by respondents, except to the extent they have been granted by this order, be, and they hereby are, denied.

Commissioners Thompson and Hanford not participating.

IN THE MATTER OF

GREAT WESTERN UNITED CORPORATION, ET AL.

Docket C-2306. Complaint, Oct. 20, 1972—Modifying order, Dec. 14, 1973

Order modifying previous Commission order, 81 F.T.C. 661, as modified, 82 F.T.C. 1263, against a Denver, Colo., real estate developer, by altering and modifying Paragraphs IB2 and IB3 of the order relative to the required disclosure of certain statements in printed advertisements concerning respondents' real estate projects.

Appearances

For the Commission: *Perry W. Winston.*

For the respondents: *Richard S. Levenberg,* Denver, Colo.

ORDER MODIFYING FINAL ORDER

Pursuant to Section 3.72(b)(2) of the Commission's Rules of Practice, and after consideration of respondents' petition of Oct. 4, 1973 to reopen and modify paragraphs IB1 and IB3 of the Final Order to Cease and Desist dated Oct. 20, 1972, subsequently modified by Commission order dated Apr. 25, 1973, and after further consideration of Commission counsel's response in support of such petition.

It is ordered, That Paragraphs IB1 and IB3 be altered and modified to read as follows:

IB1

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

Obtain HUD property report from developer and read it before signing anything. HUD neither approves the merits of the offering nor the value of the property as an investment, if any.

IB3

Failing to clearly and conspicuously disclose the following statement in all printed advertisements concerning real estate projects other than California City, however limited to projects in existence at the time this order becomes effective and to any future projects (1) covered by the Interstate Land Sales Full Disclosure

Act, and (2) where the property interest being offered is held in any form by respondents or any of their affiliates:

Obtain HUD property report from developer and read it before signing anything. HUD neither approves the merits of the offering nor the value of the property as an investment, if any.

Commissioner Hanford not participating.

IN THE MATTER OF

BRICK HOMES, INC., ET AL.

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

Docket C-2482. Complaint, Dec. 14, 1973—Decision, Dec. 14, 1973

Consent order requiring a Charlotte, N.C., seller, builder, and distributor of residential houses, among other things to cease misrepresenting the quality of materials used in its houses and their degree of completion, and from 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. Further, should respondent corporation merge with another corporation or transfer all or a substantial part of its business assets, respondents shall require a written agreement from its successor, to be filed with the Commission, that it will be bound by this order.

Appearances

For the Commission: *Robert L. Osteen, Jr.*
For the respondents: *pro se.*

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 Brick Homes, Inc., a corporation, and Richard C. Fulmer, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending 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 Brick Homes, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina with its principal office and place of business located at 4901 Pineville Road, Charlotte, N.C.

Respondent Richard C. Fulmer is an officer of the corporate respon-

dent. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past, have been engaged in the advertising, offering for sale, sale, construction, and distribution of residential houses.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraph 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 products, when sold, to be shipped from their place of business in the State of North Carolina 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 aforesaid products 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 products, respondents have made certain statements and representations with respect thereto in advertisements inserted in newspapers of general circulation, and through other advertising media, of which the following are typical and illustrative, but not all inclusive:

1. Standard brick of finest quality
   Standard high quality brick
2. Plumbing complete
3. A fully completed Brick Home
   Completely finished and ready to move into

PAR. 5. By and through the use of the aforesaid statements and representations and others of similar import and meaning not specifically set forth herein, respondents have represented directly and by implication that:

1. The finest quality brick available is used in houses constructed by respondents.

2. The plumbing in houses constructed or sold by respondents is complete, including the installation of a well and septic tank or connection to the public water and sewer lines.

3. The houses constructed or sold by respondents are complete and finished, needing no additional work or fixtures.

PAR. 6. In truth and in fact:

1. The brick used in the houses is "Grade B" brick, which is not the finest quality brick available.

2. The plumbing in houses constructed or sold by respondents is not complete and does not include installation of a well and septic tank or the connection to the public water and sewer lines.

3. The houses constructed or sold by respondents are not complete or finished and need additional work and fixtures, including closet shelving, bathroom rods, installation of well and septic tank or connection to public water and sewer lines, and installation and connection of fuel oil containers.

PAR. 7. Respondents advertised an offer to construct completely finished houses into which purchasers could immediately move without disclosing that the said houses (1) are not connected to public or individual water or sewage systems; (2) are not furnished or connected to fuel oil containers; or (3) do not contain closet rods and shelving or bathroom towel and tissue racks. Knowledge of such facts would indicate the necessity of expending additional funds in order to make the houses habitable. Thus, respondents have failed to disclose a material fact, which if known to certain customers would likely affect their consideration of whether or not to respond to said advertising in order to obtain additional information concerning the offer and to enter negotiations with respondents which results, in many instances, in purchases of such houses.

PAR. 8. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale and construction of houses 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 negotiations were, resulting in the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of the respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and the respondents' competitiors; 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 regulation promulgated thereunder, and of the Federal Trade Commis-

sion 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 by 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. Subsequent to July 1, 1969, in the ordinary course of their business, as aforesaid, and in connection with their credit sales, as "credit sale" is defined by Regulation Z, respondents have caused and are causing their customers to enter into contracts for the construction of the respondents' residential houses. On these contracts, hereinafter referred to as "the contract," respondents provide certain cost of credit information. Respondents do not provide these customers with any other consumer credit cost disclosures.

Respondents have caused and are causing certain customers to sign blank contracts, thereby failing to furnish these customers with any consumer credit cost disclosures before the consummation of the sale, as required by Section 226.8(a) of Regulation Z.

By and through the use of the contract, respondents:

1. Fail, in certain instances, to accurately disclose the "annual percentage rate" to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. Retain a security interest in property in connection with the credit sale and fail to describe the type of security interest, as required by Section 226.8(b)(5) of Regulation Z.

PAR. 13. In the connection with credit transactions, respondents fail to preserve as required by Section 226.6(i) of Regulation Z, records evidencing compliance with the requirements of the Truth in Lending Act.

PAR. 14. 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 advertisements, respondents:

State the amount of the downpayment and the amount of the monthly payments which could be arranged 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 amount of the downpayment 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."

PAR. 15. 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 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta 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 of 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Brick Homes, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its office and principal place of business located at 4901 Pineville Road, Charlotte, N.C.

Respondent Richard C. Fulmer is an officer of said corporation. He

formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

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 Brick Homes, Inc., a corporation, its successors and assigns, and its officers, and Richard C. Fulmer, individually and as an officer of said corporation, respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, distribution, or construction, directly or through others, of residential houses or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, orally, visually, in writing or in any other manner, directly or by implication, that houses or other products sold or constructed by respondents are constructed of the finest quality materials unless such is the case; or misrepresenting, in any manner, the quality of materials used in the construction of houses or other products sold or constructed by the respondents.
2. Representing, orally, visually, in writing or in any other manner, directly or by implication, that the plumbing in houses sold or constructed by respondents is complete; or misrepresenting, in any manner, the degree to which any aspect of the houses or other products sold or constructed by respondents is complete.
3. Representing, orally, visually, in writing or in any other manner, directly or by implication, that houses or other products sold or constructed by respondents are complete; or misrepresenting, in any manner the degree to which the houses or other products sold or constructed by the respondents are complete.
4. Failing to disclose, clearly, conspicuously and in such a manner as will accurately reflect the facts in connection with any advertisement, direct mail piece or other promotional material that houses sold or constructed by respondents: (1) are not connected to either public or individual water or sewer systems; (2) are not furnished or connected to fuel oil tanks or containers; and (3) do not contain closet rods and shelving or bathroom towel and tissue racks.

It is further ordered, That the respondents, incident to selling or contracting for construction of houses or other products, cease and desist from:

1. Contracting for any sale which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of signing the contract.

2. Failing to orally disclose prior to the time of sale, and in writing conspicuously and clearly on any conditional sales contract, promissory note or other instrument executed by the buyer that the buyer may rescind or cancel the sale by written notice of cancellation to respondents' address prior to midnight of the third day, excluding Sundays and legal holidays, after the date of the sale. Upon such cancellation the burden shall be on respondents to collect any goods left in the buyer's home and to return any payments received from him. Nothing contained in this right-to-cancel provision shall relieve buyers of the responsibility for taking reasonable care of the goods prior to, and for a reasonable period following, cancellation.

3. Failing to provide a separate and clearly understandable form which the buyer may use as a notice of cancellation.

4. Negotiating any conditional sales contract, promissory note, or other instrument of indebtedness to a finance company or other third party prior to midnight of the fifth day, excluding Sundays and legal holidays, after the date of execution by the buyer.

Provided, however, That nothing contained in this paragraph of this order shall relieve respondents of any contractual obligations required by federal law or that law of the state in which the contract is negotiated. When such obligations are inconsistent, respondents may apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required.

II

It is further ordered, That respondents Brick Homes, Inc., a corporation, its successors and assigns, and its officers, and Richard C. Fulmer, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. § 226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. Failing to furnish customers with all consumer credit cost

disclosures prior to the consummation of the sale, as required by Section 226.8(a) of Regulation Z.

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

3. Failing to describe the type of any security interest in property held, or to be retained or acquired in connection with any extension of credit, as required by Section 226.8(b)(5) of Regulation Z.

4. Failing to keep records evidencing compliance with the consumer credit cost disclosure requirements of Regulation Z for two years, as required by Section 226.6(i) of Regulation Z.

5. Stating the amount of the downpayment or the amount of the monthly payments which could be arranged 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 amount of the downpayment 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; and

(iv) The amountof the finance charge expressed as an "annual percentage rate."

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 shall forthwith distribute a copy of this order to each of their operating divisions.

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

It is further ordered, That respondents notify the Commission at least 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 in the event the corporate respondent merges with another corporation or transfers all or a substantial part of its business or assets to any other corporation or to any other person, respondents shall require said successor or transferee to file promptly with the Commission a written agreement to be bound by the terms of this order; *Provided*, That if respondents wish to present to the Commission any reasons why said order should not apply in its present form to said successor or transferee, they shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

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

It is further ordered, That the 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

GULF SOUTH CORPORATION, ET AL.

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

Docket C-2483. Complaint, Dec. 19, 1973—Decision, Dec. 19, 1973

Consent order requiring three consumer credit companies in Oklahoma City, Okla. and Springfield, Mo., among other things to cease 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 J. Hemrick*.

For the respondents: *John S. Patterson, Jr.*, of Gulf South Corporation, Oklahoma City, Okla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promul-

gated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Gulf South Corporation, Gulfco Investment Corporation and Family Loan, Inc., of Springfield, Mo., corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the 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 Gulf South Corporation, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Oklahoma with its principal office and place of business located at 5500 North Western Avenue, Oklahoma City, Okla.

Respondent Gulfco Investment Corporation, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Oklahoma with its principal office and place of business located at 5500 North Western Avenue, Oklahoma City, Okla. Respondent Gulfco Investment Corporation is a wholly-owned corporate subsidiary of respondent Gulf South Corporation.

Respondent Family Loan, Inc., of Springfield, Mo., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 503 St. Louis Street, Springfield, Mo. Respondent Family Loan, Inc., of Springfield, Mo., is a wholly-owned corporate subsidiary of respondent Gulfco Investment Corporation.

PAR. 2. Respondents by and through their corporate subsidary structure are now and for some time last past have been engaged in the offering to extend, and the extension of consumer credit to the public.

PAR. 3. In the ordinary course and conduct of their business, as aforesaid, respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business, as aforesaid, have charged, and are now charging, a substantial number of consumers for credit life and credit disability insurance written in connection with consumer loans.

Typical and illustrative, but not all inclusive of the circumstances in which such insurance charges are incurred by consumers are the following:

1. Respondents automatically include charges for credit life and credit disability insurance on the Disclosure Statement of Loan, and, unless the consumer specifically objects to the inclusion of the charges for such insurance, the coverage becomes part of the credit transaction.

2. On that portion of the disclosure statement of loan which contains the statement "I desire Credit Life and Disability Insurance," respondents sometimes date and place an "X" or other mark on the line for the borrower's signature.

3. Respondents place the charges for credit life and disability insurance in the "Authorized Deductions" section of the disclosure statement of loan, and these charges become part of the amount financed, but are not included in the computation of the finance charge or the annual percentage rate.

PAR. 5. By and through the acts and practices described in Paragraph Four, and others of similar import, meaning and consequence, but not specifically set forth herein, respondents, in a substantial number of instances, induce their customers to incur charges for credit life and credit disability insurance by leading them to believe, directly or by implication, that the insurance coverage is required or that their signatures are necessary solely for the purpose of consummating the credit transaction. Therefore, the signatures of respondents' customers appearing on that portion of the loan disclosure statement representing their authorization for credit life and credit disability insurance coverage do not constitute a "specific dated and separately signed affirmative written indication of [their] desire" to obtain such insurance, as required by Section 226.4(a)(5) of Regulation Z, in spite of the existence of language to the contrary in the loan disclosure statement.

