable standard or reg

tion continued in effect, issued or amended under the provisions of the aforesaid Act.

It is further ordered, That respondents notify all of their customers who have purchased or to whom have been delivered the products which gave rise to this complaint, of the flammable nature of said products and effect the recall of said products from such customers.

It is further ordered, That the respondents herein either process the products which gave rise to the complaint so as to bring them into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said products.

It is further ordered, That respondents herein shall, within ten (10) days after service upon them of this order, file with the Commission a special report in writing setting forth the respondents' intentions as to compliance with this order.

This special report shall also advise the Commission fully and specifically concerning (1) the identity of the products which gave rise to the complaint, (2) the identity of the purchasers of said products, (3) the amount of said products on hand and in the channels of commerce, (4) any action taken and any further actions proposed to be taken to notify customers of the flammability of said products and effect the recall of said products from customers, and the results thereof, (5) any disposition of said products since April 27, 1972, and (6) any action taken or proposed to be taken to bring said products into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or to destroy said products, and the results of such action. Respondents will submit with their report, a complete description of each style of carpet or rug currently in inventory or production. Upon request, respondents will forward to the Commission for testing a sample of any such carpet or rug.

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

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business employment in which he is engaged as well as a description of his assets and responsibilities.

It is further ordered, That the respondent corporation shall forth-

KEFALAS BROS., ET AL.
Complaint

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

IN THE MATTER OF
KEFALAS BROS., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS
Docket C-2304, Complaint, Oct. 16, 1972—Decision, Oct. 16, 1972.

Consent order requiring a New York City manufacturer of fur products, among other things to cease misbranding and falsely invoicing its merchandise

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Kefalas Bros., a partnership, having real and Harry Kefalas, individually and as copartners, and John Kefalas, hereinafter referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Kefalas Bros., is a partnership existing and doing business in the State of New York. Respondents Harry Kefalas and John Kefalas are copartners in said partnership. Respondents are manufacturers of fur products with their office and principal place of business located at 236 West 27th Street, New York, New York.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products

which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show that fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the rules and regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to disclose that the fur contained in the fur products was "color altered," when such was the fact.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the rules and regulations promulgated thereunder in the following respects.

Required item numbers were not set forth on labels and invoices in violation of Rule 40 of said rules and regulations.

PAR. 6. The aforesaid acts and practices of respondents, as herein alleged are in violation of the Fur Products Labeling Act and the rules and regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in

such complaint, and waivers and other provisions as required by the Commission's rules; and

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

1. Respondent Kefalas Bros. is a partnership organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondents John Kefalas and Harry Kefalas are co-partners trading as Kefalas Bros. They formulate, direct and control the acts, practices and policies of the partnership.

Respondents are manufacturers of fur products with their office and principal place of business located at 236 West 27th Street, New York, New York.

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

ORDER

It is ordered, That respondents Kefalas Bros., a partnership, and John Kefalas and Harry Kefalas, individually and as copartners trading as Kefalas Bros., or any other name or names and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped or received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Representing, directly or by implication, on labels that the fur contained in any fur product is natural when the fur contained therein is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

2. Failing to affix labels to fur products showing in words and figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

3. Failing to set forth on a label the item number or mark assigned to such fur product.

B. Falsely or deceptively invoicing any fur product by failing to set forth on an invoice the item number or mark assigned to such fur product.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business or employment in which they are engaged as well as a description of their duties and responsibilities.

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

IN THE MATTER OF

AAMCO AUTOMATIC TRANSMISSIONS, INC.

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

Docket C-2305. Complaint, Oct. 18, 1972—Decision, Oct. 18, 1972.

Consent order requiring a Bridgeport, Pennsylvania, franchisor of automobile automatic transmissions and related parts and services, among other things to cease requiring its franchisees to purchase the parts, equipment, merchandise or services used by such franchisees in the establishment and operation of their businesses solely from respondent. The order further requires respondent to compile an approved vendor list and to allow franchisees to purchase from any vendor on it, provided said vendors comply with the quality control program set forth in the order.

COMPLAINT

The Federal Trade Commission, having reason to believe that AAMCO Automatic Transmissions, Inc., hereinafter referred to as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45), as amended, and it

appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent AAMCO Automatic Transmissions, Inc., hereinafter sometimes referred to as respondent, is a corporation organized and doing business under the laws of the State of Pennsylvania with its general offices and place of business located at 408 E. Fourth Street, Bridgeport, Pennsylvania.

PAR. 2. Respondent is now, and for some time has been, engaged in the granting of licenses or franchises to corporations, partnerships and individuals located in various states and in the District of Columbia, to use their trademark and business methods in the operation of businesses specializing in the servicing, repair and sale of automatic transmissions used in automobiles and in the sale of parts, supplies and equipment for use in connection therewith. Respondent also engaged directly in the service, repair and sale of automobile transmissions through businesses owned or controlled by them. In 1970, respondent had total revenues of \$8,600,000.

PAR. 3. Respondent causes the transmission parts, new and rebuilt, and equipment it sells to be shipped to purchasers located in states other than Pennsylvania, the state in which its place of business is located. In the course and conduct of its business, as above described, respondent is now, and has been at all times referred to herein, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Except to the extent competition has been hindered, prevented, frustrated, lessened or eliminated as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the distribution of parts and equipment for the repair of automobile transmissions.

PAR. 5. Respondent's franchise agreements contain provisions which require its franchisees to purchase the initial mechanical equipment for the operation of the franchisees' business from the respondent. Examples of such equipment include hydraulic lifts and transmission jacks whose total costs averages \$8,500. In 1968, its equipment sales to its franchisees were \$749,000 and in 1970 its sales were \$100,000.

The identical equipment can be purchased from other parties than respondent at lower prices.

In a few instances where franchisees purchased or leased premises which contained hydraulic lifts, these franchisees were required to pay respondent the profit respondent would have made had the lifts been purchased from it.

PAR. 6. Respondent's franchise agreements contain provisions which require its franchisees to purchase from them "AAMCO Assembly Sets," repair kits composed primarily of "soft" parts such as paper and rubber gaskets and a few small "hard" parts such as steel clutches. In addition, the franchise agreements provide that the franchisees are required to purchase all "hard" parts such as torque converters from AAMCO. As a result of the above-mentioned franchise agreements, respondent's franchisees are compelled to purchase their entire requirement of repair parts from their franchisor. In 1968, respondent had parts sales of \$6,600,000 to its franchisees and in 1970 its parts sales to its franchisees were \$3,600,000.

None of the parts sold by respondent is manufactured by it. Respondent purchases its parts from the same sources as its competitors. Respondent's kits are not unique and, in fact, the kit was originally assembled by one of the suppliers with which AAMCO currently competes.

Respondent has advertised in its house publication that it has tested the parts of its competitors and that the results of the tests indicated respondent's parts were superior to those of its competitors. In one instance, the published test results were falsified. Respondent claimed that a testing laboratory had tested all of the parts of their competitors, when, in fact, only gaskets had been tested.

PAR. 7. Respondent has threatened to terminate franchisees who did not purchase AAMCO Assembly Sets.

PAR. 8. The acts and practices of respondent as alleged herein have had, and do now have, the tendency or effect of unduly hindering, lessening, restraining or eliminating competition in the importation and sale of new and rebuilt transmission repair parts and transmission equipment, have deprived AAMCO franchisees and consumers of the benefits of full and free competition, have hampered their free choice in the selection of suppliers from which to buy transmission parts and equipment, are prejudicial and injurious to the public, and constitute unfair methods of competition and unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which,

Decision and Order

if issued by the Commission, would charge respondent with a violation of the Federal Trade Commission Act; and
 The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

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

1. Respondent AAMCO Automatic Transmissions, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of Pennsylvania, with its executive offices at 408 E. Fourth Street, Bridgeport, Pennsylvania.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest:

ORDER

It is ordered, That respondent, AAMCO Automatic Transmissions, Inc. (AAMCO), a corporation, its successors, officers, directors, agents, representatives, directly or through any corporate or other device, in connection with the franchising of an automotive repair mission repair franchisees and the operation of an automotive repair franchisor business, such franchising and operation constituting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from requiring, in any manner or by any means, directly or indirectly, its franchisees to purchase the automotive parts, new or rebuilt, equipment, merchandise or services used by such franchisees in the establishment and operation of their automotive repair businesses from AAMCO or from any other source except as hereinafter provided.

II

It is further ordered, That respondent take all necessary action to effect the cancellation of each provision of every contract between it and its franchisees which is contrary to or inconsistent with any provision of this order.

III

It is provided, That nothing in the order shall prohibit AAMCO, a corporation, its successors, assigns, officers, directors, agents, representatives, and employees, from restricting the sources from which the franchisees of AAMCO are permitted to purchase the new or rebuilt automotive parts, equipment or merchandise used in their operations as franchisees of AAMCO in accordance with any program.

A

(1) Respondent shall compile a list of approved new automobile transmission parts vendors. All such vendors who desire to be placed on the approved vendor list, who certify in writing to AAMCO that their secondary level of parts inspection is equivalent to AAMCO's and who actually perform a secondary level of parts inspection equivalent to that performed by AAMCO, as described in AAMCO's Quality Control Manual, which shall be made available to prospective vendors, shall be placed on the approved vendor list. For the purposes of this order, a "secondary level of inspection" is defined as a quality control procedure whereby automobile transmission parts are tested and inspected by the vendor prior to their sale. Those vendors who manufacture any of the parts which they sell shall be considered to have the required secondary level of inspection if they have a quality control procedure whereby their parts prior to sale are subjected to an inspection equivalent to that performed by AAMCO.

(a) In order to allow AAMCO to ascertain the comparability of the secondary level of inspection of a vendor who desires to be placed on the approved vendor list, AAMCO shall be allowed to require that such vendor permit AAMCO to make a reasonable inspection of its quality control program.

(b) Any question as to the equivalency of a vendor's secondary level of inspection which is raised at any time by AAMCO shall be resolved by the determination of an inde-

pendent testing laboratory, selected by the Commission, with the costs being borne by the vendor. AAMCO shall raise such question only when there is a reasonable basis therefore and after AAMCO has inspected the vendor's quality control program. Whenever such a question is raised by AAMCO, respondent shall submit to the Commission a statement as to what basis exists upon which to question the equivalency of the vendor's secondary level of inspection. When such a question is raised by AAMCO the vendor shall not be placed on the approved list pending the resolution of the question of the comparability of the vendor's secondary level of inspection. A vendor who is found not to have the requisite inspection program shall be afforded an opportunity to cure any defects in his program and to request at that time that he be placed on the approved vendor list subject to the criteria enumerated heretofore.

(c) Respondent shall forward a copy of the initial approved vendor list to the franchisees of AAMCO and shall publish such list every six (6) months in a publication, such as the Twin Post, which is periodically sent to every franchisee of AAMCO.

(2) Respondent shall allow the franchisees of AAMCO to purchase from AAMCO or any person on the approved vendor list the new automobile transmission parts used in their businesses which comply with AAMCO's published specifications. In addition, AAMCO shall allow its franchisees to purchase new automobile transmission parts from all vendors who have qualified to be placed on the approved vendor list prior to the next publication of the list. Such specifications shall be made available to any vendor who is on, or desires to be placed on the approved vendor list.

(a) Any disputes as to whether an approved vendor's parts comply with AAMCO's published specifications, such disputes to be raised by AAMCO only where a reasonable basis for such dispute exists, shall be settled by a testing by an independent testing laboratory selected by the Commission at the vendor's expense. Respondent shall submit a statement as to the basis for such question to the Commission. Pending the results of such tests, AAMCO may prohibit its franchisees from purchasing or using the specific parts whose compliance with AAMCO's published specifications is questioned. Vendors shall be given an opportunity to cure a

noncompliance by resubmitting the parts in question to an independent testing laboratory selected by the Commission for testing at the vendor's expense.

(b) The purchase contracts and/or purchase orders between the AAMCO franchisees and the vendors from whom they purchase such parts, and the invoices of such vendors, shall specify that such parts comply with AAMCO's published specifications and that they have undergone the requisite secondary level of inspections.

(3) None of the above provisions shall prohibit respondent from requiring that the franchisees of AAMCO purchase in kit form new automobile transmission parts. Respondent shall provide every vendor who desires to be placed on the approved vendor list with information as to the composition of kits then sold by respondent. Respondent shall also inform all vendors on the approved vendor list of all changes in the composition of kits sold by respondent.

(4) In order to be placed on the approved vendor list and to sell new automobile transmission parts to AAMCO franchisees, a vendor shall not be required by respondent: to perform a quality control program different than that which AAMCO performs on the parts which AAMCO sells to its franchisees; to sell in kit form those parts which AAMCO sells to its franchisees in other than kit form; to sell kits whose composition is different than the kits AAMCO sells; or to comply with AAMCO's published specifications for specific parts where AAMCO does not itself comply with its own published specifications for these parts which it sells to its franchisees.

B

(1) Respondent shall formulate, establish and publish reasonable standards and specifications for equipment, merchandise, and rebuilt automotive transmission parts, *i.e.*, those parts, such as torque converters, which are customarily rebuilt and which are customarily purchased by AAMCO franchisees for use in transmission repairs, indicating the quality which they desire for such parts, equipment and merchandise in order to protect and maintain the quality of rebuilt parts, equipment and merchandise used by franchisees of AAMCO. Respondent shall forthwith forward any such standards and specifications to the persons named in Attachment A, as well as make such standards and specifications available to any manufacturer or wholesaler of rebuilt automotive parts, equipment or merchandise requesting same.

(2) Respondent shall formulate, establish and publish a list of approved manufacturers whose rebuilt parts, equipment or merchandise comply with respondent's published standards and specifications and indicate which of such manufacturers' rebuilt parts, equipment or merchandise are in compliance. Such list shall be forthwith forwarded to the persons named in Attachment A. Such list shall be published every six (6) months in the Twin Post, or any publication which is periodically sent to every franchisee of AAMCO, and, in addition, be made available to any manufacturer or wholesaler of rebuilt automotive parts, equipment or merchandise requesting same.

(a) The manufacturers of rebuilt automotive parts, equipment or merchandise whose parts, equipment or merchandise AAMCO, as of the date this order becomes effective, buys, or whose rebuilt parts, equipment or merchandise are distributed by AAMCO, as of the date this order becomes effective, shall be placed on the approved manufacturers list for such parts, equipment or merchandise as are purchased or distributed by AAMCO.

(b) Respondent shall place on the approved manufacturer list all manufacturers of rebuilt automotive parts, equipment or merchandise, in addition to those described above in (a), who comply with the following:

(i) Such manufacturers desiring to be placed on the approved manufacturers list shall represent to AAMCO that the rebuilt parts, equipment or merchandise for which they desire to be approved meet AAMCO's published standards and specifications.

(ii) Any disputes as to whether a manufacturer's equipment, merchandise, or rebuilt parts substantially comply with AAMCO's published specifications, such disputes to be raised by AAMCO only where a reason for such dispute exists, shall be settled by an independent testing laboratory chosen by the Federal Trade Commission at the manufacturer's expense. Respondent shall submit a statement as to the basis for such question to the Commission.

(iii) All such manufacturers shall be placed on AAMCO's approved manufacturer list for the rebuilt parts, equipment or merchandise involved if such parts, equipment or merchandise of the manufacturer are found to comply with AAMCO's published standards and specifications.

(3) If at any time the respondent has a reasonable basis upon which to question whether the equipment, merchandise or rebuilt parts of an approved manufacturer comply with AAMCO's published specifications, said manufacturer shall be removed from the approved manufacturer list for the specific equipment, merchandise or rebuilt parts involved. Respondents shall submit a statement as to the basis for such question to the Commission.

(a) Any dispute as to whether an approved manufacturer's equipment, merchandise or rebuilt parts comply with AAMCO's published specifications shall be settled by testing at the manufacturer's expense by an independent testing laboratory, selected by the Commission. Such manufacturer shall be afforded the opportunity for cure established heretofore in IIIA(2)(a) of this order.

(4) In order to be placed on the approved manufacturer list and to sell specific equipment, merchandise or rebuilt parts to AAMCO franchisees, a manufacturer shall not be required by respondent to comply with AAMCO's published specifications for specific equipment, merchandise or rebuilt parts where AAMCO does not itself comply with its own published specifications for these items which it sells to its franchisees.

(5) Respondent shall allow franchisees of AAMCO to purchase the rebuilt parts, equipment or merchandise of a manufacturer who is on the approved manufacturers list for such parts, equipment or merchandise. In addition, AAMCO shall allow its franchisees to purchase rebuilt parts, equipment or merchandise from all manufacturers who have qualified to be placed on the approved manufacturer list prior to the next publication of the list. The purchase contracts and/or purchase orders between AAMCO franchisees and the sources from which they purchase approved rebuilt automotive parts, equipment or merchandise shall specify that the rebuilt parts, equipment or merchandise being purchased are manufactured by a company on the approved manufacturers list for such parts, equipment or merchandise. The invoices of the sources from which AAMCO franchisees purchase approved parts, equipment or merchandise shall specify that such parts, equipment or merchandise are manufactured by a company on the approved manufacturer list for such parts, equipment or merchandise.

IV

Respondent shall be allowed to require that the franchisees of AAMCO submit to AAMCO sufficient information to enable AAMCO

to determine if the individual franchisees are using equipment, merchandise and new and rebuilt transmission parts which comply with the procedures set forth in this order. Respondent shall also be allowed to require compliance with this provision in a reasonable manner.

V

It is further ordered, That respondent shall forthwith forward a copy of this order and of attached letter "A" to each present and future franchisee of AAMCO and to the persons named in Attachment A.

VI

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

VII

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

ATTACHMENT A

Ajac Trans.,
50 Lawrence Ave.,
Brooklyn, New York

All-O-Matic,
2009 Jericho Turnpike,
New Hyde Park, New York

Alloy,
3205 S. Shields Ave.,
Chicago, Illinois

Anchor Industries, Inc.,
1725 London Road,
Cleveland, Ohio. 44112

Approved Machinery Corporation,
P.O. Box 1231.
Natchez, Mississippi. 39120

Ashco Automotive, Inc.,
528 E. Second St.,
Muscle Shoals, Alabama. 35660

Autolite Ford Parts Division,
Private Brand Sales,
P.O. Box 3000.
Livonia, Michigan

Barney & White Auto Parts, Co.,
1009 McKinley Avenue,
Columbus, Ohio

Borg Warner Service Parts Co.,
11045 Gage Avenue,
Franklin Park, Illinois. 60131

C. E. Conover (Parker Products),
2800 Bristol Pike,
Cornwell Heights, Pennsylvania. 19020

Decision and Order

81 F.T.C.

Chicago Rawhide,
900 N. State St.,
Elgin, Illinois. 60121

Clevite Graphite Bronze,
Division of Replacement Sales,
17000 St. Claire Avenue,
Cleveland, Ohio

Duro Engineering & Mfg. Division,
Republic Corporation,
14108 Towne Avenue,
Los Angeles, California. 90061

Excell & Trio Auto Parts,
3984 Mayfield,
Cleveland, Ohio

Excell & West Side Auto,
622 W. Main,
Springfield, Ohio

F. D. Farnum Co.,
P.O. Box 327
Necedah, Wisconsin. 54646

Federal Mogul Division,
P.O. Box 1966,
Detroit, Michigan. 48235

Fleet Transmission,
4960 Rising Sun Ave.,
Philadelphia, Pennsylvania

General Transmission Co.,
1622 Grand River,
Detroit, Michigan.

Hayden Trans. Cooler Co.,
P.O. Box 4278,
Riverside, California

Holley Carburetor,
11955 E. 9 Mile Road,
Warren, Michigan

Johnson Bronze,
New Castle, Pennsylvania

Kelsey Hayes,
3848 Huron River Road,
Romulus, Michigan

Lemco Industries Inc.,
5490 Dunham Rd.,
Cleveland, Ohio

Lovell Mfg. Co.,
1301 French St.,
Erie, Pennsylvania

National Seal,
P.O. Box 1966,
Detroit, Michigan

One Stop Auto Parts,
12 Colvin Avenue,
Albany, New York

Portland Transmission Warehouse,
1016 S.E. Hawthorne Boulevard,
Portland, Oregon

Raybestos Division,
Bridgeport, Connecticut

Republic Gear,
20200 E. 9 Mile Run,
St. Clair Shores, Michigan. 48083

Robert S. Greenfield Corp.,
218-26 Hempstead Avenue,
Queens Village, New York

Sealed Power Corp.,
2001 Sanford St.,
Muskegon, Michigan

United Motors Service,
1735 Jersey Avenue,
North Brunswick, New Jersey

Van Buren Automotive Prod., Inc.,
Rt. 112, Port Jefferson Station,
Long Island, New York

Vasco Sales Co.,
P.O. Box 38,
Vassar, Michigan

Wausau Motor Parts,
Schofield, Wisconsin

X-Cell Industries,
505 W. Nine Mile Road,
Hazel Park, Michigan

LETTER "A"

(Official AAMCO Stationery)

GENTLEMEN: The Federal Trade Commission has entered an order against AAMCO Automatic Transmissions, Inc. (AAMCO) which prohibits it from requiring its transmission franchisees to purchase only from AAMCO the mechanical equipment and transmission parts our franchisees use in their automative transmission business. A copy of this order is attached.

