

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS AND ORDERS

IN THE MATTER OF

HALLMARK GROUP COMPANIES, INC., ET AL.

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

Docket C-2517. Complaint, July 1, 1974—Decision, July 1, 1974

Consent order requiring a Dallas, Tex., developer of mobile home parks and its wholly-owned subsidiary in Santa Clara, Calif., among other things to cease misrepresenting and failing to provide facilities and services they represented would be available at mobile home parks they have developed. Further, the order requires respondents to provide, within ninety (90) days of the effective date of this order, mobile home parks with all of the facilities and services which they represented would be available at said parks.

Appearances

For the Commission; *Ralph E. Stone.*

For the respondents: *Pro se.*

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 Hallmark Group Companies, Inc. and Pacific Western Mobile Estates, Inc., corporations, hereinafter sometimes 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 Hallmark Group Companies, 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 208 Town North Plaza Building, 4230 LBJ Freeway, Dallas, Tex.

Respondent Pacific Western Mobile Estates, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business

located at 2075 De La Cruz Boulevard, Santa Clara, Calif. It is a wholly-owned subsidiary of respondent Hallmark Group Companies, Inc.

PAR. 2. Respondents are now, and for some time last past have been engaged in the development and operation of mobile home parks in the various States of the United States.

PAR. 3. In the course and conduct of respondents' aforesaid business, respondents have disseminated and have caused to be disseminated from their place of business located in Santa Clara, Calif. advertisements for said mobile home parks in newspapers and on radio broadcasts of interstate circulation for the purpose of inducing the lease of mobile home park spaces.

Through the aforementioned dissemination and transmission of said advertisements and the interstate nature of their business, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in mobile home park development and operation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Typical of such advertisements, disseminated as aforesaid, but not inclusive thereof, are the following: [see pp. 3-6 herein.]

PAR. 5. Through the use of said advertisements, and others similar thereto, not specifically set out herein, respondents have represented and are now representing, directly or by implication, that respondents' mobile home parks have available and fully operational certain facilities, *e.g.*, boat and camper storage, cable television, laundry facilities, car wash facilities, sauna, shuffleboard, multi-purpose court for basketball, tennis, volleyball and badminton.

PAR. 6. In truth and in fact each and every advertised facility is not available and fully operational at respondents' mobile home parks at the time such park is ready for occupancy.

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

PAR. 7. Furthermore, in the course and conduct of their business, as aforesaid, respondents failed and continue to fail to provide said mobile home parks with the fully operational facilities they represented were available.

The failure of respondents to provide fully operational facilities for the benefit of persons who leased spaces in respondents' parks in reliance upon said representations set forth in Paragraphs Four and Five hereof, was and is unfair and deceptive.

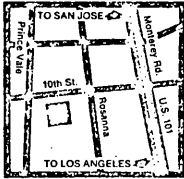
PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, and representations has the tendency and capacity to mislead and deceive members of the purchasing public into the

come live with us...

... We'd like to introduce you to the nicest part of mobile home living — Pacific Western Mobile Estates. Let's get together over a cup of coffee and sit around and relax. I know we can show you a whole new way of easy living — made up of people, recreation, and just plain fun.

... If you enjoy the sort of things we do... like swimming, sauna, billiards, tennis, shuffleboard, putting greens, indoor hydrotherapy pool, and lots of friendly clubhouse activities, you will like our park. It is real country club living at low prices.

... My name is Joe and this is my wife Mildred. They call us managers, but we feel more like neighbors. Come out today and join us.



**PACIFIC WESTERN
MOBILE ESTATES/GILROY**

500 W. Tenth Street
Gilroy, Calif. 95020
408/842-8296



All our parks have friendly managers who'd enjoy meeting you.

- Alice and "Skrif" at Modesto
- Walt and Vivian at Lathrop
- Hap and Maurita at San Jose
- Darrell and Jane at Pismo Beach

And open later this year: Vallejo Orange County Visalia Palm Springs Medford, Oregon Springfield, Oregon Lincoln, Nebraska Colorado Springs, Colorado



Write for free brochure to:
Pacific Western Mobile Estates, Inc.
2075 De La Cruz Blvd.
Santa Clara, California 95050

Name of park(s) _____
Name _____
Address _____
City _____ Zip _____ State _____

Complaint

84 F.T.C.

The Recreation Center



car wash / laundry / hobby room



exercise room



9-hole putting green



pool and sandbar



sauna

Live up to your expectations at Pacific Western Mobile Estates/Gilroy ... a recreational wonderland!

Enjoy the pride of home ownership with a country club lifestyle, but without the starched formality and land-office prices of conventional country clubs.

Amble up the path past the bubbling fountain to the clubhouse ... a center hum-m-m-ing with fun things to do ... a wonderfully inviting extension of your own home.

Enriched with the warmth of Spanish architecture ... bursting with hospitality, the expansive clubhouse provides recreation and socializing throughout the year.

Join the fun—dances, live entertainment, weekend brunches, parties and other social gatherings are easily accommodated in the spacious community hall. A full size stage, modern kitchen and banquet facilities ease the preparation and enhance the enjoyment of such events. What a lively center of exciting activity!

Get cozy ... the flow of conversation warms during friendly fireside chats in the library lounge

... ideally a restful setting to curl up and read a book ... a gracious hideaway for relaxation or television viewing.

The benefits of a spa-like atmosphere are apparent. Nothing could be more soothing than a sauna! Be gently massaged in the indoor hydrotherapeutic pool.

The relaxing resort atmosphere goes on ... enjoy a game of billiards ... or nourish an individual health program in the fully equipped men's and women's exercise room.

And there's more playing around! Splash in the pool ... gently heated throughout the year and lighted for evening dips.

Summertime arrives and the aromatic scent of smoking barbecues prevails at Pacific Western/Gilroy. Families gather on the barbecue patio to cook their favorite California cuisine over glowing charcoals.

Come by today and let us show you our beautiful park. We have some friendly managers and a lot of wonderful neighbors anxious to meet you.

Pacific Western Mobile Estates/Gilroy
500 West Tenth Street
Gilroy, California 95020
408-842-8296

GILROY PARK

The Community

Pacific Western/Gilroy is a well planned, self-contained community. Underground utilities; centrally located recreation and green areas; broad, well lit avenues with ideal circulation patterns; colorful, professionally maintained landscaping—all tastefully integrated into a beautiful, comprehensive design.

Always close at hand, the resident managers and their assistants are thoroughly trained and knowledgeable of mobile home park management. Their efficiency is matched only by their friendly, neighborly manner ... all to make your days carefree.

The security of the mobile home community is apparent ... from its walled perimeter to its street lights burning throughout the night. The management enjoys the confidence of residents and maintains a pleasant environment: no soliciting or door-to-door selling is permitted ... nor is the peaceful setting broken by noisy autos or motorcycles.

And there's more ... boat and camper storage, guest parking, underground utilities, cable television, accommodation for 12' 20' 24' 36' wide mobile homes, laundry facilities, car wash facilities, two-car parking per site.



social events



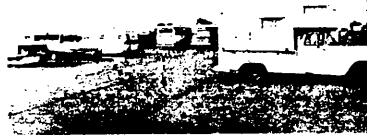
billiard room



barbecue patio



enclosed play area



boat and camper storage

community kitchen

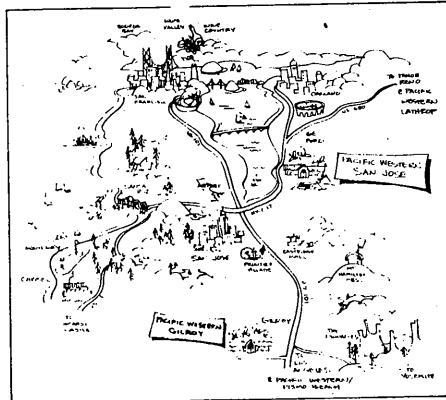


Outdoor living goes on. Play a round of golf on the 9-hole putting green. Sport activists will discover: shuffleboard, basketball, paddle-tennis, volleyball, badminton.

Especially for the children—busy bees, rabbits, porpoises, and hobby horses abound as part of a fascinating selection of play equipment safely enclosed in the separate tot play area.

Hobbies unlimited in the special hobby room! ... just another little but important spoiler at Pacific Western Gilroy.

Whether you are seeking an active, on-the-go life; pure relaxation; or a combination of both, you'll have your choice ... let us spoil you at Pacific Western Gilroy.



RENTAL INFORMATION

MONTHLY RENTAL

12' wide spaces	20' wide spaces	24'—36' wide spaces
\$65.00	\$70.00	\$75.00
Corner and Clubhouse lots \$5.00 extra per month		

MITIGATED CHARGES

- Gas and Electricity
- FREE SERVICES**
- Water
- Garbage Collection
- Clubhouse Facilities

OPTIONAL MONTHLY

CHARGES

- Pets \$3.50
- Extra Person \$5.00
- Storage \$5.00
- Cable television available

OCCUPANCY REQUIREMENTS

- All coaches less than 3 years old
- Awnings required—length and width of patio and carport
- Metal skirting to match
- Architectural approval on coaches
- 25% landscaping in green starting in front of home

FOR DETAILS, SEE REGULATIONS AVAILABLE IN OFFICE

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Decision and Order

erroneous and mistaken belief that said statements and representations were and are true and into the leasing of substantial numbers of respondents' mobile home park spaces by reason of said erroneous and mistaken belief.

PAR. 9. The acts and practices of respondents, including their continuing failure to provide fully operational facilities, 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 or deceptive 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 respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco 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, and 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 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 sixty (60) days, now in further conformity with the procedures 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 Hallmark Group Companies, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 208 Town North Plaza Building, 4230 LBJ Freeway, Dallas, Tex.

Respondent Pacific Western Mobile Estates, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 2075 De La Cruz Boulevard, Santa Clara, Calif. It is a wholly-owned subsidiary of respondent Hallmark Group Companies, Inc.

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 Hallmark Group Companies, Inc., Pacific Western Mobile Estates, Inc., corporations, their successors and assigns, and their officers, and respondents' agents, representatives, salesmen and employees, directly or through any corporation, subsidiary, division or other device, in connection with the development, operation and/or leasing of mobile home parks in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting, directly or by implication, orally or in writing, that any facility or service is available at any mobile home park.

2. Misrepresenting, directly or by implication, orally or in writing, that any facility or service will be available at any mobile home park.

Provided, however, That it shall not be deemed a violation of this paragraph if for reasons not within their control (*e.g.*, floods, other acts of God, strikes), such facility or service is not usable and available for its intended use at the time of said occupancy by the first lessee.

3. Failing to provide mobile home parks within ninety (90) days of the effective date of this order with all of the facilities and services which they represented would be available at said parks.

It is further ordered, That the respondents shall forthwith distribute a copy of this order to each of its operating divisions, and mobile home parks, and post in a prominent place for 30 days in each mobile home park presently owned and/or operated by respondents, their successors and assigns.

It is further ordered, That the respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, incorporation, or sale resulting in the emergence of a successor firm, partnership, or

corporation, or any other change in the corporation which may affect compliance obligations arising out of this order.

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

IN THE MATTERS OF

INTERNATIONAL PAPER COMPANY - Docket C-2518
VANCOUVER PLYWOOD CO., INC. - Docket C-2519

CONSENT ORDERS, ETC., IN REGARD TO ALLEGED VIOLATIONS OF THE
FEDERAL TRADE COMMISSION ACT

Complaint, July 1, 1974—Decisions, July 1, 1974

Consent orders requiring New York City and Florien, La. manufacturers of softwood plywood, among other things to cease using a basing point system of pricing; requiring the two firms to give customers the option of paying f.o.b. prices on picked-up purchases for a 10-year period and disclose the amount of actual freight on customers' invoices covering shipments sold on a delivered price basis; and requiring that in quoting prices the companies base estimated weights upon actual experience determined by representative sampling or by other reasonable methods. The agreement also provides that the orders shall not become effective until other cases involving the softwood plywood industry are resolved; the two companies shall have the option to accept the same order which may be entered against the other five non-consenting firms.

Appearances

For the Commission: *L. Barry Costilo* and *Ira S. Nordlicht*.

For the respondents: *H. F. Baker, Howrey, Simon, Baker & Murchison*, Wash., D.C. for International Paper Company. *J. Randolph Wilson, Covington & Burling*, Wash., D.C. for Vancouver Plywood Co., Inc.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating Section 5 of the Federal Trade Commission Act (U.S.C. Title 14, Section 45), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint charging as follows:

PARAGRAPH 1. Respondent International Paper Company is a corporation organized, existing and doing business under the laws of the

State of New York with its principal office and place of business at 220 E. 42nd Street, New York, N.Y. In 1971, International Paper Company had sales of \$1,969,550,000.

PAR. 2. Respondent Vancouver Plywood Co., Inc., is a corporation organized, existing and doing business under the laws of the State of Louisiana and is engaged in the sale of plywood in substantial amounts. In 1972, it had sales of \$40,000,000. It is managed and operated by Vanply, Inc., a wholly-owned subsidiary of Skelly Oil Company. Vancouver Plywood Co., Inc. has its principal office and place of business at Florien, La.

PAR. 3. Each of the respondents is substantially engaged in the manufacture, sale and distribution of softwood plywood. In the course and conduct of their business, each of the respondents is and has been for a substantial period of time engaged in selling such products to purchasers located in various States of the United States, and has caused such products to be transported from their facilities in various States of the United States to purchasers located in various other States of the United States. Each of the respondents is therefore engaged in "commerce," as "commerce" is defined in the Federal Trade Commission Act, and has been continuously so engaged for several years.

DEFINITIONS

PAR. 4. For the purpose of this complaint, the following definitions shall apply:

(a) "Softwood"—woods from coniferous trees such as pine, fir, spruce, and hemlock, which are generally light in texture, non-resistant and easily worked.

(b) "Softwood plywood" (sometimes referred to as "plywood" in this complaint)—material consisting of sheets of softwood glued or cemented together with the grains of adjacent layers arranged at right angles or at a wide angle usually being made of uniformly thin veneer sheets on either side of a thicker central layer.

(c) "Phantom freight"—the differential in amount between the actual freight costs incurred in shipping a product and higher freight charges used as the basis for billing the customer.

NATURE OF TRADE AND COMMERCE

PAR. 5. The manufacture and sale of softwood plywood is a substantial and expanding industry in the United States. In 1971, domestic shipments were \$1,246,911,000. Softwood plywood is a material which

enters heavily into the cost of construction of residential and commercial buildings. There has been a trend toward factory-built housing in which 29 percent-39 percent more plywood is used than in conventional housing. Large markets for softwood plywood include the major urban areas and suburban centers in the northeast and northcentral regions of the nation and certain urban areas in the south and the west.

PAR. 6. Historically, plywood was made from Douglas-fir trees and manufactured almost entirely in the coastal areas of the Pacific Northwest. In more recent years, the industry expanded to inland areas as types of softwood other than Douglas-fir began to be used in the manufacture of plywood. As a result of the development of new laminating techniques permitting utilization of the woods of southern pine, Georgia-Pacific established the first plywood mill in the south in For- dyce, Arkansas in 1963. Most of the large western plywood manufacturers thereafter established plants in the south. All of the respondents now have softwood plywood plants in the south.

PAR. 7. By the end of 1971, there were 51 softwood plywood plants located in the south. Since 1963, there has been a significant increase in the production of softwood plywood nationally, with most of the increase occurring in the south. By the end of 1971, production of plywood in the south reached approximately one quarter of total U.S. output.

PAR. 8. In 1969, the top eight softwood plywood producers accounted for approximately 64 percent of domestic plant shipments and the top four producers accounted for approximately 48 percent of shipments. The concentration level has increased since that time. The 1969 concentration level increased from 1963 when the top four and top eight softwood plywood producers had approximately 36 percent and 50 percent of domestic plant shipments, respectively.

PAR. 9. In 1971, the top eight softwood plywood producers accounted for approximately 74 percent of southern production and the top four producers accounted for approximately 61 percent of that production. A number of plants have recently been built in the south by the leading producers and this has resulted in an increase in concentration in the south. The respondents are among the leading producers in either the nation or in the south.

PACIFIC NORTHWEST SINGLE BASING POINT

PAR. 10. Before Georgia-Pacific opened its first softwood plywood plant in the South, respondents were charging softwood plywood delivered prices based upon rail freight rates computed from Portland, Oreg. Georgia-Pacific and each of the respondents which subsequently opened plants in the South have continued to charge delivered prices for

softwood plywood computed on the basis of rail freight from the Pacific Northwest, despite substantial shipments of softwood plywood from respondent's plants located in the south and other places geographically distant from the Pacific Northwest. As part of this basing point system, respondents have refused to permit customers the option of purchasing softwood plywood at the plant at f.o.b. prices which did not include freight from the Pacific Northwest, or to allow their customers to arrange for the mode of transportation cheapest to the customer.

PAR. 11. The parallel conduct of respondents and others in adhering to delivered prices based upon rail rates from the Pacific Northwest for shipments from mills located in other areas of the country has resulted in substantial margins of phantom freight accruing to respondents, particularly for shipments from plants in the south made to customers located in the southern, eastern, and northcentral areas of the country. This conduct enables those respondents which have plants in the west to ship plywood from their western plants to customers in the east without being undercut in price by southern mills which have a substantial geographic cost advantage. An example of the extent of phantom freight involved in the basing point system is as follows:

In Sept. 1972, a retail dealer in New Orleans, La., purchased softwood plywood produced at a plant located 60 miles away in Holden, La. The dealer paid a delivered price of \$4,289, which was computed on the basis of rail freight from Portland, Ore. Portland is 2500 miles away and the freight was \$764. The supplying plant in fact shipped the plywood to the purchaser by truck at a freight charge of \$80. Approximately 16 percent or \$684 of the purchaser's total delivered price consisted of phantom freight.

PAR. 12. The American Plywood Association, 1119 A Street, Tacoma, Wash., to which most of the respondents belong, has disseminated to the industry freight books specifying appropriate rail rates from the Pacific Northwest. This has facilitated the workings of the above-described basing point system.

PAR. 13. The respondents and the rest of the industry use uniform estimated weights to quote delivered prices to customers. Inaccuracies in a number of these weights further inflate the amount of phantom freight.

NATURE OF THE OFFENSE

PAR. 14. In the conduct of the aforesaid business, the respondents individually, and in combination with other companies, are now using and for a number of years have used and pursued parallel courses of

business behavior constituting unfair methods of competition and unfair and deceptive acts in commerce. Among the unfair methods of competition and the unfair and deceptive acts and practices which respondents individually, and in combination, have been and are now engaged are the following:

(a) establishing and maintaining a system of delivered prices based on computation of rail freight from the Pacific Northwest for shipments made from mills located outside of that region;

(b) establishing and maintaining a system of delivered prices based on computation of rail freight and applying it to shipments made by other and cheaper modes of transportation;

(c) refusing to permit customers who purchase from southern plants the option of picking up purchases at the plant at true f.o.b. mill prices; and

(d) using identical and inaccurate estimated weights as basis for quoting delivered prices.