PAR. 6. By and through the acts and practices described in Paragraphs Four and Five hereof, respondents have failed to include the charges for credit life and credit disability insurance in the finance charge when a specific dated and separately signed affirmative written indication of the consumer's desire for such insurance has not been obtained, as required by Section 226.4(a)(5) of Regulation Z, and thereby respondents:

1. Failed to compute and disclose accurately the "finance charge" as required by Sections 226.4 and 226.8 of Regulation Z; and

2. Failed to compute and disclose the "annual percentage rate" to the nearest quarter of one percent, as required by Sections 226.5 and 226.8 of Regulation Z.

PAR. 7. In the further course and conduct of their business as aforesaid, respondents, in connection with their disclosure statement of loan, obtain a security interest and sometimes fail to identify the property to which the security interest relates as required by Section 226.8(b)(5) of Regulation Z.

PAR. 8. Pursuant to Section 103 (q) of the Truth in Lending Act, respondents' aforesaid failure to comply with Sections 226.4, 226.5 and

226.8 of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that 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 thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Gulf South Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oklahoma, with its office and principal place of business located at 5500 North Western Avenue, city of Oklahoma City, State of Oklahoma.

Respondent Gulfco Investment Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oklahoma, with its office and principal place of business located at 5500 North Western Avenue, city of Oklahoma City, State of Oklahoma.

Respondent Family Loan, Inc., of Springfield, Mo., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 503 St. Louis Street, city of Springfield, State of Missouri.

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 Gulf South Corporation, a corporation, Gulfco Investment Corporation, a corporation, and Family Loan, Inc., of Springfield, Mo., a corporation, their successors and assigns, and their officers, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit, as "consumer credit" is defined in Regulation Z (12 C.F.R. § 226) of the Truth in Lending Act (Pub. L 90–321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing, in any consumer credit transaction in which the charges for credit life insurance and/or credit disability insurance are not included in the finance charge:

(a) To quote monthly payments which exclude the cost of credit life insurance and/or credit disability insurance. Monthly payments which do reflect credit life insurance and/or credit disability insurance may be quoted only if:

(1) Monthly payments without insurance premiums are also quoted; and

(2) Respondents explain clearly that credit life insurance and/or disability insurance are optional and that insurance coverage is not considered in respondents' approval of the consumer's credit, using the following language, or langauage of similar import and meaning approved by the Commission.

Family Loan, Inc., of Springfield, Missouri [or other business extending consumer credit] does not require you to obtain credit life insurance or credit disability insurance in connection with the extension of credit you seek, and your decision regarding such insurance is not considered in the approval of your credit.

(b) To inform the consumer any time respondents describe, discuss, or comment on credit life and/or credit disability insurance, whether in response to a question from a consumer, or as part of respondents' employees' presentation, that credit life and/or credit disability insurance are not required in connection with the extension of credit and are not considered in respondents' approval of the consumer's credit, using the following language, or language of similar import and meaning approved by the Commission:

Family Loan, Inc., of Springfield, Missouri, [or other business extending consumer credit] does not require you to obtain credit life insurance and/or credit disability insurance in connection with the extension of credit you seek, and your decision regarding such insurance is not considered in the approval of your credit.

(c) To provide the following disclosure to every customer for every credit transaction:

[TO BE READ BY RESPONDENTS' EMPLOYEE]

I understand that Family Loan, Inc., of Springfield, Missouri [or other business extending consumer credit] does not require me to obtain credit life insurance or credit disability insurance in connection with this loan, and that my decision regarding such insurance is not considered in the approval of my credit. I have voluntarily decided to take —— credit life insurance for $——, —— credit disability insurance for $——.

I have read this statement to (customer's name)

Loan Closer's Signature______________

Dated______________

I ACKNOWLEDGE THAT THIS STATEMENT WAS READ TO ME.

Customer's Signature_________________

Dated__________________

Such disclosure shall be made on a separate document which contains no other printed or written material and shall be read to the customer by respondents and executed prior to respondents making any other cost of credit disclosures. Respondents shall maintain the original of the statement for two (2) years following its execution and provide the customer with a copy thereof.

2. In any consumer credit transaction in which the charges for credit life insurance and/or credit disability insurance are not included in the finance charge:

(a) Dating and/or placing an "X" or other mark on the signature line of that portion of the loan disclosure statement intended to serve as the consumer's affirmative written indication of his desire to obtain credit life insurance and/or credit disability insurance.

(b) Misrepresenting, orally or otherwise, directly or by implication, that credit life and/or credit disability insurance are required as a condition of obtaining credit from respondent, or discouraging, directly or by implication, the declination of credit life or credit disability insurance.

3. Failing to explain orally to every customer the purpose of each signature requested by respondents on any document directly related to the consummation of the credit transaction.

4. Failing to compute and disclose accurately the finance charge, as required by Sections 226.4 and 226.8 of Regulation Z.

5. Failing to compute and disclose accurately the annual percentage rate to the nearest quarter of one percent, as required by Sections 226.5 and 226.8 of Regulation Z.

6. Failing to identify the property to which any security interest relates, as required by Section 226.8(b) (5) 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 deliver a copy of this order to cease and desist to all present and future personnel of respondents at their general offices in Oklahoma City, Okla., and Springfield, Mo., and in each of their subsidiary corporations who are engaged in the extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said copy of this order from each such person.

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

Commissioner Hanford not participating.

IN THE MATTER OF

SOUTHERN STATES DISTRIBUTING COMPANY, ET AL.

Docket 8882. Interlocutory Order, Dec. 26, 1973

Order granting a joint motion to replace exhibits in the record.

Appearances

For the Commission: *W. Roland Campbell* and *John H. Bedford.*

For the respondents: *James B. Gurley* of *Carter, Ansley, Smith, McLendon & Quillian*, Atlanta, Ga.

ORDER GRANTING MOTION TO REPLACE EXHIBITS IN THE RECORD

Respondents and counsel supporting the complaint having jointly moved, by motion received Dec. 7, 1973, that the Commission admit into the record of this case as exhibits certain true copies of documents which were admitted as exhibits during the trial of this matter before the administrative law judge, but which exhibits were never received

by the Commission's Division of Legal and Public Records, and having further jointly moved that inclusion in the record of certain exhibits entered into evidence or offered as evidence at the trial be waived (such exhibits not having been received by the Division of Legal and Public Records, and the parties having stipulated as to the contents of such exhibits).

It is ordered, That the true copies of documents submitted by the parties pursuant to their joint motion received Dec. 7, 1973, and described therein, be admitted to replace exhibits entered into evidence at the trial before the administrative law judge but not received by the Division of Legal and Public Records, and

It is further ordered, That the joint motion of the parties to waive inclusion in the record of respondents' exhibits RX 201, 216, 217, and 218 entered into evidence, and RX 232 and 233 which were offered as evidence but rejected, be granted, *Provided*, That the stipulation of the parties as to the contents of these documents appended to their joint motion shall be entered into the record.

Commissioner Hanford did not participate in this proceeding since oral argument was heard prior to her assumption of office.

IN THE MATTER OF

SOUTHERN STATES DISTRIBUTING COMPANY, FORMERLY KNOWN AS SOUTHERN CROSS DISCOUNT COMPANY, INC., AND TRADING AS SOUTHERN STATES DECORATORS, ET AL.

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

Docket 8882. Complaint, April 3, 1972—Decision, Dec. 26, 1973

Order and opinion requiring an Atlanta, Ga., seller and distributor of home improvement products, including residential siding and swimming pools, among other things to cease misrepresenting offers to sell; disparaging products advertised; misrepresenting offers as limited; misrepresenting prices and guarantees; failing to maintain adequate records substantiating pricing, savings and comparative value claims; misrepresenting the efficacy, durability, efficiency, composition or quality of respondents' products; misrepresenting connections or arrangements with others; failing to disclose required information as to sale of instruments of indebtedness to third parties; and failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the Truth in Lending Act.

Appearances

For the Commission: *W. Roland Campbell* and *J. H. Bedford*.

For the respondents: *James B. Gurley*, of *Carter, Ansley, Smith, McLendon & Quillian*, Atlanta, Ga.

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 Southern States Distributing Company, a corporation, formerly known as Southern Cross Discount Company, Inc., and also trading and doing business as Southern States Decorators, Southern Cross Pools, Southern Cross Windows, Miracle Plastic Roofers and Carpet Discount Outlet, and Emanuel I. Gladstone, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and of the regulations promulgated under the Truth in Lending 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 Southern States Distributing Company, formerly known as Southern Cross Discount Company, Inc., and also trading and doing business as Southern States Decorators, Southern Cross Pools, Southern Cross Windows, Miracle Plastic Roofers and Carpet Discount Outlet, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office and place of business located at 2099 Liddell Drive, N.E., in the city of Atlanta, State of Georgia.

Respondent Emanual I. Gladstone is an individual and an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution to the public of home improvement products, including, but not limited to, residential siding and swimming pools, and in the installation thereof.

COUNT I

Alleging violations 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 products, when sold, to be shipped from their place of business in the State of Georgia 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 products in commerce, as "commerce" is defined in the Federal Trade Comission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase and installation of their home improvement products, respondents and their salesmen or representatives have made, and are now making, numerous statements and representations in advertising and promotional material and through oral statements and representations with respect to the nature and limitations of their offers, their prices, their purchasers' savings, their warranty, the durability of their products, their business affiliations, and their assistance to purchasers in paying for their products and installations.

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

MAMOUTH (sic) SWIMMING POOL SALE! 19′ x 19′ REG. $1,595 NOW $795–
10-YEAR WARRANTY

* * * * * * *

LOW-LOW FINANCING E-Z TERMS
SWIMMING POOL SALE! HURRY! OFFER GOOD FOR LIMITED TIME ONLY.
$795
SAVE ON SPECIAL OFFER! ALUMINUM SIDING SALE! SIDING MADE FROM REYNOLDS ALUMINUM–SAY GOODBY TO PAINTING EXPENSES–$299

PAR. 5. By and through the use of the aforesaid statements and representations and others of similar import and meaning, but not specifically set out herein, separately and in connection with oral statements and representations of their salesmen or representatives, respondents have represented, and are now representing, directly or by implication, that:

1. The offers set out in their advertisements are bona fide offers to sell home improvement products and installations of the kind therein described at the prices and on the terms and conditions stated.

2. Their advertised offer of a 19′ x 19′ swimming pool for $795 is made only for a limited period of time.

3. Their home improvement products and installations are being offered for sale at special or reduced prices, and savings are thereby afforded to their purchasers because of reductions from respondents' regular selling prices.

4. Their 19′ x 19′ swimming pool is warranted in every respect without conditions or limitations for a period of ten years.

5. Their aluminim siding materials will never require painting.

6. Their salesmen or representatives are connected or affiliated with the manufacturers of products sold by respondents.

7. Purchasers of their products and installations are granted easy credit terms, without regard to their financial status or their ability to pay, by financial institutions with which respondents deal.

8. After the installation of their products is completed, the homes of their purchasers will be used for demonstration and advertising purposes by respondents, and, as a result of allowing or agreeing to allow their homes to be used as models, purchasers will be granted reduced prices or will receive allowances, discounts, commissions or referral fees.

PAR. 6. In truth and in fact:

1. The offers set out in respondents' advertisements are not bona fide offers to sell home improvement products and installations of the kind therein described at the prices or on the terms and conditions stated but are made for the purpose of obtaining leads to persons interested in the purchase thereof. After obtaining such leads, individual respondent Emanuel I. Gladstone or respondents' salesmen or representatives call upon such persons and disparage respondents' advertised home improvement products and installations and otherwise discourage the purchase thereof and attempt to sell and frequently do sell different and more expensive home improvements products and installations.

2. Respondents' advertised offer of a 19′ x 19′ swimming pool for $795 is not made only for a limited period of time. Said product is advertised regularly at the represented price and on the terms and conditions therein stated.

3. Respondents' home improvement products and installations are not being offered for sale at special or reduced prices, and savings are not thereby afforded to their purchasers because of reductions from respondents' regular selling prices. In fact, respondents do not have regular selling prices, but the prices at which respondents' home improvement products and installations are sold vary from purchaser to purchaser depending upon the resistance of the particular purchaser.

4. Respondents' 19′ x 19′ swimming pool is not warranted in every respect without conditions or limitations for a period of ten years or for any other period of time. Such warranty as may be provided by respondents is subject to numerous terms, conditions and limitations with respect to the duration of the warranty and fails to set forth the nature and extent of the warranty, the identity of the warrantor and the manner in which the warrantor will perform thereunder.

5. Respondents' aluminum siding materials will require painting.

6. Respondents' salesmen or representatives are not connected or affiliated with the manufacturers of products sold by respondents.

7. Purchasers of respondents' products are not granted easy credit terms, without regard to their financial status or their ability to pay, by financial institutions with which respondents deal.

8. After the installation of respondents' products is completed, the homes of respondents' purchasers will not, in most instances, be used for demonstration or advertising purposes by respondents and as a result of allowing, or agreeing to allow their homes to be used as models, purchasers are not granted reduced prices, nor do they receive allowances, discounts, commissions or referral fees.