The order permits AAMCO to require its franchisees to limit their purchases of parts and equipment to those parties who qualify under the following AAMCO Quality Control Program or to purchase such parts and equipment from AAMCO. We shall formulate and publish standards for a quality control program whereby the transmission parts are tested and inspected by vendors prior to sale. In addition we will publish specifications for new and rebuilt transmission parts and equipment. A description of the quality control program and the specifications shall be made available to manufacturers and suppliers which request them. Companies which follow the quality control procedures and specifications shall be placed on an approved manufacturer's list for such parts or equipment. This list will be published in an AAMCO publication every six months.

The AAMCO franchisees are required to submit to AAMCO sufficient information to enable AAMCO to determine if such franchisees are using equipment, merchandise, and new and rebuilt transmission parts which comply with the procedures set forth in this order.

AAMCO's franchisees are free to purchase parts and equipment only from those vendors on the approved manufacturers list and from AAMCO.

Sincerely yours,

ROBERT MORGAN.

IN THE MATTER OF

UNITED STATES STEEL CORPORATION*

Docket 8655. Order and Opinion, October 19, 1972.

Order modifying the initial decision following remand by U.S.C.A. 6th Circuit, to conform with the views set forth in the Commission's opinion, adopting the modified initial decision following remand, and directing the filing of the findings and conclusions with the court. The Commission ruled that a

*See joint Initial Decision *In the Matter of National Portland Cement Company*, Docket No. 8654, 71 F.T.C. 399.

pre-acquisition loan arrangement had substantially the same anticompetitive effect as the acquisition itself.

Mr. Joseph J. O'Malley, Mr. Wilbur W. Sacra, Jr., and Mr. Larry D. Sharp supporting the complaint.

Mr. Macdonald Flinn, Mr. Thomas B. Leary, Mr. Benjamin M. Vandergrift and Mr. Mario Diaz-Cruz, III, of White & Case for the respondent.

INITIAL DECISION ON REMANDED ISSUES BY JOHN LEWIS,
HEARING EXAMINER

JANUARY 14, 1972

STATEMENT OF PROCEEDINGS

This proceeding is now before the undersigned hearing examiner pursuant to the Commission's order of September 25, 1970 [77 F.T.C. 1646], reopening the proceeding and remanding it to him for the purpose of receiving evidence on certain specific issues. Such remand was the result of a decision of the Court of Appeals for the Sixth Circuit, filed May 6, 1970 [426 F. 2d 592, 6th Cir. 1970], which remanded this matter to the Commission for further findings of fact. The complaint herein, which was issued January 22, 1965 [74 F.T.C. 1270], charged respondent with having violated Section 7 of the Clayton Act, as amended, by acquiring the stock and assets of Certified Industries, Inc. (Certified), a ready-mixed concrete producer in the New York City metropolitan area, such company being a customer of respondent's Universal Atlas Cement Division (UAC) at the time of the acquisition. Following hearings between October 11 and November 22, 1965, the undersigned hearing examiner issued his initial decision on May 20, 1966 [71 F.T.C. 399], dismissing the complaint herein on the ground, essentially, that the evidence established Certified was a failing company within the meaning of the so-called "failing company" doctrine, which had been pleaded as a defense by respondent.

Complaint counsel had urged before the examiner after the original hearings that, (a) respondent had failed to establish Certified was a "failing company" within the meaning of the defense as initially enunciated in *International Shoe Co. v. Federal Trade Commission*, 280 U.S. 291 (1930) and (b), in any event, the defense is not an "absolute," but a "relative," defense and does not confer complete immunity on an acquisition which will have the adverse effect on competition proscribed by the statute. In his initial decision, issued May 20, 1966 [71 F.T.C. 399], the undersigned held that respondent had established the requisite elements of the failing company defense since it had shown that,

(1) Certified was in failing circumstances at the time of the acquisition and (2) there was no other prospective purchaser then available for Certified's stock or assets. He further held that the failing company doctrine provided a complete defense to the acquisition, but that to the extent it provided merely a "relative" defense, as complaint counsel had urged, the latter had failed to establish that the acquisition would be likely to have the effect on competition required to be shown under the statute. After extended consideration of the matter the Commission, in its decision issued December 2, 1968 (with two Commissioners not participating and one dissenting), reversed the examiner's decision. While agreeing that "the examiner was correct in finding that Certified was failing," it held that the failing company doctrine did not provide a complete defense to the acquisition. Since, in its view, the evidence established that in spite of Certified's failing condition the acquisition would have the detrimental effect proscribed by the statute, the Commission held that a violation of Section 7 had been proven.

The court of appeals held that there was substantial evidence to support the Commission's finding that Certified's acquisition would have an adverse competitive effect in spite of its failing condition. However, the court found it unnecessary to determine "whether [the effect of] 'failing company' status is to immunize an acquisition or is merely a factor to be weighed in determining whether the acquisition is in the 'public interest' " since, in the court's view, respondent had failed to establish it had met all of the requirements of the failing company defense, as amplified by the Supreme Court's most recent holding in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969). As noted by the court of appeals, prior to the *Citizen Publishing Co.* decision the requirements of the failing company defense were considered to be met by a showing (1) "that the financial condition and resources of the company are so dire that 'it faced the grave probability of a business failure'" and (2) that there was "no other prospective purchaser" of the acquired company. However, the Supreme Court's decision in *Citizen Publishing Co.* had added a third requirement to the defense, *viz.*, that "the prospects of the acquired company emerging from reorganization as a competitive unit must be 'dim or non-existent.'" Since the *Citizen Publishing Co.* case had been decided subsequent to the examiner's and the Commission's decisions herein, the circuit court considered it "appropriate to remand this case [to the Commission] to give U.S. Steel an opportunity to bring forth evidence that the prospects of Certified passing through bankruptcy or similar proceeding were 'dim or non-existent' [following which] the Commission will be in a position * * * make a finding of fact as to this crucial element in the failing company defense."

FEDERAL TRADE COMMISSION DECISIONS

Initial Decision on Remanded Issues

81 F.T.C.

In remanding the case, the court also charged the Commission with the responsibility of resolving a further issue, relative to the date to be used for evaluating Certified's failing condition. The date used by the hearing examiner in determining whether Certified was in a failing condition was the date of Certified's acquisition, *viz.*, on or about April 30, 1964. In so doing, the examiner had overruled the argument of counsel supporting the complaint that the appropriate date to use was January 1963, which was the date when Certified had obtained a long-term bank loan guaranteed by respondent. After reviewing the examiner's holding in this regard, the Commission concluded:

We agree with this [the hearing examiner's] conclusion. Complaint counsel's argument is therefore rejected.

The court of appeals suggested that the cement-purchasing arrangement between Certified and U.S. Steel's cement subsidiary UAC, following the loan agreement, might be illegal and directed the Commission to "reassess the standards by which the actions and defenses of United States Steel Company are to be judged." It stated, in this regard, that:

[T]he record reveals that U.S. Steel-Certified vertical ties may have taken an unlawful cast as early as January 1963. If such vertical ties were unlawful, then the failing character of Certified must be shown to have existed at that time. * * * To the extent that unreasonable foreclosure of Certified's cement demands occurred as a result of the financial arrangement in January 1963, we believe that the failing company defense must be measured from the inception of these unreasonable vertical arrangements, not from the point of their final consummation.

Following the court of appeals decision of May 6, 1970, remanding this matter to the Commission for further consideration in the light of the Supreme Court's holding in the *Citizen Publishing Co.* case, the Commission, by order issued September 25, 1970, remanded the proceeding to the undersigned hearing examiner. The examiner was directed to conduct hearings

for the purpose of receiving evidence * * * with respect to the issues of whether:

- (a) as of January 1963 the financial condition and resources of Certified Industries were so dire that it faced the grave probability of a business failure,
- (b) between January 1963 and April 1964 no prospective purchaser other than United States Steel Corporation was interested in acquiring Certified,
- (c) "Certified's opportunity for some form of continued competitive vitality through bankruptcy or similar proceedings" was "dim or nonexistent" either in January 1963 or in April 1964, and
- (d) the U.S. Steel-Certified vertical ties did in fact take an unlawful cast as early as January 1963.

The Commission's order further directed the hearing examiner, upon termination of the hearings, to prepare an initial decision "confined to the issues hereinabove specified."

Following the Commission's remand order of September 25, 1970 [77 F.T.C. 1646], the examiner convened a prehearing conference on October 29, 1970, for the purpose of delineating the issues remanded to him for consideration and the setting up of a procedural schedule, the results of said conference being embodied in the examiner's Prehearing Order No. 1 (PHO 1). At such conference the examiner overruled the position of complaint counsel, who had argued that the burden of proof under subparagraph (d) of the Commission's order (*viz.*, whether the "vertical ties" between respondent and Certified had taken on "an unlawful cast" as early as January 1963), was upon respondent and not upon the government. Complaint counsel indicated that they might decide to rest upon the existing record on this issue, but reserved a decision in this regard to a later date. They thereafter elected not to offer any further evidence on this issue. Respondent took the position that unless complaint counsel offered further evidence to establish the illegality of the vertical arrangement in January 1963, it would restrict its evidence to the period of the acquisition in April 1964, and would limit it to the issue remanded under subparagraph (c) of the Commission's order (*viz.*, whether as of April 1964 Certified's opportunity for continued competitive vitality through bankruptcy or similar proceedings was "dim or non-existent"). Respondent also raised the question whether subparagraph (b) of the remand order was intended to reopen the question of the availability of other purchasers in April 1964, and indicated that it intended to file a motion requesting certification of this question to the Commission. The examiner stated that he did not interpret the Commission's order as reopening this issue, and that further evidence by respondent under subparagraph (b) would be required only if complaint counsel were to establish that the vertical ties became unlawful in January 1963 or at some period prior to the acquisition. However, respondent was given an opportunity to file a formal motion requesting certification of this issue to the Commission, which motion was thereafter filed by respondent and was denied by the examiner's order of November 19, 1970.

Pursuant to discussions had at the prehearing conference, respondent filed a motion for the issuance of a number of subpoenas *duces tecum*, for discovery purposes, to various cement manufacturers and ready-mixed concrete firms to produce sales and financial data for the period 1964-69. Said motion was opposed by complaint counsel on the ground that the post-acquisition data sought to be obtained were irrelevant to the issues remanded in this proceeding. By order dated November 20,

1970, the examiner granted respondent's motion and issued the requested subpoenas *duces tecum*. Although most of the third parties produced the data requested, motions to quash said subpoenas *duces tecum* were filed on behalf of several of them on the ground that the information sought was irrelevant and confidential, and would be burdensome to produce. Said motions were denied by separate orders of the examiner issued in December 1970 and January 1971. Following appeals from said orders by the third parties, with complaint counsel having been granted leave to intervene, the Commission issued its order on March 4, 1971 [78 F.T.C. 1569], granting the appeals and directing the quashing of the subpoenas *duces tecum* theretofore issued by the hearing examiner.

Thereafter, a second prehearing conference was held on April 7, 1971, at which respondent indicated that as a result of the Commission's order quashing the subpoenas *duces tecum*, it would have to revise its defense strategy, insofar as it involved the use of post-acquisition data obtained from third parties, and that it would return the data submitted by a number of the third parties who had not filed motions to quash. A revised procedural schedule was agreed upon, which is embodied in the undersigned's Prehearing Order No. 2.

Hearings for the reception of evidence were thereafter convened on July 13, 14, and 15, 1971, in New York, New York. Evidence was offered at said hearings by respondent in support of the issue as to which the examiner had ruled it had the burden of proof, *viz.*, whether Certified's opportunity for some form of continued competitive vitality through bankruptcy or similar proceedings was "dim or non-existent" as of the time of the acquisition by respondent in April 1964. No evidence was offered by respondent with respect to the period January 1963, inasmuch as it made no contention that Certified was a failing company as of that time, and further contended that it was under no obligation to offer any evidence concerning this period unless complaint counsel first established that the arrangement with Certified had become illegal as of January 1963. The only evidence offered by counsel supporting the complaint was with respect to the same issue as to which evidence had been offered by respondent. Pursuant to leave granted by the undersigned, proposed findings of fact and conclusions of law were filed by the parties on September 1, 1971, and replies thereto were filed on September 15, 1971.¹

¹ The proposed findings filed by each of the parties were with respect to the issues as to which the examiner had ruled they had the burden of proof. Respondent's proposed findings were directed to subparagraph (c) of the Commission's remand order, and complaint counsel's proposed findings were directed to the remaining subparagraphs. The replies contain each party's position with respect to the opposing party's proposed findings on the issue or issues as to which the opposing party had the burden of proof.

After having carefully reviewed the evidence in this proceeding, the proposed findings of fact and conclusions of law and the replies there,² and based on his observation of the witnesses, the undersigned makes the following findings and conclusions as to the remanded issues:

A. The Prospects of Certified's Surviving Through Bankruptcy or Similar Proceedings in April 1964

1. The evidence offered by respondent consisted essentially of, (a) testimony and documentary evidence by officials of respondent and Certified, purporting to show that the state of Certified's equipment and business at the time of the acquisition was such that there was no likelihood of Certified's survival without the infusion of substantial amounts of new capital, and that despite the infusion of substantial amounts of capital by respondent, Certified's operation continued to lose substantial amounts of money in the years succeeding the acquisition, at least through 1967; (b) the testimony of witnesses from the ready-mixed concrete industry purporting to show that a substantial number of ready-mix operators in the New York City metropolitan area (NYMA) went out of business both prior to and after Certified's acquisition, and that not a single company had been able to successfully reorganize through bankruptcy or similar proceedings; and (c) the testimony of two experts in the field of bankruptcy and reorganization to the effect that the prospects of Certified's being reorganized in April 1964 were dim or nonexistent.

2. Before discussing such evidence it should be noted that the financial data offered by respondent concerning Certified's financial condition in the post-acquisition period and as to the infusion of additional capital by respondent, were received in evidence over the objection of complaint counsel. The basis of counsel's objection was that the Commission's order of March 4, 1971, quashing the subpoenas *duces tecum* issued at the instance of respondent for the production of post-acquisition financial data by third parties, precluded the receipt into evidence of respondent's own post-acquisition data. Such objection was overruled by the examiner. While the undersigned's conclusions here would be the same irrespective of whether the post-acquisition data are con-

² Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters. References to proposed findings are made with the following abbreviations: "RPF" (for respondent's proposed findings); "CPF" (for complaint counsel's proposed findings); "RR" (for respondent's reply); "CR" (for complaint counsel's reply). Other abbreviations used herein are: "Tr." (for transcript of testimony); "CX" (for complaint counsel's exhibits); "RX" (for respondent's exhibits); "I.D." (for examiner's original Initial Decision).

sidered or not, in his view such evidence is unquestionably relevant. The Commission's order holding such evidence not to be relevant, insofar as the third party subpoenas *duces tecum* were concerned, was based principally on the holding of the Supreme Court in *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568. The holding of that case, that a showing of *actual* anti-competitive effect is not a "requirement" for establishing the "probability" of competitive injury under Section 7 of the Clayton Act is not, in the opinion of the undersigned, tantamount to a holding that post-acquisition evidence has no logical probativeness.³ Moreover, where the issue is one of the prospect of a company's being successfully reorganized, evidence as to actual financial developments in the affairs of the company and in the industry during the post-acquisition period, while not a *requisite* element of proof, cannot be said to be without logical probativeness as providing a backdrop against which to compare a forecast as to what a company's prospect for reorganization would have been if it had not been acquired.

3. The evidence establishes that the nature of the ready-mixed concrete industry, as an industry, is such that it does not readily lend itself to reorganization once a company experiences serious financial difficulties. This is particularly true of the industry in the NYMA. The product, ready-mixed concrete, is a homogeneous product which is sold primarily on a price basis. There is little or no customer loyalty in the industry, and continuing customer relationships characteristic of other industries are lacking. There is no such thing as goodwill or going concern value, as an asset against which funds can be raised when a company is experiencing financial difficulty (Tr. 1381, 1384, 1403, 1407-09, 1433-34, 1498, 1520-21). The business involves substantial fixed costs, and volume is essential to spread these costs. There is, therefore, a tendency to bid low on jobs in order to maintain volume, despite the fact that the price will result in little or no profit (Tr. 1375-78, 1386-87, 1432, 1434, 1437, 1464-66). Maintenance of an efficient truck fleet is essential to a company's successful operation since, in addition to price, dependable and fast delivery is essential to obtaining business and continuing customer relationships. However, once a company experiences financial difficulty, there is a tendency to reduce

³In *United States v. Falstaff Brewing Corp.*, 333 F. Supp. 970, 972 (D.C. R.I., 1971), the court held that post-acquisition evidence showing a decline in market share was admissible, stating:

"It is well established that post-acquisition evidence is admissible in an action such as this and may properly be considered in determining whether the probable effect of said merger will be a substantial lessening of competition * * *. [T]here is no evidence that [the acquiring corporation] during said period did not make every effort to realize the benefits it hoped to obtain by its acquisition."

costs by avoiding replacement of obsolete trucks and by reducing maintenance on the existing fleet. This results in more frequent truck breakdowns and the need to cannibalize parts from other trucks, thus compounding the problem (Tr. 1439, 1441, 1448-50, 1513-14, 1526-27). The ability of a company in financial difficulty to raise additional capital against its assets is minimal. Generally, its trucks are encumbered by mortgages, and even where not encumbered they generally bring only a fraction of their cost in a sale. In the case of multi-plant companies, the prospect of selling off one or more plants is remote where the industry as a whole is suffering from overproduction and a declining demand. The cost of borrowing against accounts receivable is high and once this avenue has been pursued, it is no longer available if additional funds are required. The problems of a company in financial difficulty are compounded by the traditional slowness in payment of accounts receivable by ready-mixed concrete customers, by the practice of asserting "back charges" for alleged late or defective delivery, and by the tendency to cancel orders because of concern that the supplier will be unable to deliver (Tr. 1382-83, 1388-92, 1402, 1409-10, 1431, 1434, 1437-39, 1443, 1469-70, 1504, 1521).

4. All of the problems of the ready-mixed concrete industry in the NYMA were reflected and intensified in the case of the acquired company here involved, Certified Industries. Its financial losses had increased in the latter part of 1963 and early 1964. It was being pressed for payment by its creditors. The condition of its truck fleet was poor, with about 40 percent of its trucks being overage. Without the infusion of additional capital to repair, remodel and replace trucks, Certified was at the point where it could not have maintained enough efficiency to continue in operation. Plants and other equipment were in a bad state of repair. Despite economy measures, including reductions of salaries and the closing of some plants, it was unable to stem the tide of loss. Its need for working capital was such that within one week after the acquisition, it would have been unable to meet its payroll, to say nothing of paying for rent, utilities and material charges. The only thing that could have kept it alive was the infusion of new capital. Other than respondent, which had become involved in Certified's affairs through its guarantee of the loan from Bankers Trust Company, there was no one else on the horizon who would have been willing to provide such funds. In the case of respondent, its willingness to make further financial commitments was conditioned on its ability to have a controlling voice in trying to turn Certified around, *viz.*, by acquisition of the company (Tr. 1372 X-Y, 1448-53, 1464-65, 1467-72, 1522, 1531, 1535-36; CX 62).

5. The prospect that Certified could have been successfully reorganized must be viewed against the background of the financial travail of ready-mixed concrete companies in the NYMA during this period, and the fact that not a single one was successfully reorganized through bankruptcy or other proceedings.⁴ The record establishes that a substantial number of companies left the market during this period because of their financial inability to withstand the onslaughts of the intense, dog-eat-dog competition of a declining market. This process, which started several years prior to the acquisition of Certified, continued thereafter and included several of the firms listed in the original initial decision herein as being among the top companies in the industry (Tr. 1379-82, 1392-93, 1408-14, 1428, 1472-74, 1493; I.D. par. 102-07, at 39-41 [71 F.T.C. 436-8]).⁵ While, as complaint counsel sought to show, new companies in some instances took over or bought out the assets of departing companies, the rapid and widespread turnover of companies is itself a reflection of the depressed financial condition of the industry.⁶

6. Although, as above noted, Certified's ability to survive was dependent on the infusion of outside capital, which only respondent was willing to provide, even this was not sufficient to stem the adverse tide of its business. During the period from April 1964 (when the acquisition took place) to December 31, 1967, respondent invested \$14,320,277 in the Certified operation to cover the need for new or improved equipment and to provide for payment on bills that were due and various obligations that were owing (RX 70, 71, 76-81; Tr. 1372 L). Various economies were effected by more efficient management, including reduction of management salaries, clerical costs, interest, and insurance costs, the providing of various free services through the personnel of respondent's UAC Division, and the reducing of operating costs by closing various plants (Tr. 1372 S-W, 1534-40). Despite these efforts, Certified's losses continued and its volume remained static or declined,

⁴ Several of the companies made assignments for the benefit of creditors, but this was merely a vehicle for their dissolution or liquidation (Tr. 1411-13, 1428-33, 1393).