EFFECTS

PAR. 15. The capacity, tendency and effects of the conduct of respondents hereinbefore alleged are, among others, to:

(a) stabilize prices and provide certainty in the pricing of softwood plywood among competitors;

(b) reduce and hinder actual and potential competition among respondents in the sale and distribution of softwood plywood;

(c) create disincentives to the most efficient location of producing points;

(d) create disincentives to customers to locate close to producing points;

(e) discourage use of the cheapest and most efficient mode of transportation in given cases;

(f) discriminate in prices between customers; and

(g) mislead and deceive customers with respect to freight.

PAR. 16. The conduct of respondents hereinbefore alleged were and are unfair methods of competition, and unfair or deceptive acts in commerce in violation of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Section 45), as amended.

INTERNATIONAL PAPER COMPANY—Docket 2518

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of

the Federal Trade Commission Act, and the respondent 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 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 complaint to issue herein, 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 considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) 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 International Paper Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 220 E. 42nd Street, New York, N.Y.

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.

3. The attached order shall not become effective until thirty (30) days after the Commission enters final orders to cease and desist, resulting from litigation or consent, against Boise Cascade Corporation, Champion International Corporation, Georgia-Pacific Corporation, Weyerhaeuser Company and Willamette Industries, Inc. An order shall be considered final either by operation of law or by failure of any of the above companies to seek court review, or if court review is had as to said companies, at such time as court review is final as to all said companies. In the event the Commission obtains a final order to cease and desist, or if the Commission or any court enters an order to dismiss the complaint against any of the companies named above, International Paper Company shall for a period of thirty (30) days thereafter have the option to accept such order or dismissal in lieu of the order contained in this consent agreement.

ORDER

I

Definitions

"Softwood plywood"—material consisting of sheets of softwood glued or cemented together with the grains of adjacent layers arranged at right angles or at a wide angle usually being made of uniformly thin veneer sheets on either side of a thicker central layer.

"Softwood lumber"—softwood cut at sawmills into various sizes and shapes from coniferous wood trees.

"Particleboard"—wood panel products made from wood particles mixed with a synthetic resin or other binder and formed by heat and pressure.

"Basing point system"—a method of pricing or price computation for products produced by respondent or on hand at respondent's mill or distribution point by which that respondent quotes a delivered price computed in whole or in part on a systematic basis upon freight charges from a location or locations which are geographically different from the actual point of shipment to the customer, or computed in whole or in part upon a mode of transportation which differs from the mode actually used.

"f.o.b. price"—a price set for purchases by the customer at the distribution point or originating mill which is not based in whole or in part on a basing point system of pricing, and which does not systematically vary according to the location of the customer. An f.o.b. price shall mean a price determined for, but not necessarily different for, each mill and distribution point operated by respondent. It shall not be set at an artificial level for the purpose of affecting purchases at the mill or distribution point at an f.o.b. price.

"Actual freight charge"—freight charges determined by distance, carrier rates, and respondent's estimated weights developed in accordance with the standards set forth in Paragraph III.

II.

It is ordered, That respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or indirectly, through any corporate or other device in connection with the sale and distribution of particleboard and softwood lumber and softwood plywood in "commerce," as "commerce" is defined in the Federal Trade Commission Act, shall within sixty (60) days from the date of entry hereof:

1. Cease and desist from engaging individually, or in combination with competitors, in establishing, maintaining or using a basing point system of pricing.

2. For a period of ten (10) years, give customers the option of receiving a quotation and purchasing at f.o.b. prices in quantities of at least a truckload (approximately 40,000 lbs.) of the products covered by this order produced by respondent or on hand at respondent's mill or distribution point when the customer furnishes its own or arranges transportation compatible with respondent's facilities and complies with reasonable loading schedules and procedures of respondent. Additional cost attributable to customer pickup may be passed on to customers making pickup in the form of a surcharge above the f.o.b. price.

3. For a period of ten (10) years, state on invoices to customers for truckload or carload shipments by common or contract carrier sold on a delivered price basis the amount of actual freight charge to customers, the common or contract carrier rates from the place of shipment, the specified estimated weights if and when used, and the f.o.b. price.

III.

It is further ordered, That respondent does within one hundred twenty (120) days cease and desist from adopting or maintaining estimated weights as a basis for calculating freight charges in quoting delivered prices on softwood plywood when such estimates are not based upon the experience of actual weights of softwood plywood produced by the respondent individually. Such experience shall be accumulated and updated by representative sampling or by other reasonable methods at least once a year for five (5) years.

IV.

It is further ordered, That respondent shall cease and desist from directly or indirectly communicating, relaying or reporting to any manufacturer of softwood plywood, softwood lumber, or particleboard, information relating to prices, terms or conditions of sale (including transportation rates, charges or routing information) at which these products are sold or may be sold, except in connection with a bona fide sale to, or purchase from, such manufacturer or in connection with negotiations related thereto.

V.

Nothing contained in this order shall be interpreted as prohibiting respondent, when acting individually, 1) from granting allowances to

meet lower prices of competitors, 2) from absorbing all or any part of actual freight charges on shipment to any geographic area, 3) from charging the same delivered price to all customers within the normal area for delivery by a distribution point or mill when delivered by respondent's vehicles, or 4) from making otherwise legal communications to governmental bodies and trade or news publications.

VI.

It is further ordered, That respondent shall notify all persons having sales and policy responsibilities in its organization of the terms of the order and publish same in at least two major trade journals or periodicals twice annually for each of two years from the date of this order.

VII.

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

VIII.

It is further ordered, That within sixty (60) days from the date of service of this order, and on a periodic basis thereafter, the respondent shall submit, in writing, to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent is meeting its compliance obligations.

VANCOUVER PLYWOOD CO., INC.—Docket 2519

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent 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 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 complaint to issue herein, 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 considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) 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 Vancouver Plywood Co., Inc., is a corporation organized, existing and doing business under the laws of the State of Louisiana, with its office and principal place of business at Florien, La.

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.

3. The attached order shall not become effective until thirty (30) days after the Commission enters final orders to cease and desist, resulting from litigation or consent, against Boise Cascade Corporation, Champion International Corporation, Georgia-Pacific Corporation, Weyerhaeuser Company and Willamette Industries, Inc. An order shall be considered final either by operation of law or by failure of any of the above companies to seek court review, or if court review is had as to said companies, at such time as court review is final as to all said companies. In the event the Commission obtains a final order to cease and desist, or if the Commission or any court enters an order to dismiss the complaint against any of the companies named above, Vancouver Plywood Co., Inc. shall for a period of thirty (30) days thereafter have the option to accept such order or dismissal in lieu of the order contained in this consent agreement.

ORDER

I

Definitions

"Softwood plywood"—material consisting of sheets of softwood glued or cemented together with the grains of adjacent layers arranged at right angles or at a wide angle usually being made of uniformly thin veneer sheets on either side of a thicker central layer.

"Softwood lumber"—softwood cut at sawmills into various sizes and shapes from coniferous wood trees.

"Basing point system"—a method of pricing or price computation for products produced by respondent or on hand at respondent's mill or

distribution point by which that respondent quotes a delivered price computed in whole or in part on a systematic basis upon freight charges from a location or locations which are geographically different from the actual point of shipment to the customer, or computed in whole or in part upon a mode of transportation which differs from the mode actually used.

"f.o.b. price"—a price set for purchases by the customer at the distribution point or originating mill which is not based in whole or in part on a basing point system of pricing, and which does not systematically vary according to the location of the customer. An f.o.b. price shall mean a price determined for, but not necessarily different for, each mill and distribution point operated by respondent. It shall not be set at an artificial level for the purpose of affecting purchases at the mill or distribution point at an f.o.b. price.

"Actual freight charge"—freight charges determined by distance, carrier rates, and respondent's estimated weights developed in accordance with the standards set forth in Paragraph III.

II.

It is ordered That respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or indirectly, through any corporate or other device in connection with the sale and distribution of softwood lumber and softwood plywood in "commerce," as "commerce" is defined in the Federal Trade Commission Act, shall within sixty (60) days from the date of entry hereof:

1. Cease and desist from engaging individually, or in combination with competitors, in establishing, maintaining or using a basing point system of pricing.

2. For a period of ten (10) years, give customers the option of receiving a quotation and purchasing at f.o.b. prices in quantities of at least a truckload (approximately 40,000 lbs.) of the products covered by this order produced by respondent or on hand at respondent's mill or distribution point when the customer furnishes its own or arranges transportation compatible with respondent's facilities and complies with reasonable loading schedules and procedures of respondent. Additional cost attributable to customer pickup may be passed on to customers making pickup in the form of a surcharge above the f.o.b. price.

3. For a period of ten (10) years, state on invoices to customers for truckload or carload shipments by common or contract carrier sold on a delivered price basis the amount of actual freight charge to customers, the common or contract carrier rates from the place

of shipment, the specified estimated weights if and when used, and the f.o.b. price.

III.

It is further ordered, That respondent does within one hundred twenty (120) days cease and desist from adopting or maintaining estimated weights as a basis for calculating freight charges in quoting delivered prices on softwood plywood when such estimates are not based upon the experience of actual weights of softwood plywood produced by the respondent individually. Such experience shall be accumulated and up-dated by representative sampling or by other reasonable methods at least once a year for five (5) years.

IV.

It is further ordered, That respondent shall cease and desist from directly or indirectly communicating, relaying or reporting to any manufacturer of softwood plywood or softwood lumber, information relating to prices, terms or conditions of sale (including transportation rates, charges or routing information) at which these products are sold or may be sold, except in connection with a bona fide sale to, or purchase from, such manufacturer or in connection with negotiations related thereto.

V.

Nothing contained in this order shall be interpreted as prohibiting respondent, when acting individually, 1) from granting allowances to meet lower prices of competitors, 2) from absorbing all or any part of actual freight charges on shipment to any geographic area, 3) from charging the same delivered price to all customers within the normal area for delivery by a distribution point or mill when delivered by respondent's vehicles, or 4) from making otherwise legal communications to governmental bodies and trade or news publications.

VI.

It is further ordered, That respondent shall notify all persons having sales and policy responsibilities in its organization of the terms of the order and publish same in at least two major trade journals or periodicals twice annually for each of two years from the date of this order.

VII.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of the order,

such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries.

VIII.

It is further ordered, That within sixty (60) days from the date of service of this order, and on a periodic basis thereafter, the respondent shall submit, in writing, to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent is meeting its compliance obligations.

IN THE MATTER OF

AMERICAN ALUMINUM CORPORATION, ET AL.

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

*Docket 8865. Complaint, Oct. 4, 1971—Order & Opinion, July 2, 1974**

Order requiring a Birmingham, Ala., seller and distributor of residential aluminum siding, storm windows, storm doors and various other home improvement products, among other things to cease using any sales plan employing false, misleading or deceptive statements or representations to obtain leads to potential customers; disparaging advertised products; misrepresenting the savings available to purchasers; misrepresenting the duration, nature or extent of any guarantee; misrepresenting the durability or efficacy of its products; failing to maintain adequate records to substantiate any advertising claims made; and violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *John H. Bedford*, and *W. Roland Campbell*.
For the respondents: *Joseph J. Lyman*, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Truth in Lending Act and the regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that American Aluminum Corporation, a corporation, and Norman J. Foucha and Bobby G. Smith,

* On September 16, 1974, respondents filed a petition for review in the Court of Appeals for the Fifth Circuit.

6. Certain of respondents' home improvement products are unconditionally guaranteed or guaranteed for life.

7. Respondents' siding materials will never require painting.

PAR. 6. In truth and in fact:

1. Respondents' said advertised offers are not genuine or bona fide offers but are made for the purpose of obtaining leads as to persons interested in the purchase of respondents' products. After obtaining such leads, respondents' salesmen or representatives call upon such persons at their homes and, according to their established mode of operation, respondents' salesmen or representatives disparage the advertised product and otherwise discourage the purchase thereof and attempt to sell and frequently do sell a different and more expensive product instead of the advertised product for which the customer was originally solicited.

2. Respondents' products are not being offered for sale at special or reduced prices, and savings are not thereby afforded purchasers because of reductions from respondents' regular selling prices. In fact, respondents do not have regular selling prices but the prices at which respondents' products are sold vary from customer to customer depending on the resistance of the prospective purchaser.

3. Respondents' advertised offer is not made for a limited time only. Said merchandise is advertised regularly at the represented prices and on the terms and conditions therein stated.

4. Purchasers of respondents' products do not receive a free bonus or gift in the form of free storm windows.

5. After installation of respondents' aluminum siding is completed, homes of purchasers are not used for demonstration or advertising purposes; and purchasers, as a result of allowing their homes to be used as models, are not granted reduced prices, nor do they receive allowances, discounts or commissions.

6. Respondents' home improvement products are not unconditionally guaranteed or guaranteed for life. Such guarantee as may be provided is subject to numerous terms, conditions and limitations respecting the duration of the guarantee and the extent and manner of performance thereunder. Furthermore, in a substantial number of cases, respondents or their salesmen or representatives fail to furnish any written guarantee to the customer and fail to disclose the life during which said guarantee applies.

7. Respondents' siding materials will require painting.

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

PAR. 7. In a substantial number of instances and in the usual course of their business, respondents sell and transfer their customers' obligations, procured by the aforesaid unfair, false, misleading and deceptive means, to various financial institutions. In any subsequent legal action to collect on such obligations, these financial institutions or other third parties, as a general rule, have available and can interpose various defenses which may cut off certain valid claims customers may have against respondents for their failure to perform or for certain other unfair, false, misleading or deceptive acts and practices.

PAR. 8. In the conduct of their aforesaid business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of aluminum siding and other home improvement products of the same general kind and nature as those sold by respondents.

PAR. 9. The use by respondents of the 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 respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. 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.

COUNT II

Alleging violation 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. 11. In the ordinary course and conduct of their business, as aforesaid, respondents regularly extend, and for some time last past have 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. 12. In the ordinary course of their business as aforesaid, respondents cause to be published advertisements of their goods and services,

as "advertisement" is defined in Regulation Z. These advertisements aid, promote, or assist directly or indirectly extensions of consumer credit in connection with the sale of these goods and services. By and through the use of the advertisements, respondents:

1. State that no downpayment is required in connection with a consumer credit transaction, without also stating all of the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10 (d) (2) thereof:

- (i) The cash price;
- (ii) The number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
- (iii) The amount of the finance charge expressed as an annual percentage rate; and
- (iv) The deferred payment price.

PAR. 13. By and through the use of respondents' contract to perform various home improvements, a security interest, as "security interest" is defined in Section 226.2 (z) of Regulation Z, is or will be retained or acquired in real property which is used or expected to be used as the principal residence of the respondents' customers. Respondents' retention or acquisition of such security interest in said real property thereby entitles their credit customers to be given the right to rescind that transaction until midnight of the third business day following the consummation of the transaction or the date of delivery of all the disclosures required by Regulation Z, whichever is later.

Respondents have caused the following additional information and clause to appear in its contract with credit customers:

The undersigned agree(s) that due to the custom nature of the work called for herein (he) (they) will pay as liquidated and agreed damages the sum of 25% of the agreed price upon (his) (their) cancellation of this agreement.

By and through the use of the above-quoted additional information and clause, respondents have and are representing to their customers that they are liable for damages in the event that these customers exercise their right to rescind, thereby violating Section 226.9 (d) of Regulation Z. And, said additional information is stated and utilized so as to mislead or confuse the customer and contradicts, obscures and detracts attention from the information required by Regulation Z to be disclosed, thereby violating Section 226.6 (c) of Regulation Z.

PAR. 14. Pursuant to Section 103 (q) of the Truth in Lending Act, respondents' aforesaid failure to comply with the provisions of Regulation Z constitute violations of that Act, and, pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY DAVID H. ALLARD,
ADMINISTRATIVE LAW JUDGE

OCTOBER 9, 1973

PRELIMINARY STATEMENT

This proceeding was commenced with the issuance of a complaint on Oct 4, 1971,¹ charging the corporate respondent and Norman J. Fouca and Bobby G. Smith, individually and as officers of the corporate respondent, with violations of Section 5 of the Federal Trade Commission Act by committing unfair methods of competition and unfair and deceptive acts and practices in commerce and violating the Truth in Lending Act and the implementing regulations promulgated thereunder.

A pretrial conference was held on Dec. 21, 1971; a request for admissions was filed by complaint counsel on Jan. 18, 1972, to which respondents timely failed to answer. On Mar. 9, 1972, the matter was assigned to the undersigned. Hearings were held in Birmingham, Ala., on Apr. 4, 1972, in Chattanooga, Tenn., on Apr. 5, 6, and 7, 1972, and in Birmingham, Ala., on May 30, 1972. Thereafter, hearings were held in abeyance to allow complaint counsel to proceed with remedies, the net result of which was to enforce the subpoenas issued by the Commission against the named individual respondents as well as several other individuals. When this matter was resolved, the hearings were promptly set and concluded in Birmingham, Ala., on July 10 and 11, 1973. Briefs were filed on Sept. 10, 1973.

At those hearings, testimony and documents were incorporated in the record in support of the complaint as well as in opposition thereto. This proceeding, thus, is before the administrative law judge upon the complaint, answer, admissions, testimony and other evidence, proposed findings of fact and conclusions, and briefs filed in support thereof submitted by the parties have been carefully considered and those findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matter.

Having heard and observed the witnesses and having carefully reviewed the entire record² in this proceeding, together with the proposed

¹ On brief, complaint counsel erroneously maintain the date to be Apr. 3, 1971.

² References to the record are made in parentheses, and certain abbreviations are used as follows:

Comp.—Complaint

Ans.—Answer

Tr.—Transcript page

CX—Commission exhibit

RX—Respondents' exhibit

findings, conclusions, and briefs submitted by the parties as well as replies, the administrative law judge makes the following findings as to facts, conclusions, and order.

FINDINGS OF FACT

1. Respondent American Aluminum Corporation is a corporation organized in 1965, under the laws of the State of Alabama, with its principal office located at 1624 6th Avenue North, Birmingham, Ala.³ (Comp., par. 1; Ans. par. 1).

2. Respondent American Aluminum Corporation also does business under the trade name National Aluminum Corporation. (Ans. par. 1).

3. Respondents Norman J. Foucha and Bobby G. Smith served as the principal officers of the corporate respondent. However, respondent Foucha sold his interest in the corporation to Bobby G. Smith in Jan. 1971, and thereafter severed all relationships with the corporate respondent.⁴ (Comp. par. 1; Ans. par. 1; Tr. 606, 607).