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

PAR. 7. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their home improvement products and installations, including, but not limited to residential siding and swimming pools, individual respondent Emanuel I. Gladstone and respondents' salesmen or representatives have in many instances engaged in the following additional unfair, false, misleading and deceptive acts and practices:

1. They have obtained purchasers' signatures on blank completion certificates, mortage deeds and other instruments by making false and misleading representations and deceptive statements, including false and deceptive representations with respect to the nature and effect thereof, to induce purchasers to sign such instruments.

2. They have failed to disclose certain material facts to purchasers, including but not limited to the fact that, at respondents' option, conditional sales contracts, promissory notes or other instruments of indebtedness executed by such purchasers in connection with their credit purchase agreements may be discounted, negotiated or assigned to a finance company or other third party to whom the purchaser is thereafter indebted and against whom defenses may not be available.

Therefore the acts and practices, as set forth in Paragraph Seven hereof, were, and are, false misleading and deceptive.

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

PAR. 9. The use by the 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 substan-

tial quantities of respondents' home improvement products and installations 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 TWO

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

PAR. 11. In the ordinary course and conduct of their business, as aforesaid, respondents regualarly 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. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid, and in connection with credit sales, as "credit sale" is defined in Regulation Z, have caused and now are causing customers to enter into contracts for the purchase of respondents' home improvement products. Respondents provide their customers with no consumer credit cost disclosures other than those in respondents' contract. On these contracts, hereinafter referred to as "the contract," respondents provide certain consumer credit information.

By and through the use of the contract, respondents fail in certain instances to disclose:

1. The "annual percentage rate" as required by Section 226.8(b) (2) of Regulation Z by leaving the space provided therefor blank.

2. The number, amount and due dates scheduled for the repayment of the customer's indebtedness as required by Section 226.8(b) (3) of Regulation Z by leaving the space provided therefor blank.

PAR. 13. Respondents on the contract fail to separately itemize notary fees as "other charges" as required by Section 226.8(c) (4) of Regulation Z.

PAR. 14. 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 in some instances failed to give their credit customers the right to rescind until midnight of the third business day following the consummation of the transaction or the date of delivery of all disclosures, whichever is later, and have failed to set forth the "Effect of Rescission" in the rescission notice to their customers, as required by Sections 226.9(a) and (b).

Further respondents have made physical changes in a customer's property and performed work or services on such property before expiration of the three-day rescission period. Respondents failure to refrain from commencing work pursuant to rescindable contracts before the rescission period has expired is in violation of Section 226.9(c) of Regulation Z.

PAR. 15. In connection with credit transactions, respondents fail to preserve, as required by Section 226.6(i) of Regulation Z, records evidencing compliance with the requirements of the Truth in Lending Act.

PAR. 16. 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:

State that "1st payment in the summer," thereby implying 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 prices.

PAR. 17. 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(c)

thereof, respondents have thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY HARRY R. HINKES, ADMINISTRATIVE LAW JUDGE

APRIL 30, 1973

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this proceeding on Apr. 3, 1972, charging the respondents with 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, as well as with violations of the Truth in Lending Act. By answer duly filed respondents denied violating the Federal Trade Commission Act or the Truth in Lending Act. The answer also denied that the individual respondent named in the complaint, Emanuel I. Gladstone, formulates, directs or controls the acts and practices of the corporate respondent, and that the respondents maintain a substantial course of trade in commerce; it avers that the respondents are out of business. A prehearing conference was held to clarify the issues and arrange for a trial schedule, pursuant to which a request for admissions was submitted by counsel supporting the complaint and answered by counsel for the respondents. A similar request from counsel for the respondents for admissions by complaint counsel was submitted and answered. Document and witness lists were exchanged. Thereafter hearings were conducted in Charleston, S.C., Birmingham, Ala. and Atlanta, Ga., during the months of Sept., Oct. and Dec. 1972. The record in this proceeding was closed on Jan. 17, 1973. Proposed findings and briefs were filed by the parties on Feb. 12, 1973 and reply briefs were submitted on Feb. 27, 1973.

Any motions not heretofore or herein specifically ruled upon either directly or by the necessary effect of the conclusions in this initial decision, are hereby denied.

The proposed findings, conclusion and briefs submitted by the parties have been given careful consideration and to the extent not adopted by this decision in the form proposed or in substance are rejected as not supported by the evidence or as immaterial.

References to the record are made in parentheses using the following abbreviations:

CX—Commission's Exhibit
RX—Respondents' Exhibit
RAC—Respondents' Answer to Complaint
RAR—Respondents' Answer to Request for Admissions

Tr—Transcript of the Testimony

Having reviewed the record in this proceeding with care and having considered the demeanor of the witnesses as they testified, together with the proposed findings, conclusions and briefs submitted by the parties, I make the following: [1]

FINDINGS OF FACT

1. Respondent, Southern States Distributing Company, formerly known as Southern Cross Discount Company, Inc., a corporation organized under and by virtue of the laws of the State of Georgia, was located and doing business at 2099 Liddell Drive, N.E., Atlanta, Ga. (Admitted, RAC Par. 2).

2. Respondent, Southern States Distributing Company, formerly known as Southern Cross Discount Company, Inc., ceased doing business in December 1971 (Gladstone, Tr. 1561). The record is silent, however, as to whether the charter of either corporation has been revoked, dissolved or otherwise terminated.

3. Respondent, Southern States Distributing Company, formerly known as Southern Cross Discount Company, Inc., did business under said corporate names and the following trade names: Carpet Discount Outlet, Southern States Decorators, Southern Cross Pools, Southern Cross Windows, and Miracle Plastic Roofers (Admitted, Stipulation, Tr. 1055; Gladstone, Tr. 1561).

4. Respondent, Emanuel I. Gladstone is an individual and was an officer of the corporate respondents (Admitted, RAC Par. 2; Gladstone, Tr. 1561).

5. Respondent, Emanuel I. Gladstone formulated, directed and controlled the acts and practices of the corporate respondents. At the investigational hearings in this matter he testified "I am president of the company. If you ask me what I do, I do everything in the company. Everything is under me." When he testified about his installation manager, Gladstone said "He has discretion but I know what's going on." (CX 716 a,b). At the adjudicatory hearings Gladstone testified that he had been president of the corporate respondent. Speaking of the corporate respondent Gladstone would often use the personal pronoun "I." Thus, he testified "*I* knew when *I* put out *my* mailers *I* never used the words 'regular price' in any business advertising and *I* never used it on any of *my* advertising 'save $300 or $00 [sic] or $200.' *I* didn't do that because *I* knew that was against the Federal Trade Commission Rules." (Tr. 1601) Again, in testifying about the activities prior to incorporation, Gladstone stated: "I took quite a bit of time of preparing and

[1] The issuance of this decision was delayed briefly because of the temporary loss of certain exhibits.

planning * * * and shortly after that I started preparing to go into business." (Tr. 1657) Many employees, both supervisory and non-supervisory, had been hired by Gladstone: Salesman Oden (Tr. 398), Lead Man Rupert (Tr. 951), Lead Man Schroeder (Tr. 758), Sales Manager Cody (Tr. 915), Head Secretary Neal (Tr. 979), Credit Manager Dykes (Tr. 1033), and Assistant Installation Manager Little (Tr. 1056). Installation Manager Little worked under Gladstone's supervision (Tr. 777). Oden "guessed" that Gladstone or "somebody in the office" instructed him to get signatures to blank documents (Tr. 407) and Gladstone conducted the sales meetings (Tr. 409). Rupert obtained product knowledge from Gladstone (Tr. 965). Gladstone's approval was necessary to order the materials respondents were selling (Tr. 778). Cody received written sales material from Gladstone (Tr. 932), Gladstone instructed him how to handle customers (Tr. 916) and, when he went out to make sales, Gladstone advised him what products respondents had in stock (Tr. 933). This was corroborated, in part at least, by the testimony of Gladstone during the investigational hearing. At that time Gladstone stated that if any salesman had any questions concerning anything in the sales manual he "could ask me if he had any questions" (CX 716d). One of respondents' customers, when she decided to pay cash rather than have her transaction financed, spoke to Gladstone about it (Ferraro, Tr. 73). Gladstone himself testified that he talked with customers over the telephone (stipulation, Tr. 1014).

There is no evidence, however, that Gladstone himself engaged in any deceptive act or practice or that he instructed any of the employees of the corporate respondents to do so.

6. Respondents have been engaged in the advertising, offering for sale, sale and distribution to the public of home improvement products, including but not limited to residential siding, patios, carpeting and swimming pools and in the installation thereof (RAC Par. 3; Oden, Tr. 398; Little, Tr. 778; Cody, Tr. 929 and Little, Tr. 1057).

7. Respondents have shipped their products when sold to purchasers located in Ga., S.C., N.C., Ala. and Miss. (Admitted, RAC Par. 6; Schroeder, Tr. 760).

8. Respondents maintained all times mentioned herein a substantial course of trade in their products in commerce as "commerce" is defined the Federal Trade Commission Act. Respondents' answer to the complaint states at Paragraph 6 that "they have in the past shipped their products when sold to purchasers located in states other than Ga." Respondents deny that they have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act, and they do further show that any such business done by them has been insubstantial. Respondents stipulated,

however, that all customers of the respondents were contracted by the respondents after they received or saw one of the respondents' advertisements. Inasmuch as various consumer witnesses who contracted for the purchase of one of respondents' products resided in states other than Ga. it is likely that respondents must have advertised in states other than Ga. as well (Tr. 220). Moreover, Gladstone testified that he had sent out as many as 4 million mailers in one year (Tr. 1603). In addition, respondents admitted that during the years 1968 through 1970, inclusive, their annual gross sales approximated 1.5 million dollars. During the same years approximately 100,000 mailers were sent to prospective customers weekly and during the same years they obtained 2,000 to 3,000 proposals annually for the installation of their products (RAR). Finally, respondents' profit and loss statement shows that for the fiscal year 1968 the respondents spent more than a quarter million dollars for advertising (CX 716 t).

9. In the course and conduct of their business respondents have made statements and representations in advertising and promotional material some of which relate to limitations of their offers, their prices, their warranty, the durability of their products, their business affiliations and their assistance to purchasers in paying for their products and installations (Admitted, RAC Par. 7). Among their advertisements were the following:

SAVE ON SPECIAL OFFER!!!
ALUMINUM SIDING SALE!
[either] ENJOY EVERLASTING HOME BEAUTY
[or] SAY GOODBY TO PAINTING EXPENSES
LIMITED TIME $299–WHY PAY $999

(CX 27a, 28a, 29a, 30a, 31a, 38a, 41b, 42b, 54b, 60b, 61b, 69, 70.)

MAMOUTH (SIC) SWIMMING POOL SALE! 19' x 19' REG. $1,595 NOW–$795.00–
10 YEAR WARRANTY

(CX 32, 33, 56.)

3 ROOMS WALL TO WALL CARPET–PRICES SLASHED–LIMITED OFFER–
$99.00–COMPLETELY INSTALLED OVER PADDING

(CX 34, 35, 39, 40, 41a, 42a, 43, 44, 51.)

OLD WINDOWS REPLACED 5 WINDOWS FOR $99.00–COMPLETELY INSTALLED

(CX 41a, 42a, 54b, 55.)

SWIMMING POOL SALE! HURRY! OFFER GOOD FOR LIMITED TIME ONLY–
$795.00

(CX 56, 57, 58, 60b.)

E–Z CREDIT

(CX 39, 40, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 62, 63, 64, 65, 66, 67.)

WE USE REYNOLDS ALUMINUM

(CX 27a, 28a, 29a, 30a, 31a, 41b, 42a, 54b, 60b, 61b, 69.)

The terms "limited offer" "special offer" and "sale" were used by respondents once a week (Ans. 52, RAR).

10. Respondents' offer to sell their products were neither sales nor specials nor limited offers as set forth above. Respondents admitted that during 1968 through 1970 they advertised their siding at no other price than $299 completely installed on a 1,000 sq. ft. surface (Ans. 30, RAR). Respondents also admitted that during the same period they advertised their economy pool for anywhere from $595 to $995 (Ans. 31, RAR). Respondents further admitted that during those years they advertised their carpeting for either $99, $149, or $179, completely installed in three rooms or three areas (Ans. 33, RAR). Respondents further admitted that during 1968 through 1971 they advertised their patio for either $79, or $99 (Ans. 32, RAR). Respondents also admitted that when they advertised their storm windows they did so at no other price than 5 storm windows completely installed at $99 (Ans. 11 of July 12, 1972, RAR).

11. Respondents had lower price advertised or economy products (ADV or ECO) and non-advertised higher priced or deluxe products (PRO) (Little, Tr. 779; Gladstone, Tr. 1688).

12. Respondents advertised only their cheaper or economy products. Respondents' advertisements received in evidence refer only to their economy products. Although Gladstone testified that better grade products (PRO) had been advertised by the respondents (Tr. 1688), I cannot credit this testimony in the absence of any documentary proof in support thereof.