⁵ M. F. Hickey, which was the fifth ranking ready-mix producer in the NYMA in 1964, went out of business in 1967 because it could no longer meet its financial obligations (Tr. 1493). Some of its trucks were sold at distressed prices, as were two of its plants which were dismantled by the purchasers. Its other two plants could not be sold (Tr. 1496). Century Transit Mix, the sixth ranking producer, went out of business in 1965 (Tr. 1474, 1610). Cooney, the seventh ranking producer, after combining with another producer, discontinued operation of a number of its plants in 1966 (Tr. 1519-20).

⁶ The only evidence offered by complaint counsel on the remand of the proceeding was a single witness from the industry, through whom they sought to show that a number of companies had entered the ready-mix business in the eastern portion of the NYMA in recent years. The testimony of the witness corroborates the evidence offered by respondent as to the number of companies leaving the market because "they went broke" (Tr. 1611), and indicates that most so-called new entrants merely took over the facilities of defunct companies.

UNITED STATES STEEL CORP.
Initial Decision on Remanded Issues

as the following table reflects (RX 67-69; I.D. par. 22 at 12 [71 F.T.C. 410]):

Year	Sales	Income-Loss
1964 (last 8 months)	\$6,983,555	\$1,204,210
1965	7,616,024	1,936,839
1966	7,793,061	1,696,777
1967	7,241,021	2,041,397

7. The uncontradicted and credited testimony of two experts in the field of creditors' rights, bankruptcy and reorganization, who were called to testify by respondent, establishes that the prospects for Certified's continued competitive vitality in April 1964, through bankruptcy or similar proceedings, were dim or nonexistent. The opinions of these experts were based on Certified's financial data as of the time of the acquisition, and certain factual assumptions posited by counsel for respondent relative to the nature of the industry and Certified's particular situation at the time of the acquisition, all of which factual assumptions are supported by the record. The opinion of each witness was based on the preacquisition situation, and without his having had access to Certified's postacquisition history. However, after having given his original opinion, and each stated that such evidence merely confirmed his original data and each stated that such evidence merely for Certified's being reorganized.

8. The opinion of the first of the expert witnesses, that Certified's prospects for being successfully reorganized in April 1964 were "negligible, dim," was based on the following rationale:

* * * [T]he essential ingredient in any successful reorganization, whether it be under Chapter 10, Chapter 11, or even out of court, is the presence of a potential for profit. As I read the finances here, it seemed clear to me that by April of '64, Certified had a minus net worth. It had no working capital, its losses were averaging over \$200,000 a month, there was no indication of any change in this trend whatsoever and under those circumstances and with any other factors that you have mentioned in your hypothetical question, I don't see how Certified could have been successfully reorganized. (Tr. 1576)

Respondent called as expert witnesses two lawyers specializing in the field of creditors' rights. One of these, had represented trustees and receivers in bankruptcy, assignees for the benefit of creditors, creditors' committees and hundreds of companies in bankruptcy matters over a period of almost 50 years. He had also lectured on the subject before the Practising Law Institute and similar groups. The other, in addition to representing clients in bankruptcy matters, was a professor of law at New York University and a member of the Advisory Committee of the United States Judicial Conference on bankruptcy matters. He had also been retained by the Secretary of the Treasury as a special consultant on the Lockheed Aircraft reorganization. He was also coauthor of Collier on Bankruptcy, a standard text in the field of bankruptcy.

Initial Decision on Remanded Issues

The witness further testified that while a multi-division company, some of whose divisions were losing money while others were making a profit could be successfully reorganized by selling off the unprofitable divisions and reorganizing around the profitable portion of the business, he had never seen a successful reorganization involving an essentially one-product company which had been losing money at the rate, and over the period of time, as had Certified (Tr. 1581).

9. The other witness summarized his views as follows:

I came to the conclusion that I did based upon an analysis of operating statements and all the information contained in these various reports which were submitted to me and which * * * were introduced into evidence in this proceeding, the earnings record of this company was so poor and the prospects for the future were so uncertain, so dim, I should say, and bearing in mind the amount of money that had been put into this company in the way of new capital, starting a couple of years before when they were able to arrange that loan from the bank, all of which was dissipated quite quickly, that this is not a viable enterprise and it's one that just could not have been reorganized. * * * Now, it's true that any corporation can be reorganized. * * * Now, if someone is willing to bear the burden of losses, any corporation can be reorganized, but I can't look at it on the basis of whether it has an earning potential, if some what that earning potential is, and this to me, this case, it has no earning potential and it was ripe for liquidation in 1964 * * *. (Tr. 1648)

10. Counsel supporting the complaint offered no countervailing expert testimony as to Certified's prospects of survival through reorganization in bankruptcy or otherwise. However, they question two of the eleven factual assumptions on which the testimony of respondent's witnesses was based, viz.:

- (a) There were no prospects for marked improvement in the future demand for ready-mix concrete in general, or in the sales of Certified in particular.
- (b) There was no prospect of a purchase by a company other than U.S. Steel. (Tr. 1575)

In the opinion of the examiner, these assumptions are amply supported by the record even if the postacquisition financial evidence is ignored. The validity of the second assumption is dealt with elsewhere. Suffice it to say at this point that the examiner has previously found, and the Commission has sustained such finding, that respondent was the only purchaser available for Certified's business as of April 1964.

11. In support of their contention that the record does not support the first assumption quoted above, complaint counsel cite the testimony of a witness at the earlier hearings that he regarded the market to be in "a lull before it picks up again," and the testimony of a witness at the more recent hearings that he entered the ready-mix business in 1964 in the expectation of an increase in demand (CR at 3). The

evidence cited by complaint counsel hardly supports their position of prospect for a marked increase in the demand for ready-mixed concrete. The first witness referred to by counsel was a manufacturer of cement rather than ready-mixed concrete, and he was testifying about the situation in the cement market in October 1965 when he was called as a witness and not about the period of Certified's acquisition in April 1964 (Tr. 344-45). The testimony of the second witness, who had sold out his family's ready-mix business to a large cement company for over \$3.5 million in 1960 and remained on as president of the ready-mix operation until April 1964 during which time the operation continued to decline until it was sold to a third party, and who had leased the plant of a small bankrupt company in the eastern portion of New York City in August 1964 with the hope that "maybe '64 would be the last year of the slide" (Tr. 1526), is hardly a paean of hope and confidence in the revival of the ready-mix market in the NYMA in or about April 1964.

12. The fragmentary evidence cited by complaint counsel hardly overcomes the overwhelming evidence adduced at the earlier hearings concerning the depressed state of the ready-mix market in or about April 1964 and the lack of prospect for any marked improvement in the market in the foreseeable future, and particularly for any improvement in Certified's condition. At the time of the acquisition the depressed condition of the ready-mix market in the eastern portion of companies had declined by 18 percent. Ready-mixed concrete prices had dropped sharply. There had been a substantial shake-out of companies in the industry, with a number of companies turning to a cement company merger as a means of surviving and others simply going out of business (I.D. par. 102-07, at 39-41 [71 F.T.C. 436-8]). Whatever may be said of the prospects for an eventual improvement in the market as a whole, there certainly was no prospect for any improvement in Certified's business situation within a time frame required to prevent its financial debacle.

13. Complaint counsel also suggest that the testimony of the bankrupt's own officials, at or about the time of the acquisition, that Certified's financial reverses could be halted "with new management" (CR at 4). However, it is clear from the context of the opinions expressed by respondent's officials that, left to its own devices, Certified's future lay only in business failure and that the "new management" referred to by them was that in which respondent's own officials would assume

direction of the company after acquisition. Even this course did not presage successful operation for Certified, but was looked upon as a desperate effort by respondent to salvage whatever it could of its investment in Certified. Thus, in January 1964 respondent's executive vice-president expressed the opinion to its board of directors that: "Certified's financial position probably will cause bankruptcy unless it can find a purchaser willing to invest additional funds in the business," and its treasurer advised operating officials at the end of 1963 that: "[W]e must say to you that there is no financial basis for lending additional funds [to Certified] at this time. * * * From the viewpoint of a businessman and in the light of the financial position summarized above, we cannot consider this a good business risk" (I.D. par. 51-2, at 23-4 [71 F.T.C. 420-1]). Respondent ultimately made the acquisition not because Certified represented a good financial risk, but because it was already heavily involved in Certified's financial situation, and because acquisition offered respondent the only hope of salvaging any of its investment. It is clear that the hope expressed at the time that new management and the infusion of new funds might revive Certified is not tantamount to the existence of any expectation by respondent that Certified by itself, and through its own internal resources, had any future in the ready-mix business.

14. Although not referred to by complaint counsel in their proposed findings or reply, the examiner notes that the court of appeals' reference to the "prospects of reorganizing Certified into a vital, competitive company" stems principally from two facts, (a) that "United States Steel paid over a million dollars to the equity interests of Certified, after assuming all liabilities" and (b) that "Certified was created by the tying together of a number of ready-mix concrete and building aggregate companies serving the NYMA, each of which had created a certain amount of goodwill [thus suggesting] the possibility in a receivership proceeding." Respondent's willingness to pay \$1 million to the equity interests of Certified was due, in part, to its desire to take over a going company with its organization intact, rather than of which as an operating entity might be problematical. In addition, the decision to pay something of a premium for the equity in Certified was influenced by the opinion of respondent's officials that there were sand and gravel deposits on one of Certified's properties which might have a value of \$2½ million if they could be mined. However, subsequent to the acquisition it was ascertained that due to zoning restrictions the property could not be developed for sand and gravel pur-

UNITED STATES STEEL CORP.
Initial Decision on Remanded Issues

poses. As a result, respondent refused to pay Certified's stockholders the final payment of \$250,000 which still remained owing on the \$1 million originally agreed to be paid (Tr. 1558-62, 1541-48). In the opinion of the examiner respondent's willingness to pay a so-called premium of \$1 million under the circumstances above outlined, is hardly indicative of the existence of any real prospect for Certified's successful reorganization in bankruptcy.

15. With respect to the matter of the possibility of splitting Certified into the constituent elements from which it had been formed, the evidence offered at the earlier hearings establishes that this would not have been a feasible solution. The principal ready-mix company which it had acquired and which enabled it to more than double in size was in substantially the same trade area and there is not the slightest evidence that the splitting up of the companies would have enabled one of them to operate any more successfully than the current hearings disclosed. Moreover, as the evidence adduced at the combination of the a moribund ready-mix company. The other acquired company, Northern Lightweight Aggregate Company, was also in financial difficulty when acquired and had not operated at a profit for most of the period Certified could have realized sufficient capital from a sell-off of North-ern Lightweight Aggregate Company, as also in financial difficulty at 13-14 [71 F. T. C. 412]).

B. Whether the Vertical Ties Between Respondent and Certified Took on an "Unlawful Cast" as of January 1963

16. Complaint counsel introduced no additional evidence in support of their position that the so-called vertical arrangement between respondent and Certified "took on an illegal cast" in January 1963, when Certified obtained the loan from Bankers Trust Company as a result of respondent's intercession with the bank and its signing of a "Note Purchases Agreement" under which it, in effect, guaranteed repay-ment of the loan. Following the loan from the bank, Certified's pur-chases of cement from respondent's UAC Division increased sharply, from approximately 15 percent of its total cement purchases in 1962 to 54 percent in 1963 and then to 88 percent in 1964 (the latter year covering the period both before and after the acquisition). Although there was no written agreement between respondent and Certified, complaint counsel argue that in practical operation there existed "a

tying arrangement" between respondent and Certified under which the latter had undertaken to purchase the bulk of its cement requirements in this arrangement was "not insubstantial," complaint counsel contended that the arrangement was illegal under *International Salt Co. v. United States*, 332 U.S. 392, and other cases involving tying contracts (CPF at 15-19).

17. Complaint counsel's position at this juncture of the proceeding is no different from that which it urged at the original hearing phase. At that time it urged that both the question of Certified's failing condition and the availability of other purchasers must be determined as of January 1963, when the loan arrangement was made, rather than as of April 1964 when the acquisition took place. The undersigned over-ruled complaint counsel's position in both respects on the ground that the complaint did not charge a violation of Section 3 of the Clayton Act and, furthermore, that there was no causal connection between the loan arrangement and Certified's subsequent acquisition. On the contrary, the examiner held that the evidence disclosed Certified had entered into the loan arrangement not as a precursor to eventual acquisition, but as part of a desperate effort to try to maintain its independent existence (I.D. par. 55-56, at 79-80 [71 F.T.C. 422-3]). The Commission, finding "no evidence that in obtaining the Bankers Trust loan Certified was not making a good faith effort to rehabilitate itself," agreed with the examiner's conclusion that the controlling date was April 1964 and not January 1963.

18. The principal ground for complaint counsel's now urging a different result is not the disclosure of any evidence not previously considered, but the opinion expressed by the court of appeals herein that:

To the extent that unreasonable foreclosure of Certified's cement demands occurred as a result of the financial arrangement in January, 1963, we believe that the failing company defense must be measured from the inception of these unreasonable vertical arrangements, not from the point of their final consummation.

Since, as the examiner originally found herein, there is no evidence that the loan arrangement led to, or was calculated to lead to, Certified's eventual acquisition, the undersigned is at a loss to understand how the putative illegality of the loan arrangement and the cement-purchasing practices resulting therefrom can affect the operative date for determining Certified's failing condition and the availability of other purchasers of its business. The effort to fuse the two issues is somewhat analogous to the "felony-murder" principle applicable in

the field of criminal law, under which the element of intent or premeditation which is required to be shown in order to establish a case of first degree murder is presumed to exist, or need not be shown, if the homicide occurred in the course of committing another felony. The latter principle has a statutory, rather than a logical basis, and is not applicable to the issues in this case. The illegality of a Section 3-type of conduct cannot, in the examiner's opinion, supply the missing element to a Section 7 charge, absent a causal relationship between the two types of conduct.

19. The examiner notes that the court of appeals, in suggesting that if the vertical ties between Certified and respondent became unlawful as early as January 1963 "then the failing character of Certified must be shown to have existed at that time," cited as authority for its view the *Citizen Publishing Co.* case, noting that there:

The failing character of the [acquired] Company was measured from 1940 at which time the first joint operating agreement was effected, rather than from 1953 at which time the challenged agreement was effected.

However, the situation in *Citizen Publishing Co.* is wholly dissimilar to that existing here. In that case the two companies had entered into an agreement in 1940 under which the entire business operations of the two companies were integrated into a single joint operation. The formal merger of the two companies did not take place until 15 years later. The Supreme Court correctly held that the failing condition of the acquired company should be determined as of 1940, when the merger was consummated. In the instant case not only was there no informal acquisition in January 1963 when the loan arrangement was entered into but, so far as the evidence discloses, the arrangement was entered into with the expectation of Certified's being able to maintain its independent existence.

C. The Remaining Remanded Issues

20. The remaining issues remanded by the Commission are, in substance, (a) whether Certified was in a failing condition as of January 1963, and (b) whether any purchaser other than respondent was interested in acquiring Certified between January 1963 and April 1964. Since, as found above, the record fails to establish that, prior to the acquisition, the U.S. Steel-Certified arrangement took on an unlawful cast of such a nature as to justify advancing the date for determining compliance with the requirements of the failing company defense, it is unnecessary, in the opinion of the examiner, to make any findings or conclusions with respect to the above two issues. However, complaint

counsel contend that under the Commission's remand order a determination as to Certified's financial condition in January 1963 and as to the availability of other purchasers between January 1963 and April 1964 is not conditioned on a prior determination that the vertical arrangement between the two companies took on an unlawful cast as early as January 1963. Indeed, complaint counsel argue in their proposed findings, as they did at the initial prehearing conference herein, that the remand order was intended to reopen the entire failing company defense, including the question of whether any other purchaser was available during the period from January 1963 to April 1964 and whether Certified's financial debacle was caused by management deficiencies in Certified's operations which could have been prevented or arrested by the taking of appropriate corrective action on the part of Certified or respondent.

21. Complaint counsel's position as to the nondependence of the first two remanded issues on a prior determination that the Certified-U.S. Steel vertical arrangement took on an unlawful cast as early as January 1963, is based on the fact that the remand order "placed the question of 'unlawful cast' fourth in the series of issues which must be decided by the examiner," and they argue that:

There is no indication in the remand order that the financial condition of Certified in January 1963, or that company's outlook for continued viability or competitive vitality in January 1963, is relevant to all of the other remand issues only if some unlawful vertical ties are first demonstrated. (CPF at 5)

While the remand order itself does not spell out the conditional nature of certain of the issues, it is clear from the court of appeals decision which prompted the present remand that the Commission did not intend a broad reopening of the failing company defense such as that which complaint counsel suggest.

22. The basic reason for the remand to the Commission by the court of appeals was, as previously noted, "to give U.S. Steel an opportunity to bring forth evidence that the prospects of Certified passing through bankruptcy or similar proceedings were 'dim or nonexistent,' and so that the Commission had not previously considered this to make a finding of fact as to this crucial element in the failing company defense." The Commission had not previously considered this question and respondent had not offered any evidence regarding it because the need for such a showing (in order to meet the requirements of the failing company defense) had not been made explicit until the Supreme Court's decision in *Citizen Publishing Co.*, following the Commission's decision herein. It is clear, therefore, that the basic purpose of the remand was to permit the reception of additional evidence

UNITED STATES STEEL CORP.
Initial Decision on Remanded Issues

629

on a specific element of the failing company defense, *viz*, the prospects for Certified being reorganized in bankruptcy or otherwise, and not to reopen the entire failing company defense, as of January 1963, and the availability of other purchasers at that time, entered into the picture as a result of the court's observation that the arrangement between respondent and Certified might have taken on an "unlawful cast" as early as January 1963. If such were the case, then a determination as to whether respondent had met the requirements of the failing company defense would have to be made as of the earlier date rather than as of the date of the acquisition, which is normally considered to be the operative date for determining the applicability of the failing company defense, and was so considered by both the Commission and the examiner here. Only if it were determined that the arrangement of the acquisition would Certified had become illegal prior to the date between respondent and Certified had become illegal prior to the date of the acquisition would Certified's financial condition and the availability of other purchasers prior to April 1964 become relevant considerations under the remand was being made "in accordance with the opinion states that the remand was being made."

24. In connection with the questions which were required to be reopened by the court, and that it did not intend to reopen the entire failing company defense as of April 1964, or as of some earlier date which has no pertinence unless the Certified-U.S. Steel arrangement became unlawful prior to the date of actual acquisition. In accordance with the Commission's order opened by the court, it must be assumed that the Commission intended to reopen only the questions which were required to be reopened by the court, and that it did not intend to reopen the entire failing company defense as of April 1964, or as of some earlier date which has no pertinence unless the Certified-U.S. Steel arrangement became unlawful prior to the date of actual acquisition.

24. In connection with the questions which were required to be reopened by the court, and that it did not intend to reopen the entire failing company defense as of April 1964, or as of some earlier date which has no pertinence unless the Certified-U.S. Steel arrangement became unlawful prior to the date of actual acquisition. In accordance with the Commission's order opened by the court, it must be assumed that the Commission intended to reopen only the questions which were required to be reopened by the court, and that it did not intend to reopen the entire failing company defense as of April 1964, or as of some earlier date which has no pertinence unless the Certified-U.S. Steel arrangement became unlawful prior to the date of actual acquisition.

Initial Decision on Remanded Issues

at or about the time of the acquisition, but as intending to require a showing of nonavailability of other purchasers only if it were first established that the ties between Certified and respondent had become illegal in January 1963 or at some date prior to April 1964.

25. In connection with complaint counsel's position that the remand order was intended to reopen the entire failing company defense, including the question of whether there were other less anticompetitive ways of correcting Certified's financial difficulties (CPF at 5-6), it should be noted that this position was first asserted at the initial prehearing conference herein. At that time the examiner ruled contrary to the position of complaint counsel, and suggested that any broadening of the issues beyond those specifically set forth in the Commission's remand order would require a modification of the Commission's order. Complaint counsel reserved the right to seek a modification of the Commission's order (PHO 1, par. 4). However, no such motion was made by complaint counsel.