4. Respondent Bobby G. Smith now formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. (Comp. par. 1; Tr. 751-52, 754, 762, 608, 611-12, 621-22, 700).

5. Smith hires and fires salesmen (Tr. 699), furnishes leads to them (Tr. 706-07), approves and pays for the mailers and advertisements (Tr. 707-08), determines to whom mailers will be sent (Tr. 716), presides at sales meetings (Tr. 711-12); resolves disputes with customers (Tr. 705-06), assumes responsibility for installation (Tr. 699), and determines to which finance company to transfer the customers' retail installment contract (Tr. 704).

6. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, and distribution of residential aluminum siding, storm windows, storm doors and various other home improvement products to the public and in the installation thereof. (Comp. par. 2; Ans. par. 2).

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act,
7. Respondents, in the course and conduct of their business, now

³ At some period of time, the principal office appears to have been moved to 228 First Avenue North, Birmingham, Ala. (Tr. 697-98).

⁴ In their proposed findings, respondents admit that the corporate respondents' internal office affairs and fiscal policies were conducted primarily by respondent Foucha as a corporate officer until he sold his interest to Bobby G. Smith (Tr. 609, 690, 707). Respondents also admit that during that time frame, respondent Bobby G. Smith in his capacity as a corporate officer hired the salesmen and generally was in charge of selling the corporate respondents' products. (Tr. 619, 690-91, 699, 707, 714).

cause, and for some time last past have caused, their said products, advertising and promotional material, contracts, and other business papers and documents to be shipped and transmitted from and to their place of business, located as aforesaid in the State of Alabama and from the suppliers of said products, located in various States of the United States, to their prospective purchasers and purchasers thereof, located in various other States of the United States, other than the State of Alabama and the states in which said suppliers are located, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act. (Comp. par. 3; Admitted at prehearing conference, Tr. 5).⁵

8. Respondents' gross sales during 1968, were \$1,477,977 and in 1969, \$1,664,867 (CX 10b). Since Smith became president in Jan. 1971, sales have not diminished appreciably and during 1972, were about \$1,000,000 (Tr. 712-13).

Respondents' Advertisements and Representations Therein

9. Respondents' principal method of advertising its products is through mailouts to people in selected areas where it plans to solicit business (Tr. 611, 616). Approximately 50,000 mailers were sent out each week (Tr. 714) to different states (Tr. 616). CX 1a-8b are typical mailouts. They represent formats of advertisements used by respondents during the period of 1961-1971 (Admission #2).

10. The mailouts most often sent out by American offered aluminum siding installed for \$189.50, \$199.50 or \$219.50 with free storm windows (CX 1a-7b).

a. A salesman testified that leads given him were always from the mailers, with a price of \$189.50, \$199.50 or \$219.50.

b. All of the 20 public witnesses whose testimony was adduced at the hearings had received mailers similar to CX 1a-7b. The mailers featured the cheaper grade siding at less than \$219.50.

c. There was no evidence that the mailer featuring the more expensive siding (CX 8a-8b) had ever been used, except for the testimony of respondent Foucha, who claimed some had been sent out (Tr. 616).

⁵ In their proposed finding No. 8, respondents also admit that their business "was transacted under circumstances disclosing, they were engaged 'in commerce' as that term is defined in the Federal Trade Commission Act."

Initial Decision

84 F.T.C.

11. Typical and illustrative of the contents of respondents' mailouts, but not all-inclusive thereof, are the following:

ALL-ALUMINUM SIDING SALE
 MANY MONTHS TO PAY-LOW MONTHLY PAYMENTS
 PAY NOTHING FOR MONTHS AFTER INSTALLATION
 \$199.50
 (CX 1a, CX 2a, CX 4a)

ENJOY EVERLASTING HOME BEAUTY FREE BONUS

Special Offer To You-If you act promptly we will include Storm Windows for every window in your home as a FREE Bonus with the purchase of our All Aluminum or Siding Special.

- 100% Guaranteed Genuine Aluminum Siding
- Completely installed by our our expert home finishers.
- Absolutely NO EXTRAS to pay.
- YOUR CHOICE of beautiful decorator colors.
- One lifetime installation protects forever!

(CX 1a, 2a, 3b, 4a, 5b, 6a, 33a, 35a).

THIS CARD IS WORTH \$431.00 TO YOU AND YOU GET A BONUS GIFT FREE WITH PURCHASE

THIS IS A LIMITED OFFER!!

MAIL THIS CARD TODAY AND GET YOUR FREE GIFT

Mail this card within 7 days to become eligible for this savings, plus FREE Storm Windows for every window in your home with the purchase of this Aluminum Siding for your home.

(CX 1b, 2b, 7b, 33a, 35a)

12. Each of the mailouts sent out included a business reply card and when prospective customers fill in the reply cards and return them to respondents, the cards then become leads and are turned over to salesmen (Tr. 400-01, 619, 707). Thereafter, the salesmen make appointments with the prospective customers and attempt to sell them aluminum siding installed on their homes (Tr. 619). The respondents generally have two grades of aluminum siding that they offer to sell. The first is what respondents call Imperial siding and the second is referred to as cheaper siding (Tr. 704). The cheaper siding was offered for sale in respondents' mailers at \$199.50, \$189.50, \$219.50 and \$199 completely installed (CX 1a-7b). The Imperial siding is advertised in a mailer at a price of \$199.50 (CX 8a-8b).

13. Respondent American furnished salesmen with its contract forms, mortgage forms, and rescission notices, and other forms necessary to make sales of aluminum siding (Tr. 465, 468). The salesmen would then, upon making a sale, obtain the customer's signature on a

blank retail installment contract which was later completed by American (Tr. 474).

14. Respondent American furnished salesmen unpainted samples of the cheaper grade aluminum siding and storm windows (CX 59) to show to customers (Tr. 434). These samples were used by salesmen to show the siding advertised at less than \$219.50, with a free storm window (Tr. 434).

15. Through oral statements of its salesmen who called on prospective customers in response to receiving a reply from the mailouts, respondents made the following representations with regard to the transactions:

a. The offer set forth in said advertisements is a bona fide offer to sell the advertised products at the prices and on the terms and conditions stated.

b. Respondents' products are being offered for sale at special or reduced prices, and that savings are thereby afforded to purchasers from respondents' regular selling price.

c. Respondents' advertised offer is made for a limited time only.

d. That purchasers of respondents' products would receive a Free Bonus or gift in the form of free storm windows.

e. After the installation of respondents' aluminum siding is completed, the homes of purchasers will be used for demonstration and advertising purposes by the respondents; and, as a result of allowing their homes to be used as models, purchasers will be granted reduced prices or will receive allowances, discounts or commissions.

f. Certain of respondents' home improvement products are unconditionally guaranteed for life.

g. Respondents' siding materials will never require painting.⁶

Bait and Switch Sales Tactics

16. Respondents' sales methods were described by one respondent as "step up selling" which means "When you go into a customer's house and sell a product and after you sell the product you show them something besides what you've advertised." (Foucha, Tr. 610-11). To accomplish this, the salesman sells the cheaper grade siding and obtains a signed contract for it. After obtaining the signed contract, the salesman persuades the customer to purchase the Imperial grade siding at a much higher price (Smith, Tr. 733-34). Salesmen were told by respondents to

⁶A, b, c and d above were admitted by respondents at the pretrial conference (Prehearing Tr. 21-22). The representations e, f and g, which were not admitted, will be discussed fully hereinafter under the headings "Representations Regarding Use of Home in Advertising," "Guarantee," and "Never Requires Painting."

sell the better grade material to earn a commission (Cameron, Tr. 410).

17. During the time period of Mar. 12, 1969 through Dec. 31, 1969, respondents neither sold nor installed any residential siding at the advertised prices of \$189.50, \$199, \$199.50 or \$219.50 (Admission #3). No documentary evidence was presented to show that American had ever sold residential siding at the above-mentioned prices.

18. According to respondent Foucha, American kept something like 100 squares of the cheaper grade siding on hand in its warehouse (Tr. 625). The installation manager testified that he had enough of the cheaper grade siding in stock to do only five or six jobs (Tr. 762). Even though it maintained this limited amount in stock, American purchased none of the residential siding advertised in the mailouts for cheaper grade siding (CX la-7b) during the years 1968 and 1969 (Admission #7). Although the records of sales for the nine-month period show no sales at \$219.50 or less, there were sales at much higher prices where it appears that the cheaper grade siding was used (Tr. 643-46; CX 11Z228, 11Z268, 11Z269). In these instances, the price per square far exceeded the price per square advertised in CX la-7b, which would be \$19.95 to \$21.95.

19. American could not have operated profitably if it had sold its aluminum siding at prices of \$199.50 with free storm windows.

a. According to respondent Foucha, the cost of the siding, exclusive of any accessories needed to install it, was \$10-12 per square and the installer was paid \$6 per square (Tr. 620). A square is 100 square feet. Overhead expenses, including advertising, were for the year 1969, 34.7 percent (CX 10b) and on a \$199.50 sale would amount to \$69.23. On a \$199.50 job, the siding would cost a minimum of \$100, the installation cost would be \$60 and overhead expense would be \$69.23. This would total \$229.23.

b. This figure, however, does not take into consideration any commission to the salesman or the cost of storm windows which were supposed to be given free with the job. Thus American, taking into consideration all costs and expenses of doing business, would lose money on any job done at less than \$219.50.

20. Respondents discouraged their salesmen from selling the siding advertised for \$219.50 or less by paying salesmen a very small commission on it, and a much better commission on the Imperial grade siding.

a. The commission on the Imperial grade siding was 50 percent of all money charged over \$65 per square and thus depended on the price charged the customer (Foucha, Tr. 621).

b. The commission on the siding advertised at less than \$219.50 was a couple of dollars (Cameron, Tr. 412). This, according to a salesman of

American, being practically nothing, induced you to sell a better grade material (Tr. 412).

21. Respondents discouraged the purchase of aluminum siding advertised at a price of \$219.50 or less by salesmen showing customers unpainted samples which were unattractive.

a. Fifteen public witnesses who had been switched to the Imperial grade siding were shown unpainted samples after they had first signed a contract for siding at \$199.50 (Parkerson, Tr. 141; Ellis, Tr. 171; Smith, Tr. 247; Bryant Tr. 264, the testimony of 11 of these witnesses was stipulated as being the same as that of Woods Bryant, CX 60; hereinafter when reference is made to Bryant's testimony, it includes the 11 witnesses whose testimony was stipulated).

b. These witnesses described the sample as looking like tin (Tr. 141, 247, 264) or what you would put on a barn (Tr. 140). One witness was told he would have to paint it right after it was put on to keep it from tarnishing (Ellis, Tr. 172). After Bryant saw the unpainted sample, he told the salesman he wouldn't have it (Tr. 265).

22. Respondents, after binding the prospective customer to a contract for the siding of \$219.50 or less, immediately proceeded to disparage it, claiming that it would require special maintenance and would not prove satisfactory.

a. Witnesses who had been switched were told that the \$199.50 siding would require regular maintenance such as painting or treatment (Tr. 172, 247, 264).

b. Some were told it would rattle because of not being interlocked (Tr. 173, 174, 268) and that anything would dent it (Tr. 269).

c. Four witnesses who contracted for siding advertised in the CX la-7b mailers were told the siding which they purchased would require some maintenance. They were told such things as it would have to be treated twice a year (Creel Tr. 66), would have to be painted every 2 or 3 years (Winsett, Tr. 98), would have to be waxed each year (Hatcher, Tr. 274), would have to be painted (Whaley, Tr. 317). Two of these witnesses were told the siding would not interlock (Winsett, Tr. 97; Whaley, Tr. 317).

23. When a customer who had contracted for the siding offered at \$219.50 or less would not be switched to the Imperial grade siding, respondents failed to perform under its contract to install the aluminum siding. Various reasons were given, such as the siding was not in stock.

a. Five witnesses, who contracted for cheaper grade siding between the years 1966-1971, were unable to get performance by American (Creel, Tr. 57-91; Winsett, Tr. 93-119; Cannon, Tr. 223-39; Hatcher, Tr. 82-93; Whaley, Tr. 24-37). Joseph W. Cannon spent \$25 in telephone

charges calling American about installation of the cheaper siding job at \$259, to no avail (Tr. 230-32). He made at least 15 calls to the company (Tr. 236) and was told such things as the siding was not in stock (Tr. 231). He paid \$25 down on the contract (CX 228) by check to American (CX 50a and b). In spite of his many efforts in prodding American, he never received performance or his deposit back (Tr. 232). Even the Chattanooga Better Business Bureau and the Birmingham Better Business Bureau, whom he contacted, did not get him his money back (Tr. 231-32).

b. Martha Winsett, who had contracted with American for a siding job at \$259 in Sept. of 1971 (Tr. 98), was promised installation within two weeks (Tr. 100). When no one came to install the siding, she wrote the company but received no answer (Tr. 100-02). Believing she was bound to the contract and wanting siding put on her house, she contacted the Birmingham Better Business Bureau and finally, through their efforts, received a letter from American canceling the contract (Tr. 102-03; CX 46).

c. Mattie Creel signed a contract for the cheaper grade siding at \$297, paying \$50 down (Tr. 65; CX 45). Installation, which had been promised in two weeks, was never done (Tr. 69-70). She called American several times and was given various excuses why the job had not been done, such as the company was out of siding (Tr. 69-70). She was finally told her money for downpayment was being mailed (Tr. 69-70). When it was not received, she called again and was told she could get "two lawyers" to collect her downpayment and it would not do any good (Tr. 70). Finally, after four months of trying to get the job done or her money back, she contacted the Better Business Bureau and finally received a refund (Tr. 71).

c. Ben Whaley contracted with American for the cheaper grade siding and paid \$39.50 down in 1966 (Tr. 318). He was promised that the siding would be installed by Dec. 15, 1966. As a result of not hearing from them, he wrote letter but received no reply (Tr. 321). His down payment was not refunded until he went to the Better Business Bureau (Tr. 320-21).

d. James Hatcher, who contracted with American for the cheaper grade siding at \$335 (CX 39c), also failed subsequently to hear from that company (Tr. 276). He had been promised installation within sixty days (Tr. 274). He called at least three times and on one occasion was told it was not in stock (Tr. 276). Subsequently, he answered a similar mailer and contracted with Southern Aluminum Enterprise for a similar job at \$398 (Tr. 277, 279, CX 40). He never again heard from this company (Tr. 280), which actually is a trade name used by respondent American (Foucha, Tr. 612).

Price Savings Representation

24. The representation in respondents' mailers that a customer saves \$431 on the advertised special (CX 1b, 2b, 4b, 7b) clearly implies that the regular price would be \$630.50. Also, the representation that \$189.50 is a "50% discount special" represents a regular price of \$379 for the cheaper grade siding. Respondents do not have a regular price of \$630.50, \$379 or any other regular price for the cheaper grade siding. Respondents admitted there is no regular price for its products and the prices at which they are sold vary from customer to customer, depending on the resistance of the prospective customer (Prehearing Conference, Tr. 27).

25. In its mailer for the Imperial grade siding (CX 8a-b), respondents claim "if you act now save 20% NOW ONLY \$1999.00." This clearly infers a regular selling price for the Imperial grade siding of \$2493.00 for ten squares, which would amount to \$249.30 per square. The amount is much in excess of the usual and the highest price at which the Imperial grade siding is actually sold.

a. According to respondent Foucha, the maximum price which salesmen would be allowed to charge a customer for Imperial siding is \$100 to \$150 per square (Tr. 618).

b. According to respondent Smith, the average price of the Imperial siding is only \$90 per square (Smith, Tr. 739).

c. Cameron, a salesman, testified the list price for Imperial siding installed with ten squares would be \$1595 (Tr. 502). The normal price would be based on \$100 per square or \$1000 for the job advertised on the mailer CX 8a-b (Tr. 502, 503).

d. Thus, the highest price which a salesman would be authorized to charge for the Imperial grade siding on the mailer would be \$1500 and the average price on a job as advertised would be \$900-\$1000.

e. The claimed regular price is more than two times this average price of a job and 60 percent in excess of the highest possible price charged customers.

Limited Time Offer

26. The offer made in the mailers for siding at \$219.50 or less was not for a limited time only as represented. The mailers with the offer proclaiming "All American Siding Sale" were sent out to prospective customers each and every week (Smith, Tr. 707-08). In fact, about 50,000 mailers were sent each week (Smith, Tr. 714).

a. The so-called special offer was a continuing offer even though it had the appearance of bait designed to make sales at higher prices. The

only sense in which the offer was limited was that American might not send a salesman to the area for an isolated lead (Cameron, Tr. 530-31).

b. The mailer, however, clearly gives the impression that the sale advertised was a limited offer and not being continually made (CX la-7b).

c. The prospective customer considered the price at which the siding was advertised to be an exceptional bargain (Winsett, Tr. 94; Parkerson, Tr. 139; Ellis, Tr. 159; Bryant, Tr. 263).

d. Because it had the appearance of a bargain, the prospective customer mailed it back right away (Bryant, Tr. 263). Some customers sent the card back shortly after receiving the mailer to qualify for the free storm windows, which offer they assumed to be limited (Creel, Tr. 63; Parkerson, Tr. 137).

27. Respondents' salesmen tell customers the reduced price on the Imperial grade siding is a limited offer (American, Tr. 458). As an example, one customer was told the offer of Imperial siding at \$995 was limited (Smith, Tr. 251). The Imperial siding is offered continuously at similar prices (See Finding 25).

Free Gift Representation

28. The mailers state "mail this card today and get your free gift" (CX la-7b). Prospective customers do not receive any gift for sending the mailer. In fact, customers do not receive the free gift of storm windows mentioned in its mailers for making a purchase.

a. None of the 20 customer witnesses received any free gift or storm windows.

b. Mrs. Parkerson, who was promised storm windows and doors by the salesman, did not receive them (Tr. 141). The salesman entered "no plastic windows" on her contract (CX 57) to make her believe she would receive aluminum storm windows.

c. The free storm windows are not given to customers who purchase the Imperial grade siding and they are only free with the cheaper material (Campbell, Tr. 767).

d. Salesmen were told to tell customers "that they're plastic, and cost about a dollar each to manufacture" (Cameron, Tr. 433).

e. Mrs. Creel sent the reply card back in immediately in order to receive the free storm windows offered (Tr. 63). She contracted to purchase the advertised special in the mailer and did not receive either it or the storm windows (Tr. 68-69).