13. Invoices received in evidence show that during 1968 respondents sold 95 deluxe swimming pools but none of the advertised or economy swimming pools and that during 1969 respondents sold 48 deluxe swimmings pools but no advertised or economy pools, that is, no sales of pools advertised at from $595 to $995 (CX 717 a-e); that during 1968 respondents bought 5,314 squares of deluxe siding but only 44 squares of economy siding and that during 1969 the amounts were 7,748 squares of deluxe siding compared to 155 squares of economy siding, that is, siding advertised to be installed on an average 1,000 sq. ft. surface for a price of $299 (CX 717 d-e); that respondents' purchases of deluxe carpeting during 1968 and 1969 totaled 47,820 sq. yds. compared to their purchases of economy carpeting totaling only 7,226 sq. yds., that is, carpeting advertised as installed in three rooms or three areas at $99 (CX 717 h-m).

Respondents' Installation Manager Little testified that they tried to carry some of the economy products in stock most of the time, that one-third of their stock of carpeting was the economy carpeting and that one-fourth of their stock of siding was economy siding (Little, Tr. 780–81). Five hundred of respondents' sales in chronological order from June 20, 1969 through Sept. 10, 1969 were received in evidence indicat-

ing that 2 advertised siding jobs, 2 advertised patios, 14 advertised carpeting jobs and no advertised pools were installed for a total of 18 economy products (Tr. 1084). Counsel for the respondents argues that if 18 economy sales were made in less than a three month period, it is reasonable to assume that the respondents were selling and installing at least 80 economy home improvement jobs in each year of their operation (Respondent's Answering Brief p. 9). I cannot disagree. I note, however, that only 3.6 percent of the 6/20/69–9/10/69 sales were of the economy products although they were the only products advertised. The conclusion is inescapeable that respondents' purchases as well as sales of the economy or advertised product compared to its purchases and sales of the deluxe product were insignificant, and I so find. I further find that respondents' advertising of the economy products was for the purpose of selling the deluxe substitute.

14. It was stipulated that respondents' salesmen carried with them samples of the advertised and more expensive products when calling on customers and explained the difference between them to the customers (Tr. 221). Respondents further admitted that they furnished their salesmen with these models or samples (Ans. 17, RAR). Complaint counsel contend that these models were shown to discourage the purchase of the advertised product. They cite, for example, the fact that the deluxe carpeting was carried in a brown carrying case while the economy carpeting was carried in a cardboard folder (CX 673, 674); that the deluxe pool model was contained in a black carrying case with a plexiglass cover, was painted and had landscaping while the advertised pool model was assembled out of unpainted wood and was contained in an unpainted wooden suitcase that was smaller (CX 679, 680); that the deluxe storm window was in a black carrying case while the economy model was in an unpainted wooden stand (CX 685, 686); that the deluxe patio model was in a brown carrying case while the economy patio model was only a piece of corrugated metal supported by unpainted wooden posts (CX 677, 678). They also cite the fact that the models themselves showed quality differences, the deluxe product being visibly better or thicker than the economy model. I conclude that the exhibition of these models as described above would tend to encourage a customer to buy the deluxe product. This is not to say, however, that the customer was thereby deceived inasmuch as there is no evidence from which to conclude that the representations made by the salesmen in exhibiting the models were false or deceptive. It can only be assumed that a customer being shown both a better and a poorer product would normally prefer to have the better product. The mere exhibition of a better product together with a poorer product, absent any misrepresentation or deception, cannot and should not give rise to any violation of law. Any other

conclusion would prevent a merchant from handling more than one quality line of merchandise. The slight embellishment engaged in by the respondents by making the surroundings of the deluxe product more pleasing is not an embellishment of the deluxe product itself and not a misrepresentation of the two grades of quality shown to the customer.

15. Respondents discouraged customers from purchasing the advertised or economy products by telling them that the advertised or economy products required expensive and/or extensive maintenance. Thus, many of the customer witnesses testified that when the salesmen told them that the advertised product would require extensive maintenance compared to the deluxe model they lost interest in the advertised product (McCants, Tr. 36; Ferraro, Tr. 65; Rutland, Tr. 112; Visel, Tr. 180; Martin, Tr. 91; Alverson, Tr. 204). There is nothing deceptive however, in a seller's comparisons of his products if the comparison is truthful.

With respect to siding and patios, however, respondents' salesmen represented them as needing to be sprayed or painted (Martin, Tr. 91). Economy patios were represented as rusting (Bryant, Tr. 388), but respondents advertised their $99 economy patio as "Rust-Proof" (CX 54 b). With respect to siding, it was stipulated that the respondents' salesmen represented the advertised siding as needing to be repainted or waxed and that it may oxidize "similar to rust on steel or iron" (Tr. 222). Respondents advertised their economy siding, however, telling the reader "say goodbye to painting expense." The representations of the salesmen, if true, rendered respondents' ads untrue. On the other hand, respondents' ads, if true, rendered respondents' salesmen's representations untrue. Either way, some of respondents' representations, either by ad or by statement to a customer, were untrue and deceptive.

16. Respondents discouraged customers from purchasing the advertised or economy products by telling them that they had either no guarantee or a lesser guarantee than the deluxe product (Stipulation, Tr. 221). Respondents stipulated that their advertised pool carried a one-year manufacturer's guarantee (Tr. 222). Their swimming pool ads, however, specified a ten-year warranty on their economy pools (CX 32, 33, 56). Here, as in the case of siding above, respondents' advertisements on the swimming pool differ in the guarantee offered from the one that has been stipulated on advertised pools. One or the other is false; either respondents' advertisements directed to the public in general or the representations of its salesmen as stipulated. With respect to siding, however, customer-witnesses testified that respondents' salesmen told them that the advertised product would not be guaranteed. There is no evidence that any customer or the public at large was led to believe that the economy siding carried any guarantee. With respect, therefore, to

products of the respondent other than the swimming pool it does not appear that there was any false representation with respect to the guarantee on advertised products.

With respect to the respondents' deluxe products a customer-witness testified he was told that the deluxe carpeting would be guaranteed for fifty years although he received a guarantee for only ten years (Hankey, Tr. 212). I do not credit this testimony simply because I find it impossible to believe that any reasonable person would represent a carpet to be guaranteed for 50 years or would believe someone's representation to that effect.

17. In many instances customers who contracted for the purchase of respondents' advertised or economy product failed to get performance on that contract. Sometimes customers cancelled their contract as a result of inordinate delay in installation. In other instances customers were induced to renegotiate their contract and pay a higher price. Complaint counsel submitted a number of contracts in evidence showing purchases of the economy or advertised product of the respondents. Notations on the customer file jackets indicate delays of from 2 to 8 months in the performance of these contracts (CX 334a, 339a, 349, 355a, 366a, 367a, 369a, 379a, 408a, 409a, 410a, 412, 417a, 418a, 419, 420, 423a, 351, 377, 395a, 346a, 328). CX 96c indicates that the contract for the advertised siding was cancelled "at wife's request." The contract is dated May 15, 1968 and the cancellation Dec. 3, 1968. CX 379a shows that a customer signed a contract for the installation of an advertised patio on Nov. 10, 1967 and the cancellation was on Apr. 23, 1968. CX 419 shows that the customer signed a contract for an advertised patio on June 6, 1969 which transaction was not cancelled until Jan. 5, 1970 (Tr. 810). CX 351 shows a contract for "36 yards economy" carpet and "25 yards PRO" carpeting. This was changed to "59 yards PRO" and the work was done 9 days after the contract was signed. CX 346a shows that a customer contracted for the advertised patio at $79 on Aug. 16, 1968. The work was done on Oct. 31, 1968 after the contract was changed from economy to PRO at $200. The foregoing exhibits, however, are not conclusive on this matter. It may be as counsel for the respondents argues, that the delay in the performance of a contract was occasioned by the customer's request for a delay. It may also be true that the customer voluntarily directed a change in the contract terms because the customer wanted the better product and was willing to pay more for it. It may also be true that unavoidable delays in obtaining the material contracted for or respondents' difficulties in obtaining the proper workmen to do the job made it necessary to delay the installation for some time in some cases. If these documents constituted the only

evidence of respondents' alleged refusal of failure to install the contracted economy product, they might not be sufficient to sustain the charge.

There is, however, the testimony of several witnesses to consider. Mrs. Martin signed a contract for the installation of the advertised siding at $359 and CX 703 shows that this contract was executed on Dec. 9, 1968. When she testified in this proceeding on Sept. 12, 1972, she had still not heard from the respondent although she had been promised immediate installation (Tr. 93). Mrs. Atkinson signed a contract for the installation of respondents' windows for $99 in Mar. 1970. Three months later she learned that the contract had been cancelled (Tr. 334). Although it was argued by counsel for the respondents that in many instances contracts were cancelled because of the failure to obtain credit approval, no explanation was offered by the respondents in this particular transaction. In the absence of any explanation I cannot assume that credit failure was the cause of the cancellation even though that was the cause of other cancellations. Mr. Higdon signed a contract for the installation of the advertised siding at $600 in Apr. 1970. Installation was promised in two weeks. He waited the promised two weeks and sometime thereafter. When he telephoned respondents for an explanation he was told that the material would not be available for another thirty days. He then cancelled the contract (Tr. 549). Mrs. Curtis signed a contract during 1970 for the installation of advertised siding at $425. This was to be delivered within one week. Two or three weeks later her husband called the respondents and spoke to the general manager who had no knowledge of the contract but promised to investigate and return the call. When the Curtises had not heard from the respondents for two or three weeks more, Mr. Curtis phoned again and was told by the respondents' representative that the respondents were unable to perform the work because the salesman had misrepresented the company and another salesman would come out to see them. The Curtises waited another 90 days and, when no one appeared, cancelled the contract (Tr. 563). Mr. Chandler signed a $420 contract for advertised siding in Aug. 1968. Installation was promised in three weeks. No one appeared and the Chandlers phoned repeatedly. After about three or four months Mr. Chandler spoke to respondents' manager who told him there would have to be additional charges to complete the job. Mr. Chandler then cancelled the contract (Tr. 570).

Mrs. Hill contracted in May 1971 to have the advertised siding installed for $289. She made a deposit and installation was promised within two to three weeks. When no one showed up she made several calls to respondents who finally told her that the siding was not available and they could not deliver. Her deposit was refunded (Tr. 658).

Respondents stipulated that Mr. Cassis would have testified that he contracted for the installation of the advertised pool at $449 in June 1969. Installation was promised by July 4, 1969. When no one showed up Mr. Cassis called asking when the job would be completed. In Sept. when the swimming season was over and the pool had not been installed Mr. Cassis cancelled the contract (Tr. 1051).

The testimony of these witnesses establishes clearly that the respondents failed to go through with the contracts for the advertised or economy product. No specific explanation for these failures was offered. Respondents' conclusionary statement that many contracts could not be fulfilled because of the failure of credit approval or the unavailability of materials or workmen does not explain or contradict the specific testimony of these witnesses. If, indeed, the contracts of these witnesses were not fulfilled because of credit reports or temporary lack of materials or workmen it was incumbent upon respondents to produce such evidence which it should have had.

I conclude, therefore, that respondents discouraged sales of the economy product, although they advertised it for sale extensively, by failing to deliver or perform as obligated.

18. Respondents' salesmen represented themselves to customers as "factory representatives" although respondents did not have any salesmen who were actually factory representatives (Ans. 37, 38 of RAR and Stipulation, Tr. 468). In addition, some of respondents' salesmen used the title "manager" even though they were not managers (Cody, Tr. 919; Pearson, Tr. 1077; Stipulation, Tr. 1080).

19. In their advertisements for the sale and installation of their products respondents offered to sell their products to customers with "No Money Down" (CX 27a, b, 28a, b, 29a, b, 32–35, 36b, 37, 38a) or "Low Monthly Payments" (CX 27a, 28a, 29a, 30a, 37, 38a, 61b, 69–71) or "Low, Low Financing" (CX 30b, 31a, 54b, 56–58, 60b, 61a) or "Terms to Suit" (CX 29a) or "Budget Terms" (CX 27b) or "E–Z Terms" (CX 30a, 31a, 38a, 41a, 42a, 54b, 57, 58, 60b, 61a) or "E–Z Credit" (CX 39, 40, 43–53, 62–67). Respondents admitted, however, that they rarely, if ever, began installation of their products unless the credit of the customer had been approved by the financial institution which would purchase the contract from respondents (Ans. 28, of RAR). Complaint counsel contend that the advertisements of the respondents "certainly implied that respondents would sell and install their products regardless of the purchasers' financial background as respondents would see to it that any customer could make a purchase." I do not agree. The complaint in this proceeding alleges that "purchasers of respondents' products are not granted easy credit terms without regard to their financial status or their ability to pay by financial institutions with which respon-

dents deal." None of the expressions used by the respondents in their advertisements relating to credit suggests that credit is granted without regard to the financial status of the purchaser or his ability to pay. The most that can be said is that the advertisements spoke of easy terms of credit, obviously referring to repayment schedules and the mechanics of applying for credit. There is nothing in the record of this proceeding to indicate that the credit terms extended to purchasers of the respondents' products were not easy or that the mechanics of applying for credit were not made easy by the respondent. Indeed, the record would indicate that respondents' salesmen obtained the credit information from the customer, thus relieving that customer from the necessity of dealing directly with the financial institution (Oden, Tr. 401–09; Dykes, Tr. 1033–47; Neal, Tr. 980).