26. Complaint counsel are nevertheless asserting essentially the same position in their proposed findings herein. They refer, for example, to Certified's failure to avail itself of other offers for purchase during the 1963-64 time-period, suggesting that the loan commitment obtained through the assistance of respondents was responsible for Certified's lack of interest in such offers and, further, that neither Certified nor respondent made any effort to correct Certified's fiscal deficiencies (CPF at 24-30). All of these matters were considered in the original initial decision herein. Thus, the examiner held that the declination of an offer for acquisition from another company at or about the time of the U.S. Steel-sponsored loan (which offer would also have involved vertical integration) did not establish the availability of other purchasers (I.D. par. 58, at 81 [71 F.T.C. 423]). This holding was specifically quoted and upheld in the Commission's decision. The examiner also specifically found that at the time of the inception of negotiations for the acquisition of respondent in November 1963 no other purchaser was available, all negotiations having ceased for at least several months prior thereto (I.D. par. 61, at 82 [71 F.T.C. 424]). This holding was not disturbed by the Commission. The matter of Certified's alleged failure to take appropriate steps to meet its financial problems was also considered in the initial decision, as was respondent's alleged responsibility for not stemming the decline (I.D. par. 37 at 17 [71 F.T.C. 415]; par. 62-64 at 82-4 [71 F.T.C. 425]). Lacking a clear mandate from the Commission that it desires to have these issues relitigated, it is inappropriate to consider complaint counsel's proposed findings concerning matters not included in the remand order.

CONCLUSIONS

1. The record fails to establish that the U.S. Steel-Certified ties or business arrangements in January 1963, or at any period prior to the acquisition in April 1964, took on an unlawful cast of such a nature as to require a showing by respondent that the elements of the failing company defense were met as of such earlier date.

2. It is unnecessary to consider whether Certified faced a grave probability of business failure as of January 1963, in view of the conclusion reached in Paragraph 1 above.

3. It is unnecessary to consider whether any other prospective purchaser was interested in acquiring Certified in January 1963 or at any time prior to the period of the acquisition in view of the conclusion in Paragraph 1 above, and in view of the fact that the matter of the availability of other purchasers in April 1964 and for a reasonable period prior thereto has already been considered in the examiner's original initial decision herein.

4. The record establishes that Certified's opportunity for some form of continued competitive vitality through bankruptcy or similar proceedings was dim or nonexistent in April 1964. In view of the conclusion reached in Paragraph 1 above, it is unnecessary to determine what the prospects for such continued competitive vitality were as of January 1963.

CONCURRING OPINION OF CHAIRMAN KIRKPATRICK

I concur in the order herein and join in the opinion to the extent that it holds that the loan arrangement between U.S. Steel and Certified was unlawful under Section 5 of the Federal Trade Commission Act and that Certified was not in a failing condition in January 1963, for the purposes of the failing company defense. Also, to the extent that the opinion and mandate of the Court of Appeals require our disposition of this matter to rest upon a January 1963 application of that defense, this Commission is, of course, not free to hold otherwise. However, my view would be that the failing company defense should be evaluated as of the date of the acquisition of "share capital" or of "any part of the assets of another corporation." That date could be the date of the acquisition or merger or it could also be an earlier date upon which the two companies may have entered into a transaction or arrangement tantamount to such an acquisition but not such in the strict legal sense. In the latter event, as in *Citizen Publishing*, the failing company defense should be considered as of the date of that transaction or arrangement. But that would not appear to be

the case here. I would not conclude that the loan arrangement between Certified and U.S. Steel constituted the equivalent or an acquisition or was such as to lead inevitably thereto. The fact that such January 1963 transaction may have violated Section 1 of the Sherman Act, Section 5 of the FTC Act, or Section 3 of the Clayton Act would not, in my view, give rise to the application of Section 7 of the Clayton Act as of that date.

I would also like to note that I concur in the Commission opinion of December 2, 1968, with respect to the scope of the failing company defense.

DISSENTING OPINION BY COMMISSIONER DENNISON

Being unable to subscribe to the majority's view that there existed a vertical "tying" arrangement which had taken an unlawful cast at the time of the loan agreement in January 1963, nor with the view that the "failing company" defense is not an absolute defense, I am compelled to dissent. I do not find the loan guarantee agreement of such a nature as to create an actionable restraint of trade. Furthermore, even if an unlawful restraint did exist, I do not find any causal relation between such restraints and Certified's failing condition in April 1964.

As to the first question, the law is clear that not every conceivable "tie-in" arrangement falls within the rigid *per se* category of illegality. The very same Court of Appeals which reviewed this proceeding has construed the Supreme Court's *Fortner* decision as requiring an affirmative showing that the seller possessed "economic advantage" or "power" in the market of the tying product before the *per se* doctrine attaches. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 452 F. 2d 1095, 1101 (6th Cir. 1971). Without this qualification, perfectly harmless, or even beneficial arrangements reasonably sought by the customer, would be needlessly barred. No attempt has been made by complaint counsel to show that U.S. Steel had financial or other advantages over other lenders in the New York area that gave it any such market power. The only thing unique about U.S. Steel in this regard was its willingness to guarantee the bank loan to Certified. But such willingness in and of itself does not establish market power or advantage in the lending market. See *Fortner Enterprises, Inc. v. United States Steel*, 394 U.S. 495, 505 (1969). The fact that Certified was willing to buy cement from respondent at a price that was sometimes in excess of a competitor's price does not demonstrate leverage in the credit market since the price of the total package (*i.e.* the price of credit included, considering the risks involved) may have

been a competitive price to Certified, not a monopolistic price. See "Credit as a Tying Product," 69 Col. L. Rev. 1435, 1443 (1969).

Nor do I see any justification for concluding that the financial arrangement here was an actionable restraint of trade under a "rule of reason" or other test applicable to requirements contracts. As the Commission noted in its original decision in this matter, the January 1963 loan enabled Certified to retain its independent status rather than become permanently integrated into a cement company, which appeared the likely alternative at that point in time. It is true that during the ensuing calendar year Certified in return purchased somewhat more than half its cement requirements from U.S. Steel thus foreclosing some part of the market. But this does not amount to the type of total and permanent foreclosure that results from an acquisition. It is not enough in my view to point to the fact that the Commission found (and the Court affirmed) that the later vertical acquisition was actionable under Section 7 of the Clayton Act. As the Court of Appeals itself noted, the standard for adjudging the legality of requirements contracts is more tolerant with respect to requirements contracts than vertical integration by acquisition. *U.S. Steel Corp. v. Federal Trade Commission*, 426 F. 2d 592, 601 (6th Cir. 1970). See also *Brown Shoe Co. v. United States*, 370 U.S. 294, 330-332 and n. 55 (1961) ("ownership integration is a more permanent and irreversible tie than is contract integration"). If the test for measuring the market for foreclosure effect announced in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), is used (in this case, the area in which competing cement sellers could practically turn for customers), the amount of foreclosure occasioned during 1963 does not on its face appear substantial. Certified's purchases of cement from U.S. Steel's division constituted about 1.2 percent of total shipments by cement plants that served the New York area. In view of the fact that the loan arrangement had the salutary possibility of keeping Certified intact as an independent non-integrated competitor in the highly concentrated ready-mix market (a market much more concentrated than the cement market and one which was dominated by one company, Colonial Sand and Stone, possessing 50 percent of sales), I think the financial arrangement should not be condemned on some mechanical test of "foreclosure" to cement suppliers.

Furthermore, I agree with Chairman Kirkpatrick that the vertical arrangement in January 1963 did not amount to, or lead ineluctably to, a more permanent form of integration attackable under Section 7. Nor do I find any persuasive evidence that the arrangement caused

Certified's "failing condition" in April 1964 or contributed to the fact that there were no other available purchasers at that time. It seems clear to me that Certified failed not because of the loan arrangement but in spite of it.

Regarding the legal relevance of the failing company doctrine, I would associate myself with former Commissioner Elman's dissent in this matter [74 F.T.C. 1305].

OPINION OF THE COMMISSION

By DIXON, *Commissioner*:

An order to cease and desist was issued by the Commission in this matter on December 2, 1968 [74 F.T.C. 1270]. Thereafter the order was reviewed by the United States Court of Appeals for the Sixth Circuit, and in an opinion issued May 6, 1970 [426 F. 2d 592, 6th Cir. 1970], the court remanded the case to the Commission for further findings of fact and further proceedings in light of the Supreme Court's holding in *Citizen Publishing Company v. United States*, 394 U.S. 131 (1969), as well as the views of the Court of Appeals set forth in its opinion.

The complaint herein, filed January 22, 1965, charged that United States Steel Corporation, a large producer of portland cement through its Universal Atlas Cement Division, had violated Section 7 of the Clayton Act by acquiring Certified Industries, Inc., one of the four largest ready-mixed concrete producers in the New York City metropolitan area.

On May 20, 1966 [71 F.T.C. 399], Hearing Examiner John Lewis filed an initial decision dismissing the complaint. The primary basis for this dismissal was that the acquired company's failing condition at the time of its acquisition immunized the transaction from Section 7 challenge. The examiner also held, in the alternative, that the acquisition did not have the tendency to substantially lessen competition or to create a monopoly in any line of commerce in any section of the country. On appeal, the Commission reversed these rulings by the examiner, holding (1) that the challenged acquisition was anticompetitive within the test of Section 7, and (2) that the failing condition of the acquired company did not exempt the acquisition. In its final order, entered December 2, 1968, the Commission directed U.S. Steel to divest itself of the acquired corporation and also enjoined it for a period of ten years from acquiring any ready-mix company without prior approval of the Commission.

Thereafter U.S. Steel filed a petition with the Court of Appeals for the Sixth Circuit to review and set aside this order. The court ruled

that the Commission's findings of fact with respect to the effect of the acquisition on competition we supported by substantial evidence and upheld that portion of the Commission's decision. The court did not resolve the issue raised by the Commission's ruling with respect to the scope of the failing company defense. It did, however, specifically reject respondent's contention that its acquisition of Certified was completely immunized by the "failing company doctrine." It held, in this connection, that respondent had failed to prove the "ultimate facts material to the rule of *International Shoe Co. v. FTC*, 280 U.S. 291 (1930) * * *" as clarified by more recent Supreme Court decisions culminating in *Citizen Publishing Company v. United States*, *supra*. The Court of Appeals pointed out that the *Citizen Publishing Company* decision had held that a company claiming the failing company defense must show not only (1) "that the financial condition and resources of the [acquired] company are so dire that 'it faced the grave probability of a business failure'" and (2) that there was "no other prospective purchaser" but also that the prospects of the acquired company emerging from reorganization as a competitive unit were "dim or non-existent." The court further observed that U.S. Steel had failed to sustain its burden with respect to the third requirement. Since *Citizen Publishing* had been decided subsequent to the Commission's disposition of the instant case, however, the court considered it appropriate "to remand this case to give U.S. Steel an opportunity to bring forth evidence that the prospects of Certified passing through bankruptcy or similar proceedings were 'dim or non-existent.'"

The court also expressed the view that upon remand "the Commission should reassess the standards by which the actions and defenses of United States Steel Company are to be judged." In this connection, the court referred to a "notes purchase agreement" between U.S. Steel and Bankers Trust Company which enabled Certified to obtain a long-term loan commitment from the latter. This agreement was entered into in January 1963, approximately 15 months before the acquisition was consummated. Relying upon the Supreme Court's decision in *Citizen Publishing Company v. United States*, *supra*, the court held that if "vertical ties" in the form of increased cement purchases by Certified from respondent had taken an unlawful cast as of the time of the loan agreement then the failing character of Certified must be shown to have existed at that time.

After remand from the court, the Commission, by order of September 25, 1970 [77 F.T.C. 1646], reopened the proceeding and remanded it to Hearing Examiner Lewis to begin hearings, in accordance with the opinion of the Court of Appeals, for the purpose of receiving evidence with respect to the issues of whether:

(a) as of January 1963 the financial condition and resources of Certified Industries were so dire that it faced the grave probability of a business failure.

(b) between January 1963 and April 1964 no prospective purchaser other than United States Steel Corporation was interested in acquiring Certified.

(c) "Certified's opportunity for some form of continued competitive vitality through bankruptcy or similar proceedings" was "dim or non-existent" either in January 1963 or in April 1964, and

(d) the U.S. Steel-Certified vertical ties did in fact take an unlawful cast as early as January 1963.

In an initial decision filed January 14, 1972, Mr. Lewis made findings of fact with respect to only one of the above issues. He found on the basis of testimony and documentary evidence adduced by respondent, including the testimony of two experts in the field of bankruptcy and reorganization, that the prospects of Certified's surviving through bankruptcy or similar proceedings in April 1964 were dim or non-existent. The examiner did not decide the question whether "the U.S. Steel-Certified vertical ties did in fact take an unlawful cast as early as January 1963," apparently because he did not believe the court's remand instructions on this point were correct as a matter of law. He found instead that "the record fails to establish that, prior to the acquisition, the U.S. Steel-Certified arrangement took on an unlawful cast of such a nature as to justify advancing the date for determining compliance with the requirements of the failing company defense" (emphasis added). Having so found, he deemed it unnecessary to make any findings or conclusions with respect to the two remaining issues, (a) and (b) above.

In their appeal from the examiner's decision counsel supporting the complaint do not contest the conclusion that Certified's opportunity for some form of continued competitive vitality through bankruptcy or similar proceedings were dim or non-existent in April 1964. They concede that Certified was in a failing condition when it was acquired. Their principal argument concerns the examiner's failure to find that the relationship between U.S. Steel and Certified was unlawful in January 1963 when U.S. Steel arranged the Bankers Trust loan for Certified.

The following facts necessary to an understanding of this aspect of the case and of the court's ruling with respect thereto are not in dispute: By the end of 1962 Certified was in a very tight financial position. It was still earning a profit but because of its growth and the

high volume it was generating, it had insufficient working capital for its needs. In December 1962 Certified's management informed representatives of U.S. Steel that Certified would have difficulty in paying a \$150,000 note which was due to mature on February 15, 1963. As a consequence, U.S. Steel arranged a meeting between Certified and Bankers Trust Company of New York, where U.S. Steel was a depositor. After investigating Certified representatives of the Bankers Trust Company reached the conclusion that the ready-mix company had young, aggressive management with good ideas as to how to run the company properly but that it was in need of approximately \$3 million on a long term basis to refinance existing debt, provide for new equipment and furnish much needed working capital. The Bankers Trust representatives were "somewhat enthusiastic" about the possibilities and prospects in the Certified situation, but in early January 1963 they advised officials of U.S. Steel that the necessary term loan would not be "bankable" without some sort of credit support or guarantee by U.S. Steel. Realizing that the furnishing of such a guarantee would afford it the opportunity to increase sales of cement to Certified, U.S. Steel entered into an agreement with the bank under which it agreed to purchase notes given to the bank by Certified, up to a maximum of \$3.5 million in the event such notes were not paid when due. The bank then loaned Certified \$3.3 million for a period of ten years, at a rate of interest of $\frac{7}{8}$ percent above the bank's prime commercial loan rate. After the loan had been approved U.S. Steel submitted to Certified a proposed supply agreement under which Certified would agree to buy not less than 65 percent of its cement requirements from respondent for a period of ten years. This agreement was not executed, but Certified increased its cement purchases from respondent from approximately 15 percent in 1962 to 53.6 percent in calendar year 1963. By November of 1963 Certified was purchasing cement from U.S. Steel at a rate that would amount to 700,000 barrels a year, equaling slightly over 65 percent of its requirements.

When this matter was first before the Commission argument was made by complaint counsel that the above-mentioned loan was instrumental in inducing Certified to reject purchase offers from cement manufacturers that were attempting to acquire it. Hence, they contended that since respondent's financial involvement with Certified prevented the latter from being acquired, the operative date for determining whether Certified was in a failing condition should be January 1963. In rejecting this argument the Commission held that there was no evidence that Certified was not making a good faith effort to rehabilitate itself and that it was preferable for it to secure

financing to retain its independence than to be acquired by a cement company. Contrary to the suggestion made by respondent's counsel during oral argument on appeal from the initial decision on remand, the Commission did not rule on, or even consider, the question of whether Certified's increased purchases of cement from respondent were illegally tied to respondent's guarantee of the January 1963 Bankers Trust loan or whether there was an exclusive dealing arrangement in violation of Section 3 of the Clayton Act.¹

The question of whether there were illegal vertical ties between U.S. Steel and Certified in the form of increased cement purchases by Certified was placed in issue by the court's remand to the Commission and by the Commission's instructions on remand to the Commission examiner. As stated above, the examiner failed to make a finding on this issue, apparently having been persuaded by respondent that the court had misread the *Citizen Publishing* case. Respondent had argued in this connection "Clearly the *Citizen* decision in no way supports the conclusion that any and all 'vertical ties [which] may have taken an unlawful cast' at some time prior to the challenged acquisition require that 'the failing character of [the acquired company] must be shown to have existed at that time.'" ²

This argument, however, misstates the holding of the Court of Appeals. The court did not indicate that it was interested in "any and all" unlawful vertical ties between respondent and Certified. It specifically stated: "Apparently, U.S. Steel and Certified participated in [the January 1963 'notes purchase agreement'] with the tacit understanding and expectation that Certified would receive a large loan at exceptionally favorable interest rates in return for which Certified would purchase a very substantial portion of its future cement supplies from U.S. Steel. The effect of such an agreement may very well have been the use of credit, as a lever, to unreasonably restrain or induce Certified from purchasing its cement needs for a sufficient period of time on the open market. Such an arrangement, and its accompany-

¹ Complaint counsel argued before the hearing examiner in the first proceeding "[g]iven the substantiality of this foreclosure of [the increased cement purchases by Certified from respondent subsequent to the Bankers Trust loan] and the accompanying trend in the New York market, there is little question that if challenged separately, U.S. Steel's 'deal with Certified' . . . could have been held violative of Section 3 of the Clayton Act." The hearing examiner refused to consider this argument, holding "[w]hether the U.S. Steel-guaranteed loan and the resultant increase in Certified's purchases of U.A.C. cement are violative of Section 3 of the Clayton Act is something the examiner need not determine, since the complaint does not charge such a violation nor was the matter litigated." This ruling was not challenged on appeal to the Commission.

² As an example of a pre-acquisition unlawful vertical tie which should not logically have any bearing on the time for determining whether a company is failing, respondent referred to a situation where a dealer acquiesces in a manufacturer's network of territorial resale negotiations isolating its dealer organization from intra-brand competition.

ing effects, may well be unlawful under Section 1 of the Sherman Act. * * * To the extent that unreasonable foreclosure of Certified's cement demands occurred as a result of the financial arrangement in January, 1963, we believe that the failing company defense must be measured from the inception of these unreasonable vertical arrangements, not from the point of their final consummation." This position seems to us to be consistent with the rationale of *Citizen Publishing* in which the earlier date (of an unlawful agreement) was applied with respect to a merger which "had the effect of continuing in a more permanent form a substantial lessening of competition. * * *" In this case the court is interested in ascertaining whether there was an unlawful agreement between respondent and Certified having substantially the same anticompetitive effect as the subsequent acquisition.

We have no doubt from our review of the record that respondent's increased sales of cement to Certified were tied to respondent's guarantee of the Bankers Trust loan. First of all, we find that the arrangement here, like that in *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969), was not the mere sale of merchandise on credit, but instead involved two separate products. Here, as in *Fortner*, Certified contracted "to obtain a large sum of money over and above that needed to pay the seller for the physical products purchased." The guarantee of the loan was not inseparable from the sale of cement to Certified. Secondly, the record establishes that Certified did not wish to be acquired by another company at that time and that it had reason to believe that it could preserve its existence as an independent entity only if it could obtain long term financing in the amount of at least \$3 million. It is also clear from the record that prior to receiving the Bankers Trust loan, Certified had exhausted its efforts to obtain the type of long term financing it desired and knew that it had no one to turn to except respondent. The record further shows that even under the most optimistic view Certified could not have expected to extricate itself from its financial problems for at least three to five years. It also establishes that Certified's financial condition continued to deteriorate even after it received the Bankers Trust loan and that it could look only to U.S. Steel for further assistance. Respondent, on the other hand, assisted Certified in obtaining the loan with the purpose of obtaining a substantial increase in its share of Certified's cement purchases. In 1962 respondent supplied only about 15 percent of Certified's cement requirements. It requested that its share be increased to at least 65 percent of Certified's requirements and, by the end of 1963, Certified was purchasing respondent's cement at that rate. These facts are by themselves persuasive evidence that Certified had obligated itself to

purchase most of its cement requirements from respondent in return for the latter's assistance in obtaining financing.

There is, moreover, other evidence of record manifesting the existence of such a relationship between respondent's guarantee of Certified's loans and the increased purchases of respondent's cement by Certified. During 1963 Certified bought most of its cement requirements from respondent even though respondent was selling at the going market price, less a cash discount, and other cement companies were offering allowances over and above the cash discount.³ One of the most attractive prices was offered by Triangle Cement Company in the form of a volume discount and the record discloses that Certified asked respondent to meet this price and that respondent refused to do so.⁴ Nevertheless Certified continued to purchase most of its requirements from respondent at the higher price.