Representations Regarding Use of Home in Advertising

29. Respondents, through their salesmen, offer customers a so-called reduced price if they will allow their homes to be used for advertising and demonstration purposes.

a. All of the customers who purchased the Imperial grade siding were told that they were receiving a price reduction for allowing their homes to be used for advertising purposes (Ellis, Tr. 175; Smith, Tr. 253; Parkerson, Tr. 143; Bryant Tr. 266).

b. In addition to this, James W. Smith was offered \$50 for every other job sold as the result of the company using pictures taken of his home (Tr. 253).

30. Respondents, after installation of siding on the homes of purchasers, do not use the homes for demonstration or advertising purposes (Admitted at Prehearing Conference, Tr. 30).

Guarantee

31. Respondents, through their salesmen, represent that their Imperial grade siding is guaranteed for life and that customers will receive a written guarantee to this effect.

a. Cameron, a salesman, testified that each and every customer is told he will receive a lifetime guarantee on the Imperial siding (Tr. 450, 456).

b. Customers were told that the expensive siding was guaranteed "just as long as it was on the house" (Bryant, Tr. 267). James W. Smith, who was told it was guaranteed a lifetime (Tr. 251), was also told "we'll guarantee it not to blow off" (Tr. 250).

32. Respondents' written guarantee on the Imperial grade siding is as follows:

Vendor guarantees this aluminum siding applied on your home to be free from defects of workmanship and material, and shall replace any defective part free of charge for the lifetime of your structure; however, the seller will not be responsible for defects or damages arising through negligence of purchaser or acts of anyone else. (CX 9; Foucha, Tr. 626-27).

33. Respondents do not furnish each customer the written guarantee on the Imperial grade siding (Smith, Tr. 251-52; Bryant, Tr. 268).

34. Respondents' home improvement products are not unconditionally guaranteed. Such guarantee as may be provided is subject to numerous terms, conditions and limitations respecting the duration of the guarantee and the extent and manner of performance thereunder (Admitted, Prehearing Conference, Tr. 31).

35. Respondents do not fully honor the guarantee on the Imperial grade siding.

Illustrative is the fact that the Imperial grade siding which was installed by respondents on James W. Smith's home blew off and respondents refused to fix it, claiming this was not covered by the guarantee (Tr. 250, 252).

36. Respondents' representations on its mailers for cheaper grade siding "100% Guaranteed Genuine Aluminum Siding," "One lifetime installation protects forever" and "Enjoy Everlasting Home Beauty" infer that it is guaranteed to last and protect one's home indefinitely. One witness expressed it this way, "I just took it from the card that it was good aluminum and it was—I kind of took it as a lifetime guarantee" (Ellis, Tr. 171).

37. There was no guarantee on the cheaper grade siding other than that it was 100 percent aluminum siding (Foucha, Tr. 627). Salesmen told prospective customers that the only guarantee on the cheaper grade siding was that it would be installed properly (Cameron, Tr. 447).

Never Requires Painting

38. Respondents, by the statements in their mailers (CX la-7b), "Stop Unnecessary Home Problems" and "Enjoy Everlasting Home Beauty," imply that the siding advertised will not require painting or other maintenance.

39. The cheaper grade siding advertised requires maintenance including painting at regular intervals according to what respondents' salesmen tell prospective customers (See Finding 22).

COUNT II

Alleging violations of the Truth in Lending Act and the implementing regulation promulgated thereunder and of the Federal Trade Commission Act,

40. Respondents regularly extend, and for some time last past have 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 (Comp. par. 11; Ans. par. 11; Admitted, Prehearing Conference, Tr. 39).

41. Respondents, in their mailers advertising aluminum siding, state that it can be purchased with "no down payment" without disclosing the other terms of sales, such as:

- a. The cash price;

- b. The number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
- c. The amount of the finance charge expressed as an annual percentage rate; and
- d. The deferred payment price.

(Admitted, Prehearing Conference, Tr. 41).

42. Since the Truth in Lending Act went into effect on July 1, 1969, respondents have caused the following additional information and clause to appear in their contracts with credit customers:

The undersigned agree(s) that due to the custom nature of the work called for herein (he) (they) will pay as liquidated and agreed damages the sum of 25% of the agreed price upon (his) (their) cancellation of this agreement. (CX 24c, 25c, 37, 42, 57)

43. By and through the use of the above-quoted additional information and clause, respondents have and are representing to their customers that they are liable for damages in the event that these customers exercise their right to rescind, and said additional information misleads and confuses the customer and contradicts, obscures and detracts attention from the information required by Regulation Z to be disclosed.

a. The experience of Billy Ellis, who testified at the hearings, illustrates how a prospective customer can be confused about his right to rescind the contract under the Truth in Lending Act.

b. Ellis contracted for the Imperial grade siding on Oct. 9, 1969 (CX 32; Tr. 182). He was given a group of papers in an envelope, which he was told by the salesman to keep and not do anything with them until hearing from the company (Tr. 183). The next day after signing the contract, Ellis decided he had made a bad deal and would like to back out (Tr. 183). He did not do anything about backing out of the contract because the contract had the appearance of being legally binding (Tr. 183-84).

Holder in Due Course

44. In a substantial number of instances and in the usual course of their business, respondents sell and transfer their customers' obligations to various financial institutions. In any subsequent legal action to collect on such obligations, these financial institutions or other third parties, as a general rule, have available and can interpose various defenses which may cut off certain valid claims customers may have against respondents for their failure to perform or for certain unfair, false, misleading or deceptive acts and practices.

a. This was admitted by respondents at a prehearing conference, Tr. 37-38.

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b. The experience of James W. Smith illustrates how a customer has no recourse against the lending institution purchasing his contract with respondents. Smith claimed that respondents failed to honor their guarantee on the Imperial grade siding installed on his home (Tr. 250, 252). Consequently, Smith complained to the finance company to whom he was making payments, Avco, that American had not completed service on his house (Tr. 255). Smith testified regarding Avco's reply as follows: "They said there wasn't nothing they could do about it. It was between me and the company, American Aluminum Corporation." (Tr. 255).

CONCLUSIONS

45. Respondents consistently employ "bait and switch" tactics in selling their aluminum siding, which inherently is a deceptive practice.

a. The offer in its mailers to sell aluminum siding fully installed with free storm windows for a price of \$219.50 or less is not a *bona fide* offer but rather one used as bait to obtain leads of prospective customers who can then be sold the more expensive aluminum siding on which respondents realize a more substantial profit (Findings 15-19). The fact that this siding is not generally sold is enough to draw an inference of a switch.

b. To accomplish the switch, respondents disparage the aluminum siding which it extensively advertises, by use of unpainted samples and running it down (Findings 20, 21). This method of selling, as employed by respondents, presents a bait and switch scheme including most all of the elements of that practice and clearly fits the definition of this unfair practice set forth in the Commission's Guides Against Bait Advertising. (CCH Trade Reg. Rep. ¶39,011 Nov. 24, 1959):

Bait advertising is an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. The primary aim of a bait advertisement is to obtain leads as to persons interested in buying merchandise of the type so advertised.

c. The bait and switch nature of respondents' operation is evidence by practices condemned by the guides:

1. Respondents' offer to sell advertised produce in advertisements is not a *bona fide* effort to sell it (Guide 1).

2. The first contact or interview with the customer is secured by deception in that the offer in respondents' advertisements does not truthfully represent the product and nature of the offer (Guide 2).

3. Respondents refuse to sell the product offered in accordance with the terms of the offer (Guide 3 (a)).

4. Respondents and their representatives disparage the advertised product (Guide 3 (b)).

5. Respondents do not have a sufficient quantity of the advertised product to meet reasonably anticipated demands (Guide 3 (c)).

6. Respondents show or demonstrate a product that is defective, unusable, or impractical for the purpose represented in the advertisement (Guide 3 (e)).

7. Respondents use a sales plan or a method of compensation for salesmen designed to prevent or to discourage them from selling the advertised product (Guide 3 (f)).

8. Respondents fail to deliver the advertised product and make refunds (Guide 4 (b)).

d. The facts here are also almost identical to the factual situation presented in *All-State Industries of N. C., Inc. v. FTC*, 465, 423 F.2d 423 (4th Cir. 1970), *cert. denied*, 400 U.S. 828 (1970). There, the Court of Appeals affirmed a decision of the Federal Trade Commission holding bait and switch practices to be a deceptive practice.⁷

e. The only difference here and *All-State, supra*, is that respondents herein do not install the cheaper grade siding which they advertise (see Finding 17), making this even a more obvious example of bait and switch. See *Royal Construction Company*, 71 F.T.C. 762 (1967), where similar sales methods were found to be bait and switch practices.

46. Respondents have engaged in deceptive advertising by claiming that their products are being offered at special or reduced prices and for a limited time only.

a. Respondents misrepresent the savings to a prospective customer on their siding advertised at \$219.50 or less and on their Imperial grade siding (Findings 24 and 25) and that the offers on both grades siding are limited (Findings 26-27).

⁷The Commission described the practices in its *All-State* decision, 75 F.T.C. 465, 485, as follows:

"Respondents' principal method of advertising is through mail-outs which include return mail cards. These mail-out advertisements promote an inexpensive product within respondents' product line which they refer to as an "ADV" product. The ADV product is ostensibly offered at a substantial reduction from a fictitious "regular" price for a fictitious "limited" time. Respondents also sell a more expensive line of similar products which they term "PRO" products. When prospective customers return the mail cards to respondents, the cards are turned over to salesmen who make appointments with the prospective customers. Respondents' sales approach is to attempt to obtain a signed contract for sale of the ADV product along with a signed note for the price of the product and a deed in blank. After obtaining the signed contract, the salesman proceeds to disparage the ADV product by pointing out a multitude of deficiencies in the product. The salesman then produces a sample of the PRO product, embarks upon a lengthy discussion of its virtues in contrast with the deficiencies of the ADV and concludes, whenever possible, by selling the PRO product to the customer in place of the ADV product. Respondents do, however, install the ADV product if a customer insists or demands its installation in accordance with the ADV contract."

b. In *All-State Industries, supra*, the respondents therein also represented in their mailouts that their prices were specials and reduced for a limited time only. It was held therein that the representations of price savings and that the offer was limited were deceptive because "with minor changes from time to time, respondents' prices for their ADV products have always remained substantially the same and do not represent any reduction from previously established prices." (75 F.T.C. at p. 477).

c. In *Royal Construction Company, supra* at 781, the representation "limited time" in connection with their special offer of aluminum siding was held to be a deceptive practice because "respondents regularly advertised the so-called aluminum siding over a period of two years."

47. Respondents have engaged in deceptive advertising by misrepresenting that customers will receive a free gift by sending in the mailout business reply card or making a purchase. See Finding 28 and *Royal Construction Company, supra* at 782-85, where the same practice was held to be deceptive.

48. Respondents have engaged in deceptive advertising and selling practices by advising prospective customers that their homes may be used for advertising purposes and thereby granting a reduction from prices originally quoted. See Findings 29-30 and *All-State Industries, 75 F.T.C. 477, 478*, wherein the same representation was held to be a deceptive practice.

49. Respondents have engaged in a deceptive practice by misrepresenting the guarantee on the products they sell. See Findings 31-37 and *All-State Industries, 75 F.T.C. 478*, wherein it was held that the representation "100% Guaranteed Genuine Aluminum Siding" in mailouts was deceptive where the "Actual guarantee, when presented to a customer, is not an unconditional 100% guarantee." Here, the siding advertised at \$219.50, less, was not guaranteed at all, although it was represented to be "100% Guaranteed Genuine Aluminum Siding" in the mailouts. See Guide I of the FTC Guide Against Deceptive Advertising of Guarantees, CCH Trade Reg. Rep. ¶39,014, Apr. 26, 1960, which requires full disclosure of all facts whenever a guarantee is advertised.

50. Respondents have engaged in a deceptive practice by misrepresenting that its aluminum siding never requires repainting (see Findings 38-39).

51. The use by respondents of the 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 respondents' products by reason of said erroneous and mistaken belief.

a. It long has been established that the Commission may utilize its accumulated expertise to determine what direct and implied representations are contained in such advertising. *Pfizer, Inc.*, F.T.C. Docket No. 8819 (1972); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965), and its expertise may be similarly applied to determine what facts are material to consumers and whether such information has been withheld. (*Pfizer, supra*). Moreover, in making such determinations, the Commission may draw its own inferences from the advertisements and need not depend on testimony or exhibits, aside from the advertisements themselves, introduced into the record. *Carter Products, Inc. v. FTC*, 323 F.2d 523 (5th Cir. 1963).

b. A finding of actual deception is not prerequisite to proof of a violation of the Federal Trade Commission Act, and representations merely having the capacity to deceive are unlawful. *Charles of the Ritz Dist. Corp. v. FTC*, 143 F.2d 676, 680 (2nd Cir. 1944).

c. "The important criterion in determining the meaning of an advertisement is the net impression that it is likely to make on the general populace." *National Bakers Services, Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964). In determining the impression created by an advertisement, the Commission need not look to the technical interpretation of each phrase but must look to the overall impression likely to be made on the buying public. *Murray Space Shoe Corporation v. FTC*, 304 F.2d 270, 272 (2nd Cir. 1962).

d. Although a statement "may be obviously false to those who are trained and experienced [this] does not change its character, nor take away its power to deceive others less experienced." *FTC v. Standard Education Society, et al*, 302 U.S. 112, 116 (1937). The fact that the representation may be obviously false to the more sophisticated is immaterial.

52. The aforesaid acts and practices of respondents, as herein found, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.⁸ This deception of purchasers constitutes unfair competition. *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922). In reaching

⁸ Respondents admit that they have been in substantial competition in commerce, with corporations, firms and individuals in the sale of aluminum siding and other aluminum home improvement products of the same kind. (Comp. par. 8; Ans. par. 8).

this conclusion, the administrative law judge has evaluated respondents' practices in light of the capacity of the advertisements to deceive, and the inherent unfairness of the advertisements and the practices, and not on the basis of a demonstrated injury to purchasers. *Montgomery Ward & Co. v. FTC*, 379 F.2d 666 (7th Cir. 1967); *Charles of the Ritz*, *supra*.

53. Moreover, by the acts described above, respondents have failed to comply with the provisions of Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System, which failure constitutes a violation of the Federal Trade Commission Act pursuant to Section 103 (q) of the Truth in Lending Act.

54. In their proposed findings and conclusions of law, respondents urge the administrative law judge to conclude that there "is no evidence to support the allegations of the complaint that respondents Norman J. Foucha and Bobby G. Smith, in their *individual capacities*, violated the provisions of the Federal Trade Commission, or the Truth-in-Lending Act." However, the named individual respondents admittedly were the persons responsible for the management, direction and control of the corporate respondent. Effective administration of the Federal Trade Commission Act and the Truth in Lending Act dictate that an outstanding order be directed against the responsible individuals and not merely against a lifeless corporate entity. For respondents Norman J. Foucha and Bobby G. Smith were, and Bobby G. Smith now is, in fact, the alter ego of American Aluminum Corporation. *Cf. Fred Meyer, Inc.*, 63 F.T.C. 1; *Pati-Port, Inc. v. Federal Trade Commission*, 313 F.2d 103, 105 (4th Cir. 1963).

55. Since one of the essential purposes of both the Federal Trade Commission Act and the Truth in Lending Act is the protection of the public, the Commission necessarily must "be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). The remedy in the accompanying order has a reasonable relationship to the unlawful practice here found to exist. It is the only action which reasonably could be calculated to preclude a revival of the illegal practices.

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

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

58. This decision is not a major Federal action significantly affecting

the quality of the human environment within the meaning of the National Environment Policy Act of 1969.⁹

ORDER

It is ordered, That respondents American Aluminum Corporation, a corporation, and its officers, and Norman J. Foucha and Bobby G. Smith, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, distribution or installation of aluminum siding, storm windows, storm doors or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, any advertising, sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of other merchandise or services.
2. Making representations purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.
3. Discouraging the purchase of or disparaging any merchandise or services which are advertised or offered for sale.

⁹ Section 102 of the National Environmental Policy Act of 1969 (Public Law 91-190), specifically requires that all agencies of the Federal Government shall, to the fullest extent possible,

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly effecting the quality of the human environment, a detailed statement by the responsible official on--

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

But see *Harlem Valley Transportation Association v. George M. Stafford*, Civil No. 73-Civ. 1330, S.D.N.Y., June 21, 1973, where the Court emphasized that the agency "should determine at the outset of * * * proceedings whether 'major Federal actions significantly affecting the quality of the human environment' are involved within the meaning of 42 U.S.C. §4332(2)(C), and, if so, (2) to require staff preparation of a draft impact statement for circulation to the parties * * *," and *Hanly v. Kleindienst*, 471 F.2d 823 (2nd Cir. 1972) where the Second Circuit Court of Appeals held at p. 836 that:

"Notwithstanding the absence of statutory or administrative provisions on (threshold determinations), this Court has already held in *Hanly* * * * that federal agencies must 'affirmatively develop a reviewable environmental record * * * even for purposes of a threshold (NEPA) determination.' We now go further and hold that before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision. * * * The precise procedural steps to be adopted are better left to the agency, which should be in a better position to determine whether solution of the problems with respect to a specific major federal action can better be achieved through a hearing or by informal acceptance of relevant data."

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

5. Representing, directly or by implication, that any price for respondents' products and/or services is a special or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products and/or services have been sold in substantial quantities by respondents in the recent regular course of their business; or misrepresenting, in any manner, the savings available to purchasers.

6. Representing, directly or by implication, that any offer to sell products is limited as to time or is limited in any other manner.

7. Representing, directly or by implication, that persons will receive a gift of a specified article of merchandise, or anything of value.

8. Representing, directly or by implication, that the home of any of respondents' customers or prospective customers will be used as a model home, or otherwise, for advertising, demonstration or sales purposes.

9. Representing, directly or by implication, that any allowance, discount or commission is granted by respondents to purchasers in return for permitting or agreeing to allow the premises on which respondents' products are installed to be used for model homes or demonstration purposes.

10. Representing, directly or by implication, that any of respondents' products 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 clearly and conspicuously disclosed; or making any direct or implied representation that any of respondents' products are guaranteed unless in each instance a written guarantee is given to the purchaser containing provisions fully equivalent to those contained in such representations.

11. Representing, directly or by implication, that any product is guaranteed for life without clearly and conspicuously disclosing the life to which such reference is made; or misrepresenting, in any manner, the duration, nature or extent of any guarantee.

12. Representing, directly or by implication, that respondents' products will never require repainting; or misrepresenting, in any manner, the durability or efficacy of respondents' products.

13. Failing to deliver a copy of this order to all present and future salesmen or other persons engaged in the sale of respon-

dents' products and to secure from each salesman or person a signed statement acknowledging receipt of said order.

14. Assigning, selling or otherwise transferring respondents' notes, contracts or other documents evidencing a purchaser's indebtedness, unless any rights or defenses which the purchaser has and may assert against respondent are preserved and may be asserted against any assignee or subsequent holder of such note, contract or other documents evidencing the indebtedness.