20. Complaint counsel contend that respondents discouraged salesmen from selling the advertised or economy products. In support of this contention complaint counsel cite the testimony of employees of the respondents to the effect that the salesmen were not informed as to what products were available or what products were in stock (Schroeder, Tr. 756–64; Rupert, Tr. 969; Pearson, Tr. 1078). From this, complaint counsel contend that respondents discouraged their salesmen from selling the advertised product by not telling salesmen what, if any, advertised products were in stock. I do not agree. There is as much reason to assume that in the absence of any information concerning inventory the salesmen would conclude that the advertised product was in stock rather than not in stock. Consequently, the salesmen would not be inclined to discourage purchases of the advertised stock on the assumption that they had none of it in stock. This conclusion is supported by the testimony of respondents' installation manager who stated that they tried to keep a substantial supply of both economy and deluxe products in stock (Tr. 780).

Complaint counsel also argue that respondents discouraged their salesmen from selling the advertised products by paying the salesmen little or no commissions on such sales. They cite respondents' admission that sales commissions on the deluxe product are computed by first deducting for the company 20 percent of the contract price, then deducting the total cost of both the materials and labor and then allowing the salesmen a commission of 50 percent of the balance (Ans. 23 RAR). On sales of the advertised products, however, respondents admitted that they pay their salesmen a commission of up to 5 percent of the cash price of the contract (Ans. 36 RAR). Complaint counsel cite a contract jacket for the sale of an advertised siding at $350 on which the salesman earned no commission (CX 479; Ans. 5 RAR). Further, by examining the customer file jacket on which the salesman's commission should be listed,

complaint counsel cite CX 344a and 349 showing no sales commission paid on the sale of economy patios at $79 and $129 respectively; CX 482a and 484a showing a $5 sales commission paid on the sale of $489 and $299 economy siding respectively; CX 339a showing a sales commission of $5 on the sale of economy carpet at $260; CX 418a showing a sales commission of $9 on a $299 economy siding job; CX 423a showing a sales commission of $3.52 on a sale of an $124 economy patio. Complaint counsel compared these exhibits with CX 370a and 373a showing a sales commission of $290 on a sale of deluxe siding at $1,924 and a sales commission of $106.50 on the sale of a deluxe siding at $1,194.80.

I do not believe that the above evidence can support a finding that the respondents discouraged their salesmen from making sales of the advertised product by paying them less or no commission on such sales. It is apparently true, of course, that on the eight instances cited above, respondents' salesmen made little or no commission on sales of the economy product. This, however, represents but a very small proportion of the respondents' business in the advertised products, the exhibits dating over a period of time more than a full year of respondents' sales. Moreover, there is no evidence from which to assume that the salesmen were guaranteed a larger commission or even any commission on sales of the deluxe product. If the sales price of such product was not greater than the 20 percent retained by the company plus the total cost of labor and materials, the salesmen would get no commission whatever. Under such circumstances, therefore, I cannot conclude that the respondents discouraged their salesmen from making sales of the advertised products by their method of computing the salesmen's commission on such products. Indeed, salesman King, testifying as complaint counsel's witness, stated that he was paid 5 percent on his sales of the economy products installed. The fact that on a few isolated contracts no sales commission was paid on advertised products does not negate the conclusions I reach above.

21. Respondents did not have a regular selling price for their deluxe products (RRB p. 21). Gladstone testified that the salesmen were "instructed to use the words 'initial price' or 'opening price' * * * it wasn't a regular price' " (Tr. 1602). It was stipulated further that the salesmen usually granted discounts from the price first quoted to the customer (Tr. 479). This was also confirmed by the testimony of some of respondents' salesmen (Oden, Tr. 412; King, Tr. 469–81; Schneider, Tr. 1139). Complaint counsel argue that certain customers were told by respondents' salesmen that they were being granted discounts from the regular selling price of the respondents' deluxe products. An examination of the testimony cited in this respect, however, fails to demonstrate that the customers were told they were getting discounts from a regular

selling price. Instead, their testimony makes it quite clear that the discounts they were getting were from the salesmen's initial offering price, which was no more than the opening offer in negotiations. In these price negotiations which took place between the salesman and the customer the salesman would employ various strategems to convince the customer that he was getting a bargain and would advance various reasons for allowing the discount from that initial or offering price. This, however, is not the same as telling the customer that the contract price is a reduction from the seller's regular selling price (McCants, Tr. 37; Ferraro, Tr. 69; Martin, Tr. 93; Rutland, Tr. 115; Killian, Tr. 145; Parker, Tr. 149; Visel, Tr. 183; Alverson, Tr. 205; Williams, Tr. 241; Morgan, Tr. 317; Fitts, Tr. 372; Doss, Tr. 500; Isley, Tr. 536). I conclude, therefore, that respondents' salesmen did not tell their customers that they were receiving various discounts from the regular selling price of the deluxe product.

22. Respondents did not have a regular selling price for their economy products although their advertisements showed a reduction from a regular selling price. Thus, CX 32 and CX 33 advertised respondents' economy pools:

Reg. $1,595 NOW $795.

See Finding 9 above.

As found in Finding 10, above, respondents advertised their economy pool from 1968–1970 for no more than $995. Their sales of pools during 1968 and 1969 were only of the deluxe models (CX 717a–e). No sales were shown of the economy model. This evidence was not contradicted by the respondents. It follows, therefore, that there was no regular price of $1,595 for the respondents' economy pool.

With respect to the economy carpeting which was advertised at "Prices Slashed to $99," it appears that some of respondents' advertisements listed a price for such carpeting at higher levels (Finding 10, above). If so, the price of $99 represented a cut in the price of that carpeting as advertised previously. This is insufficient to establish a finding that their economy carpeting was advertised at fictitious prices. Similarly, respondents admitted that they advertised siding at no other price than $299 (Ans. 30 RAR). Their advertisements, however, while specifying a price of $299 added "Why Pay $999." Such a statement is not necessarily a representation that $999 was respondents' regular selling price of the siding. It could just as well be a competitor's price for siding or a customer's willingness to pay that much. Standing alone, therefore, it fails to substantiate complaint counsel's charge that the siding was advertised as being regularly sold for $999 by respondents.

Although the economy carpeting or siding was not advertised as having a regular selling price higher than the one at which it was being

advertised, it is undeniable that the economy pools were so advertised and to that extent I have found respondents' advertisements or economy pools showing a reduction from a regular selling price to have been false.

23. Reference has been made earlier to respondents' sales tactics, giving a prospective customer an opening or initial price for the deluxe product and then, on occasion, reducing said price by various stratagems, such as telling the customer the home would be used for display purposes or that the customer's purchase being the first in the area would be helpful to the respondents or by getting permission to use a display sign in front of the customer's home or by getting permission to take pictures of the house. I see nothing wrong in a seller's use of a fictitious reason for reducing his sales price, provided he actually reduces his sales price. Complaint counsel also contend, however, that respondents' salesmen falsely told their customers that they would bring by prospective customers so that their customers could expect to earn referral fees. They cite the testimony of Killian in support of that contention. An examination of the transcript, however, shows that Killian's testimony was merely to the effect that the salesman wouldn't give him anything off the price but "they would do something for you. I don't remember now what it was." In response to complaint counsel's question "Would this be payments of any type?" Killian replied "That's what he made us to believe, yes." I do not consider this testimony as supporting complaint counsel's contention. The witness could not remember what respondents' salesman promised to do for him and his answer concerning payment was in response to complaint counsel's leading question and is, therefore, not entitled to considerable probative weight (Tr. 146). Similarly, complaint counsel cite testimony of Visel who testified he made two referrals but received only one gift. His testimony indicates, however, that the offer of a gift did not apply if the referral did not result in a sale. Visel did not testify that the second referral resulted in a sale. It cannot, therefore, be assumed that he was entitled to a gift for that second referral (Tr. 188). Moreover, it was Visel's impression that his failure to receive a gift had nothing to do with the respondent (Tr. 193). Complaint counsel also cite the testimony of Alverson but his testimony only indicates that he was to receive $25 whenever a prospective customer bought a pool as a result of being shown Alverson's pool by the respondents' salesmen. He did not receive any such fees, but there is no evidence that any such sale took place. Similarly, other customers were promised gifts or referral fees if sales were made by the respondent as a result of showing that customer's home improvement to prospective customers who bought as a result. The record, however, does not establish that prospective customers

bought as a result of being shown the customer's home improvement (Morgan, Tr. 317; Thomas, Tr. 522; Whitsey, Tr. 603). Thomas testified that he was promised a commission from each job his house sold, but that he never received any such commission (Tr. 522). There is nothing to suggest, however, that any other job was sold as a result of his purchase, nor can I assume that the salesman represented he would bring prospective customers to see Thomas' house. Whitsey testified that respondents' salesman said he would erect a sign in Whitsey's front yard and that Whitsey would receive $25 everytime someone would buy (Tr. 603. No sign, however, was erected and Whitsey got no referral fees. Whitsey's testimony cannot be credited. He was unable to recall signing several formal documents at that time, although he acknowledged the genuineness of his signature on them. It is not likely that his recollection of the salesman's representations would be more reliable than his recollection of signing formal documents. Finally, Mrs. Morgan testified that the respondents' salesman said he would put a sign in her yard and promised her a $25 fee for every sale consummated as a referral from her house (Tr. 317). No sign was erected. Her testimony, standing alone, might be considered insufficient to prove that respondents promised to bring other prospective customers to the one buying their deluxe product and thereby enable the latter to earn referral fees. But CX 488 is a list which was admitted by respondents to be the ones to whom referral fees were paid by respondents. This exhibit shows only five referral fees paid in 1968, two in 1969 and 8 in 1970, for a total of 15 in three years. Respondents further admitted that some of the referral fees in CX 488 were paid to other home improvement contractors (RAR Ans. 20–21). It is clear that practically no referral fees were paid by respondents during 1968–70 when their sales proposals numbered more than 6,000. I conclude, therefore, that although respondents promised to pay referral fees to buyers of their products if others bought as a result and led such buyers into believing such fees could be earned no such earnings were intended nor were they expected by respondents.

24. Respondents' salesmen have upon occasion given customers of respondents' products warranties and guarantees which were not complied with by the respondents. Thus, Rutland testified that the respondents' salesman had represented to him that the deluxe pool would carry a thirty-year warranty. The warranty he received, however, was only for ten years on the liner and the filtering tank. His testimony concerning a thirty-year warranty, however, is not free from doubt. The sale took place more than three years ago and it is doubtful that Rutland would recall all of the details of the salesman's conversation, particularly when it was evident that Rutland could not recall conversations

around the same time with a representative of the finance company financing the sale (Tr. 113, 129, 134, 137). Indeed, when speaking to the finance company representative Rutland clearly indicated that he knew about a ten-year warranty on the pool (CX 730a–c). Mrs. Fitts, however, testified that the salesman told her the deluxe pool would have a ten-year warranty on the liner. When the pool developed leaks and Mrs. Fitts called for the repair of the pool no one appeared and Mrs. Fitts repaired the pool herself at her own expense. Similarly, Stewart testified that he has been promised a ten-year warranty on the pool but that the liner developed a puncture. He called respondents but no one appeared to make the repair and he replaced the liner himself at his own expense. I find, therefore, that on occasion warranties or guarantees were made by respondents' salesmen to prospective customers but that respondents did not honor such guarantees on all occasions. Counsel for the respondents concedes that "respondents admit that there probably were instances wherein certain salesmen were loose with the word 'warranty' ". Respondents cannot escape responsibility for the "loose" language of their salesmen promoting the sale of their products whether or not they condoned such behavior. If the representations were made respondents were under an obligation to fulfill those obligations or to take positive steps to negate the impressions left by such salesmen with the prospective customer by prominent written announcements of the appropriate guarantee and to do so before the sale was consummated. Thus, the contract that Mrs. Ferraro negotiated with the salesman specified "Heavy Duty Vinyl Liner 10 year Uncond. Maint. Guarantee" (CX 660). She testified, however, that she found she has to pay to get the liner re-installed (Tr. 70). An examination of the respondent's sales manual to its salesmen reveals a manufacturer's guarantee on the deluxe pool which guarantee does not include (CX 4z–14) re-installation of the liner. No such restriction on the pool's guarantee was indicated by the language used on Mrs. Ferraro's contract but the written guarantee proved not to be unconditional. This is confirmed by the experiences of Mrs. Fitts and Mr. Stewart. I conclude therefore, that respondents falsely represented the nature and extent of the guarantee given on the deluxe pool which their salesmen sold.

25. Complaint counsel contend that respondents' salesmen did not advise respondents' credit customers that the contracts would be assigned to a finance company. They cite in support of that contention the testimony of some of the witnesses which, it is argued, indicates that they were not so advised. The testimony of these witnesses, however, is not that clear. In general it consists of testimony to the effect that the salesmen told them the respondents would "take care of" financing (Thomas, Tr. 18) or would "handle" the financing (McCants, Tr. 37).

Nevertheless, when a representative of the finance company telephoned those customers to discuss the contract the customer had signed, they did not register any surprise that the matter was being handled by a company other that the respondents.