We believe that these facts not only evidence the existence of a tying arrangement but also demonstrate that the restraint imposed on Certified was even more onerous than the restrictions in *International Salt Co. v. United States*, 332 U.S. 392 and *Northern Pacific R. Co. v. United States*, 356 U.S. 1, which gave the vendors in those matters a priority on the business of their vendees only when their prices were no higher than the prices of their competitors.⁵

³ Mr. E. L. Litman, vice president and general manager of Certified Industries, testified as follows with respect to cement prices:

Q. You speak of allowances. Could you go into this in a little more detail and explain that situation?

A. Cement companies, some cement companies—I don't know which exactly—were offering allowances over and above the cash discount for the purchase of their product.

Q. And this would have brought their price down lower than that that Universal Atlas would supply cement to you for?

A. Yes, Sir. (Tr. 849)

⁴ Mr. Litman testified as follows with respect to a conversation with one of respondent's officials, Mr. Raggio, in which he requested respondent to meet Triangle's price:

Q. What was your main purpose in discussing this issue with Mr. Raggio? Were you hoping he would match this discount?

A. I think so.

* * * * *

Q. What did Mr. Raggio tell you about meeting this discount?

A. I don't recall exactly what he told me, but I believe he would have taken it under consideration.

Q. Well, did he? Did you get a reduction in price?

A. No, Sir.

Q. Did you make any change in your buying policy after Mr. Raggio refused you this discount?

A. No, Sir. At least not as I recall and not related to this conversation. (Tr. 856-857)

⁵ This type of evidence would have satisfied even the dissenting justice in *Northern Pacific R. Co. v. United States*, *supra*, at 16-17: "I do not deny that there may be instances where economic coercion by a vendor may be inferred, without any direct showing of market dominance, from the mere existence of tying arrangements themselves, as where the vendee is apt to suffer economic detriment from a tying clause because precluded from purchasing a tied product at better terms or of a better quality elsewhere."

We further find that the foregoing vertical arrangement between respondent and Certified, foreclosing as it did a substantial share of the New York market for portland cement, had an adverse effect on competition in this market comparable to that which we have already found resulted from the eventual acquisition of Certified. It is unnecessary, however, to again analyze the competitive effects of the foreclosure. Since we find that respondent compelled Certified to buy respondent's cement in order to obtain respondent's financial assistance and that the arrangement was therefore in the nature of a tie-in, it is enough to find that a not insubstantial portion of commerce was affected. *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357 (1965), *Federal Trade Commission v. Brown Shoe Company, Inc.*, 384 U.S. 316 (1966). The vertical foreclosure resulting from the arrangement amounted to \$1,675,000 in 1963 alone which far exceeds the amounts deemed "not insubstantial" by the Court in *International Salt and Fortner*.

As stated above, the hearing examiner did not make any finding on issue (a) of the remand order, *i.e.*, whether as of January 1963 the financial condition and resources of Certified Industries were so dire that it faced the grave probability of a business failure.⁶ Respondent does not claim, however, that Certified was in a failing condition as of this earlier date. It made no attempt to introduce evidence on this issue nor did it take exception to the examiner's ruling that it was not required to do so unless it were established that the January 1963 arrangement was illegal. Respondent specifically states in its proposed findings that "Respondent does not claim that Certified was a failing company as of January 1963 (R. 1282, 1643). Accordingly, the evidence it offered on remand was addressed solely to issue (c) and only to Certified's opportunity for survival through bankruptcy or similar proceedings from the date of its acquisition on April 30, 1964. * * *" (Findings of Fact and Conclusions of Law on Remand Proposed by Respondent, page 3) Accordingly, we find that the record does not establish that as of January 1963 the financial

⁶ The examiner reasoned that he was required to receive evidence on Certified's financial condition in January 1963 and to make findings with respect thereto only if he first found that the arrangement between respondent and Certified had taken an unlawful cast as early as January 1963. This reasoning, however, leaves much to be desired. It should have occurred to him that even if he had found no illegality in the January 1963 arrangement, this finding could have been set aside by the Commission on review or appeal of the initial decision. Certainly, it should be unnecessary to include in a remand order a specific reminder to the examiner that he is merely rendering an initial decision, not a final one.

condition and resources of Certified Industries were so dire that it faced the grave probability of a business failure.⁷

To the extent indicated herein, the appeal of complaint counsel is granted. The initial decision following remand will be modified to conform with this opinion and, as so modified, will be adopted as the decision of the Commission. The Commission's findings and conclusions will be filed with the Court of Appeals for the Sixth Circuit.

ORDER ON REMAND

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision following the remand of the case by the United States Court of Appeals for the Sixth Circuit; and

The Commission having determined for the reasons set forth in the accompanying opinion that the appeal of counsel supporting the complaint should be granted in part and that the initial decision following remand should be modified to conform with the views set forth in the opinion:

It is ordered, That the initial decision following remand be modified by striking therefrom findings 16 through 26, beginning on page 17 and ending on page 22, and conclusions 1 through 3 on page 23, and substituting therefor the findings and conclusions contained in the accompanying opinion.

It is further ordered, That the findings and conclusions contained in the initial decision following remand, as so modified, be, and they hereby are, adopted as the decision of the Commission.

It is further ordered, That the General Counsel be, and he hereby is, directed to file said findings and conclusions with the United States Court of Appeals for the Sixth Circuit.

Commissioner Kirkpatrick filed a concurring opinion. Commissioner Dennison dissented and filed an opinion. Commissioner MacIntyre did not participate.

⁷ The record shows that Certified had earned a profit in each year of its existence. In the fiscal year ending June 30, 1972, and for the six-month period ending December 31, 1962, Certified's financial condition was as follows:

	Total assets	Net sales	Net income	Retained earnings
June 30, 1972.....	\$9,322,225	\$9,753,178	\$321,910	\$717,865
6-month period ending December 31, 1962....	9,204,364	7,140,043	57,521	1,775,386

¹ (CX 23: CX 26 A-M)

A thorough investigation of Certified was made by representatives of Bankers Trust Company in December 1962 and January 1963. Although "pressures were mounting," Certified's situation "was not considered critical" by these financial experts at that time. (CX 52(a)) The firm still had retained earnings, a substantial net worth, expanding sales and the expectation of a profitable year.

Complaint

IN THE MATTER OF

GREAT WESTERN UNITED CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE TRUTH IN LENDING ACTS*Docket C-2306. Complaint, Oct. 20, 1972—Decision, Oct. 20, 1972.*

Consent order requiring a developer of real estate projects based in Denver, Colorado, and its subsidiaries, among other things to cease misrepresenting the purposes of and the benefits to be derived from its real estate training course; misrepresenting the conditions of and proposed additions to certain real estate projects presently under development; failing to maintain adequate records upon which certain representations are based; and inaccurately disclosing information required by Regulation Z of the Truth in Lending Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Great Western United Corporation, a corporation, and its subsidiaries, Great Western Cities, Inc., California City Realty Company, California City Development Company, Great Western Cities Realty, Colorado City Realty Company, Colorado City Development Company and GWU Properties, Inc., corporations, hereinafter referred to as respondents, have violated the provisions of said Acts, 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:

COUNT I

Charging a violation of Section 5 of the aforesaid Federal Trade Commission Act, the Commission alleges:

PARAGRAPH 1. Respondent Great Western United Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at the Equitable Building, Denver, Colorado. Respondent Great Western United Corporation from its aforementioned principal place of business is responsible for all the acts and practices of the aforementioned subsidiary corporations hereinbefore referred to as respondents in this complaint.

Respondents Great Western Cities, Inc., California City Realty Company, California City Development Company, Colorado City

Development Company and GWU Properties, Inc., are wholly-owned corporate subsidiaries of Great Western United Corporation. Respondents Great Western Cities Realty Company and Colorado City Realty Company are subsidiaries of California City Realty Company. Each is organized, existing and doing business under and by virtue of the laws of the State of California, except for Colorado City Realty Company and Colorado City Development Company which are corporations organized, existing and doing business under and by virtue of the laws of the State of Colorado. The principal offices and places of business of the said corporations are as follows:

(1) Great Western Cities, Inc., California City Development Company, Colorado City Development Company, GWU Properties, Inc., Equitable Building, Denver, Colorado.

(2) California City Realty Company, Great Western Cities Realty, 6363 Sunset Boulevard, Hollywood, California.

(3) Colorado City Realty Company, 4490 Bent Brothers Boulevard, Colorado City, Colorado.

PAR. 2. Respondents are now and for some time in the past have been engaged in the advertising, offering for sale and sale of interests in real estate located in California, Colorado and New Mexico to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time past have caused, their contracts, promotional material, and various business papers to be shipped from their places of business in California and Colorado to agents, employees, prospective purchasers, and purchasers of interests in their real estate thereof, located in various States of the United States other than California and Colorado, and in the course of business have made sales of interests in real estate in States other than California and Colorado, and in the course of business have maintained real estate training schools in States other than California and Colorado, and have carried on a substantial amount of advertising in States other than California and Colorado, to solicit sales of interests in the company's real estate, and maintain and at all times mentioned herein have maintained, a substantial course of trade in said sales of interests in real estate in commerce, as "commerce" is defined in the Federal Trade Commission Act.

A

PAR. 4. In the course and conduct of their business, and for the purposes of inducing the sale of interests in real estate offered by them, respondents publish, or cause to be published in newspapers of

general circulation and disseminate through direct mail campaigns, advertisements containing many statements and representations, directly or by implication, regarding the earning potential available to persons participating in respondents' real estate training programs. Typical and illustrative of these statements and representations, but not all inclusive thereof, are the following:

Would you like to earn \$350 to \$500 extra money a month? Increase your income with a part-time job. We have many who are earning \$10,000 and more—Our business is booming—Unaffected by tight money. We pay your real estate license training tuition * (* We pay for your real estate training license, you pay for the lesson material). Free educational program plus dynamic sales training. Your decision to enter this exciting profession never came at a better time. Now in our real estate course you not only learn, but you keep your present job as long as you want. Our exceptional method of helping you enter California's fastest growing field includes not only free instruction for approved applicants in the Principals of Real Estate Law but also training in salesmanship from real estate professionals of demonstrated ability. Learn HOW to contact and develop prospective buyers. HOW to show property and HOW to ask for an order and get it! MEN and WOMEN from the arts, factories, the schools and offices, broaden your horizons and learn what it means to grow with California. When you are licensed, you'll sell our prospects in your area. We will "close" your sales, you receive full commission (no splits)—No waiting for escrow to close; never hunt for listings—Prospects in every area. We have continuous advertising and promotion campaigns!—More prospects than our present staff can handle! Expenses advanced—Free Transportation—Immediate income. Let us explain. Attend one of these free explanation meetings.

PAR. 5. By and through the use of the above quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, and for the purpose of selling interests in their real estate to persons answering said advertisements and of obtaining leads to sell interests in their real estate from persons answering said advertisements, respondents and their agents and representatives represent and have represented directly or by implication to persons answering said advertisements, that:

1. The average person could enter this course and with a reasonable amount of effort could earn \$350 to \$500 a month working on a part-time basis.
2. Sales of interests in respondents' real estate are not affected by adverse economic conditions.
3. Persons entering this course will receive full commissions while company salesmen close their sales.
4. Expenses will be advanced to persons entering this course and such expenses will cover the actual expenses incurred in making sales presentations.
5. This training course is primarily designed to produce licensed

salesmen who are willing to sell interests in respondents' real estate either part-time or full-time.

6. Participants in this training course will not have to provide prospects for the company.

PAR. 6. In truth and in fact,

1. Only a small percentage of the persons entering this course ever achieve earnings of \$350 to \$500 for their part-time efforts.

2. All sales of interests in real estate are affected by adverse economic conditions.

3. Full commissions are given to a participant where company salesmen close his sales only after the participant obtains his license and then only on the first four sales. After that, if help is needed to close a sale, a smaller commission is paid than would have been paid, had the participant closed the sale himself.

4. Monies reimbursed for expenses seldom meet the expenses actually incurred in making sales presentations.

5. The company was primarily interested in making sales of California City land to participants in this course and only secondarily interested in producing a large number of part-time or full-time salesmen.

6. Participants in this training course have been required in the past to provide prospects for the respondents immediately after enrollment and are now required to provide prospects after becoming licensed.

Said statements and representations were therefore false, misleading and deceptive.

B

PAR. 7. In the further course and conduct of their business, and for the purpose of inducing the sale of interests in real estate offered by them, respondents published or caused to be published in newspapers of general circulation and in brochures distributed through the mails and on radio and television, advertisements containing many statements and representations, directly or by implication, regarding the investment opportunities available in the respondents' real estate projects.

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

Great Western United Corporation * * * The Great Western Restaurant Co. (with picture and legend) Prime Time Restaurants are distinctive and expanding.

The Great Western Sugar Co. * * * (with picture and legend) The Great Western Sugar Company, America's largest producers of beet sugar.

Shakey's Pizza * * * (with picture and legend) We serve fun at Shakey's (also Pizza).

A view of cultivated Emerald Christmas Trees (with picture).

Great Western Foods Company markets consumer convenience foods throughout the Southeastern United States.

Great Western Cities, Inc. Builds new cities in Western United States. Four cities now under development and planning are: California City, California—Colorado City, Colorado—Lake Pueblo de Conchiti, New Mexico—3-R Ranch, Colorado. Other cities are planned for the near future.

One of the Great Western Cities.

By and through the use of the above quoted statements and representations, and others of similar import and meaning, but not expressly set forth herein, respondent Great Western United Corporation has participated in and permitted the use of its name and the prestige and financial diversified magnitude of its over-all operations for the purpose of selling interests in its subsidiaries' real estate to persons answering said advertisements or of obtaining leads to sell said interests in real estate from persons answering said advertisements.

PAR. 8. In the further course and conduct of their business, and for the purpose of inducing the sale of interests in real estate offered by them, respondents published or caused to be published in newspapers of general circulation and in brochures distributed through the mails and on radio and television, advertisements containing many statements and representations, directly or by implication, regarding the investment opportunities in respondents' real estate projects.

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

California City was incorporated December 10, 1965, and became the third largest city in area in California, the tenth largest in the United States.

Invest in one of America's fastest growing areas * * * the Antelope Valley—California City area in Southern California. California City is the tenth largest (in area) incorporated city in the United States.

America's largest intercontinental airport in Antelope Valley by 1980 * * * 100,000,000 passengers per year.

We believe that land in such selected growth areas (California City) is a good and safe investment and offers great profit potential for investors.

Don't miss the exploding Antelope Valley! * * * and the opportunities in Antelope Valley land!!!

California City is located in the exploding Antelope Valley portion of Southern California where population and industry are experiencing rapid growth.

California City's abundant healthful water from underground source (no treatment necessary) supplied by California City Community Services District.

California City is a growing, thriving community, too. Its population has doubled in four years.

Experts predict population (Antelope Valley) will increase 400% within five years.

Buy a quarter acre of land. Get a city (California City) free.

Roads and streets, utilities and water, city conveniences, parks and unsurpassed recreational facilities (in California City).

The Great Cochiti Indian Nation cordially invites you to be among the first to know—in detail—about the finest recreational homesites (Cochiti Lake) offered in many years near Albuquerque and Sante Fe!

The wonders of nature's recreational offerings have been augmented by MERBISC, The Most Extraordinary Recreation Bargain in Southern Colorado—An ever-expanding list of outdoor recreational facilities ranging from baseball to boating. They're all available to you and your family with your vacation home at Colorado City—One of the Great Western Cities.

PAR. 9. By and through the use of above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, and with the purpose of selling interests in their real estate, respondents and their agents and representatives represent and have represented, directly or by implication that:

1. Persons buying land in California City at the respondents' prices will, after holding the property for a reasonable amount of time, realize a profit upon reselling.

2. There are no substantial barriers to California City property resale prices increasing at a faster rate than other areas of California.

3. Many prior purchasers of California City property from respondents have received profits upon the resale of their property after holding for a reasonable amount of time.

4. California City is a very large, thriving and densely populated city in the Antelope Valley and both are growing at a faster rate than other areas of California.

5. There are no expenses involved in buying and owning property within California City.

6. California City presently has completed roads, sewers, utilities and water to service all lots in the city.

7. Cochiti Lake is a real estate project in which one may purchase fee simple interests.

8. Use of California City's and Colorado City's recreational facilities are free to land owners.

PAR. 10. In truth and in fact,

1. California City's record to date as a project does not indicate that profits will be made by all persons buying land at respondents' price after owning it for a reasonable amount of time.

2. There are undisclosed possible barriers to growth in California City property's resale prices.

- a. California City is located in a desert (Mojave) and the cost of obtaining an adequate water supply may retard its growth.

- b. California City may not be successful in competing for residents with older established municipalities which are closer to the Los Angeles area and the site of the proposed intercontinental airport at Palmdale, California.

c. In the event plans to build the proposed intercontinental airport are discontinued, the growth potential of California City will be diminished.

3. Many persons purchasing California City land from respondents have not made a profit upon reselling their property.

4. The land project now called California City was begun by its founder, N. K. Mendelsohn, in 1958. During the first 12 years of its existence, the population has grown to only 1,224 persons and to date more than one-half of the land in California City has been sold. Kern County, the county in which California City is located, increased its population by 11.3 percent during the period from 1960 through 1970. The average rate of population growth for all counties in California during the same period was 25.4 percent.

5. The land in California City in most instances is encumbered with a city deferred improvement note which carries an interest charge and is to be paid off in monthly payments. A charge of \$200 is made for the right to use city recreational facilities in addition to city taxes.

6. Only a small portion of the total acreage in California City is serviced by completed roads, sewers, utilities and water.

7. Cochiti Lake is a real estate project in which the respondents own a 99 year lease and sales of interests in the project are subleases from respondents, not fee simple interests.

8. Land owners in California City and Colorado City must pay \$200 a year to use the city's recreational facilities.

Said statements and representations were, therefore, false, misleading and deceptive.

PAR. 11. In the further course and conduct of their business, and for the purpose of inducing the sale of interests in real estate offered by them, respondents or their agents and representatives have made statements and representations, directly or by implication, regarding the investment opportunities available in the respondents' real estate projects.

Typical and illustrative of these statements and representations, but not all inclusive thereof, is the following:

The University of California is placing a branch in California City.

PAR. 12. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, and for the purpose of selling interests in their real estate, respondents and their agents and representatives represent and have represented, directly or by implication that:

Complaint

S1 F.T.C.

1. Respondents' real estate is about to boom in value because various institutions and businesses have made definite commitments to place facilities in respondents' land developments.

PAR. 13. In truth and in fact, such statements are false, and persons acting upon such statements have been and are being misled.

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 in the sale of interests in real estate.

PAR. 15. The use by respondents of the aforesaid unfair practices and false, misleading deceptive statements and representations 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 participation in real estate training courses and into the purchase of interests in respondents' real estate by reason of said erroneous and mistaken belief.

PAR. 16. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Charging a violation of the aforesaid Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, the Commission alleges:

PAR. 17. Paragraphs One through Three, inclusive of Count I of this Complaint, are hereby set forth by reference and made a part of this Count as fully and with the same effect as if quoted here verbatim.

PAR. 18. In the ordinary course and conduct of its business as aforesaid, respondents regularly arrange, and for some time past have arranged, for the extension of consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 19. Between January 4, 1971, and January 27, 1971, in the ordinary course of their business as aforesaid and in connection with credit sales of their California City properties as set forth in Count I, A and B *supra*, respondents offered to customers, and granted to some customers, discounts from the price at which respondents

offered to sell said properties for cash. These discounts were conditioned upon the customers' purchasing the properties for cash or paying larger downpayments than required for purchasing the properties on credit. Such discounts were finance charges imposed upon customers who did not avail themselves of the available discounts, as provided in Sections 226.4(a)(5) and 226.8(o) (as amended) of Regulation Z.