15. Failing to include the following statement clearly and conspicuously on the face of any note, contract or other instrument of indebtedness executed by or on behalf of respondents' customers:

NOTICE

Any holder takes this instrument subject to the terms and conditions of the contract which gave rise to the debt evidenced hereby, any contractual provision or other agreement to the contrary notwithstanding.

16. Failing to maintain adequate records:

(a) For a period of five (5) years which disclose the factual basis for any representations or statements as to special or reduced prices, as to usual and customary retail prices, as to savings afforded to purchasers, and as to similar representations of the type described in paragraph 5 of this order.

(b) For a period of five (5) years, with regard to each and every contract hereafter entered into between respondents and their customers, which disclose, in itemized form, what each customer was charged, exclusive of interest or finance charges, for materials and for labor, and for those contracts involving siding, or the installation of siding, or both, additional information as to the total amount of siding materials and other materials installed or delivered to the customer, the type and grade of said siding and other materials, a description of the installation performed, the total amount of money paid to salesmen, agents or representatives for the solicitation of the said contracts, and what each customer was charged exclusive of interest or finance charges per square foot for the performance of the said contract.

(c) For a period of five (5) years invoices, notices for payment and all similar documents which respondents receive in the conduct of their business from suppliers, subcontractors and other persons, and for a period of five (5) years copies of all contracts entered into between respondents and their customers.

II

It is further ordered, That respondents American Aluminum Corporation, a corporation, and its officers, and Norman J. Foucha and Bobby G. Smith, 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 advertisement or consumer credit sale of home improvement products or services, or any other products or services, as "advertisement" and "credit sale" are defined in Regulation Z (12 C.E.R. 226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq.*), forthwith cease and desist from:

1. Representing, directly or by implication, in any advertisement as "advertisement" is defined in Regulation Z, 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 all of the following items are stated in terminology prescribed under Section 226.8 of Regulation Z:

- (i) the cash price;
- (ii) the amount of the downpayment required or that no downpayment is required, as applicable;
- (iii) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
- (iv) the amount of the finance charge expressed as an annual percentage rate; and
- (v) the deferred payment price.

2. Representing, directly or by implication, on retail installment contracts, promissory notes, or on any written document or orally, that customers will or may be liable for damages, penalties or any other charges for exercising their right to rescind that is provided by Section 226.9 of Regulation Z.

3. Supplying any additional information, contract clause or other statement about the customer's liability or obligations in the event that the customer exercises his right to rescind except that information furnished in accordance with Section 226.9 of Regulation Z.

4. Supplying any additional information, in writing or orally, that is stated, utilized or placed so as to mislead or confuse the customer or that contradicts, obscures or detracts attention from the information that is required to be disclosed by Regulation Z, as prohibited by Section 226.6 (c) of Regulation Z.

5. 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, 226.8, 226.9 and 226.10 of Regulation Z.

III

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

It is further ordered, That 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 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 address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

OPINION OF THE COMMISSION

BY THOMPSON, *Commissioner*:

This matter is before the Commission on appeal from an initial decision of an administrative law judge finding that American Aluminum and two of its officers have failed to make certain credit disclosures required by the Truth in Lending Act, 15 U.S.C. §§1601, *et seq.*, and have engaged in certain deceptive acts and practices in the advertising and sale of various home-improvement products, particularly aluminum siding, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a). The order issued by the law judge would require respondents to make the credit disclosures required by the former statute in their future contracts and advertising and to cease and desist from the other deceptive acts and practices in their future business dealings.

The law judge found, and respondents do not deny: (1) That respondent American Aluminum advertises its aluminum-siding business by

sending out "mailers" to local homeowners offering to install such aluminum siding for \$189.50 to \$219.50 ("low priced siding"), a price that is described as a "saving" of \$431; (2) that these promotional mailers also promise that, if the attached response card is returned within seven days, a set of storm windows will be thrown in as a "free gift" or bonus; (3) that these mailers also imply that the aluminum siding in question will last indefinitely; (4) that homeowners who return these mailers are visited by salesmen who, after execution of the contract for the purchase of the advertised low-priced siding, make every effort to "switch" the purchaser to a higher-priced product (respondents' "Imperial" aluminum siding); (5) that this "switching" of the customer to the higher-priced product is accomplished by showing him an unpainted and unattractive sample of the advertised low-priced siding, disparaging its durability, and explaining that it would require periodic painting and other costly maintenance; (6) that respondents' salesmen also offer substantial reductions from a purported "regular" price of the higher-priced "Imperial" siding if the customer will permit the use of his home for advertising purposes and promise a written guarantee that the siding will last indefinitely; (7) that in fact all of these representations are false, *i.e.*, no such guarantees are provided, the product does not last indefinitely, customers' homes are never used for advertising or demonstration purposes, and there are no "regular" prices from which a discount *could* be given (the salesmen charge whatever the individual customers will pay, up to certain maxima that are well below the purported "regular" price); (8) that respondents have rarely, if ever, actually installed the advertised low-priced siding, even when it has been demanded by particular customers; and (9) that American Aluminum has failed to make a number of credit disclosures required by the Truth in Lending Act and has used contracts that tend to mislead the customer as to his right to rescind under that statute.

Respondents contend on appeal, however: (a) That the record does not support the law judge's finding that the two *individual* respondents, Smith and Foucha, are legally responsible for the bait-and-switch practices of the firm's salesmen; (b) that their competitors are engaged in similar practices and hence that the law judge and the Commission committed prejudicial error in denying respondents' pretrial motion for the issuance of subpoenas *duces tecum* directed to a number of such competing organizations; (c) that the record does not support the law judge's finding of injury to the public; and (d) that the order issued by the law judge is overly broad insofar as it (i) directs its prohibitions to "all" products respondents might sell in the future rather than to those involved in its past deceptions, (ii) prohibits certain representations

without regard to whether they might in fact be true, and (iii) abrogates the "holder-in-due-course" doctrine on respondents' future credit sales. We agree that the order goes too far in the last two particulars but otherwise affirm and adopt the law judge's decision.

It is a well-settled principle of law that the Federal Trade Commission is not precluded from stopping the law violations of a particular firm merely because some other firms might be engaged in similar practices. *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411 (1958); *United Biscuit Co. v. Federal Trade Commission*, 350 F. 2d 615, 624 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966). And since injury to competitors is not a necessary element of a case charging deception of the public, *Federal Trade Commission v. Algoma Lumber*, 291 U.S. 67, 81 (1934), the data respondents sought to gather by the requested subpoenas *duces tecum* would have been irrelevant to this proceeding. Nor is it a defense in such a case to show that the public has not in fact been injured¹ by the challenged deception. Section 5(b) of the Federal Trade Commission Act requires that, as a condition to filing a complaint, (1) the Commission must have "reason to believe" an unfair or deceptive act or practice has occurred and (2) it must "appear" to the Commission that a proceeding to stop that violation "would be to the interest of the public * * *" 15 U.S.C. 45(b). Once such a complaint has been issued, however, the courts will not review the mental processes of the Commission in arriving at that decision not permit the charged party to litigate the adequacy of the data on which the Commission acted.² The issue to be litigated, rather, is "whether the alleged violation has in fact occurred." *Exxon Corporation*, Docket 8934 (Order of the Commission, June 4, 1974) [83 F.T.C. 1759].

The two corporate officers, Smith and Foucha, concede their responsibility for the firm's violations of the Truth in Lending Act and the deceptive claims in their printed advertisements, their denials of liability being limited to the "bait-and-switch" practices of their salesmen. The record is clear, however, that they knew about and were involved in those practices. First, they admit their responsibility for sending out the "bait," the mailers purporting to offer the product at a price (\$189.50 to \$219.50, for an alleged "saving" of \$431) they will not in fact accept. In

¹ American Aluminum's officials testified that its prices were 30 percent to 50 percent lower than those of a particular competitor. Tr. 516-522, 661-664, 725-727. Since complaint counsel had no legal obligation to attempt a rebuttal of this irrelevant testimony, it naturally stands "uncontroverted" in the record.

² This is not to imply, of course, that the Commission *itself* does not have at least a duty to consider, in deciding whether a particular proceeding is likely to be "to the interest of the public," the issue of consumer injury. Sensible resource allocation requires that, other things being equal, the Commission focus its limited resources on those matters in which the probable economic benefits to the consuming public are likely to be the largest. These are internal policy questions, however, not issues on which a law violator himself is entitled to be heard.

other words, the "offers" these two men sent out to the local homeowners in such large quantities³ were not, as the law judge correctly found, *bona fide* offers.

Secondly, both of these men were clearly aware of the "switching" operations practiced by their salesmen. Foucha, president and sole stockholder of the firm until Jan. 1971, described the company's sales plan as "step-up selling," *i.e.*, persuading the customer to shift to a higher-priced product after he has already been sold a lower-priced one.⁴ Smith, the man who supervised the firm's salesmen prior to his purchase of the company from Foucha in 1971 and its president and sole stockholder since that time, devised the salesman-compensation plan used to encourage customer "switching." (The salesman gets "a couple of dollars" if he sells the low-priced siding, versus as much as \$150 if he sells the higher-priced product.⁵) Third, both of these men knew that the firm could not have been operated profitably if the product had actually been sold at the advertised low prices.⁶ Fourth, a former salesman testified without contradiction that both men had told him he had to sell the higher-priced product in order to get a commission.⁷ Fifth, the number of protests lodged with the company by customers demanding performance at the advertised low price or their money back is simply inconsistent with any possibility that these men could have been unaware of what was going on.⁸

These same considerations persuade us that any order issued here, if it is to be effective, must extend to "all" products these respondents might sell in the future. This is not a case in which a relatively remote corporate official is being charged with constructive responsibility for an unlawful act committed by a couple of salesmen in violation of an established and enforced company policy. These men *were* the corporation—its "alter ego"—and their acts *were* its policies. Deception is a way of life with these respondents, a major part of their stock-in-trade.

³ Approximately 50,000 of these mailers were sent out each *week*. Tr. 714.

⁴ Tr. 610-611.

⁵ The salesman receives a commission of 50 percent on that part of the sales price that *exceeds* \$65 per "square" (a surface measuring 10 feet by 10 feet or a total of 100 square feet). Since the firm's average sales price is approximately \$90 per square, the average sales commission is some \$12.50 per square or roughly \$125 on a somewhat below average 10-square (1,000 square feet) installation or job. See tr. 412, 621, 678, 739.

⁶ Initial decision, pp. 8-9. "On a \$199.50 job, the siding would cost [respondents] a minimum of \$100, the installation cost would be \$60.00 and overhead expense would be \$69.23. This would total \$229.23." *Id.*, p. 9. Respondents would thus lose some \$30 on each installation at the advertised \$199.50 price, even if they (a) paid *no* commission to their salesmen and (b) omitted (as they did anyway) the promised free storm windows. *Id.* (The prices quoted are for a quantity sufficient to cover 10 squares, *i.e.*, 1,000 square feet. *Id.*, p. 8; tr. 620.) In fact, respondents charge an average price of \$900 for a job of this size. See note 5, *supra*.

⁷ Tr. 410.

⁸ Initial decision, pp. 10-12. One such customer testified, for example, to having made at least 15 telephone calls to the company in an effort to get the lower-priced product installed or his money back. Tr. 230-236. Despite his own and the efforts of the Chattanooga and Birmingham Better Business Bureaus on his behalf, he got neither. *Id.*

Having sympathetically misrepresented their products and their terms of trade for so many years (the firm was organized in 1965), it would be unrealistic, we think, to expect them to voluntarily adopt a program of honest business dealing when and if they find it in their interest to begin selling some new line of products. As modified by us, the law judge's proposed order will bar no legitimate business activity. It will serve, rather, to reinforce those honest impulses that are said to survive to at least some degree in the human breast after even the most prolonged association with a fast branding iron. These are precisely the kinds of respondents the courts had in mind when they affirmed the principle that those caught violating the law must expect some "fencing in." *Federal Trade Commission v. National Lead Company*, 352 U.S. 419, 431 (1957).

The record is insufficient, however, to support the provision in the law judge's order that would bar respondents from future recourse to the holder-in-due-course doctrine. This is an appropriate remedy where there is "some evidence of actual or imminent injury from the operation of the doctrine." *Southern States Distributing Company*, Docket 8882 (Dec. 26, 1973), at 13 [83 F.T.C. 1126]. The respondents in the case before us do negotiate their customer contracts but only one witness testified (and not too clearly) that such negotiation had been used as a bar to his claim against respondents.⁹ The Commission will require a more definite showing than this before denying any individual respondent, on a case by case basis, the right to negotiate his commercial paper.

We also agree that even these respondents should not be prohibited from making a claim they can prove is true. Again such a remedy is appropriate in the situation where the nature of the product dictates that a certain representation, if made, will necessarily be a false one. *Lane v. Federal Trade Commission*, 130 F. 2d 48 (9th Cir. 1942). Such is not the case here. If respondents should actually adopt the policy of giving away additional "bonus" items, for example, to people who buy their aluminum siding, we see nothing inherently unfair or deceptive about their saying so in their advertisements.

The decision and order of the administrative law judge will be modified in accordance with this opinion and, as so modified, adopted as the decision and order of the Commission.

⁹Tr. 255.

FINAL ORDER

This matter having been considered on respondents' appeal from an initial decision of the administrative law judge of Oct. 9, 1973, and the Commission having determined that said appeal should be granted in part and denied in part in accordance with the accompanying opinion of the Commission:

It is ordered, That respondents American Aluminum Corporation, a corporation, and its officers, and Norman J. Foucha and Bobby G. Smith, individually and as officers of said corporation, and respondents' agents representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, distribution or installation of aluminum siding, storm windows, storm doors or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, any advertising, sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of other merchandise or services.
2. Making representations purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.
3. Discouraging the purchase of or disparaging any merchandise or services which are advertised or offered for sale.
4. Representing, directly or by implication, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.
5. Representing, directly or by implication, that any price for respondents' products and/or services is a special or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products and/or services have been sold in substantial quantities by respondents in the recent regular course of their business; or misrepresenting, in any manner, the savings available to purchasers.
6. Representing, directly or by implication, that any offer to sell products is limited as to time or is limited in any other manner, unless such represented limitations are actually in force and are in good faith adhered to.
7. Falsely representing, directly or by implication, that persons will receive a gift of a specified article of merchandise, or anything of value.

8. Falsely representing, directly or by implication, that the home of any of respondents' customers or prospective customers will be used as a model home, or otherwise, for advertising, demonstration or sales purposes.

9. Falsely representing, directly or by implication, that any allowance, discount or commission is granted by respondents to purchasers in return for permitting or agreeing to allow the premises on which respondents' products are installed to be used for model homes or demonstration purposes.

10. Representing, directly or by implication, that any of respondents' products 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 clearly and conspicuously disclosed; or making any direct or implied representation that any of respondents' products are guaranteed unless in each instance a written guarantee is given to the purchaser containing provisions fully equivalent to those contained in such representations.

11. Representing, directly or by implication, that any product is guaranteed for life without clearly and conspicuously disclosing the life to which such reference is made; or misrepresenting, in any manner, the duration, nature or extent of any guarantee.

12. Representing, directly or by implication, that respondents' products will never require repainting; or misrepresenting, in any manner, the durability or efficacy of respondents' products.

13. Failing to deliver a copy of this order to all present and future salesmen or other persons engaged in the sale of respondents' products and to secure from each salesman or person a signed statement acknowledging receipt of said order.

14. Failing to maintain adequate records:

(a) For a period of five (5) years which disclose the factual basis for any representations or statements as to special or reduced prices, as to usual and customary retail prices, as to savings afforded to purchasers, and as to similar representations of the type described in Paragraph 5 of this order.

(b) For a period of five (5) years, with regard to each and every contract hereafter entered into between respondents and their customers, which disclose, in itemized form, what each customer was charged, exclusive of interest or finance charges, for materials and for labor, and for those contracts involving siding, or the installation of siding, or both, additional information as to the total amount of siding materials and

other materials installed or delivered to the customer, the type and grade of said siding and other materials, a description of the installation performed, the total amount of money paid to salesmen, agents or representatives for the solicitation of the said contracts, and what each customer was charged exclusive of interest or finance charges per square foot for the performance of the said contract.

(c) For a period of five (5) years invoices, notices for payment and all similar documents which respondents receive in the conduct of their business from suppliers, subcontractors and other persons, and for a period of five (5) years copies of all contracts entered into between respondents and their customers.

II

It is further ordered, That respondents American Aluminum Corporation, a corporation, and its officers, and Norman J. Foucha and Bobby G. Smith, 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 advertisement or consumer credit sale of home improvement products or services, or any other products or services, as "advertisement" 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.*), forthwith cease and desist from:

1. Representing, directly or by implication, in any advertisement as "advertisement" is defined in Regulation Z, 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 all of the following items are stated in terminology prescribed under Section 226.8 of Regulation Z:

- (i) the cash price;
- (ii) the amount of the downpayment required or that no downpayment is required, as applicable;
- (iii) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
- (iv) the amount of the finance charge expressed as an annual percentage rate; and
- (v) the deferred payment price.

2. Representing directly or by implication, on retail installment contracts, promissory notes, or on any written document or orally, that customers will or may be liable for damages, penalties or any other charges for exercising their right to rescind that is provided by Section 226.9 of Regulation Z.

3. Supplying any additional information, contract clause or other statement about the customer's liability or obligations in the event that the customer exercises his right to rescind except that information furnished in accordance with Section 226.9 of Regulation Z.

4. Supplying any additional information, in writing or orally, that is stated, utilized or placed so as to mislead or confuse the customer or that contradicts, obscures or detracts attention from the information that is required to be disclosed by Regulation Z, as prohibited by Section 226.6(c) of Regulation Z.

5. 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, 226.8, 226.9 and 226.10 of Regulation Z.

III

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

It is further ordered, That 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 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 address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That respondents, American Aluminum Corporation, Norman J. Foucha and Bobby G. Smith shall, within sixty (60)

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days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Commissioner Nye not participating.

IN THE MATTER OF

COLT INDUSTRIES OPERATING CORP.

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

Docket C-2520. Complaint, July 12, 1974—Decision, July 12, 1974

Consent order requiring a Hartford, Conn., manufacturer, seller and distributor of sporting firearms and firearm accessories, among other things to cease fixing its dealers' retail prices of firearm products; requiring dealers, through any means, to agree to resell at specified retail prices; using cancellation threats to induce dealers to observe its retail prices; and requesting dealers or salesmen to report persons who do not adhere to its suggested retail prices.