Certainly if they were under the impression that the contract was not going to be assigned to another company for financing, one would expect the customer to register some surprise when called by a stranger about financing of the contract. Moreover, I note that the contracts themselves clearly state that the instruments may be assigned to a financial institution (RX 217). Some of the consumer witnesses were candid enough to say they "took it for granted" that the respondents would finance the purchase of carpeting (Doss, Tr. 502) or they "thought" respondents would finance the contract although the salesman didn't say so (Williams, Tr. 238). Complaint counsel stress the testimony of one of respondents' salesmen who, they contend, testified that he told customers respondents carried their own papers. An examination of the salesman's testimony, however, reveals this statement:

I told them that they carried their own paper and discounted to other companies also. I think at one time maybe they carried a few notes, you know.
Q. In other words you told them that Southern Cross would do so—would do both, that *they would either discount it or finance it themselves?*
A. *Right* (Tr. 440). (Emphasis added.)

I, therefore, conclude that the customers of the respondents were not misled into thinking that the respondents themselves would finance the purchase of the product.

26. The complaint alleges and complaint counsel contend that the respondents obtained purchasers' signatures on blank documents by making deceptive and misleading statements with respect to the nature and effect thereof. In support of this contention complaint counsel cite the testimony of a number of customers. Their testimony, however, establishes only that they were unaware they were signing a mortgage. See, for example, Thomas, Tr. 25; McCants, Tr. 37; Ferraro, Tr. 73; Mansell, Tr. 226, 235; Williams, Tr. 237; Bryant, Tr. 389; Doss, Tr. 501, 509; Robertson, Tr. 587–94; Vickers, Tr. 639. Several other witnesses, however, testified about the representations made by respondents' salesmen. Thus, Rutland testified that when he asked what the meaning of the words "Deed of Trust" were, the salesman answered "There was a mutual trust between the company and myself." (Tr. 116, 140–41.) Parker testified that although the salesman did not mention a mortgage he did mention a lien on the equipment that was bought (Tr. 153–74). Parker added that he would not have signed the contract had he known that his residence was being mortgaged (Tr. 158). Similarly, Fitts testified that the salesman represented that only the swimming pool

would have a lien but not her house (Tr. 364, 371, 373). Both Fitts and Parker testified that the document they signed was blank.

It should be noted first of all that the respondents are not charged with failure to advise customers that there would be a mortgage on their property. Rather, the charge is that respondents obtained such signatures on these and other instruments by making false and misleading representations and deceptive statements.

As to the testimony of Fitts cited above, the record notes that although she testified that the salesman said the lien would be only on the swimming pool, and not on her house, at another point Mrs. Fitts testified that the salesman told her it was on the swimming pool and "that was all that he said" (Tr. 366). Later when the finance company called Mrs. Fitts to have her sign another document to replace the one that she had previously signed which was apparently improperly executed, she refused to sign the second document but told the installers that she had signed and mailed it back to the finance company. She admitted that there was no mortgage on any of her property as a result of these transactions. Mrs. Fitts also denied having a telephone conversation with a representative of the finance company on Oct. 7, 1968. But respondents' Exhibit 207 is an excerpt of a recorded telephone conversation between her and the representative of the finance company. Similarly she could not remember signing a financial statemnet. But she admitted that the signature on a financial statement was hers. Under all tne circumstances, therefore, I conclude that Mrs. Fitts's testimony regarding her conversation with the respondents' salesman cannot be credited in view of her obvious inconsistencies. Her testimony does not permit a conclusion that the respondents' salesman induced her signature to a document by false and misleading statements, inasmuch as I consider her recollection of her conversation with the respondents' salesman unreliable.

With respect to Rutland's testimony to the effect that the respondents' salesman told him that "Deed of Trust" means a mutual trust between the company and himself, it should be noted that although he testified that he could not recall a recorded telephone conversation with the finance company (Tr. 134) respondents' Exhibit 205 is an excerpt of such a recorded telephone conversation. Further, in that recorded telephone conversation with the representative of the finance company he was told "this will be a second mortgage on your property for the amount of the work that was done," to which Rutland replied "Ok." One would certainly expect him to register some surprise at being told for the first time, if it was the first time, that there was to be a mortgage on

his house. Moreover, although he testified that he could not mortgage the house because he had no legal right to do so, it is apparent from the recorded telephone conversation with the finance company that he did not convey that information to the finance company. Finally, although Rutland testified that he was told of his right to cancel the transaction, he did not receive the rescission papers. Here again the telephone conversation with the finance company indicates Rutland was reading from a standard rescission form while talking to the finance company. (See below.) I conclude that Rutland's recollection of the language used by the respondents' salesman concerning the existence of a mortgage cannot be credited in view of the obvious inconsistencies in his testimony.

With respect to Parker's testimony that respondents' salesman made no mention of a mortgage on his residence but only of a lien on the equipment bought, it should be noted that his testimony is not quite clear. He admitted that the salesman mentioned a lien on the equipment. He does not claim that the salesman denied the existence of a mortgage on his property but only that had he known that he would not have signed. There is, therefore, considerable doubt that the salesman was guilty of any false or deceptive statements. Assuming, nevertheless, that Parker testified to the effect that the salesman misrepresented the creation of a mortgage on his home, the question still remains whether such testimony can be believed. RX 209 is an excerpt of a recorded telephone conversation between Mrs. Parker and a representative of the finance company. In it Mrs. Parker admits without any apparent surprise that she understands that this will be a mortgage on the property. I find Mr. Parker's testimony unreliable under the circumstances.

Finally, the formal contract executed by customers of the respondents clearly states that "Your property will be subject to a lien" (RX 216). Similarly, the rescission notice given to the customer by the respondents tells the customer that he has "Entered into a transaction which may result in a lien, mortgage or other security interest on your home" (RX 106).

I conclude that complaint counsel have not sustained their burden of proof by substantial evidence that respondents obtained customers' signatures on blank documents by making false and misleading representations and deceptive statements.

27. In the ordinary course and conduct of their business respondents did regularly extend consumer credit as said term is defined in Regulation Z, the implementing regulation of the Truth in Lending Act (Admitted, RAC, Par. 15).

28. Subsequent to July 1, 1969, respondents in the ordinary course of their business and in connection with credit sales as "credit sale" is defined in Regulation Z, have caused their customers to enter into contracts for the purchase of respondents' home improvement products. Respondents generally provide their customers with no consumer credit cost disclosures other than those in respondents' contracts. On these contracts respondents provide certain consumer credit information (Admitted, RAC, Par. 16).

29. In certain instances respondents failed to disclose on their sales contracts the "Annual percentage rate" as required by Sec. 226.8(b)(2) of Regulation Z, leaving the space provided therefor blank. Thus, respondents' credit manager identified CX 620a, c and CX 633 a, b and stated that CX 620 c and CX 633 b are credit sales of respondents' products on which the space provided for the "Annual percentage rate" had been left blank. Counsel for the respondents does not dispute that the annual percentage rate was omitted on these documents. He contends however that "this was an honest clerical error. One mistake out of thousands of transactions only proves that respondents made a very sincere effort to comply with Truth in Lending." This, however, does not excuse violations of the Act even if they are but a few.

30. Respondents on their contracts with credit customers do not separately itemize notary fees paid by the respondents as "other charges" (CX 8). Complaint counsel contend that the cost of a notary fee is an incident of the extension of credit by respondents and although the notary fees are paid not by the customer directly but by the respondents directly to the mechanics who do the installation and amounts to $5 usually, the cost of these fees are indirectly charged to each credit customer. Consequently, those notary fees should have been shown as a charge included in the amount financed as required by Section 226.8(c)(4) of Regulation Z. Counsel for the respondents confirm that notary fees were paid by the respondents from their general operating funds. These were always considered a cost of doing business and were never charged to a customer. Section 226.4(e)(4) states that fees for notarizing shall not be included in the finance charge with respect to a transaction. Section 226.8(c)(4) requires the disclosure of "all other charges, individually itemized, which are included in the amount financed but which are not part of the finance charge." In both instances it is significant that the regulation speaks of charges and not of the seller's cost of doing business. There are any number of costs borne by a seller and considered when that seller computes a sales price. I do not believe that the intent of Regulation Z is for a seller to disclose to his customer the intimate details of his cost of doing business. On the contrary, the buyer is interested only in what he is being charged and

what items make up that charge. Here the buyer was charged for the installation of a product of the respondents. The respondents' cost of these products was not revealed to the customer nor were the respondents' overhead expenses revealed, inasmuch as those costs or expenses were not charged to the customer. Similarly, that notary fees were not charged to the customer but were absorbed by the respondents as a cost of their doing business regardless of the amount of the particular sale involved. I conclude, therefore, that the respondents, while not separately itemizing notary fees paid by them in connection with a credit sale, did not violate Regulation Z issued under the Truth in Lending Act.

31. In the event of a credit sale 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 was obtained or acquired by respondents in real property which was used or was expected to be used as the principal residence of respondents' customer. Respondents' acquisition or retention of such a security interest in said real property thereby entitled 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 as required by Regulation Z, whichever is later (Admitted, RAC, Par. 18).

32. Complaint counsel contend that the respondents have in some instances failed to give their credit customers the right to rescind until the third business day following the consummation of the transaction or the date of delivery of all disclosures, whichever is later. In support of this argument complaint counsel cite the testimony of respondent Gladstone during an investigational hearing in 1971. A transcript of an excerpt of his testimony at that time indicates that on a transaction dated May 8, 1970, (Fri.) the customer was only given two business days to rescind the transaction, being given only until May 11, 1970, (Mon.) within which to cancel the transaction. The contracts themselves are not in evidence; only a portion of Gladstone's testimony during the investigational hearing is. That portion makes it quite clear that on that particular transaction Regulation Z was not complied with. Nevertheless, Regulation Z may not have been violated inasmuch as there is insufficient evidence from which to conclude that the transaction was a credit sale. Indeed, Gladstone testified at that time that he wasn't sure whether the contract was a cash sale or whether it was a financed sale. The missing information may have been contained in other portions of Gladstone's testimony during the investigational hearing but in any event remains missing here. Consequently, I cannot find that in that particular transaction respondents violated Regulation Z.

Next, complaint counsel cite the testimony of Rutland to the effect that the respondents' salesmen had not left a rescission notice with him in connection with his purchase of a swimming pool (Tr. 117). Reference has previously been made to the unreliability of Rutland's testimony. Once again reference is made to the recorded telephone conversation that Rutland held with a representative of the finance company (RX 205). In that conversation Rutland said that four papers were left with him. He read from one of those papers: "you have entered into this transaction on 7/11/69." He was then asked "there is another date right below there near the address," to which Rutland answered "it was by mail or telegram." Rutland then gave the date as 7/15/69. RX 106 is the notice of the customer's right of rescission as prescribed in Regulation Z. It reads:

> You have entered into a transaction on (date) which may result in a lien, mortgage on other security interest on your home * * * if you decide to cancel this transaction you may do so by notifying (Creditor) at (Address) by mail or telegram sent not later than midnight of (date).

It is obvious to me that Rutland was reading from his notice of right of rescission when talking to the representative of the finance company. Finally, Rutland's signature is on RX 201 dated 7/25/69 in which Rutland acknowledges that he received a notice of right of recission from the seller at least three business days before that date and that he has not exercised such right. Under all the circumstances, therefore, I do not credit the testimony of Rutland, and cannot find that he was not given the proper right of rescission by respondents.

Complaint counsel cite the testimony of Robinson who stated that after he had signed a second contract for the purchase of aluminum siding from respondents, they immediately began installation of the siding without giving him the required three day rescission period (Tr. 343). Specifically, however, Robinson testified that he was visited by respondents' salesman on Mar. 26, 1970 on which day he contracted for the purchase of siding for $1,383 (Tr. 341). Upon reconsideration he decided that the price was too high. He then entered into another contract with the respondents at a reduced price of $1,050. This second contract, like the first contract, was dated Mar. 26, 1970 but Robinson's testimony makes it clear that the second contract was executed three or four days after Mar. 26, and work did not begin until three or four days after the original contract was signed. Indeed, Robinson admitted that it was possible that the interval could have been as much as a week.

Where an obligation is already secured by a security interest in real property, which is used or expected to be used as a principal residence of that customer, and the amount of the new transaction does not exceed the amount of the unpaid balance plus any charges on the existing

obligation, no new right of rescission is available to that customer. See Section 226.903, Interpretations of Regulation Z, Jan. 28, 1970. Here, since the work did not begin until at least three days (and perhaps more) following the execution of the original contract and the new contract was for an amount not in excess of the original contract, but for a lower amount, there was no violation of Regulation Z in respondents' failure to issue a new right of rescission to that customer upon the occasion of the execution of the second contract.

Complaint counsel next cite the testimony of customer Whitsey. When complaint counsel asked this witness what the salesman said about the effect of the contract, Whitsey answered "Nothing, he just told me, said he—I couldn't cancel it. That's all." (Tr. 604). Upon cross examination when shown RX 126 which was a rescission form, Whitsey admitted he had received a copy (Tr. 608). Almost immediately thereafter, however, Whitsey denied receiving a copy of that form (Tr. 609). On page 610 of the transcript, Whitsey admitted that the signature on that exhibit was his but Whitsey couldn't remember signing anything like that. The only thing he could remember signing was the contract which the salesman wrote out in longhand. When shown RX 127, a document entitled "Authority to Begin Work," he recognized his wife's signature on it. In it she acknowledged receipt of a notice of a right of rescission which right she had not exercised. I do not credit the testimony of Mr. Whitsey because of the obvious confusion in his testimony.