By and through use of this system of discounts, respondents:

1. Failed to disclose accurately the "cash price," as required by Section 226.8(c)(1) of Regulation Z, excluding from the cash price the amount of the available discount as required by Section 226.8(o)(7) of Regulation Z;
2. Failed to disclose accurately the amount of the "unpaid balance of cash price," as required by Section 226.8(c)(3) of Regulation Z;
3. Failed to disclose accurately the "amount financed," as required by Section 226.8(c)(7) of Regulation Z;
4. Failed to disclose as part of the "finance charge" and to include in the amount of the finance charge the amount of the available discount as required by Sections 226.4(a)(5), 226.8(c)(8) and 226.8(o)(7) of Regulation Z;
5. Failed to disclose the "annual percentage rate" accurately to the nearest quarter of one percent, computed in accordance with Sections 226.5 and 226.8(o)(7) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

PAR. 20. Subsequent to July 1, 1969, in transactions in which the customer was entitled to the right to rescind as provided in Section 226.9 of Regulation Z, respondents provided those customers with notices of the right to rescind in the form prescribed by Section 226.9(b) of Regulation Z. On those notices respondents disclosed that customers could exercise the right to rescind by notifying respondent no later than midnight of the third business day following the date of the transaction. However, pursuant to Section 226.9(a) of Regulation Z, because respondent had not provided all disclosures required by Section 226.8 of Regulation Z, as set forth in Paragraph Seventeen hereof, customers had a continuing right to rescind the transaction until such time as respondent provided such disclosures. Therefore, respondent failed to disclose accurately, on the notice provided under Section 226.9(b), the date by which the customer could effectively give notice of cancellation of the transaction, as required by Section 226.9(b) of Regulation Z.

PAR. 21. Subsequent to July 1, 1969, respondents have caused advertisements to be published, broadcast, or delivered, which advertisements aid, promote or assist directly or indirectly the extension of

Complaint

81 F.T.C.

consumer credit. By and through the use of the statement "LONG TERM FINANCING * * * UP TO TEN YEARS!" and others of similar import and meaning in said advertisements, respondents have stated the period of repayment without also disclosing all of the following items, as required by Section 226.10(d)(2) of Regulation Z.

- (a) The cash price;
- (b) The amount of the down payment required or that no down payment is required, as applicable;
- (c) The number, amount, and due dates of the indebtedness if credit is extended;
- (d) The amount of the finance charge expressed as an annual percentage rate; and
- (e) The deferred payment price.

PAR. 22. By and through the acts and practices set forth above, respondents fail to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of the Act, such failure to comply constitutes a violation of the Truth in Lending Act and pursuant to Section 108 thereof, respondents have violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with the violation of the Federal Trade Commission Act; and the Truth in Lending Act and the implementing regulation promulgated thereunder; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed

consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Great Western United Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at the Equitable Building, Denver, Colorado. Respondent Great Western United Corporation from its aforementioned principal place of business is responsible for all the acts and practices of its subsidiary corporations hereinbefore referred to as respondents in the complaint.

Respondents Great Western Cities, Inc., California City Realty Company, California City Development Company, Colorado City Development Company and GWU Properties, Inc. are wholly-owned corporate subsidiaries of Great Western United Corporation. Respondents Great Western Cities Realty Company and Colorado City Realty Company are subsidiaries of California City Realty Company. Each is organized, existing and doing business under and by virtue of the laws of the State of California, except for Colorado City Realty Company and Colorado City Development Company which are corporations organized, existing and doing business under and by virtue of the laws of the State of Colorado. The principal offices and places of business of the said corporations are as follows:

(a) Great Western Cities, Inc., California City Development Company, Colorado City Development Company, and GWU Properties, Inc., Equitable Building, Denver, Colorado.

(b) California City Realty Company and Great Western Cities Realty, 6363 Sunset Boulevard, Hollywood, California.

(c) Colorado City Realty Company, 4490 Bent Brothers Boulevard, Colorado City, Colorado.

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

ORDER

I

A

It is ordered, That respondents Great Western United Corporation, Great Western Cities, Inc., California City Realty Company, California City Development Company, Great Western Cities Realty

Colorado City Realty Company, Colorado City Development Company, and GWU Properties, Inc., corporations, their successors and assigns, and respondents' officers, agents, representatives, and employees directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering free, offering for sale, or sale of real estate training courses, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Directly or by implication:

(a) Representing that salesmen who participated in respondents' training courses will earn or receive any stated or gross or net amount; or representing in any manner, the past earnings of a salesman who participated in respondents' training courses unless in fact, the past earnings represented are those of current salesmen employed 3 months or more in the community or geographical area in which such representations are made and accurately reflect the average earnings of these salesmen calculated on the basis of annualized earnings of the most recent fiscal year under circumstances similar to those of the salesman or prospective salesman to whom the representation is made.

(b) Representing in any manner that sales of real estate are not affected by adverse economic conditions.

(c) Making any representations that salesmen who participated in respondents' training courses will receive full commissions while other salesmen assist in closing their sales; or misrepresenting in any manner the commissions available to salesmen who participated in respondents' training courses. Any statement as to any term or terms on which commissions are granted must contain a fair statement of all terms.

(d) Making any representations that expenses will be advanced to participants in respondents' training courses where said advancements do not cover the expenses actually incurred; or misrepresenting in any manner the expenses to be advanced to participants in respondents' training courses

2. Failing to maintain adequate records:

(a) which disclose the facts upon which any representations of the type described in Paragraph 1(a) of LA, *supra*, of this order are based, and

(b) from which the validity of any representations of the type described in Paragraph 1(a) of LA, *supra*, of this order can be determined.

3. Failing to clearly and conspicuously disclose the following statement, where appropriate, in all printed advertisements con-

cerning respondents' training courses which are associated with real estate projects:

The company recommends that trainees in this course buy property in [insert common name of project]. Trainees will be asked (or "required" if such requirement exists) to furnish leads. The company will provide you with a copy of a Government HUD Report (or "State of California, Department of Real Estate's Public Report" or "[name of State] Public Report," where appropriate) for a recently approved tract and it is recommended that you read this report before enrolling.

4. Failing to clearly and conspicuously disclose the following statement in all television and radio advertisements concerning respondents' training courses which are associated with real estate projects:

Write (call) for a Government HUD Report (or "[Name of State] Public Report") on (insert common name of project), (address or telephone number).

5. Failing

(a) to provide to trainees one or more Government HUD Reports or State Public Reports for tracts which reasonably typify the kind of real estate they will be asked to sell, in advance of their enrolling in respondents' training courses which are associated with sales in real estate projects;

(b) to obtain a signed statement from said trainees to the effect that they did receive said reports in advance of their enrolling in said training courses.

B

It is further ordered, That respondents Great Western United Corporation, Great Western Cities, Inc., California City Realty Company, California City Development Company, Great Western Cities Realty, Colorado City Realty Company, Colorado City Development Company, and GWU Properties, Inc., corporations, their successors and assigns 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, or sale of interests in real estate, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to clearly and conspicuously disclose the following statement in all printed advertisements concerning California City:

It is recommended that you obtain from the company and read the State of California Department of Real Estate's Public Report for a recently approved tract in California City.

2. Failing to clearly and conspicuously disclose the following statement in all television and radio advertisements concerning California City:

Write (call) for a California Public Report, ----- (address or telephone number).

3. Failing to clearly and conspicuously disclose the following statement in all printed advertisements concerning real estate projects other than California City, however limited to projects in existence at the time this order becomes effective and to any future projects, (1) covered by the Interstate Land Sales Full Disclosure Act, and (2) where the property interest being offered is held in any form by respondents or any of their affiliates:

It is recommended that you obtain from the company and read a recent Government HUD Report (or "[Name of State] Public Report") for a recently approved tract.

4. Failing to clearly and conspicuously disclose the following statement in all television and radio advertisements concerning real estate projects other than California City, however limited to said projects in existence at the time this order becomes effective and to any future projects (1) covered by the Interstate Land Sales Full Disclosure Act, and (2) where the property interest being offered is held in any form by respondents or any of their affiliates:

Write (call) for a Government HUD Report (or "[Name of State] Public Report").

Failure to provide one or more said reports for tracts which reasonably typify the kind of real estate being sold, to persons requesting them in response to the disclosures required in Paragraphs 1, 2, 3, and 4 of IB, *supra*, shall be deemed a violation of the order.

5. Failing
(a) to clearly and conspicuously disclose in all advertisements concerning Cochiti Lake that the interest being sold which said interest terminates or the year in which said subleasehold interest terminates;
(b) to clearly and conspicuously disclose in all advertisements concerning real estate projects, the type of interest where less than a fee simple is to be conveyed and disclose the number of years in which said interest terminates, or the year in which said interest terminates.

6. Representing directly or by implication that:

(a) There are no expenses involved in buying and owning property within California City; or misrepresenting in any manner the expenses involved in owning interests in property in real estate projects.

(b) California City has completed roads, sewers, utilities and water lines to service all lots in the city; or misrepresenting in any manner the nature or extent of roads, sewers, utilities and water lines available or to be made available in real estate projects.

(c) California City has "abundant healthful water from underground source * * *," or misrepresenting in any manner the amount of or lack of water available to property in real estate projects.

(d) California City's or Colorado City's recreational facilities are available to purchasers without charge; or misrepresenting in any manner the expenses or fees involved in owning interests in property in real estate projects.

(e) It is the policy of respondents to repurchase California City land from purchasers or resell it on their behalf unless the applicable conditions and limitations are clearly disclosed; or misrepresenting in any manner the respondents' repurchase or resale policies in real estate projects.

(f) The University of California is placing a branch in California City; or misrepresenting in any manner that actions will be taken by respondents or third parties which will enhance the value of real estate.

II

It is ordered, That respondents Great Western United Corporation, Great Western Cities, Inc., California City Realty Company, California City Development Company, Great Western Cities Realty, Colorado City Realty Company, Colorado City Development Company, and GWU Properties, Inc., corporations, their successors and assigns and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any consumer credit sale of interests in real property in any advertisement to aid, promote, or assist directly or indirectly any extension of credit, as "credit sale" and "advertisement" are defined in Regulation Z (12 C.F.R. § 226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. Failing in any credit sale to accurately disclose the amount of the "cash price" as required by Sections 226.8(c) (1) and 226.8(o) (7) of Regulation Z.

2. Failing in any credit sale to accurately disclose the amount of the "unpaid balance of cash price" as required by Section 226.8(c) (3) of Regulation Z.

3. Failing in any credit sale to accurately disclose the "amount financed" as required by Section 226.8(c) (7) of Regulation Z.

4. Failing in any credit sale to accurately disclose the amount of the "finance charge" as it is required to be computed and disclosed by Section 226.8(o) (7) of Regulation Z.

5. Failing to disclose the "annual percentage rate" accurately to the nearest quarter of one percent, in accordance with Sections 226.5 and 226.8(o) (7) of Regulation Z, as required by Section 226.8(b) (2).

6. Causing to be disseminated to the public in any manner whatsoever any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, which advertisement states, directly or by implication, the amount of the downpayment required or that no downpayment is required, the amount of any installment payment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless it states all of the following items in terminology prescribed under Section 226.8 of Regulation Z as required by Section 226.10(d) (2) of Regulation Z:

(1) the cash price;

(2) the amount of the downpayment required or that no downpayment is required, as applicable;

(3) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(4) the amount of the finance charge expressed as an annual percentage rate; and

(5) the deferred payment price.

7. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondents shall, within 60 days after service upon them of this order, with regard to each customer in each consumer credit transaction entered into by respondents or any re-

spondent between January 4, 1971 and January 27, 1971, in which transaction a security interest or the future right to a security interest was retained or acquired by any respondent in any real property located in California City, California if that property at the time of the transaction was used or was expected to be used as a principal residence of the customer, and if that customer did not receive a discount as described in Paragraph 19 of the complaint in this proceeding:

1. Deliver to each such customer in a single envelope:
 - a. Notices of the right of rescission in the number, manner and form set forth in Section 226.9(b) of Regulation Z, the date by which the transaction may be cancelled to be stated as the third business day after the customer actually receives the notice.
 - b. A statement containing all disclosures required by Section 226.8 of Regulation Z to have been made in that transaction computed in accordance with Sections 226.4, 226.5 and 226.8(o)(7) of Regulation Z, in the manner and form prescribed by Section 226.6 of Regulation Z.
 - c. A copy of the following statement, in writing:

You entered into a consumer credit transaction for the purchase of real property with (name of respondent creditor) on (date). Enclosed are the disclosures required by the Federal Truth in Lending Act, which accurately describe the credit costs and conditions of your transaction. Also enclosed is a notice of your right to cancel this transaction according to the provisions of the Federal Truth in Lending Act. Please read these documents promptly, since your right to cancel the transaction expires on midnight of the third business day following the day you actually receive this notice.

2. As to each customer who cancels such a transaction in accordance with the provisions of Section 226.9 of Regulation Z, perform all acts required by Section 226.9(d) of Regulation Z to effect the cancellation of the transaction.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating subsidiaries and divisions.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in any corporate respon-

Complaint

81 F.T.C.

dent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

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

IN THE MATTER OF

FABBIS, INC., ET AL., DOING BUSINESS AS ROCHESTER
PLUMBING AND HEATING CONTRACTORS

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE TRUTH IN LENDING ACTS

Docket 8833. Complaint, Jan. 18, 1971—Decision Oct. 30, 1972.

Order requiring a Rochester, New York, firm engaged in the sale of plumbing and heating equipment and installation services to the public, among other things to cease violating the Truth in Lending Act by failing to provide each customer with a notice of the right to rescind prior to consummation of the transaction; making any physical changes in customer's property or performing any work on such property before expiration of the rescission period; and failing to make any other necessary disclosures as required by Regulation Z of the said Act.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Fabbis, Inc., a corporation, doing business as Rochester Plumbing and Heating Contractors, and Richard J. Fabrizi and James J. Rebis, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Fabbis, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business

located at 123 Barberry Terrace, Rochester, New York. It is doing business under the name of Rochester Plumbing and Heating Contractors.

Respondents Richard J. Fabrizi and James J. Rebis are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the sale of plumbing and heating equipment and installation services to the public.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents arrange, and for some time last past regularly have arranged, for the extension of consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents in the ordinary course and conduct of their business and in connection with their arranging for consumer credit, have caused, and are causing, customers to execute retail installment contracts, herein referred to as "the contract," which results or may result in a security interest being retained or acquired in real property which is used or is expected to be used as the principal residence of the customer. The customers thereby have the right to rescind such transactions, as provided in Section 226.9(a) of Regulation Z.

PAR. 5. In connection with the consumer credit transactions set forth in Paragraphs Three and Four hereof, respondents prepare documents containing consumer credit cost disclosures required by Section 226.8 of Regulation Z and obtain from customers written acknowledgment of receipt of these disclosures, but in some instances nevertheless fail to provide the customer with a copy of such disclosures, as required by Section 226.8(a) of Regulation Z.

PAR. 6. In connection with the consumer credit transactions set forth in Paragraphs Three and Four hereof, respondents complete notices of the right of rescission in the form required by Section 226.9(b) of Regulation Z and obtain from customers written acknowledgment of receipt of these notices, but in some instances nevertheless fail to provide each customer who has the right to rescind the transaction with two copies of such notices, as required by Sections 226.9(b) and (f) of Regulation Z. In many such instances, respondents fail to provide the customer with any copies of the required notice.

PAR. 7. Having entered into the consumer credit transactions set forth in Paragraphs Three and Four hereof, respondents in some instances fail to delay making any physical changes in the property of the customer and fail to delay performing any work or service for the customer until the three day rescission period provided for in Section 226.9(a) of Regulation Z has expired, in violation of Section 226.9(c) of Regulation Z.

PAR. 8. Pursuant to Section 103(k) of the Truth in Lending Act, respondents' aforesaid failures to comply with the requirements of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents thereby have violated the Federal Trade Commission Act.

Mr. James M. Katz and Mr. Myer S. Tulko supporting the complaint.

Mr. Percival D. Oviatt, Jr., and Mr. Samuel P. Merlo, of Woods, Oviatt, Gilman, Sturman & Clarke, Rochester, New York for respondents.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

JUNE 16, 1971

PRELIMINARY STATEMENT

Respondents, a corporation, and two individual officers, are charged with violating the Truth in Lending Act (15 U.S.C. 1601), as implemented by Federal Reserve Regulation Z (12 C.F.R. § 226). The complaint was issued on January 18, 1971, against Fabbis, Inc., doing business as Rochester Plumbing and Heating Contractors and its officers, Richard J. Fabrizi and James J. Rebis, individually and as officers of the corporation.

It charged that:

1. Respondents regularly arrange for the extension of consumer credit to their customers, and have failed to provide them with a duplicate copy of consumer credit cost disclosures, to retain, as required by Section 226.8(a) of Regulation Z.

2. In rescindable transactions, respondents have failed to provide their customers with requisite copies of notices of the right of rescission, as required by Section 226.9(b) of Regulation Z.

3. In rescindable transactions, respondents have failed to delay during the three day rescission period, making any physical changes in the customers' property, commencement of the work or deliveries to customers' residences for the duration of the rescission period, in violation of Section 226.9(c) of Regulation Z.

Respondents' Answer admitted the following facts:

1. Respondent Fabbis, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 123 Barberry Terrace, Rochester, New York. It is doing business under the name of Rochester Plumbing and Heating Contractors.

2. Respondents Richard J. Fabrizi and James J. Rebis are officers of said corporation. Their address is the same as that of the corporate respondent. Respondents are now, and for some time last past have been, engaged in the sale of plumbing and heating equipment and installation services to the public.

3. As a part of their business, in the ordinary course and conduct of their business as aforesaid, respondents arrange, and for some time last past regularly have arranged, for the extension of consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

Respondents' Answer either flatly denied, or denied knowledge of, all of the other allegations in the complaint.

A prehearing conference was held in Washington, D.C., on March 2, 1971. Evidentiary hearings were held in Rochester, New York commencing on March 18, 1971, and were concluded on March 22, 1971.

The following abbreviations will sometimes be used herein making references to the record: Transcript—Tr.; Commission Exhibits—CX; Respondents' Exhibits—RX; Complaint Counsels' proposed findings of fact—CPF; ¹ Respondents' proposed findings of fact—RPF; Complaint—C; Answer—A.

On the basis of the entire record ² the hearing examiner makes the following findings, conclusions and order. All proposed findings not found expressly or in substance are denied as erroneous, irrelevant or immaterial.

1. Respondent Fabbis, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 123 Barberry Terrace, Rochester, New York. It is doing business under

¹ References to proposed findings of the parties include the citation of authority or reasons submitted therewith on the accuracy of which the hearing examiner has relied in light of the requirements of the ninety (90) day rule.

² In accordance with the Commission rules reference is made to the principal supporting items of evidence. The citation of particular references in no way indicates that the entire record has not been considered. The findings are based on the record as a whole and not only on the citations to the exhibits or transcript pages specifically noted.

the name of Rochester Plumbing and Heating Contractors (Tr. 44; C., A.).

2. Respondents are now, and for some time last past, have been engaged in the sale of plumbing and heating equipment and installation services to the public (Tr. 44; C., A.). There was no proof that respondents have engaged in interstate commerce (Tr. 98-101, 411, 423-425).

3. In the ordinary course and conduct of their business as aforesaid, respondent corporation under the direction and control of the individual respondents has arranged and for some time last past, regularly has arranged, for the extension of consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System (C., A.; Tr. 85-88, 95, 443-444, 528).

A number of customer witnesses testified expressly that respondent corporation arranged for the extension of consumer credit to them: (Tr. 61-62; Tr. 110; Tr. 137). Commission Exhibits 25A-59G (Tr. 390) are the bank records in evidence of thirty-six additional instances in which respondent corporation arranged credit for customers.

4. Subsequent to July 1, 1969, respondent corporation in the ordinary course and conduct of its business and in connection with arranging for consumer credit, has caused, and is causing, customers to execute retail installment contracts to finance home improvements on real property that is used as the principal residence of the customer.

A number of customer witnesses testified that respondent corporation performed work on a structure which was used as a home and that was the principal residence of the witness and his or her spouse (Tr. 56-57; 105-106; 132; 166; 182; 236-237; 253; 263-264; 280; 315; 335-336; 357).

5. Respondent corporation employed workmen to install the plumbing and heating equipment it sold to its customers (Tr. 80).

6. No waivers of workmen's liens were presented at the hearing (CPF 6), however, the corporate respondent specifically waived any security interest or right of lien in connection with each transaction (RPF 5).

7. In consumer credit transactions respondents have failed to render consumer credit cost disclosures to their customers prior to consummation of their transactions.

A number of customer witnesses who testified at the hearing indicated that he or she discussed the method of payment with respondents' salesman before or at the time the sales agreement was executed

and that it was understood that respondents would arrange for the extension of credit to them (Tr. 61; 110; 137; 173; 189-190; 212-213; 242; 256-257; 282-283; 317; 340-342; 361-362).

Mr. Apostalou, one of the respondents' salesmen, testified that the first thing discussed with a customer who indicated an intent to make a purchase was the method by which payment would be made (Tr. 478-479). Mr. Rease testified that the company wants to know that it is going to be paid so that the method of payment is discussed with the customer (Tr. 432, 440).

Mr. Apostalou testified that he would contact Mr. Rease after a contract was signed in order to have him come out to a customer's home and seek execution of the bank papers (Tr. 478).

Mr. Rease's testimony indicated that by the time he arrived at the home of a customer, to arrange for the extension of consumer credit, the sales contract would already be signed (Tr. 432).