Appearances

For the Commission: *James D. Tangiers.*

For the respondent: *John Linsenmeyer, Cravath, Swaine & Moore,*
New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Colt Industries Operating Corp., a corporation, and more particularly described and referred to hereinafter as respondent, has violated and is now violating the provisions of Section 5 of said Act (15 U.S.C. 45), 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 respect thereto as follows:

PARAGRAPH 1. Respondent Colt Industries Operating Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. Its Firearms Division is a successor in interest to Colt's Inc., an Arizona corporation, with its office and principal place of business located at 150 Huyslope Ave., in Hartford, Conn.

PAR. 2. Respondent, through its firearms division, has been and is now engaged in the manufacture, sale and distribution of sporting firearms and firearm accessories, with gross sales in 1970 in excess of \$17,000,000. Respondent manufactures sporting firearms and firearm accessories at its plants located in Hartford, Conn. and Rocky Hill, Conn., and sells such products directly to as many as 7,000 authorized dealers located throughout the United States.

PAR. 3. In the course and conduct of its business as aforesaid, respondent has been and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that respondent has caused and now causes its various products to be shipped from the state of manufacture thereof to other States of the United States for resale and distribution through its authorized dealers.

PAR. 4. Except to the extent that competition has been hindered, frustrated, lessened and eliminated as set forth in this complaint, respondent has been and is now in competition with other persons, firms and corporations engaged in the manufacture, sale and distribution of sporting firearms and firearm accessories.

PAR. 5. Respondent, in combination, agreement, and understanding with some of its authorized dealers, or with the cooperation or acquiescence of other of its dealers, has for the last several years been engaged in a planned course of action to fix, establish and maintain suggested retail prices at which certain of its products are resold. In furtherance of said planned course of action, respondent has for the past several years engaged in the following acts and practices, among others:

(a) Regularly furnishing all its dealers with price lists and necessary supplements thereto containing the suggested retail prices;

(b) Establishing agreements, understandings and arrangements with certain of its dealers, some of whom are located in states which do not have fair trade laws, as a condition precedent to the granting of a dealership, that such dealers will maintain its suggested retail prices;

(c) Informing certain of its dealers, by direct and indirect means, that it expects and requires such dealers to maintain and enforce its suggested retail prices, or such dealerships will be terminated;

(d) Requiring its dealers to agree not to sell or otherwise supply its firearms and firearm accessories to anyone who is not an authorized dealer of the respondent;

(e) Soliciting and obtaining from certain of its dealers, cooperation and assistance in identifying and reporting dealers who advertise, offer to sell or sell respondent's products at prices lower than its suggested retail prices;

(f) Directing its salesmen, representatives, and other employees to secure and report information identifying any dealer who fails to adhere to and maintain its suggested retail prices; and,

(g) Threatening to terminate and terminating authorized dealers who fail or refuse to observe and maintain respondent's suggested retail prices.

PAR. 6. By means of the aforesaid acts and practices, and more, respondent, in combination, agreement, and understanding with certain of its authorized dealers and with the acquiescence of other of its authorized dealers, has established, maintained and pursued a planned course of action to fix and maintain suggested retail prices at which respondent's products will be resold.

PAR. 7. The acts and practices of respondent as hereinabove described, have been and are now having the effect of hindering, lessening, restricting, restraining and eliminating competition in the resale and distribution of respondent's firearms and firearm accessories, and constitute unfair methods of competition in commerce, all in derogation of the public interest and 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 Washington, D.C. 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, its attorney 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 it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60)

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 Colt Industries Operating Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its officers and principal place of business located at 150 Huyshope Ave. in Hartford, Conn.

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

I

It is ordered, That respondent, Colt Industries Operating Corp., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, distribution, offering for sale or sale of firearms and firearm accessories (hereinafter referred to in this order as "firearm products"), in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Establishing, maintaining or enforcing any contracts, agreements, understandings or arrangements entered into with dealers in respondent's firearm products which have the purpose or effect of fixing, establishing, maintaining or enforcing the suggested retail prices at which respondent's firearm products are to be resold;

2. Requiring any dealer or prospective dealer to enter into oral or written agreements or understandings that such dealer or prospective dealer will resell or offer for resale respondent's firearms products at any price;

3. Requesting dealers or prospective dealers, either directly or indirectly, to report any person or firm who does not adhere to the suggested retail prices by respondent, or acting on reports so obtained by refusing or threatening to refuse sales to any person or firm so reported;

4. Threatening dealers, either directly or indirectly, with cancellation in order to induce them to observe, maintain, or advertise the respondent's suggested retail prices;

5. Requiring from dealers charged with price cutting or failure to adhere to suggested retail prices, promises or assurances of the

observance of respondent's suggested retail prices as a condition precedent to future sales to said dealers;

6. Directing or requiring respondent's salesmen, or any other agents, representatives, or employees, directly or indirectly, from requiring its dealers to adhere to its suggested retail prices, to report dealers who do not adhere to such suggested retail prices, or to act on such reports by refusing or threatening to refuse sales to dealers so reported;

7. Requiring or inducing by any means, dealers or prospective dealers, to refrain, or to agree to refrain from reselling respondent's firearm products to any other dealers or distributors which are authorized by law to sell firearm products; and

8. Publishing, disseminating or circulating any price lists, price books, price tags, advertising or promotional material, or other documents indicating any retail prices without stating on each page of such price lists, price books, price tags, advertising or promotional material, or other documents that the prices are suggested or approximate.

Provided, however, nothing hereinabove shall be construed to waive, limit or otherwise affect the right of respondent to enter into, establish, maintain and enforce in any lawful manner any price maintenance agreement excepted from the provisions of Section 5 of the Federal Trade Commission Act by virtue of the McGuire Acts amendments to said Act to disseminate or circulate to any of its dealers and distributors suggested retail prices for the sale of its firearm products.

II

It is further ordered, That the respondent herein shall within sixty (60) days after service upon it of this order, mail a copy of this order to each of its dealers under cover of the letter annexed hereto as Exhibit A, and furnish the Commission proof of the mailing thereof.

III

It is further ordered, That the respondent shall forthwith distribute a copy of this order to each of its operating departments, and to all of its sales personnel and shall instruct each sales person employed by it now or in the future to read this order and to be familiar with its provisions.

IV

It is further ordered, That the respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the

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

V

It is further ordered, That the respondent herein shall, 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 compiled with this order.

EXHIBIT A

(Letterhead of The Firearms Division of
Colt Industries Operating Corporation)

Dear Dealer:___

Colt has entered into an agreement with the Federal Trade Commission relating to its distributional activities and pricing policy. A copy of the consent order entered into pursuant to that agreement is enclosed herewith.

Colt has entered into this agreement solely for the purpose of settling a dispute with the Commission, and the agreement and order is not to be construed as an admission by Colt that it has violated any of the laws administered by the Commission. Instead, the order merely relates to the activities of Colt in the future.

In order that you may readily understand the terms of the order, we have set forth the essentials of the agreement with the Commission, although you must realize that the order itself is controlling rather than the following explanation of its provisions:

(1) While Colt may suggest retail prices for its products, distribute suggested retail price lists, and preticket with suggested retail prices, Colt will not solicit the agreement of its dealers to adhere to those suggested retail prices or take any other action to require such dealers to follow those suggested retail prices since they are not binding. Dealers are free to set their own retail prices on Colt products.

(2) Colt will not solicit, invite or encourage dealers to report any person not following its suggested retail prices, and furthermore, will not act on any such reports sent to it.

(3) Colt will not require or induce its dealers to refrain from advertising Colt products at any price they choose or from selling Colt products at any price to any person of their choice.

Sincerely yours,
David C. Eaton
President

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IN THE MATTER OF

LINCOLN UPHOLSTERY COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS*Docket C-2521. Complaint, July 12, 1974—Decision, July 12, 1974*

Consent order requiring a Chicago, Ill., seller and installer of carpeting and other goods and services, among other things to cease using any sales plan employing false, misleading or deceptive statements or representations to obtain leads to potential customers; using bait advertising; disparaging advertised products; using misleading savings claims; failing to provide customers with a three-day cooling-off period within which they may cancel their contracts with full refund rights. Further, respondents are required to include a statement on all notes of indebtedness that any third-party is bound by the terms and conditions of the contract, and to cease violating the Truth in Lending Act by failing to disclose to customers, in connection with the extension of customer credit, such information as required by Regulation Z of the said Act.

*Appearances*For the Commission: *Kozo Fukuda.*For the respondents: *Robert S. Atkins, Freeman, Freeman & Atkins,*
Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of 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 Lincoln Upholstery Company, a partnership, and Isadore Shapiro and Howard Kaufman, individually and as co-partners trading and doing business as Lincoln Upholstery Company, Lincoln Upholstery and Furniture Company, Lincoln Upholstery and Carpet Company, Lincoln Carpet Company, and Commercial Contract Carpet Company, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing 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 Lincoln Upholstery Company, a partnership, is organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal place of business at 7170 West Grand Avenue, Chicago, Ill.

Respondents Isadore Shapiro and Howard Kaufman are individuals

who are co-partners trading and doing business as the said Lincoln Upholstery Company, Lincoln Upholstery and Furniture Company, Lincoln Upholstery and Carpet Company, Lincoln Carpet Company, and Commercial Contract Carpet Company. They formulate, direct and control the acts and practices of the said respondent partnership. Their address is the same as that of the respondent partnership.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, delivery and installation of carpeting to the public at retail, and in the advertising, offering for sale, and sale of other goods and services to the public at retail.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of 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 their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their places of business located in the State of Illinois, to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, 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 carpeting and other goods and services, respondents have made, and are now making, numerous statements and representations by repeated advertisements through audio and visual means disseminated by television broadcasts with interstate coverage, and in newspapers of interstate circulation, and by oral statements and representations of their salesmen to prospective purchasers with respect to their products and services.

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

Save \$\$\$ on 100% BROADLOOM WALL-TO-WALL Carpeting

2 Rooms and a Hall

\$119

No Extras! This Low, Low Price Includes

- First Quality Broadloom
- Custom Installation Anywhere within 100 Miles
 - Padding
 - Metal Door Bars
 - Certified Measurements

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* * * * *

LINCOLN'S SHOP AT HOME SALE AND FOR LESS! Why Spend two, four hundred dollars * * * when Lincoln carpets three rooms, wall-to-wall * * * from one nineteen complete!

* * * * *

A message from Lincoln Carpeting Home of the Professionals

* * * * *

The Lincoln Professionals Do the Job Quicker and Better

* * * * *

When Lincoln carpets three rooms, wall-to-wall * * * from one nineteen complete!

* * * * *

Save 1/3 on Plastic Covers

* * * * *

Save \$\$\$ on Reupholstery

* * * * *

Drapery Sale

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 the oral statements and representations of respondents' salesmen to customers and prospective customers, respondents have represented, and are now representing, directly or by implication, that:

1. Respondents are making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements.

2. By use of the word "Padding," and other words of similar import and meaning, all of the carpeting mentioned in such advertisements is installed with separate padding included at the advertised price.

3. By use of color illustrations appearing in newspaper advertisements and in TV commercials, the advertised carpeting is actually available in the colors and styles depicted in such advertisements and commercials.

4. By use of phrases such as "Save \$\$\$," "100% Broadloom," and other words and phrases of similar import and meaning, the respondents have no reservations as to the suitability of advertised carpeting for normal household use from the standpoint of durability.

5. By use of words and phrases such as "Sale," "Why Pay," "Save 1/3 on Plastic Covers," and words or phrases of similar import and meaning, the advertised prices represent reductions in price, which reductions are not insignificant, from those previously charged by the respondents for the advertised carpeting or other advertised goods or services.

PAR. 6. In truth and in fact:

1. Respondents' offers are not bona fide offers to sell said carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are made for the purpose of obtaining leads to persons interested in the purchase of carpeting. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents or their salesmen, who make little or no effort to sell to the prospective customer the advertised carpeting. Instead, they exhibit what they represent to be the advertised carpeting which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced carpeting or floor coverings of superior quality and texture are thereupon exhibited, which by comparison disparages and demeans the advertised carpeting. By these and other tactics, purchase of the advertised carpeting is discouraged, and respondents, through their salesmen, attempt to sell and frequently do sell the higher priced carpeting.

2. A substantial portion of the carpeting advertised by the respondents is not installed with separate padding which is included in the advertised price. To the contrary, a substantial portion of the advertised carpeting has rubberized backing which is bonded to the carpeting.

3. The advertised carpeting is generally not available in the colors and styles depicted in the color illustrations appearing in newspaper advertisements and TV commercials. To the contrary, the advertised carpeting generally is available only in one or two colors or styles which are not depicted in such color illustrations.

4. The respondents have definite reservations as to the durability of the advertised carpeting. In many instances, respondents sell such advertised carpeting only under the express condition that such carpeting is "not guaranteed" as to "durability or wearability."

5. The advertised prices for advertised products or services generally do not represent savings. In most instances, advertised prices for advertised products and services during May or June of 1973 have been the same as those featured each week for a period of several months or more.

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

PAR. 7. In the 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 indi-

viduals in the sale and distribution of carpeting and other goods and services of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices, and their failure to disclose material facts, as aforesaid, 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 complete, and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief. Respondents or their representatives thus have induced customers to enter into contracts upon initial contact without giving the customers sufficient time to carefully consider the purchases and consequences thereof.

Additionally, in cases where consumers buy pursuant to retail installment sales contracts, respondents in some instances have directly or indirectly caused consumers to believe that they are precluded from raising failure of performance by respondents as a defense to demands for payment, when such demands for payment are made by assignees of the respondents.

PAR. 9. 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.

COUNT II

Alleging violations of the Truth in Lending Act, and the implementing regulations promulgated thereunder, the allegations of Paragraphs One and Two are incorporated by reference as if fully set forth verbatim.

PAR. 10. In the ordinary course and conduct of their business as aforesaid, respondents regularly extend consumer credit, as "consumer credit" is defined in Section 226.2(k) of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 11. Subsequent to July 1, 1969, in the ordinary course and conduct of their business and in connection with credit sales as "credit sale" is defined in Section 226.2(n) of Regulation Z, respondents have caused, and are now causing, their customers to execute each of three documents contemporaneously as follows: (1) a form entitled "Contract;" (2) a form entitled Credit Application; and (3) a form entitled

retail installment contract and security agreement. The "Contract," which purports on its face to obligate the customer to pay on delivery of goods and services which are the subject of the credit sale, fails to state the actual terms of payment and other items required to be disclosed under Section 226.8 of Regulation Z. Such disclosures, which generally purport to be responsive to Section 226.8(b) and (c) of Regulation Z, are actually contained in the contemporaneously executed retail installment contract and security agreement.

In some instances, respondents have caused, and are now causing, customers to execute the so-called "Contract" prior to the time that disclosures are completed in the retail installment contract and security agreement. The execution of such "Contract" by the customer created a contractual relationship between the customer and the respondents. Such a relationship constitutes the consummation of a transaction within the meaning of Section 226.2 (cc) of Regulation Z.

PAR. 12. By the acts and practices set forth in Paragraph Eleven, in some instances the respondents have failed to provide customers with disclosures in connection with credit sales prior to the consummation of such transaction, and have thus violated Section 226.8(a) of Regulation Z.

PAR. 13. The said "Contract" which is used together with the retail installment contract and security agreement in connection with credit sales, contains, *inter alia*, the following confession of judgment clause:

In the event of any default by Customer of any of the provisions of this agreement, Customer hereby irrevocably authorizes any attorney of any court of record to appear for Customer in such court during time or vacation, and to confess judgment without process against Customer in favor of Lincoln or Lincoln's assigns for such sum as may be due hereunder, together with interest, costs of collection and reasonable attorney's fees, and to waive and release all errors which may intervene in any such proceedings, and consent to immediate execution upon said judgment, hereby ratifying and confirming all that said attorney may do by virtue hereof. This clause shall not be deemed a part of this Contract if contract is executed in Indiana.

Additionally, subsequent to July 1, 1969, a large portion of credit sales by the respondents has involved, and does still involve, the sale and installation of wall-to-wall carpeting in the homes of customers. As part of such sales, such carpeting is installed in behalf of the respondents by a sub-contractor who is retained and is to be paid by the respondents. The sub-contractor uses workmen to install the carpeting in the homes of customers of the respondents as part of such credit sales transactions.

PAR. 14. By use of the so-called "Contract" containing a confession of judgment clause as part of their credit sales transactions, as "credit

sale" is defined in Section 226.2(n) of Regulation Z, in some instances, the respondents have retained or acquired, or will retain or acquire, a security interest, as "security interest" is defined in Section 226.2(z) of Regulation Z, in real property which is used, or which is expected to be used, as the principal residence of the customer. Respondents' retention or acquisition of a security interest in said real property gives their customers, who are extended consumer credit, as "consumer credit" is defined in Section 226.2(k) of Regulation Z, the right to rescind the transaction until midnight of the third business day following the date of consummation of the transaction or the date of delivery of all the disclosures required by Regulation Z, whichever is later.

Additionally, where wall-to-wall carpeting is the subject of a credit sale, in some instances, the respondents, the subcontractor, and the workmen have retained or acquired, or will retain or acquire, a security interest, as "security interest" is defined in Section 226.2(z) of Regulation Z, in real property which is used, or which is expected to be used, as the principal residence of the customer. The retention or acquisition of a security interest in such real property by the respondents, the subcontractor, and the workmen, or by any of them, gives the customers of the respondents, who are extended consumer credit by the respondents, as "consumer credit" is defined in Section 226.2(k) of Regulation Z, the right to rescind the transaction until midnight of the third business day following the date of consummation of the transaction or the date of delivery of all the disclosures required by Regulation Z, whichever is later.

However, in such instances where customers have the right to rescission, respondents have failed 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, and have thus violated Section 226.9(b) of Regulation Z.

PAR. 15. Respondents have caused additional information and provisions to appear in the form entitled "Contract" used in connection with their credit sales, as "credit sale" is defined in Section 226.2(n) of Regulation Z, referred to above. For example, the "Contract" purports to create a cash-on-delivery transaction, contradicting the actual terms of payment which are set forth in the contemporaneously executed retail installment contract and security agreement.

Typical and illustrative examples of such additional information and provisions, but not all inclusive thereof, are the following:

1. This contract is immediately effective when signed by both parties hereto or their duly authorized agents, and is not subject to cancellation, exchange or refund. Customer agrees that should he fail or refuse to perform the terms of this contract, he shall pay to

Lincoln a sum of money equal to one-third (1/3) the contract price as liquidated damages, except as provided in Paragraph 2.

2. In the case of furniture to be reupholstered or re-styled by Lincoln, if within ninety (90) days from the date hereof, Customer has not paid all amounts required to be paid before delivery and has not, at Customer's expense, picked up his furniture, Lincoln shall thereupon discard such furniture, retaining as liquidated damages any deposits made by customer, and Lincoln and Customer shall have no further liability to each other.