Finally, Commission counsel cite the testimony of customer Alverson, who testified that he signed a contract for a deluxe patio on Apr. 20, 1970 and that it was installed on Apr. 23, 1970. Alverson had not previously been listed by complaint counsel as a witness with respect to Truth in Lending, a pre-trial requirement imposed, without objection, by me. When counsel for respondents objected to Alverson's testimony, I ruled that I would not entertain argument on Truth in Lending as far as Alverson and his testimony were concerned. Accordingly, I cannot consider this witness' testimony in connection with the proposed finding.

In sum, I find that complaint counsel have not sustained their burden of proof by substantial credible evidence to establish that respondents violated Regulation Z in failing to give credit customers the right to rescind within the time limits specified in that Regulation.

33. Complaint counsel contend that respondents violated Regulation Z by not printing the "Effect of Rescission" in twelve-point bold-faced type as is required for the notice of opportunity to rescind. They argue that the effect of rescission is an important part of the rescission notice and should be printed in type similar in size to the other printing on the form. This may be true. Complaint counsel admit, however, that "the

Regulation does not specify, however, the size of type to be used in printing the Effect of Rescission." (Proposed findings, p. 68.) If so, I find it difficult to conclude that the respondents have violated some language of the regulation which language, however, does not exist. I conclude that the respondents have not violated Regulation Z in this respect.

34. In the ordinary course of their business respondents caused to be published advertisements of their goods and services as advertisements are defined in Regulation Z. These advertisements aided, promoted or assisted, directly or indirectly, extensions of consumer credit in connection with the sale of respondents' goods and services (Admitted, RAC, Par. 20).

35. Respondents' advertisements after July 1, 1969, failed to comply with the Truth in Lending Act. CX 57 and CX 68 show that respondents advertised their products after July 1, 1969, saying "First payment in the summer." The clear implication of such a statement absent any qualifying words such as "First *installment* payment in the summer" is that the customer will have no downpayment. Under Regulation Z, Section 226.10(d)(2), where the seller advertises no downpayment required, the advertisement must also state the cash price, the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended, the amount of the finance charge expressed as an annual percentage rate, and the deferred payment price. None of this additional information is contained in the respondents' advertisements. Their omission is a violation of Regulation Z. See Letter 192 at CCH Consumer Credit Guide, ¶3223.

36. Complaint counsel contend that respondents violated Regulation Z by failing to preserve for a period of two years after the date of disclosure copies of the rescission notice as required by Section 226.6(i) of that regulation. During the investigational hearing in this matter in 1971, respondent Gladstone was shown 10 contract jackets (such as CX 22d) on jobs contracted and installed subsequent to July 1, 1969, when the Truth in Lending Act became effective. Gladstone admitted that the contract jackets should have contained a copy of the rescission notice but did not. In response to question number 36 of complaint counsel's request for admissions concerning the lack of rescission notices in the 10 contract jackets referred to above, the respondents answered in their answer No. 36 that "they can neither admit or deny said request because the contract jackets referred to in said request are in storage. Respondents are making every effort to secure same and will supplement their answers to this request for admission when and as soon as possible." Some six months later, when hearings were held before me in this matter, respondents called a representative of the finance company

who testified that said finance company had copies of the rescission notices applicable to those particular contracts. These copies had been obtained by the finance company, presumably from the respondents. There is no doubt, therefore, that the finance company retained the necessary rescission notices. The issue, however, is whether the respondents did. The record contains no contradiction to the failure of respondents to have the rescission notices in the contract jackets of these 10 contracts. Counsel for the respondents argue that the rescission notices may have been lost during the pendency of the investigation in this matter and, at the worst, only 10 of perhaps thousands of contracts were deficient in this requirement. Consequently, respondents must be deemed to have made an honest effort to comply with the law. I am cited no authority to the effect that honest intentions and good faith can excuse noncompliance with Regulation Z. Respondents have not explained their failure to retain the copies of rescission notices. Their absence from those jackets is undenied and constitutes an admission that the respondents failed to keep copies of their rescission notices in those 10 instances for the two years required under Regulation Z.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Southern States Distributing Co., formerly known as Sourthern Cross Discount Company, Inc., a corporation, and also trading and doing business as Southern States Decorators, Southern Cross Pools, Southern Cross Windows, Miracle Plastic Roofers and Carpet Discount Outlet, and Emanuel I. Gladstone. Counsel for the respondents contend that jurisdiction over the respondents is lacking because the respondents are out of business now and were out of business before the Commission issued its complaint. He cites *Dietzgen Co.* v. *FTC*, 142 F.2d 321 where the court held "if the practice has been surely stopped and by the act of the party offending, the object of the proceeding having been attained, no order is necessary nor should one be entered." The court added, however, that "parties who refuse to discontinue until proceedings are begun against them and proof of their wrongdoing obtained, occupy no position where they can demand a dismissal." As the Commission held in *Zale Corp.*, FTC Docket 8810 (1970) [sic, (1971) 78 F.T.C. 1195, 1240]: "Where, as here, the abandonment took place only after the Commission's hand was on respondent's shoulder, the courts are clear that abandonment of the practices under such circumstances will not support a conclusion that the practices will not be resumed." Here I note that the respondent corporations ceased doing business in Dec. 1971 (Tr. 1561). During that month, however, respondents were advised by the issuance of a news

release that the Commission intended to issue a complaint against them.

Moreover, the decisions make it quite clear that mere discontinuance of an illegal practice is not a sufficient basis for dismissing a complaint. There must be reason to believe the practice will not be resumed. Here, although the corporate respondents have ceased doing business, there is no evidence that their charter of incorporation has been revoked or dissolved. There is no reason to assume that these corporations can not be revived to do business. In such event the absence of a cease and desist order would permit the resumption of illegal activities. In addition, the inidvidual respondent, Emanuel I. Gladstone, may resume this type of business if he has not already done so. During his testimony he refused to state the nature of his present occupation. To the extent he may be found to have violated the provisions of the Federal Trade Commission Act or the Truth in Lending Act, he would be free to continue such activities absent a cease and desist order. Consequently, I conclude that the Federal Trade Commission has jurisdiction over these corporate respondents and the individual respondent despite the fact, if it is a fact, that they have ceased doing business and are therefore not presently committing any illegal acts.

Counsel for the respondents also contend that the Federal Trade Commission lacks jurisdiction because respondents' interstate commerce is so insubstantial as to deprive the Commission of jurisdiction. In *Guziak* v. *FTC*, 361 F.2d 700, *cert. den.*, 385 U.S. 1007, the court held against a home improvement contractor who had challenged Commission jurisdiction because only 3 sales had been made in interstate commerce out of an annual gross sales volume of $400,000. The court held:

> There appears to be no basis in terms of either history or logic for holding that the Commission may not assert its power until the interstate activity under scrutiny has reached a certain magnitude.

and quoted *Gellman* v. *FTC*, 290 F.2d 666, with approval:

> The Commission's jurisdiction is not intended to be affected even if only a single unfair act is involved.

2. Said respondents have been at all times relevant hereto engaged in interstate commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. Reference is made to Findings of Fact 7 and 8 *supra*.

3. Respondent, Emanuel I. Gladstone, is personally responsible and liable for the acts of the respondent corporations and their employees. Counsel for the respondent contends that since Gladstone did not commit or condone any deceptive acts he should not be held personally responsible for such acts. He cites *Coro, Inc.* v. *FTC*, 338 F.2d 149, *cert. den.*, 380 U.S. 954, where the president and board chairman of a

corporation who was the largest stockholder of that corporation was held not personally liable for the corporation's unlawful acts despite his admission that he had "overall corporate responsibility" and "responsibility of the acts and practices of the corporation." It should be noted that the Commission's decision in that case was reversed by the Court of Appeals, the Commission having found that that individual should have been held personally liable. It should be further noted that the corporate respondent in that case was a large, responsible, and publicly held corporation, its stock being listed on the American Stock Exchange since 1929. Moreover, its business was nationwide and its annual net sales were over 33 million dollars. As the hearing examiner held in that case (63 FTC 1164, 1187):

> These circumstances distinguish this case from those in which corporate officers were held personally because of their domination of closely held or family corporations; their active, direct and personal participation in unlawful practices; or the existence of circumstances suggesting a likelihood of the order's evasion.

More nearly approximating the facts in this proceeding is the decision in *General Transmissions Corp. of Washington*, 73 FTC 399, 431. There the individual corporate officer was held personally responsible for the acts of the corporation. Among other things he hired the manager and ordered the equipment for the place of business; he signed the lease for the corporation and ordered merchandise for it; records were kept in his office where the bookkeeping was done and only he, his wife and another individual had authority to sign corporate checks. The corporate respondents in this proceeding are more like the corporate respondent in the *General Transmission* case than in the *Coro* case. Respondent Gladstone, an officer of said corporation, admitted knowing what was going on and doing "everything" in the company. Moreover, he clearly identified himself as the corporation when he spoke of knowing that *he* never used the words regular price in *his* mailers. In addition he hired not only supervisors but even nonsupervisory personnel and supervised the installation manager's work. His approval was necessary to order the materials and he admitted that he talked to customers over the phone. I have, therefore, found that respondent Gladstone formulated, directed and controlled the acts and practices of the corporate respondents and is therefore personally responsible for the acts of those corporate respondents. See Findings 4 and 5, *supra*.

4. Respondents have engaged in unfair methods of competition in commerce and have committed unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act. See Findings 10, 15, 16, 17, 18, 22, 23, 24, 29, 35 and 36.

THE REMEDY

Having found that the respondents have violated Section 5 of the Federal Trade Commission Act I shall order that they cease and desist from engaging in such illegal activities.

Complaint counsel urge that an order be issued compelling the corporate respondents to deliver a notice of right to rescind according to the terms of Regulation Z to each customer who purchased products from respondents on or after July 1, 1969 in any credit transaction in which the respondents have retained or acquired, or will retain or acquire a security interest in real property which is used or expected to be used as the customer's principal place of residence. Inasmuch as I have found (see Finding 32 above) that complaint counsel have not sustained their burden of proof by substantial creditable evidence to establish that respondents violated Regulation Z in failing to give credit customers the right to rescind within the time limit specified in that regulation, there is no basis for the issuance of an order in that respect. Moreover, even had the respondents violated Regulation Z by failing to give customers the right to rescind it is doubtful that an order could be effectively promulgated in view of the fact that the corporate respondents have been out of business for some time, their records are in a state of disarray, if not lost completely, and compliance with an order requiring them to issue rights of rescission would, in effect, compel them to go back into business and create an office force solely for the purpose of the issuance of such rights. Such a solution would not be realistic and paractical. In any event, however, no such order is appropriate here inasmuch as I have concluded that the record evidence in this case fails to sustain the charge that the respondents have violated Regulation Z in this respect.

Complaint counsel also urge that the order issued prohibit respondents from renegotiating their contracts or other documents evidencing a purchaser's indebtedness unless any rights or defenses which the purchaser has or may assert against respondents are preserved and may be asserted against any assignee or subsequent holder. Here, too, inasmuch as I have found that the evidence fails to support a conclusion that the respondents misled their customers into thinking that the respondents themselves would finance the purchase of the product, there is no justification for the issuance of an order which would limit their rights to renegotiation of the customers' contracts or other documents of indebtedness.[2] Moreover, I have serious doubts that such an

[2] It should be noted that if such an order were issued, it would result in putting the seller out of business since no finance company would buy such encumbered paper. I do not think it to be the aim of the Federal Trade Commission Act to put a seller out of business but only to have him cease his illegal activities. Here, such an order would prevent the seller's continuation in business even if he, in the future, engaged in no false or deceptive acts and acted in a completely honest and legal way.

order would be legally enforceable. The law is clear and has been in effect for many years permitting the assignment of negotiable instruments to a holder in due course who takes the instrument unencumbered by any defenses which the maker of the instrument may have against the assignor. This law, of course, may be changed legislatively and has been so changed in some jurisdictions. Until it is so changed, however, an administrative or judicial change would perhaps be improper. Recently, the Commission adopted the unappealed decision of the administrative law judge (*Seekonk Freezer Meats, Inc.*, Docket No. 8880) [82 F.T.C. 1025]. In that decision the respondent was ordered to cease and desist from assigning a purchaser's document evidencing his indebtedness unless the purchaser's rights against the respondent may be asserted against any assignee. In that case, however, it was found that when the purchasers learned that their notes were being transferred to a finance company they "displayed a marked hostility towards such companies and did not wish to deal with them." One of the witnesses testified that he was "mad." Another testified that she was "very surprised." Moreover, the decision found that the respondent's advertising was false in representing that the corporate respondent would extend credit and would carry purchasers' unpaid obligations. Here none of these circumstances exist. I have found that the evidence fails to support a finding that the respondents represented that they would carry the purchasers' unpaid obligations. I have also found that the purchasers evidenced no surprise when called by the finance company. In short, the basis for a change in the holder in due course doctrine which existed in the *Seekonk* case does not apply here.