Thus, the consumer witnesses would not receive the consumer credit cost disclosures prior to execution of the sales proposal or of the retail installment contract. (Tr. 62; 108-112; 116; 135-137; 168-169; 186-189; 212-214; 241-243; 258; 282-284; 317-318; 357-361).

8. In connection with consumer credit transactions respondents obtained from customers written acknowledgment of receipt of documents containing spaces for consumer credit cost disclosures, but in some instances, nevertheless, failed to provide customers with a completed copy of such disclosures.

Customer witnesses presented by counsel supporting the complaint testified that respondents failed to provide them with a fully completed retainable copy of consumer credit cost disclosures. The documents in evidence, nevertheless, reveal that each customer signed an acknowledgment of receipt of the disclosures. (Tr. 116-117, CX 10-A; Tr. 137, CX 12-A; Tr. 169, CX 8-B; Tr. 187-189, CX 11-A; Tr. 214-216, CX 14-B; Tr. 241, CX 9-C; Tr. 258-260, CX 17-C; Tr. 285-286, 288 CX 21-B; Tr. 323, CX 15-B; Tr. 345-346, CX 24-A; Tr. 360, CX 13-B).

9. In connection with consumer credit transactions, respondents obtained from customers written acknowledgment of receipt of notices of right of rescission, but failed, in fact, to provide each such customer who it is claimed had the right to rescind with any copies of such notices.

Customer witnesses testified that they did not receive a copy of these notices of right of rescission to retain. However, the documents reveal that receipt thereof was acknowledged (e.g. Tr. 170; 116-117; CX 10-C, 10-D; Tr. 137, 148, CX 12-C, D; Tr. 216; Tr. 258, CX 17-C, D; Tr. 288; Tr. 323, CX 15-D, E; Tr. 345-346, CX 24-C, D; Tr. 360, CX 13-D, E).

10. Having entered into credit transactions with their customers, respondents failed to delay making any physical changes in their customers' property, performing any work or making any deliveries to the residences of such customers, for the duration of a three-day period. A number of customer witnesses testified that the respondents commenced performance of the work during the first three days after the contract was signed (Tr. 62, 67; 111; 138-139; 172; 189; 217; 245; 262; 291; 317; 348; 362).

11. In such credit transactions, respondents did not obtain valid waivers of the right of rescission from such customers. A number of customer witnesses testified that there was no emergency situation requiring that the work upon their homes be performed before expiration of the three-day period (Tr. 117; 172; 208).

Although respondents' counsel elicited testimony from several of Commission witnesses indicating that they believed they had executed waivers of their right of rescission (Tr. 171; 204-205) the witnesses testified that there was no bona fide emergency situation requiring immediate performance of the work (Tr. 172; 190).

A witness from one of the banking institutions testified that he had examined the records of transactions arranged with his bank by respondents during the period of July 1, 1969, through December 30, 1969, and was unable to find any waivers of the right of rescission in the bank files for the period of July 1, 1969, through December 1969 (Tr. 387). George Rease, respondents' general manager, testified on cross-examination that, during the period covered by the Commission's investigation no valid waivers of the right of rescission were obtained (Tr. 446-447). Respondent Rebis confirmed that some waivers that had been obtained were deemed inadequate by counsel and were thrown away upon counsel's advice (Tr. 540-541).

12. Shortly before the hearings in this matter were scheduled, respondents' attorneys were supplied with a list of complaint counsel's prospective witnesses. Thereafter, Mr. Rebis, one of the individual respondents, contacted a number of prospective witnesses and sought to obtain handwritten statements (Tr. 537-539). Mr. Larmon, the respondents' customer relations man, accompanied Mr. Rebis to the homes of the prospective Federal Trade Commission witnesses. He made notes, then asked that witness copy, in his or her own handwriting, a statement embodying what was contained in the notes (Tr. 495-506).

A number of the Commission's witnesses testified that they executed such statements for respondents. However, each one also testified under oath, contrary to the written statement, at the hearing and in-

dicated that the contradictory written statements were in error (Tr. 141; 146-148; 202-203; 231-232; 306-308; CPF 12).

13. During the hearing, respondents also produced certain questionnaires signed by customer witnesses, entitled "Help Us Maintain Good Business," and offered them into evidence to contradict the sworn testimony of these witnesses. Because of the manner in which these documents were procured and because of the concealment of their true purpose by respondents' employees, the hearing examiner accepts the sworn statements given at the hearing.

The questionnaire was prepared as a result of the Commission's investigation (Tr. 532-533). Examination of these questionnaire forms reveals that part of Question 2 relate to allegations of violations which were subsequently brought against the company by the Commission (RX 7, 9, 11, 13, 15, 16).

Representatives of the respondents called upon every credit customer with whom the company dealt during the period covered by the investigation (Tr. 550) and, in some instances, the salesman who sold the equipment to the customers interviewed was the same person who came with the questionnaire (Tr. 552).

The method by which these questionnaires were completed was confusing and lent itself to erroneous answers being obtained. The company's representative read each question orally to the respective signer (Tr. 468) and marked or checked off the answers himself (Tr. 467). Although Question 2 of the questionnaire referred to the respective customer's receipt or non-receipt of certain documents, the questioner did not have any samples of those documents available for the customer's examination (Tr. 488). The company's representative asked to see the documents that the customers had in their possession; some had them and others did not (Tr. 488). The customers were not informed as to the true purpose of the questionnaire. Although, one of the salesmen who went around with the questionnaires explained that they were merely designed to see if the company's customers received required papers and knew their rights (Tr. 482). Mr. Larmon, the customer relations man of the company, testified that he himself did not know the true purpose of the questionnaire (Tr. 505-508). Mr. Kramer, another company salesman, testified that it was merely to help the company maintain good business (Tr. 476).

Mrs. Szczepanski, one of the customer witnesses, testified that she believed the questionnaire which she executed (RX 4) was a public relations device (Tr. 178). She also stated that she was not told the significance of the document or the reason for its execution (Tr. 179).

Mrs. Simon testified that she did not pay much attention to the

questionnaire before signing (Tr. 199). She did not even look at it (Tr. 200).

Mrs. Grodner testified that she only signed the questionnaire because the company's representative, who came with it, promised that she would thereafter be furnished with copies of everything which she had signed at the time the transaction was entered into (Tr. 250).

Mr. Crews testified that the answers contained in the boxes in the questionnaire were not true and never had been true (Tr. 272-274).

Mr. Zimmer testified that the respondents' representatives came around with the questionnaire and indicated that the company had found a number of incomplete papers behind a desk and that they wanted to be sure he had received all documents which he was entitled to and that it was to be used merely for public relation purposes (Tr. 302, 305). He also stated that he did not read the statement (Tr. 304).

Mr. Dunbar testified that he did not read the statement and that the answers were marked by the company's representative (Tr. 355).

The statements contained in the questionnaire are unclear and capable of misinterpretation. The testimony of Mr. Henning indicates the possibility of misinterpretation because of the omission of dates (Tr. 75-76).

Mr. Wiemer testified that he did not understand the questions asked in the questionnaire (Tr. 119). Mrs. Szczepanski stated that she did not understand the questions and only later realized that what she had signed was not the truth (Tr. 179). Mrs. McKnight testified that her answers to the questionnaire were erroneous (Tr. 229-231).

14. Respondents Richard J. Fabrizi and James J. Rebis are officers of said corporation. Their address is the same as that of the corporate respondent. (Admitted by Respondents' Answer, and Amended Answer to Paragraph One of the Complaint, and Stipulation (Tr. 44).)

15. Respondents Richard J. Fabrizi and James J. Rebis are responsible for the acts and practices of Fabbis, Inc., with regard to the requirements of the Truth in Lending Act.

Mr. Fabrizi testified that he and Mr. Rebis are the president and vice president, respectively, of the corporate respondent, and have been such since the firm's incorporation in 1963 (Tr. 84-86). They are its chief operating officers, being the company's general manager (Tr. 78) and its sales manager (Tr. 85). During the entire corporate existence the individual respondents, Messrs. Fabrizi and Rebis, have been the company's sole stockholders, sharing the stock equally (Tr. 84, 86, 411). In essence, the company is a continuation of the informal partnership between these individuals which was begun several years

Initial Decision

prior to formation of the present corporation (Stipulation, Tr. 44). The very name of the corporation, "Fabbis," was derived from a combination of the first part of Mr. Fabrizio's name and the last part of Mr. Rebis' name (Tr. 84).

The individual respondents testified that they were aware of what Regulation Z required of them. Mr. Fabrizio stated that the lending institutions with which the respondents dealt informed him and Mr. Rebis about these requirements (Tr. 90). Marine Midland's sales representative, Frank Griffin, testified that he called upon the individual respondents many times regarding Truth in Lending matters and spoke with them personally (Tr. 377-379). Additionally, the individual respondents had conferences with their attorney relating to compliance with Truth in Lending (Tr. 415). Mr. Rebis testified that he and Mr. Fabrizio knew what their company was required to do to comply with the law (Tr. 528).

Mr. Fabrizio testified that he or Mr. Rebis telephoned one out of ten customers when the law first became effective to ascertain whether they received their copies of the bank papers (Tr. 95). Mr. Rebis hired all the company salesmen, was responsible for assigning them their duties and supervising their activities (Tr. 85-86) whose duty it was to make consumer credit cost disclosures and to secure execution of retail installment obligations on the finance paper of the various local banks (Tr. 94). Mr. Rease was, and is, responsible to them for his activities (Tr. 87). Mr. Rease testified that he has been employed by the company for 7 years (Tr. 427) and that he sees Messrs. Fabrizio and Rebis every day that they are in town and often discusses individual consumer credit transactions with them (Tr. 443-444). He testified that Mr. Fabrizio was shown every paper relating to every transaction of the company during the period in question (Tr. 444).

REASONS FOR DECISION

The threshold question in this matter, *i.e.*, the power of Congress to legislate on credit questions regardless of their interstate character has been resolved by the Supreme Court's action on another Title of the Truth in Lending legislation.³ Since the jurisdiction delegated to the Commission expressly deals with the question of commerce and states that the Commission may act "irrespective of whether the person is engaged in commerce * * *"⁴ The question of jurisdiction requires no further comment.

³ *Perez v. United States* 39 LW 4487 1402 U.S. 1461, April 26, 1971.
⁴ 15 U.S.C. 1601.

The next serious question involves the credibility of the consumer witnesses. Respondents take the position that because the witnesses, prior to the trial, signed statements for the respondents that were contradictory to their testimony (some both in the form of questionnaires and also in the form of written statements and others in the form of questionnaires only) their testimony should be given no weight. We disagree.

The questionnaires were presented as a form of public relations device. "Help Us Maintain Good Business" was the title. These questionnaires were made out after the investigation by the Federal Trade Commission was commenced, and designed, not by counsel who would have had a responsibility to the Commission to insure that they were properly taken, but, by employees of the corporate respondent who were wholly untrained and who were clearly interested in securing the "right" answers. The written statements were not secured until after the complaint was issued and the list of witnesses submitted to counsel. These too were taken, not by counsel, but by one of the respondents accompanied by another employee. One witness was told that she could avoid coming to the hearing if she signed (Tr. 202-203). Under the circumstances, the weight of the combined testimony under oath that the questionnaires and statements were false makes it much more probable than not that the respondents had failed to abide by the Truth in Lending Act and regulations. This is particularly true when the recollection of the respondents' employees was vague concerning their instructions in securing the questionnaires and concerning the events which gave rise to the requirements for notice of rescission and delay of commencement of the work. Moreover, several of respondents' witnesses made it clear that the question of how the financing was to be done was discussed before the sales proposal was signed and at that time the prerequisites of disclosure were not complied with so that the customers had no opportunity to compare financing costs. The contention that the transactions started out as cash transactions and only later credit was sought is inherently incredible, despite the form of the proposal.⁵ The witnesses made it very apparent in their testimony that they they could not afford the large expenditures required and had to secure financing. We turn next to the far more serious question of the waiver of lien by respondents.

Respondents contend and the papers filed establish that they waived any lien they would secure on the property. Thus, they claim the transaction does not create any security interest and accordingly it is not

⁵ We need therefore not consider the claim by respondents that they had secured an interpretation from the Chief of the New York Office of the Federal Trade Commission that in the case of financing, not discussed at the time of the proposal but later requested, the provisions of the act and regulation have no application.

rescindable. Respondents further claim that an interpretation to this effect was secured from the Chief of the New York Office of the Commission.⁶

Complaint counsel take the position that even though the waiver might be effective to prevent respondents from securing a lien on the property for themselves, the New York lien law creates a lien in favor of their workmen and their material supplies in the event that the wages or material charges are not paid⁷ and it was the purpose of the Truth in Lending legislation to require that all liens be considered even though not under the control of the lender. This position, it seems to the undersigned is wholly unwarranted. It would make it impossible ever to secure a waiver because, particularly in the case of union labor where the union may dispatch the employees directly to the job, the employer would not even know who they were at the time the transaction was entered into and could not secure waivers from them. There is moreover, here, no claim that the materialmen were unpaid or that the workmen did not receive their wages. To the contrary, the materials were paid for in the normal course in advance of their delivery to the job. Unless the law and regulations are to be construed to require a waiting period and a right to rescission in all cases—which is clearly not true since a waiver by the customer in cases of emergency is provided for⁸—there cannot be a requirement that the possible liens of workmen and materialmen must be waived also. By reason of the waivers of the banks and of the respondents, it seems to me that this phase of the charge must be dismissed.

This is not, however, dispositive of the proceeding. Paragraph Five of the complaint contains the following charge:

In connection with the consumer credit transactions set forth in Paragraphs Three and Four⁹ hereof, respondents prepare documents containing consumer

⁶ Since the person by whom the interpretation was allegedly given was not called to deny it, we must assume that the claim was correct. While as a matter of law such interpretation may carry little weight, from the standpoint of the public interest in issuing an order in this matter it may be very significant.

⁷ McKinneys "Lien Law" Volume Article 1, 1-3.

⁸ I have not discussed the waiver by the customer of the waiting period because respondents admit that the waivers secured were inadequate.

⁹ The paragraphs referred to provide as follows:

Paragraph Three: In the ordinary course and conduct of their business as aforesaid, respondents arrange, and for some time last past regularly have arranged, for the extension of consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

Paragraph Four: Subsequent to July 1, 1969, respondents in the ordinary course and conduct of their business and in connection with their arranging for consumer credit, have caused, and are causing, customers to execute retail installment contracts, herein referred to as "the contract," which results or may result in a security interest being retained or acquired in real property which is used or is expected to be used as the principal residence of the customer. The customers thereby have the right to rescind such transactions, as provided in Section 226.9(a) of Regulation Z.

Initial Decision

81 F.T.C.

credit cost disclosures required by Section 226.8 of Regulation Z and obtain from customers written acknowledgment of receipt of these disclosures, but in some instances nevertheless fail to provide the customer with a copy of such disclosures, as required by Section 226.8(a) of Regulation Z.

This it seems to the hearing examiner includes a charge that the customer is not provided with the cost disclosures prior to the time he or she signs the sales proposal. This is true because Section 226.8 (a) of Regulation Z specifically provides:

(a) General rule. Any creditor when extending credit other than open end credit shall, in accordance with § 226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969. Except as provided in paragraphs (g) and (h) of this section¹⁰ *such disclosures shall be made before the transaction is consummated*. At the time disclosures are made, the creditor shall furnish the customer with a duplicate of the instrument or a statement by which the required disclosures are made and on which the creditor is identified. All of the disclosures shall be made together on either

(1) The note or other instrument evidencing the obligation on the same side of the page and above or adjacent to the place for the customer's signature; or

(2) One side of a separate statement which identifies the transaction. (Emphasis and Footnote added)

Admittedly, it was the practice of the salesmen prior to November or early December 1969 when Mr. Rease was in sole charge of handling the "bank papers" to secure the commitment in the sales proposal and then to call Mr. Rease to come over to the customer's house and have the

¹⁰ The subsections referred to have no applicability. They read as follows:

(g) Orders by mail or telephone. If a creditor receives a purchase order or a request for an extension of credit by mail, telephone, or written communication without personal solicitation, the disclosures required under this section may be made any time not later than the date the first payment is due, provided:

(1) In the case of credit sales, the cash price, the downpayment, the finance charge, the deferred payment price, the annual percentage rate, and the number, frequency, and amount of payments are set forth in or are determinable from the creditor's catalog or other printed material distributed to the public; or

(2) In the case of loans or other extensions of credit, the amount of the loan, the finance charge, the total scheduled payments, the number, frequency, and amount of payments, and the annual percentage rate for representative amounts or ranges of credit are set forth in or are determinable from the creditor's printed material distributed to the public, in the contract of loan, or in other printed material delivered or made available to the customer.

(h) Series of sales. If a credit sale is one of a series of transactions made pursuant to an agreement providing for the addition of the amount financed plus the finance charge for the current sale to an existing outstanding balance, then the disclosures required under this section for the current sale may be made at any time not later than the date the first payment for that sale is due, provided:

(1) The customer has approved in writing both the annual percentage rate or rates and the method of treating any unearned finance charge on an existing outstanding balance in computing the finance charge or charges; and

(2) The creditor retains no security interest in any property as to which he has received payments aggregating the amount of the sale price including any finance charges attributable thereto. For the purposes of this subparagraph, in the case of items purchased on different dates, the first purchased shall be deemed first paid for, and in the case of items purchased on the same date, the lowest priced shall be deemed first paid for.

Initial Decision

other papers signed. Thus the customers did not at the time they agreed to the purchase on time have any disclosure of what the cost of financing would be. So the expressed purpose of the Act " * * * that the customer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit" (15 U.S.C. § 1661) was frustrated.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over respondents and over the subject matter of this proceeding. Under the law it is not necessary that the transaction be in interstate commerce.
2. The individual respondents, by reason of their ownership of the corporate respondent, their direction and control over its operations, and the history of the corporation as successor to a partnership involving the individual respondents and the ease with which the corporation could be eliminated, should be held individually responsible if the corporation is held responsible.
3. The corporation and the banks validly waived any security interest they might have over the residences of respondents' customers and thus no right of rescission arose.
4. The respondents systematically failed to afford to the prospective customers the disclosure of the credit costs before the sales order was executed and a downpayment made. Thus the requirements of Section 226.8(a) of Regulation Z were not met and the purpose of the Act was not carried out.
5. The following order should be issued:

ORDER

It is ordered, That respondents Fabbis, Inc., a corporation, doing business as Rochester Plumbing and Heating Contractors or under any other name, and its officers, and Richard J. Fabrizi and James J. Rebis, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with any consumer credit sale, as "consumer credit" and "credit sale" are defined in Regulation Z (12 C.F.R. § 226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to provide any customer prior to consummation of the transaction with a copy, which the customer may retain, of all disclosures required to be made by Section 226.8 of Regulation Z, in the form and manner prescribed therein, as required by Section 226.8(a) of Regulation Z.

2. Failing, in any consumer credit transaction or advertisement, to make all disclosures required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z, in the manner, form and amount prescribed therein.

It is further ordered, That a copy of this order to cease and desist be delivered to all present and future personnel of respondents engaged in the consummation of any credit sale, and that respondents secure from each such person a signed statement acknowledging receipt of said order.

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

CONCURRING STATEMENT OF CHAIRMAN KIRKPATRICK

I have serious reservations about the validity of Sections 226.9(a) and 226.2(z) of Regulation Z insofar as they define nonconsensual mechanics' liens arising by operation of law to be security interests which trigger the Act's rescission provisions. I would not have interpreted Section 125(a) of the Act in this way, and I believe the Board may have exceeded its authority in so doing.

I am reluctant, however, to take a position which, if adopted by the majority, would result in an unreviewable decision to terminate most governmental enforcement in this regard. The opportunity for appellate review is foreclosed, of course, when the Commission decides an issue in the favor of the respondent. That factor alone would not ordinarily influence my judgment. In this particular instance, however, I believe that for a variety of reasons the Commission's decision should be subject to the scrutiny of full judicial review.

The validity of the regulations here at issue presents a close question—one which involves a difficult matter of statutory interpretation. As the majority notes, courts in two jurisdictions have disagreed on whether or not Section 125(a) of the statute applies in the factual situation here present. The statute itself provides little guidance in determining the precise limits of the Board's discretion in

interpreting the statute. According to Section 105, regulations are valid if, "in the judgment of the Board (they) are necessary or proper to effectuate the purposes of (the statute) to prevent circumvention or evasion thereof or to facilitate compliance therewith." (emphasis added). Thus, the law gives the Board a broad mandate for the exercise and application of its expertise, and the outer boundaries of its discretion have not to date been satisfactorily defined.