The "Contract" further states:

This contract constitutes the sole and entire agreement between the parties. No warranties, representations, or promises, oral or written, have been made by Lincoln unless endorsed hereon in writing. I (we) agree to the terms of this contract and warrant and represent that I (we) have read this contract in its entirety, understand and agree to all the terms and provisions contained herein, and acknowledge receipt of a true copy of this contract.

PAR. 16. By and through the use of the above-quoted additional information, respondents have also represented, and are now representing, to their customers that such customers would be liable for damages in the event that such customers exercise their right to rescind, regardless of any right which may be conferred under Section 226.9(d) of Regulation Z. Such representation, in instances where customers have the right to rescind, contradicts Section 226.9(a) and (d) of Regulation Z. Said additional information has been stated, utilized, or placed by the respondents so as to mislead, or confuse the customer, and contradicts, obscures, and detracts attention from the information required by Regulation Z to be disclosed, thereby violating Section 226.6(c) of Regulation Z.

PAR. 17. Subsequent to July 1, 1969, in the ordinary course and conduct of their business and in connection with credit sales as "credit sale" is defined in Section 226.2(n) of Regulation Z, in some instances, respondents have been unable or have otherwise failed to present for inspection, when requested to do so by representatives of the Federal Trade Commission, copies of disclosure statements with respect to credit sales consummated within the two years immediately preceding the date of such request. The copies of disclosure statements constitutes evidence of compliance with Regulation Z. The inability or other failure of the respondents to produce such disclosure statements, upon request, to representatives of the Federal Trade Commission, was consequently a violation of Section 226.6(i) of Regulation Z.

PAR. 18. By and through the acts and practices set forth above, respondents failed 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 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, 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 sixty (60) 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 Lincoln Upholstery Company, a partnership, is organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal place of business at 7170 West Grand Avenue, Chicago, Ill.

Respondents Isadore Shapiro and Howard Kaufman are individuals who are co-partners trading and doing business as the said Lincoln Upholstery Company, Lincoln Upholstery and Furniture Company, Lincoln Upholstery and Carpet Company, Lincoln Carpet Company, and Commercial Contract Carpet Company. They formulate, direct and control the acts and practices of the said respondent partnership.

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 respondents Lincoln Upholstery Company, a partnership, and Isadore Shapiro and Howard Kaufman, individually and as co-partners trading and doing business as Lincoln Upholstery Company, Lincoln Upholstery and Furniture Company, Lincoln Upholstery and Carpet Company, Lincoln Carpet Company, and Commercial Contract Carpet Company, or under any other name or names, and respondents' agents, representatives, and employees, successors and assigns, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of carpeting and floor coverings, or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sales of carpeting or other merchandise or services.
2. Making representations, orally or in writing, directly or by implication, purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.
3. Disparaging, in any manner, or discouraging the purchase of any merchandise or services which are advertised or offered for sale.
4. Representing, orally or in writing, directly or by implication, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.
5. Failing to maintain and produce for inspection and copying for a period of three years adequate records to document for the entire period during which each advertisement was run and for a period of six weeks after the termination of its publication in press or broadcast media:
 - a. The cost of publishing each advertisement including the preparation and dissemination thereof;
 - b. The volume of sales of the advertised product or service at the advertised price; and

c. A computation of the net profit from the sales of each advertised product or service at the advertised price.

6. Representing, orally or in writing, directly or by implication, that a stated price for carpeting or floor coverings includes the cost of a separate padding and the installation of such padding and carpeting thereof, unless in every instance where it is so represented the stated price for floor coverings does, in fact, include the cost of such separate padding and installation thereof; or misrepresenting in any manner, the prices, terms, or conditions under which respondents supply separate padding and provide installation in connection with the sale of floor covering products.

7. Representing, directly or indirectly, by color illustration, orally, or in writing, that any advertised product is available in more than one pattern, style or color without stating directly and explicitly the exact patterns, styles or colors, in which such advertised product is available, and the time required for delivery.

8. Failing to disclose clearly and conspicuously within each advertisement for an advertised product or service each reservation, if any, as to suitability or durability of such advertised product or service for normal usage by the customers who may buy such product or service.

9. Representing, directly or indirectly, orally, visually or in writing, that the advertised price for an advertised product or service represents savings:

a. where the advertised price for such advertised product or service has been in effect for the three weeks immediately preceding the date on which such price is featured in any advertisement;

b. where the advertised price has not been previously documented as representing a not insignificant reduction from the prices at which the advertised product or service had been openly and actively offered for sale during seven of the ten weeks immediately preceding the date on which such advertised price is included within any advertisement;

c. where the advertisement containing the advertised price has been prepared for Lincoln by an advertising agency or advertising representative who has not previously provided the respondents with a signed statement certifying that such agency or representative is familiar with the Federal Trade Commission's Guides on Deceptive Pricing and with the instant order to cease and desist, and intends to prepare all such

advertisements in compliance with both the Guides and the instant order to cease and desist.

10. Failing to furnish the buyer, except in those instances where the buyer receives a Notice of Right of Rescission prescribed by Regulation Z under the Truth in Lending Act, with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

11. Failing to furnish each buyer, except in those instances where the buyer receives a Notice of Right of Rescission prescribed by Regulation Z under the Truth in Lending Act, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point bold face type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

(enter date of transaction)
(Date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE: OR YOU MAY IF YOU WISH, COMPLY WITH THE IN-

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INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO _____ (Name of Seller), AT _____ (address of seller's place of business) NOT LATER THAN MIDNIGHT OF _____ (Date).

I HEREBY CANCEL THIS TRANSACTION.

(date)

(Buyer's signature)

12. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

13. Including in any contract or receipt any liquidated damages, forfeitures, confession of judgment, or any waiver of any of the rights to which the buyer is entitled under this order including specifically his right to cancel the sale in accordance with the provisions of this order.

14. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

15. Misrepresenting, directly or indirectly, orally or in writing, the buyer's right to cancel.

16. Failing or refusing to honor any valid notice of cancellation by a buyer within ten (10) business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the

contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

17. Negotiating, transferring, selling or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

18. Failing, within 10 business days of receipt of the buyer's notice or cancellation, to notify him whether the seller intends to repossess or to abandon any shipped or delivered goods.

19. Failing to include the following statement clearly and conspicuously on the face of any note, contract or other instrument of indebtedness executed by or on behalf of respondents' customers:

NOTICE

Any holder takes this instrument subject to the terms and conditions of the contract which gave rise to the debt evidenced hereby, any contractual provision or other agreement to the contrary notwithstanding.

II

It is further ordered, That respondents Lincoln Upholstery Company, a partnership, and Isadore Shapiro and Howard Kaufman, individually and as co-partners trading and doing business as Lincoln Upholstery Company, Lincoln Upholstery and Furniture Company, Lincoln Upholstery and Carpet Company, Lincoln Carpet Company, and Commercial Contract Carpet Company, under any name or names, respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division 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. Supplying or using:

a. in any credit sale transaction, any additional information, contract clause, or other statement pertaining to such transaction, which represents, directly or indirectly, that a cash-on-delivery transaction is involved.

b. 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, any additional information, contract clause, or other statement pertaining to such transaction, which represents, directly or indirectly, that the customer may be liable for damages in the event of cancellation, or which represents, directly or indirectly, that the customer would not be entitled to a complete refund in the event that such customer elects to exercise his right to rescind pursuant to Section 226.9(a) and (d) of Regulation Z.

4. Supplying, or using, any additional information, contract clause, or other statement pertaining to a transaction generally, unless such additional information, contract clause or other statement is provided in a fashion which complies with Section 226.6(c) of Regulation Z.

5. Failing to preserve, and to make available upon request for inspection by any authorized representative of the Federal Trade Commission copies of all disclosures given with respect to each credit transaction, and other evidence of compliance with Regulation Z, for a period of two years from the date of such transaction, as required by Section 226.6(i) of Regulation Z.

6. 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, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of carpeting or other goods and services, with a copy of the Commission's news release setting forth the terms of this order.

It is further ordered, That respondents deliver a copy of this order to cease and desist to each operating division and to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit, and that respondents secure a signed state-

ment, acknowledging receipt of said order from each such person.

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 address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

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

ROCKWELL INTERNATIONAL CORPORATION*

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECTION 7 OF THE CLAYTON ACT

Docket 8842. Complaint, May 10, 1971—Decision, July 15, 1974

Consent order requiring a well-diversified corporation headquartered in Pittsburgh, Pa., among other things to divest itself of its knitting machine manufacturing division, Wildman-Jacquard. Further, for a five-year period respondent must, at the acquirer's option, make available at a maximum 2 percent royalty all patents, know-how and technological assistance relating to the production and operation of electronic knitting machines; and for a ten-year period respondent is forbidden to acquire, without prior Commission approval, any domestic manufacturers or sellers of looms or knitting machines or any foreign manufacturers and sellers of this machinery whose United States sales exceed an average of \$500,000 in the preceding five years, or exceeded \$700,000 in any one of the five years.

Appearances

For the Commission: *Harold E. Brandt, Stephen Miller and James W. Olson.*

For the respondent: *William F. Swanson, Jr. and Scott L. Holden, Pittsburgh, Pa. and Chadbourne, Parke, Whiteside & Wolff, New York City.*

*By order dated March 14, 1973, the administrative law judge ordered that the complaint conform with the change in name of the respondent from North American Rockwell Corporation to Rockwell International Corporation.

Complaint

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COMPLAINT

The Federal Trade Commission, having reason to believe that respondent North American Rockwell Corporation, Rockwell International Corporation, a corporation, has violated Section 7 of the Clayton Act, as amended, (15 U.S.C. Sec. 18) and that a proceeding in respect thereof would be in the public interest, issues its complaint pursuant to Section 11 of the Clayton Act, (15 U.S.C. Sec. 22) stating its charges as follows:

I. DEFINITIONS

PARAGRAPH 1. For the purpose of this complaint, the following definitions shall apply:

(a) "Weaving machines," *i.e.*, looms, include all the machines used in the manufacture of fabric by interlacing warp and filling yarns according to a pre-defined pattern.

(b) "All knitting machines" include all the machines used in the manufacture of fabric by a series of interlocking loops.

(c) "Hosiery knitting machines" include seamless hosiery machines, half-hose machines and full-fashioned hosiery machines.

(d) "Knitting machines other than hosiery machines" include tricot machines, raschel machines, simplex machines, single jersey machines (including interlock), double jersey machines, sweater strip machines, flat bed machines, full-fashioned outerwear machines and pile machines, among others.

(e) "Machines used to manufacture apparel and fabric for apparel" include weaving machines and all knitting machines.

II. RESPONDENT

PAR. 2. North American Rockwell Corporation [Rockwell International Corporation] (hereafter "NAR") is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business at 2300 East Imperial Highway, El Segundo, Calif.

PAR. 3. NAR is the result of a merger on Sept. 22, 1967 between North American Aviation and Rockwell-Standard Corporation. NAR's business is conducted through two groups: the Aerospace and Systems Group and the Commercial Products Group. In addition to being the principal contractor in the Apollo/Saturn program, the Aerospace and Systems Group is a major manufacturer of spacecraft, launch vehicles, rocket engines, military aircraft and advanced electronic systems and devices. It is also the third largest company in the field of nuclear reactors and related products, and it is one of the world's major research

and development organizations. In addition to being the nation's leading independent supplier of highly engineered components for motor vehicles, the Commercial Products Group also is a leading manufacturer of textile machinery, aircraft for the general aviation market, fiberglass yachts, houseboats and pleasure boats, industrial components and graphic arts equipment. Since its formation in 1967, NAR has acquired nine companies, with three of the acquisitions occurring during the calendar year 1969. For its fiscal year ending September 30, 1969, NAR had sales and other income of \$2,689,124,000; net income of \$64,916,000; and total assets of \$1,519,726,000. On the basis of NAR's Sept. 30, 1969 financial statements, the May 15, 1970 Fortune Directory listed NAR as the 30th largest industrial corporation in the United States in total sales.

PAR. 4. Pursuant to an agreement of merger and consolidation dated May 26, 1967, Rockwell-Standard Corporation acquired Draper Corporation on June 30, 1967. The Draper Corporation is the world's largest producer of automatic looms and one of the nation's leading producers of replacement parts for knitting machines and parts for textile machinery, turnings and shapes, with total sales in the year 1966 in excess of \$112 million. In addition, the Draper Company through its wholly-owned subsidiary, the Wildman-Jacquard Company, whose 1966 sales totaled \$9,694,266, is one of the nation's leading producers of knitting machines.

PAR. 5. At all times relevant herein, NAR sold and shipped, and is now selling and shipping products in interstate commerce throughout the United States; hence, NAR was, at the time of the acquisition challenged herein, and is now, engaged in commerce as "commerce" is defined in the Clayton Act.

III. THE TEXTILE MACHINE WORKS

PAR. 6. Prior to Aug. 29, 1968, the Textile Machine Works (hereafter "TMW") was a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located in Wyomissing, Pa. (mailing address Reading, Pa.).

PAR. 7. At the time of its acquisition, TMW was the nation's largest manufacturer of all knitting machines and of hosiery knitting machines and was a leading producer of knitting machines other than hosiery machines, such as tricot machines and full fashioned outerwear machines. In addition, TMW was also a producer of fabric machinery, pressure hose reinforcing machines, packaging machinery, needles for knitting machines and surgical uses, and castings.

PAR. 8. For its fiscal year ending Apr. 28, 1968, TMW had total sales

of \$48,322, 391 and at the time of the acquisition, total assets of \$45,290,-638.

PAR. 9. At all times relevant herein, TMW sold and shipped products in interstate commerce and was engaged in "commerce" within the meaning of the Clayton Act.

IV. ACQUISITION

PAR. 10. Pursuant to an agreement and plan of reorganization adopted Apr. 5, 1968, NAR, on Aug. 29, 1968, acquired substantially all of the property, assets and business of TMW in exchange for 300,000 shares of the company's \$4.75 convertible preferred stock, Series A.

V. TRADE AND COMMERCE

PAR. 11. The process of making fabric from yarn falls into two broad categories, namely weaving and knitting. The manufacturing industry which produces the looms for weaving and the machines for knitting is highly concentrated. In 1967, two firms accounted for virtually all of the nation's production of looms, of which NAR's Draper alone accounted for nearly 80 percent, while five companies accounted for almost all of the nation's production of knitting machines. Traditionally, fabrics for apparel have been produced on weaving machines. In recent years, improved knitted techniques have resulted in the growth of knitted fabrics, especially for apparel use at the expense of woven fabrics.

PAR. 12. In 1967, five companies accounted for 95.7 percent of the nation's \$71.3 million of shipments of machines used to produce apparel and fabric for apparel, *i.e.*, looms and knitting machines, by domestic manufacturers, of which NAR, the largest, accounted for approximately 46.4 percent, and TMW ranked second with approximately 22.7 percent. In 1967, five companies accounted for 49.8 percent of the nation's \$106.6 million market of machines used to produce apparel and fabric for apparel, of which NAR, the largest domestic company, accounted for approximately 24.3 percent, and TMW ranked second with approximately 11.6 percent.

PAR. 13. In 1967, five companies accounted for 96.3 percent of the nation's \$40.2 million of shipments of all knitting machines by domestic manufacturers, of which TMW, the largest, accounted for approximately 40.3 percent, and NAR's Wildman-Jacquard ranked third with approximately 19.2 percent. In 1967, five companies accounted for 95.8 percent of the nation's \$25.8 million of shipments of knitting machines other than hosiery machines by domestic manufacturers, of which NAR's Wildman-Jacquard ranked second with approximately 29.8 percent, and TMW ranked third with approximately 20.2 percent.

PAR. 14. In 1967, five domestic companies accounted for 49.6 percent of the nation's \$58.2 million market for all knitting machines, of which TMW, the largest domestic company, accounted for approximately 21.3 percent, and NAR's Wildman-Jacquard ranked third domestically with approximately 7.7 percent. In 1967, five domestic companies accounted for 43.4 percent of the nation's \$42.4 million market of knitting machines other than hosiery machines, of which NAR's Wildman-Jacquard ranked second domestically with approximately 10.6 percent and TMW ranked third domestically with approximately 8.0 percent.

PAR. 15. NAR, through Draper with its looms, and through Wildman-Jacquard with its knitting machines, competed directly with TMW in the manufacture and sale of machines used to manufacture apparel and fabric for apparel.

PAR. 16. At the time of the acquisition of TMW by NAR, both Wildman-Jacquard and TMW were, by reason of their continuing experience and reputation as knitting machine manufacturers, two of the most likely potential competitors in the manufacture and sale of all types of knitting machines other than those types which they were then manufacturing.

VI. THE EFFECTS OF THE ACQUISITION

PAR. 17. The effect of the acquisition by NAR of TMW may be substantially to lessen competition or to tend to create a monopoly throughout the United States in the following ways, among others:

a. By eliminating actual competition between NAR and TMW in the manufacture and sale of machines used to manufacture apparel and fabric for apparel, all knitting machines, and knitting machines other than hosiery machines;

b. By eliminating potential competition between NAR, TMW and others in the manufacture and sale of knitting machines.

c. The dominant position of NAR in the manufacture and sale of machines used to manufacture apparel and fabric for apparel has been, or may be, further strengthened and entrenched vis-a-vis both existing and potential competitors with the result that the likelihood of any reduction in such a dominant position is remote.

VII. VIOLATION CHARGED

PAR. 18. The acquisition of TMW by NAR on Aug. 29, 1968, constituted a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. Sec. 18).

DECISION AND ORDER

The Federal Trade Commission having initiated a complaint charging that the respondent named in the caption hereof has violated the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondent and complaint counsel, after the evidentiary record was closed, by joint motion dated Jan. 2, 1974 having moved to have the matter removed from adjudication for the purpose of submitting an executed consent agreement; and

The Commission, by order issued Jan. 11, 1974, having withdrawn this matter from adjudication pursuant to Section 2.34(d) of its rules; and

The executed agreement contains a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint which the Commission issued, 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 provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comment 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 makes the following jurisdictional findings and enters the following order:

1. Respondent, Rockwell International Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with an office and place of business located at 600 Grant Street, Pittsburgh, Pa.