To its task of interpreting the statute, the Board brings considerable knowledge acquired from its long involvement with monetary and credit matters, as well as from public comments which it receives on all regulations before they are promulgated in final form. We have little indication on this record of the factors which in the Board's judgment made necessary and proper the interpretation of the statute here challenged.

In these circumstances and in a case which does not involve a clear abuse of discretion, I am not inclined to rule that the regulations of a Congressionally empowered expert body operating under so broad a mandate are invalid.

OPINION OF THE COMMISSIONER

By MACINTYRE, Commissioner:

This matter is before the Commission upon the appeal of complaint counsel from the initial decision of the administrative law judge filed June 16, 1971. In this decision the administrative law judge held that some, but not all, of the charges of the complaint were sustained, and he entered an order to cease and desist as to those practices he found to be unlawful. Complaint counsel filed an appeal, respondents have answered such appeal, and complaint counsel in turn have filed a reply. Oral argument on the appeal was held January 6, 1972.

The complaint charges the respondents with violations of the Truth in Lending Act (15 U.S.C. 1601, *et seq.*) (referred to hereafter as the Truth Act) and Regulation Z (12 C.F.R. § 226), the implementing regulation, as well as the Federal Trade Commission Act (15 U.S.C. 41, *et seq.*). The charges are, in general, that respondents, in connection with the extension of consumer credit, in transactions covered by the Act, have failed, as required by Regulation Z, to provide customers with a copy of consumer credit cost disclosures; have failed, as required by Regulation Z, to provide their customers with copies of a notice of the right of rescission; and have failed, as required by Regulation Z, to delay, during the three-day rescission period, the making

of physical changes in the customers' property and the commencement of work or service.

The respondents are Fabbis, Inc., a New York corporation doing business as Rochester Plumbing and Heating Contractors, as well as the individuals Robert J. Fabrizi and James J. Rebis, named individually and as officers of the named corporation. The respondents, at the time of the hearing and prior thereto, engaged in the sale of plumbing and heating equipment and installation services to the public.

The administrative law judge, in his initial decision, held that respondents systematically failed to afford prospective customers the disclosure of credit costs before the sales order was executed and a downpayment made; thus, that the requirements of Section 226.8(a) of Regulation Z were not met and the purpose of the Act not carried out. He included in his initial decision an order to prohibit such practices. The administrative law judge failed to find a violation of law, however, insofar as the respondents were charged with failing to provide their customers with notices of the right of rescission as required by Section 226.9(b) of Regulation Z and with the failure to delay performance during the three-day rescission period required by Section 226.9(c) of Regulation Z. On the two latter charges the administrative law judge agreed with respondents' contention that since the corporation and the banks providing the loan money had waived any security interest they might have in the property there was thus no right of rescission for the customer. He rejected complaint counsel's position that liens created by operation of law, such as workmen's and materialmen's liens, constituted a security interest under the Act and made the transactions rescindable.

Complaint counsel appeals from the part of the initial decision in which the administrative law judge failed to find violations of law as charged in the complaint, contending that he was in error in not holding respondents' credit transactions to be rescindable and therefore subject to the requirements of the Act and Regulation Z covering the customer's right of rescission. Complaint counsel requests that the order prohibit for the future all the violations charged, and in addition he seeks a provision in the order which would require respondents to afford their customers in prior transactions the right to rescind such transactions.

Except for a question on the scope of the order, there is only one issue of substance raised by complaint counsel's appeal. It is whether or not respondents' credit transactions are rescindable transactions, and therefore subject to Section 125 of the Act and to Section 226.9 of Regulation Z providing a right of rescission, where respondent cor-

poration and the banks making the loans acted to waive all their security interest but where mechanic's liens or liens created by operation of law in favor of workmen and others were not waived.¹ Since July 1, 1969 (the effective date of Regulation Z), respondents, in connection with the arranging for consumer credit caused customers to execute retail installment contracts to finance home improvements on real property used as customers' principal residences (finding 4, page 4 [p. 682, herein], initial decision). The record is clear, and the administrative law judge found, that respondents failed to supply copies of the required notice to such customers of their right of rescission and that they further failed to delay the making of physical changes in the customers' properties and the performing of work on such residences during the three-day rescission period (findings 9 and 10, pages 5 and 6 [pp. 683 and 684, herein] of the initial decision).

Although respondents claim that respondent corporation and the lending banks waived all of their security interest in the transactions involved, they made no such claim for the liens created by operation of state law covering subcontractors, workmen and others. The administrative law judge specifically found that no waivers of workmen's liens were presented at the hearing (finding 6, page 4 [p. 682, herein], initial decision). Respondents, who have the burden of going forward with the evidence on this point since they seek to establish that they come within an exception to the general requirements of the statute, have made no showing of a waiver of workmen's liens or of all other liens created by operation of law. Furthermore, the credit

¹ Section 125 (a) of the Act reads in part:

"Except as otherwise provided in this section [exceptions which are not here applicable], in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the material disclosures required under this chapter, whichever is later, by notifying the creditor, in accordance with the regulations of the Board, of his intention to do so. * * *

Section 226.9 of Regulation Z implements this section of the Act and reads in part: " * * * Except as otherwise provided in this section, in the case of any credit transaction in which a security interest is or will be retained or acquired in any real property customer shall have the right to rescind that transaction until midnight of the third business day following the date of consummation of that transaction or the date of delivery of the disclosures required under this section and all other material disclosures required under this Part, whichever is later, by notifying the creditor by mail, telegram, or other writing of his intention to do so. * * *

Other parts of Section 226.9 contain requirements relating to notice for opportunity to rescind, delay of performance and other matters.

Opinion

forms used by the respondent corporation suggest that mechanic's liens of subcontractors, laborers and others were not waived.²

There is no dispute that the law of the State of New York, the jurisdiction in which the transactions presented herein took place, grants mechanic's liens on customers' homes to subcontractors, laborers and others for work performed (N.Y. Lien Law, § 3 (McKinney 1966)). Respondent corporation employed workmen to install the plumbing and heating equipment it sold to customers (finding 5, page 4 [p. 682, herein], in initial decision). Thus, it appears that if the mechanic's liens or the right to such liens granted to respondents' workmen by operation of law are a security interest within the meaning of that term in the Act, respondents are in violation of the Act and Regulation Z.

It is our view that a security interest under the Act does include mechanic's liens and other liens created by operation of law. In this view we follow the holding and the reasoning of the Circuit Court of the United States Court of Appeals for the District of Columbia, which held to that effect in *Gardner and North Roofing Siding Corporation v. Board of Governors of the Federal Reserve Board*, 464 F. 2d 838 (D.C. Cir. 1972); 4 CCH Consumer Credit Guide § 99159.³ At issue in the *Gardner* case was the validity of the Board's regulations, which had the effect of requiring the seller to notify a customer of his right to rescind when there is a probability that a lien on his house will arise by operation of law even though he has not executed an indenture on the property. The statute (Section 125(a)) provides for the right of rescission in a consumer credit transaction "in which a security interest is retained or acquired" in customers' residences, whereas the Board's regulation reads in pertinent part: "in which a

² A section of respondents' "Retail Installment Obligation" used in the transactions shown in the record reads as follows:

"3. SECURITY INTERESTS: Represents that, except as a provision is made in 'D-2' of this Obligation for the execution and delivery of a Collateral Mortgage on the above 'Property to be Improved' by the Buyer(s) [and by any other owner(s) of any interest in said Property] to the Bank designated above, and/or b. the right to a Mechanic's Lien on said Property to the Bank designated above, and/or other person (excluding the seller) who performs labor or furnishes materials for the improvement thereof, may be a security interest in said Property within the meaning of 'security interest' as used in Federal Reserve Board Regulation Z, no security interest is or is to be held, retained or acquired by the Seller, the Bank designated above, or any other person in connection with the extension of credit evidenced by this Obligation." (Commission Exhibit 9-j.)

³ The same or a similar issue is raised in *N. C. Freed Company, Inc., et al. v. Board of Governors of the Federal Reserve System*, U.S.D.C. W.D.N.Y. September 29, 1971, CCH Consumer Credit Guide § 99356. The district court in the case held that only contracts which acquired a security interest through a mortgage, deed of trust, or other type of instrument are rescindable; that Congress did not include liens which arise in the course of operation of law. The *Freed* case has been appealed to the United States Court of Appeals for the Second Circuit. *N. C. Freed Company, Inc., et al. v. Board of Governors of the Federal Reserve Board*, appeal docketed, No. 72-1381 (2d Cir.).

security interest is *or will be* retained or acquired" (§ 226.9(a)) (emphasis supplied). The Board also defined the term "security interest" to include liens created by operation of law (§ 226.2(z)). The court upheld the Reserve Board's regulations on this point. It reasoned in part that a contract to renovate, remodel or repair a house imports the materials will be furnished in connection with that work; and that, therefore, *implicit in the contract* is a provision that a lien will attach to secure payment for the work and the materials. We believe it is clear from the decision that the court's reasoning and its holding covers all nonconsensual security interests, including the mechanic's liens granted by statute to the creditor as a contractor or supplier, as well as mechanic's liens granted to third parties not privy to the original contract, such as subcontractors, laborers and others, for their work, services or materials.

Accordingly, we hold that respondents violated the Act and Regulation Z not only in the respects found by the administrative law judge but also in the other respects charged in the complaint, *i.e.*, for failing to provide notice of rescission and for failing to delay performance within the three-day period provided by law.

There is no direct issue before the Commission on the validity of respondents' waiver policy. That issue would have been before us had respondents shown that all security interests were waived, including the mechanic's liens of their workmen and others. In the circumstances there is no need to inquire into the validity and appropriateness of the waivers. They were incomplete and so the defense must fail.⁴

It should be noted, however, that Section 226.901 also provides that if, as a result of the transaction, a security interest is or will be retained or acquired by a subcontractor, workman or other person, the transaction is rescindable and the creditor then would be responsible for delivering the rescission notice and the applicable disclosures and for delaying performance.

⁴Neither the Act nor Regulation Z expressly provides for the waiver of security interests. The only explicit language on waiver they contain is that for the *customer's* waiver of his right of rescission under certain emergency-type circumstances (see Section 125(d) of the Act and Section 226.9(e) of Regulation Z). The concept of a waiver of security interest by the creditor appears in Section 226.901 of the Reserve Board's "interpretations" of Regulation Z. This interpretation section provides that where a creditor *effectively* waives his right to retain or to acquire a mechanic's or a materialmen's lien he has not retained or acquired that security interest. Under this interpretation, if all security interests are waived, the transaction is not rescindable and the creditor does not have to comply with Section 125 of the Act and the regulation concerning the consumer's right of rescission.

It should be noted, however, that Section 226.901 also provides that if, as a result of the transaction, a security interest is or will be retained or acquired by a subcontractor, workman or other person, the transaction is rescindable and the creditor then would be responsible for delivering the rescission notice and the applicable disclosures and for delaying performance.

As indicated above, complaint counsel, so far as remedy is concerned, contends for a new paragraph in the order which would require respondents on past sales between July 1, 1969 and January 18, 1971, for which they arranged the extension of consumer credit and in which a security interest in real property was retained or acquired, to afford the customers involved, within fourteen days of the receipt of a specified notice, the opportunity to rescind the transactions. The Commission's order, he argues, can and should compel respondents to give their credit customers what they are entitled to under the Act and regulations. He claims that such a remedy will bear more than a reasonable relationship to the violations uncovered. Complaint counsel cites the relief granted by the hearing examiner in another matter, *Charnita, Inc., et al.*, Docket No. 8829.

The Commission, on June 6, 1972 [80 F.T.C. 892], issued its own decision in that *Charnita* matter, holding, among other things, that so far as certain lot-buying customers were concerned those respondents had "an unfulfilled and continuing duty to give notice, in accordance with Section 226.9 of Regulation Z, of the customers' right of rescission." The Commission there further stated that "[u]ntil such notice is given, respondents are thus in a continuing violation of the statute."

We do not believe that the same approach is justified on the facts in this proceeding. *Charnita* concerned land sales, not home improvement sales as in this case. The installations and alterations involved in home improvement transactions cannot easily be undone, if they can be undone at all. These improvements are generally of a permanent nature, such as the installation of a new furnace, new air conditioning equipment and the like. Removal of this equipment will often be impractical and possibly damaging to the house in which it is installed. Furthermore, removal could lead to additional expenses to the home owner. Inflation and other factors might easily make replacement more costly than was the original installation. In such a case a mere right to rescind, without more, would not restore the customer to his prior position and might be detrimental to him if the seller in fact removed the equipment.

A provision in the Reserve Board's regulation covering the right of rescission (Section 226.9(d) of Regulation Z) appears to be directed to this situation. It states in part:

If the creditor has delivered any property to the customer, the customer may retain possession of it. Upon the performance of the creditor's obligations under this section, the customer shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the customer shall tender its reasonable value. * * *

While the record here has not been developed on this point, it may be assumed that in most of the transactions return of the creditor's property would be impracticable and so cancellations would necessarily raise problems as to the return of "reasonable value." Very likely each situation would require individual negotiation to arrive at equitable results. We further assume in these situations of cancellation that under the Board's rule the customer would have the option of removal or of tendering reasonable value, though this is not altogether clear.

This matter, therefore, raises problems, as mentioned, of likely adjustments and negotiations not present in *Charmita* and the facts developed in this record are inadequate to make appropriate determinations as to just how such an order would work or what its impact would be insofar as the home owners are concerned or the respondents. Without greater factual details on this point we do not believe that an order looking to past transactions is justified on this record.

In our view, it would not be helpful to remand this matter for the taking of additional evidence on the scope of the order. Time is important in order to provide protection to respondents' future customers. We believe that a broader public interest will be served by seeking an immediate enforcement of a prospective order to cease and desist rather than to suffer the inevitable delays which would result from a remand for further facts.

In connection with the order, there is one further point which should be mentioned. The administrative law judge, in footnote 6, page 12 [p. 689, herein], stated that he assumed the correctness of respondents' claim to the effect they were advised by the head of the New York office that their transactions because of their waiver policy were not rescindable. He based this assumption on the fact that the person referred to was not called to deny the claim. The next sentence in the footnote reads: "While as a matter of law such interpretation [by the New York office head] may carry little weight, from the standpoint of the public interest in issuing an order in this matter it may be very significant." Whether or not the administrative law judge's assumption is warranted, we do not agree with the sentence above quoted if he means by this that the Commission is thereby in some way not fully free to issue an appropriate order in this case in the public interest. No principle of equitable estoppel bars the Commission from the performance of its duty because of the mistaken action of subordinates. *Double Eagle Lubricants v. F.T.C.*, 360 F. 2d 268, 270 (10th Cir. 1965). To prevent any misinterpretation on the issue we will strike the footnote.

Final Order

81 F.T.C.

Accordingly, complaint counsel's appeal will be granted to the extent above indicated and otherwise denied. The initial decision of the hearing examiner will be modified so as to conform to the views expressed in this opinion and as modified adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon complaint counsel's appeal 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 the initial decision should be modified in accordance with the views and for the reasons stated in the accompanying opinion and as modified adopted as the decision of the Commission:

It is ordered, That pages 123 and 13 [*supra* at 688-90] of the administrative law judge's initial decision be modified as follows:

witnesses made it very apparent in their testimony that they could not afford the large expenditures required and had to secure financing. We turn next to the far more serious question of the waiver of lien by respondents.

Respondents contend that they waived any lien they would secure on the property. Thus, they claim the transaction does not create any security interest and accordingly it is not rescindable. Respondents further claim that an interpretation to this effect was secured from the Chief of the New York Office of the Commission.

Complaint counsel take the position that even though the waiver might be effective to prevent respondents from securing a lien on the property for themselves, the New York lien law creates a lien in favor of their workmen and their material suppliers in the event that the wages or material charges are not paid⁶ and it was the purpose of the Truth in Lending legislation to require that all liens be considered even though not under the control of the lender. The position of complaint counsel is correct for the reasons stated by the court in *Gardner and North Roofing and Siding Corporation v. Board of Governors of the Federal Reserve Board*, 464 F. 2d 838 (D.C. Cir. 1972); 4 CCH Consumer Credit Guide § 99159. Accordingly, respondents' transactions shown on this record were rescindable and subject to the requirements of § 226.9 of Regulation Z governing the customer's right to rescind.

Paragraph Five of the complaint contains the following charge:

"In connection with the consumer credit transactions set forth in Paragraphs Three and Four⁷ hereof, respondents prepare documents containing consumer credit cost disclosures required by Section 226.8 of Regulation Z and obtain from customers written acknowledgment of receipt of these disclosures, but in some instances nevertheless fail to provide the customer with a copy of such disclosures, as required by Section 226.8(a) of Regulation Z."

This it seems to the hearing examiner includes a charge that the customer is not provided with the cost disclosures prior to the time he or she signs the sales

Final Order

proposal. This is true because Section 226.8(a) of Regulation Z specifically provides:

⁶ McKinney's "Lien Law" Volume Article 1, 1-3.
⁷ The paragraph referred to provide as follows:

"PARAGRAPH THREE: In the ordinary course and conduct of their business as aforesaid, respondents arrange, and for some time last past regularly have arranged, for the extension of consumer credit, as 'consumer credit' is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.
 "PARAGRAPH FOUR: Subsequent to July 1, 1969, respondents in the ordinary course and conduct of their business and in connection with their arranging for consumer credit, have caused, and are causing, customers to execute retail installment contracts, herein referred to as 'the contract', which results or may result in a security interest being retained or acquired in real property to which is used or is expected to be used as the principal residence of the customer. The customers thereby have the right to rescind such transactions, as provided in Section 226.9(a) of Regulation Z."

It is further ordered, That footnote 10, page 14 [*supra* 690], in the initial decision be, and it hereby is, renumbered 8.

It is further ordered, That conclusion 3 on page 16 [*supra* at 691] of the initial decision be, and it hereby is, modified to read as follows:

3. Respondents, in credit transactions shown in this record, violated the Truth in Lending Act and Section 226.9(b) of Regulation Z by failing to provide their customers with the opportunity to rescind and copies of a notice of the right of rescission in accordance with the regulation. Respondents, in credit transactions shown on this record, violated the Truth in Lending Act and Section 226.9(c) of Regulation Z by failing to delay during the three-day rescission period making physical changes in the customer's property and in the performing of work and services for such customers. The claim that security interests were waived is rejected because there is no showing that all liens created by operation of law, such as mechanic's liens of workmen, were waived.

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

ORDER

It is ordered, That respondents Fabbis, Inc., a corporation, doing business as Rochester Plumbing and Heating Contractors or under any other name, and its officers, and Richard J. Fabrizio and James J. Rebis, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection

with any consumer credit sale, as "consumer credit" and "credit sale" are defined in Regulation Z (12 C.F.R. § 226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. Failing to provide any customer prior to consummation of the transaction with a copy, which the customer may retain, of all disclosures required to be made by Section 226.8 of Regulation Z, in the form and manner prescribed therein, as required by Section 226.8(a) of Regulation Z.

2. Failing, in any transaction in which a security interest is or will be retained or acquired in real property which is used or is expected to be used as the principal residence of the customer, to provide each customer with notice of the right to rescind, in the form and manner specified by Section 226.9(b) of Regulation Z, prior to consummation of the transaction.

3. Making any physical changes in a customer's property or performing any work or services for the customer on such property before expiration of the rescission period provided for in Section 226.9(a) of Regulation Z, in any transaction in which a security interest is or will be retained or acquired in real property which is used or is expected to be used as the principal residence of the customer, as provided in Section 226.9(c) of Regulation Z.

4. Failing, in any consumer credit transaction or advertisement, to make all disclosures required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z, in the manner, form and amount prescribed therein.

It is further ordered, That a copy of this order to cease and desist be delivered to all present and future personnel of respondents engaged in the consummation of any credit sale, and that respondents secure from each such person a signed statement acknowledging receipt of said order.

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

It is further ordered, That the initial decision of the administrative law judge, as modified herein, be, and it hereby is, adopted as the decision of the Commission.

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

Chairman Kirkpatrick concurring in the disposition of this proceeding.

IN THE MATTER OF

CAL-ROOF WHOLESALE, INC., ET AL.

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

Docket C-2307. Complaint Oct. 30, 1972—Decision, Oct. 30, 1972

Consent order requiring a Portland, Oregon, wholesaler and distributor of building materials, including residential siding products, among other things to cease misrepresenting any aspect of contests or other promotional schemes or devices; misrepresenting the quality or properties of its siding or other building products; and representing that its products are guaranteed unless pertinent information with respect thereto is clearly and conspicuously disclosed.

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 Cal-Roof Wholesale, Inc., a corporation, and Morris Greenstein, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Cal-Roof Wholesale, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its principal office and place of business located at 110 S.E. Taylor, Portland, Oregon.

Respondent Morris Greenstein is an officer of the corporate respondent. He formulates, directs and controls the acts and practices herein described. His business address is the same as that of the corporate respondent.