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

ORDER

I

It is ordered, That, subject to the prior approval of the Federal Trade Commission, respondent Rockwell International Corporation, a corporation (hereinafter Rockwell), through its officers, directors, agents, representatives, employees, successors and assigns, shall, as soon as possible and in any event within two (2) years from the date this order becomes final, divest absolutely and in good faith, all assets, properties, rights and privileges, tangible and intangible, presently owned or con-

trolled by or assigned to what was formerly referred to as the Wildman-Jacquard Company or the Wildman-Jacquard Division of respondent, excluding, however, any of such equipment, machinery, raw material reserves, inventory and other property as are presently located at respondent's facility in Reading, Pa. and used for the manufacture or sale of large diameter circular machinery, which were not formerly used in production at the Norristown plant which is to be divested, (hereinafter Wildman-Jacquard), including but not limited to the plant owned by it and located at 1300 Stanbridge Street, Norristown, Pa., and including all equipment, machinery, raw material reserves, inventory, and other property of whatever description located at such plant and all customer lists, trade names, patents, trademarks and good will (expressly excluding, however, the trademarks Rockwell International, Rockwell, North American Rockwell, Electroknit, Electroknit 48 and other marks or names not exclusively used by Wildman Jacquard) in so far as they relate to Wildman-Jacquard and also including all additions and improvements thereto made since Jan. 1, 1973 up to the date of divestiture, to a person, firm or corporation able to operate such plant as a separate, independent and viable going concern in the manufacture and sale of large diameter circular knitting machines.

Rockwell shall also make available, on a nonexclusive basis, for a period of five (5) years from the date of divestiture, to the acquirer, at the acquirer's option, and by license or other contract, solely for the purpose of making, using and selling electronically controlled large diameter circular double knit machines as produced by Rockwell for commercial sale at or prior to the date of divestiture (hereinafter Electronic Machines), for royalty payments of not in excess of 2 percent of the sales price of the acquirer's machines making use thereof, the following:

- (a) All patents and patent applications developed on behalf of Rockwell, its subsidiaries and affiliates covering inventions which were conceived or reduced to practice during the period from Aug. 29, 1968 to the date of divestiture for use in and which relate to the structure, manufacture or operation of Electronic Machines;
- (b) All other know-how and technology in the form of documents developed by Rockwell, its subsidiaries and affiliates during the aforesaid period for use in and which relate to the structure, manufacture or operation of Electronic Machines;
- (c) At the request of the acquirer, other reasonable technological assistance relating to know-how and technology developed by Rockwell, its subsidiaries and affiliates, during the aforesaid period for use in or which relate to the structure, manufacture or opera-

tion of Electronic Machines, such technological assistance to be provided through Rockwell personnel upon the payment of normal consulting fees for the personnel involved in addition to the royalty payments set forth above; and

(d) All patent rights and other know-how or technology in the form of documents which were licensed or assigned to, or otherwise acquired by Rockwell, its subsidiaries and affiliates during the aforesaid period for use in and which relate to the structure, manufacture or operation of Electronic Machines.

II

It is further ordered, That, if respondent is unable to sell or dispose of Wildman-Jacquard for cash, nothing in this order shall be deemed to prohibit respondent from retaining, accepting and enforcing in good faith any security interest therein, not to exceed five (5) years in duration, for the sole purpose of securing to respondent full payment of the price, with interest, at which Wildman-Jacquard is sold or disposed of; *Provided, however,* That if after a good faith divestiture of Wildman-Jacquard pursuant to this order, the buyer fails to perform his obligations and respondent regains ownership or control of Wildman-Jacquard by enforcement of any security interest therein, respondent shall redinvest such company within one year in the same manner as provided for herein.

III

It is further ordered, That, pursuant to the requirement of Paragraph I above, none of the assets, rights or privileges, tangible or intangible, to be divested pursuant to Paragraph I above, shall be divested directly or indirectly to anyone who is, at the time of the divestiture, an officer, director, employee, or agent of, or under the control, direction or influence of Rockwell or any of Rockwell's subsidiaries or affiliated corporations or who owns or controls more than one (1) percent of the outstanding shares of the capital stock of Rockwell.

IV

It is further ordered, That, pending divestiture, respondent shall not make any changes, other than in the ordinary course of business, or permit any deterioration in any of the plants, machinery, buildings, equipment or other property or assets of whatever description of Wildman-Jacquard which may impair said Wildman-Jacquard's capacity for the manufacture, distribution or sale of knitting machines.

V

It is further ordered, That, respondent Rockwell shall cease and desist for the period beginning on the date this order becomes final and ending ten (10) years after the completion of the divestiture required by Paragraph I of this order from acquiring, or acquiring and holding, directly or indirectly, without prior approval of the Federal Trade Commission, any part of the assets, or one (1) percent or more of the stock or other share capital, or other actual or potential equity interest or right of participation in the earnings of any domestic concern, corporate or non-corporate, which is engaged in the manufacture or sale in the United States of looms or knitting machines capable of being used to manufacture apparel or fabric for apparel, or of any foreign concern, corporate or non-corporate, engaged in the manufacture or sale of such looms or knitting machines whose sales in the United States of such looms and knitting machines in the five (5) years preceding such acquisition exceeded an average of \$500,000 per year, or exceeded \$700,000 in any one of such five years.

VI

It is further ordered, That, respondent Rockwell shall within sixty (60) days after date of service of this order, and every sixty (60) days thereafter until respondent Rockwell has fully complied with the provisions of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which respondent Rockwell is endeavoring to comply or has complied with this order. All compliance reports shall include, among other things that are from time to time required, a summary of contracts or negotiations with anyone for the specified property and assets, and the identity of all such persons and copies of all written communications to and from such persons.

VII

It is further ordered, That, respondent Rockwell 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, or any other proposed change in the corporation which may affect compliance obligations arising out of this order.

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IN THE MATTER OF

CARNATION COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-2522. Complaint, July 15, 1974—Decision, July 15, 1974*

Consent order requiring a Los Angeles, Calif., seller and distributor of Carnation Instant Chocolate Flavored Nonfat Dry Milk and its Los Angeles, Calif., advertising agency, among other things to cease misrepresenting and falsely advertising that its product is the nutritional equivalent of milk or reconstituted nonfat dry milk. Further, respondents are required for a one-year period to clearly disclose in all advertising for such a product that is not equivalent nutritionally to milk or reconstituted nonfat dry milk.

Appearances

For the Commission: *Kernit C. Morrison, Jr.* and *Edward F. Downs.*

For the respondents: *Ms. Robin Robinson* for Carnation Company, Los Angeles, Calif. *Mr. Harry L. Schnideman, Covington & Burling,* Wash., D.C. for Erwin Wasey, Inc.

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 corporate respondents Carnation Company and Erwin Wasey, Inc. 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. Carnation Company 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 5045 Wilshire Boulevard, in the city of Los Angeles, State of California.

PAR. 2. Erwin Wasey, Inc., 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 5455 Wilshire Boulevard, in the city of Los Angeles, State of California.

PAR. 3. Carnation Company is now, and has been for more than six months last past, engaged in the advertising, offering for sale and sale of Carnation Instant Chocolate Flavored Nonfat Dry Milk, a food product, as "food" is defined in the Federal Trade Commission Act.

PAR. 4. Erwin Wasey, Inc., is the advertising agency for Carnation Company and has been placing for publication and causing the dissemination of advertising material, including but not limited to the advertising referred to herein to promote the sale of certain of Carnation Company's products, which come within the classification of "food" as said term is defined in the Federal Trade Commission Act.

PAR. 5. Carnation Company causes the said product, when sold, to be transported from its place of business in the State of California to purchasers thereof located in various other states of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said product in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 6. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said product by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in newspapers, magazines and other advertising media, and by means of 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, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product; and have disseminated and caused the dissemination of, advertisements concerning said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly the purchase of said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

Here's something new from Carnation-Carnation Instant Chocolate Flavored Nonfat Dry Milk. With protein and calcium and fortified with vitamins A and D.

No * * * they're not all mine * * * but it seems like it at snack time. I give them Carnation Instant Nonfat Dry Milk * * * because, well, I'm sort of a health nut. You see, its nonfat dry milk with protein, calcium and B-vitamins. Frankly, I think its one of our best buys today. And now-there's chocolate flavor too * * * New Carnation Chocolate Flavored Nonfat Dry Milk.

PAR. 8. Through the use of the aforesaid advertisements, and others similar thereto not specifically set out herein, and through the use of the

name "Carnation Instant Chocolate Flavored Nonfat Dry Milk" respondents have represented and are now representing, directly or by implication that Carnation Instant Chocolate Flavored Nonfat Dry Milk is the nutritional equivalent of reconstituted non-fat dry milk.

PAR. 9. In truth and in fact,

Carnation Instant Chocolate Flavored Nonfat Dry Milk is not the nutritional equivalent of reconstituted non-fat dry milk.

Therefore, the advertisements referred to in Paragraph Seven were and are misleading in material respects and constituted, and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 10. The dissemination by the respondents of the false advertisements, as aforesaid, constituted and now constitutes, unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 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, 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 the 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 sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its compliant, makes the following jurisdictional findings, and enters the following order.

1. Respondent Carnation Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5045 Wilshire Boulevard, city of Los Angeles, State of California.

Respondent Erwin Wasey, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 5455 Wilshire Boulevard, city of Los Angeles, State of California.

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 Carnation Company, a corporation, and respondent Erwin Wasey, Inc., a corporation, and 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, sale or distribution of the product designated as Carnation Instant Chocolate Flavored Nonfat Dry Milk, or any other product of similar composition or possessing substantially similar properties, do forthwith cease and desist from directly or indirectly:

1. Disseminating, or causing the dissemination of any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents directly or by implication that any such product is the nutritional equivalent of milk or of reconstituted nonfat dry milk, through the use of the name Carnation Instant Chocolate Flavored Nonfat Dry Milk or otherwise.

2. Disseminating, or causing the dissemination of any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product in commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any representation prohibited by Paragraph 1 hereof.

It is further ordered, That respondents Carnation Company and Erwin Wasey, Inc. shall forthwith cease and desist, for a period of one (1) year from the date this order becomes final, from disseminating any advertisement in commerce, as "commerce" is defined in the Federal Trade Commission Act, for any product subject to this order, unless such advertisement contains a clear and conspicuous disclosure that

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such product is not the nutritional equivalent of non-fat milk, except that no such disclosure shall be required in any advertisement that promotes the use of any such product as a substitute for non-milk beverages. *Provided, however,* That the aforesaid disclosure shall be required in *any* advertisement that states or represents that any product subject to this order contains, or is made with, non-fat dry milk.

It is further ordered, That respondents 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 respondents such as dissolution, assignment, or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries or any other changes in the corporations which may affect compliance obligations arising out of the order.

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

KENNECOTT COPPER CORPORATION

Docket 8765. Interlocutory order, July 23, 1974

Denial of respondent's petition to reopen the proceedings on question of relief. Dissenting statement by Commissioner Nye; separate statement by Chairman Engman, concurred in by Commissioner Dixon.

Appearances

For the Commission: *Fiodie P. Favarella, Joseph Eckhaus and P. Abbott McCartney.*

For the respondent: *Sullivan & Cromwell, New York, N.Y. and Howrey, Simon, Baker & Murchison, Wash., D.C.*

DISSENTING STATEMENT

BY NYE, *Commissioner:*

Kennecott Copper Corporation has petitioned the Commission to reopen these proceedings on the question of relief.¹ I would grant the

¹The petition was filed pursuant to Section 3.72(b) (2) of the Commission's Procedures and Rules of Practice, which provides in relevant part:
(cont'd)

petition and reopen these proceedings for the limited purpose of supplementing the record with evidence relating to developments occurring since our original decision which may be relevant to the question whether the relief we ordered, divestiture of Peabody Coal Company and a ten year moratorium on further acquisitions, is still the most appropriate relief we can fashion to satisfy the purpose of Section 7 of the Clayton Act, 15 U.S.C. §18.

This conclusion does not proceed from recognition of any infirmities in our original decision or order. The Commission was correct on the basis of the facts as they existed when it acted and nothing occurring since the record was closed—or at least since our order was entered—can detract from the correctness of that decision. *Reynolds Metals Company*, 56 F.T.C. 1680 (1960). Nor do I accept any contention that the Commission did not give Kennecott a fair hearing on the question of relief or that the Commission somehow has the burden of proving it fashioned the least onerous relief possible after it determines a violation of the law has occurred. The Commission made clear its opposition to the Peabody acquisition long before that acquisition was consummated and there was no question before, during or after the trial that complete divestiture was the object of the Commission's effort. Divestiture is and should continue to be the normal remedy for violations of Section 7 of the Clayton Act. *United States v. E. I. du Pont de Nemours and Co.*, 366 U.S. 316, 328-329 (1961). Finally, I find no merit in the suggestion that this case is in some way so important that the relief granted must be fashioned to uphold "the public interest" rather than to remedy a violation of Section 7 of the Clayton Act. When a distinction between these two objectives is to be drawn, it will be for Congress to do so.

Nevertheless, much which may be highly relevant to the question of appropriate relief has occurred since the trial record was closed over five years ago.² The shortage of energy supplies which developed in the summer of 1973 and became acute during the subsequent embargo imposed by some of the oil-exporting countries greatly altered this

(cont'd)

Whenever any person subject to a decision containing a rule or order which has become *** final, is of the opinion that changed conditions of fact or law require that said rule or order be altered, modified, or set aside, or that the public interest so requires, such person may file with the Commission a petition requesting a reopening of the proceeding for that purpose. ***

Statutory authority for the petition is contained in Section 11(b) of the Clayton Act, 15 U.S.C. §21(b), which provides in relevant part:

[T]he Commission *** may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission *** conditions of fact or of law have so changed as to require such action or if the public interest shall so require ***.

²The trial commenced on Jan. 27, 1969, and concluded on June 11, 1969.

country's perception of its energy needs. The consequent national drive for self-sufficiency in energy production relies in significant part on accelerated exploitation of our abundant coal reserves and wider participation in that exploitation.³

There is substantial reason to believe these events have precipitated changes in fact central to important findings of the Commission, principally those findings relating to trends in industry concentration and foreseeable market entry by oil and gas companies and public utilities.⁴ In light of these events and the recent expertise developed by the Commission,⁵ I believe we should consider again, with a current record, the remedy appropriate to the violations involved in this case.⁶

SEPARATE STATEMENT BY CHAIRMAN ENGMAN,
CONCURRED IN BY COMMISSIONER DIXON

Although the Commission has decided to deny the petition to reopen the Commission's order of divestiture in this manner, this action does not deny recognition of the importance of the ultimate question that will eventually confront the Commission—whether divestiture under a plan to be submitted by respondent will accomplish not only separation of Kennecott's ownership and control over Peabody, but also continuation of Peabody "as a going concern and effective competitor in the mining, production and sale of coal" as provided in the Commission's order. This question—which in my view is the crucial question underlying the issues that have been argued to us on this petition—cannot be determined now

³See Energy Messages of President Nixon to the Congress, Nov. 8, 1973 and Jan. 23, 1974.

⁴The affidavit of Leonard B. Rahn, vice president of sales for Peabody Coal Company, filed in support of the Kennecott petition provides some detail with respect to a number of the new entrants, the expansion of certain firms in the industry, and other information relevant to present trends in concentration. Earlier, our opinion stressed that the coal industry was "experiencing a steady trend toward rising concentration" which "unless halted, foreshadows ominous developments in the coal industry, with production and sale of coal concentrating in fewer and fewer hands." *Kennecott Copper Corp.*, 78 F.T.C. 744, 914 (1971). In explaining our concept of potential competition we conceded that, as a general rule, a violation of Section 7 is generally found only in those circumstances in which the acquired firm is a leading factor in a "tight" oligopoly, whereas the coal industry, at least on a national level, was a "loose" oligopoly. *Id.* at 922. We recognized an exception to this rule, however, because two additional factors were present in the coal industry, *i.e.*, "the growth of the leading firms compared with the growth of the coal industry as a whole" showed a "demonstrated trend toward high concentration" and "barriers to entry [were] high and * * * becoming more formidable." *Id.* at 922, 924. We warned that competition might become nonexistent if we did not act promptly: "[T]he Commission should not wait until an industry has become engulfed in oligopoly's stranglehold before [it should] intercede." *Id.* at 928.

While it is clear that the Commission should not commit itself to such a wait, it is also clear that the Commission should not preclude itself from considering facts which occur during the process of judicial review if that is necessary to better serve the purposes of Section 7 of the Clayton Act.

⁵See, *e.g.*, Staff Economic Report, Interfuel Substitutability in the Electric Utility Sector of the U.S. Economy (1972) and Staff Economic Report, Concentration Levels and Trends in the Energy Sector of the U.S. Economy (1974).

⁶The supplemental record should include evidence showing what firms have newly entered the coal industry, the means by which entry was effected, the other business enterprises in which these firms are engaged, the prospect of future entry by additional firms, the kind and amount of investment capital available for the development of coal resources, and the extent to which coal is being or may be substituted for other sources of energy. See Staff Economic Report, *re*: Interfuel Substitutability in the Electric Utility Sector of the U.S. Economy (1972).

but must await completion of steps by Kennecott to develop an appropriate divestiture plan for submission to the Commission.

ORDER DENYING PETITION TO REOPEN PROCEEDINGS

On May 23, 1974, Kennecott Copper Corporation (hereinafter Kennecott) filed a "Petition to Reopen the Proceedings on the Question of Relief," pursuant to Section 3.72 of the Commission's Rules of Practice, including therein a request for oral argument on the petition, and submitted at the same time a request for oral discussion. Kennecott has subsequently filed various supplemental submissions relevant to its petition. The Bureau of Competition has replied, by answer of June 20, 1974, opposing the petition. Oral argument upon the petition was held on July 10, 1974. The Commission has considered the arguments of petitioner, and does not believe that adequate grounds have been shown to warrant reopening these proceedings for the purpose of considering the issue of relief. The issue of appropriate relief was considered by the Commission at the time it issued its original decision, and its order has been affirmed by the United States Court of Appeals [467 F. 2d 67], and certiorari denied by the Supreme Court [416 U.S. 963 (1974)]. Alleged changed conditions of fact and law described by petitioner are not such as to warrant reopening of these proceedings.

Accordingly, *It is ordered*, That the "Petition to Reopen the Proceedings on the Question of Relief" be, and it hereby is, denied.

Commissioners Thompson and Nye dissenting.

IN THE MATTER OF

GER-RO-MAR, INC., TRADING AS SYMBRA'ETTE, ET AL.

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

*Docket 8872. Complaint, Nov. 24, 1971—Decision, July 23, 1974**

Order requiring a San Jose, Calif., manufacturer of brassieres, girdles, swimwear, wigs and lingerie, among other things to cease using an open-ended, multi-level (pyramid) marketing plan to recruit distributors for its products; misrepresenting the earnings and profits a distributor may expect to make; maintaining resale prices; and restricting distributors as to whom they may sell their merchandise.

Appearances

For the Commission: *Jerome Steiner and Ralph Stone.*

For the respondents: *Rosenberg & Wiseman, San Jose, Calif.*

* Petition for review filed Oct. 11, 1974, C.A. 2nd.