ORDER

I

It is ordered, That respondents, Southern States Distributing Company, a corporation trading and doing business as Southern States Decorators, Southern Cross Pools, Southern Cross Windows, Miracle Plastic Roofers and Carpet Discount Outlet, or under any other name (formerly known as Southern Cross Discount Company, Inc.), its successors and assigns, and Emanuel I. Gladstone, individually and as an officer of said corporation, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution or installation of home improvement products including residential siding, as swimming pools or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making representations purporting to offer products, installa-

tions or services for sale when the purpose of such representations is not to sell the offered products, installations or services, but to obtain leads or prospects for the sale of other products, installations or services at higher prices.

2. Discouraging the purchase of any product, installation or service by failing to deliver or perform as obligated to.

3. Representing, directly or by implication, that any product, installation or service is offered for sale by respondents when such offer is not a bona fide offer to sell such product, installation or service.

4. Representing, directly or by implication, that any of respondents' offers to sell products or installations or services is limited as to time or restricted or limited in any other manner, unless such represented limitations or restrictions are actually in force and in good faith adhered to.

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

6. Failing to maintain adequate records (a) which disclose the facts upon which any savings claim, including former pricing claims and comparative value claims of the type discussed in Paragraph 5 of this order are based; and (b) from which the validity of any savings claim, including former pricing claims and similar representations of the type described in Paragraph 5 of this order can be determined.

7. Representing, directly or by implication, that any of respondents' products, installations or services are warranted or guaranteed unless the nature and extent of the warranty or guarantee, the identity of the warrantor or guarantor and the manner in which the warrantor or guarantor will perform thereunder, are clearly and conspicuously disclosed in immediate conjunction therewith; and unless respondents promptly and fully perform all of their obligations and requirements, directly or impliedly represented under the terms of each such warranty or guarantee.

8. Falsely representing, directly or by implication, that their aluminum siding materials will not require painting or other type of restorative maintenance; or misrepresenting in any manner the

efficacy, durability, efficiency, composition or quality of any of respondents' products, installations or services.

9. Falsely representing, directly or by implication, that respondents' salesmen or representatives are connected or affiliated with any manufacturer or manufacturers of products sold by respondents; or misrepresenting, in any manner, the connections, affiliations or sponsorships of respondents, their salesmen or representatives, or the nature or scope of respondents' business activities.

10. Falsely representing, directly or by implication, that the home of any of the respondents' purchasers, or prospective purchasers will be used for any type of advertising or demonstration purpose or as a model home and, that as a result of such use, respondents' purchasers or prospective purchasers will earn discounts, referral fees or allowances of any type.

II

It is further ordered, That the respondents, Southern States Distributing Company, a corporation, trading and doing business as Southern States Decorators, Southern Cross Pools, Southern Cross Windows, Miracle Plastic Roofers and Carpet Discount Outlet or under any other name (formerly known as Southern Cross Discount Company, Inc.), its successors and assigns and Emanuel I. Gladstone, individually and as an officer of said corporation, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or any advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (Pub. L. 90–321, 15 U.S.C. 1601, *et seq.*), do cease and desist from:

1. Failing to disclose the "annual percentage rate" in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. 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 the annual percentage rate; and

(v) deferred payment price.

3. Failing to keep record evidence of compliance with the consumer credit cost disclosure requirements of Regulation Z for two years, as required by Section 226.6(i) of Regulation Z.

III

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 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.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

The complaint in this matter was issued April 3, 1972, charging that respondents had engaged in a variety of acts and practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, and the Truth in Lending Act, 15 U.S.C. Section 1601, *et seq.*, in connection with the advertising, sale, and installation of swimming pools, residential siding, carpeting, windows, patios and other items. After hearings, the administrative law judge issued an initial decision on Apr. 30, 1973, in which he found that respondents had committed many of the violations alleged. He entered a cease and desist order. The case is before us on an appeal by complaint counsel, seeking an enlargement of that order.

Among the unfair or deceptive acts and practices in which respondents were found to have engaged were (1) advertising economy model products for the purpose of achieving sales of more expensive, deluxe models (I.D. 13);[1] (2) misleading use of such terms as "limited offer,"

[1] Initial decision, Finding 13. This form of abbreviation will be used throughout. Other abbreviations used herein:
Tr.—Transcript of hearings
CX—Complaint counsel's exhibit
RX—Respondent's exhibit

"special offer," and "sale" to describe prices which in fact were the regular prices at which goods were sold continuously (I.D. 10), and falsely representing that the regular price of swimming pools constituted a bargain price (I.D. 22); (3) falsely representing the maintenance characteristics of siding and patios (I.D. 15); (4) falsely representing the character of the guarantees offered on certain products (I.D. 16, 24); (5) discouraging the purchase of advertised or economy models by failing to perform on contracts calling for their purchase (I.D. 17); (6) false representations by salesworkers to the effect that such personnel were "factory representatives" or "managers" (I.D. 18); (7) representing that referral fees would be paid to customers if others purchased respondents' products as a result of viewing customers' homes, when in fact no such earnings were intended or expected to be paid by respondents (I.D. 23).

Respondents have not appealed from the above and other findings of liability, or from the order provisions against them. Complaint counsel for their part have not challenged certain findings of the administrative law judge adverse to complaint counsel's case, in particular, the finding that respondents did not, as alleged by the complaint, fail to give credit customers the right to rescind their agreements within the time limits specified by Regulation Z of the Federal Reserve Board interpreting the Truth-in-Lending Act (I.D. 32).

From our own review of this matter we find no reason to disturb the findings or order provisions of the administrative law judge to the extent they are unappealed by either side, with the exception of Finding 23 and order Paragraph 10 discussed in Section IV of our opinion.

Complaint counsel argue on appeal that entry of additional order provisions which the administrative law judge failed to include is justified by the record and necessary to protect the public interest. In particular, complaint counsel seek (1) a broad prohibition on disparagement by respondents of their own products to prevent bait and switch tactics; (2) a prohibition on inducing customers to sign blank documents and on misrepresentation of the nature of legal instruments to be signed (based on alleged occurrence of such practices); and (3) limitation of respondents' ability to negotiate their contracts in such fashion as to invest their assignees with the status of holders-in-due-course.

We shall consider the subsidiary issues raised by these requests for additional relief below:

I. BAIT AND SWITCH; DISPARAGING ECONOMY OR ADVERTISED MODELS

There can be little doubt that respondents have engaged in widespread bait and switch tactics. At issue on appeal is whether or not the

order entered by the administrative law judge is adequate to prevent their recurrence.

The administrative law judge found that respondents had advertised so-called "economy" (sometimes referred to as ECO or ADV) items with the intention not to sell these items, but rather to obtain leads to prospective customers who might be induced to purchase more expensive wares (I.D. 13).

Once a customer had responded to an advertisement, efforts would be made by salespeople to induce the consumer to purchase a more expensive model of the advertised item. It is not clear to what extent this selling effort involved misrepresentation at the point of sale of the characteristics of the economy and deluxe models. For instance, the economy patio was advertised as "Rust-Proof," but customers were told in their homes that it would rust (I.D. 16). The economy siding was advertised with the promise that the consumer could "Say goodbye to painting expense," but the consumer who sought thus to bid farewell by inviting a sales agent to visit was told that the siding would need to be repainted or waxed, and that it might oxidize (I.D. 16). From these disparities, the administrative law judge concluded simply that respondents had either misrepresented the quality of their economy products in their printed advertisements or they had misrepresented the quality orally at the point of sale (I.D. 16). Either the bait was misrepresented at the outset, and the misrepresentation subsequently corrected to encourage the switch, or the bait was misrepresented at the point of sale to encourage the switch.

In addition, respondents' sales representatives were furnished with models of advertised and deluxe products which were used with the effect (whatever the purpose) of discouraging customers from purchasing the advertised item in favor of the more expensive one (Tr. 44, 66–67, 204–05, 312). One would obviously expect that a model of a costlier product should appear more attractive than that of a cheaper one, to the extent that the more expensive product is in reality more attractive than the economy version. Complaint counsel argue, however, that the models in fact distorted the real differences between bait items and switch items, to the detriment of the bait items. For instance, the deluxe pool model came in a black carrying case with a plexiglass cover, painted, landscaped, and filled with blue ersatz water (CX 680), while the advertised pool model was made of unpainted wood, contained in an unpainted wooden suitcase, and came without simulated water, swimming pool ladder, or the same sort of luxurious landscape (CX 677). Similarly, inspection and comparison of other models of advertised and deluxe products indicates that the deluxe model was invariably packaged to appear comparatively more attractive than it would if simply

placed or installed side by side with the economy item in the same setting (CX 678, 679, 685, 686).

It is clear from the record that consumers were induced by display of these models to depart from their previous intentions to purchase the advertised economy product and accept the more expensive one (Tr. 44, 66–67, 204–05, 312). What cannot be precisely determined is the extent to which these switches resulted from real differences in economy and deluxe products accurately illustrated by the models, as opposed to the misleading embellishments affixed to the deluxe models.

If all else failed, and a consumer insisted on contracting for an advertising item, respondents often countered by failing to perform, or delaying performance until the consumer cancelled the contract or agreed to renegotiate for a higher-priced item (I.D. 17).

In order to prevent recurrence of the above bait and switch scenario, the administrative law judge entered order provisions which would prohibit respondents from:

(1) Making representations purporting to offer products, installations or services for sale when the purpose of such representations is not to sell the offered products, installations or services, but to obtain leads or prospects for the sale of other products, installations or services at higher prices;

(2) discouraging the purchase of any product, installation or service by failing to deliver or perform as obligated to;

(3) representing, directly or by implication, that any product, installation or service is offered for sale by respondents when in fact such offer is not a bona fide offer to sell such product, installation or service;

(4) * * * misrepresenting in any manner the efficacy, durability, efficiency, composition or quality of any of respondents' products or services.

In addition, certain order provisions entered by the administrative law judge prohibit the deceptive pricing claims which were designed to convince consumers that advertised products were being offered at bargain prices, when in fact they were being advertised at customary prices.

To supplement these provisions, complaint counsel argue that the Commission should include an order provision prohibiting respondents from:

> Discouraging the purchaser from purchasing, or disparaging, any product, installation or service which is advertised or offered for sale by respondents.

It is clearly insufficient to curb a bait and switch scheme by prohibiting respondents only from discouraging purchase of advertised items by means of failing to deliver once they are contracted for. An integral part

of respondents' business operations consisted of baiting consumers by means of advertising inexpensive items and subsequently attempting to induce customers to purchase more expensive and profitable products. Failure to delivery the bait item when contracted for was only used as a last resort, after point-of-sale efforts to induce purchase of the switch item had failed.

The order issued by the administrative law judge, besides prohibiting discouragement by means of nonperformance, also prohibits any misrepresentation of the "efficacy, durability, efficiency, composition or quality" of any of respondents' products or services, either orally or by written advertisement. This prohibition may serve to eliminate the bulk of the abuses noted here. To the extent that "bait and switch" is accomplished by means of misrepresenting the qualities of the bait item in a written advertisement and subsequently revealing its true inadequacies at point of sale, a prohibition on the original misrepresentation may eliminate the fraud. Similarly, if the switch is accomplished by means of deliberately misrepresenting the virtues of the bait item at point of sale (having accurately portrayed it in the bait advertisements), a prohibition on oral misrepresentation should also serve to eliminate the problem. The difficulty arises in that certain characterizations, descriptions, or portrayals of a product, and certain sales pitches and approaches do not, when standing alone, fall to the level of actionable misrepresentations, but may, nonetheless, be integral parts of a fundamentally deceptive and unfair bait and switch selling scheme. Thus it would be hard to argue that the comparatively unattractive models of economy items carried by respondents' sales personnel expressly misrepresented the characteristics of these economy items. When compared to embellished models of the deluxe items, however, the economy models could only serve to reflect invidiously upon the advertised items, and their use constituted a clear disparagement of the advertised products which may well have played a role in effecting the desired switches. Similarly, while scant evidence was adduced at trial, it is not difficult to envision respondents, if prohibited by an order from making unequivocal misrepresentations as to the quality of products either in the bait advertisements or at the point of sale, resorting instead to "reverse puffery" to achieve the unlawful purpose. Absent evidence of other abuses, we would not challenge the right of an entrepreneur to disparage his or her products as "terrible," "low-quality," "not suitable for you," or whatever. But the situation clearly takes on a different cast where the disparagement occurs with respect to items which, by virtue of being advertised, have been implicitly represented to be undeserving of disparagement. Under such circumstances, the presumption must be that any disparagement is undertaken for an unfair and deceptive pur-

pose, and it must be prohibited. We will thus enlarge Paragraph I (2) of the administrative law judge's order to prohibit respondents from disparaging their products. We base this change both upon the record evidence of past disparagement (display of models of advertised specials in comparatively unattractive surroundings, bearing no relation to actual comparative value), and upon the necessity to prevent recurrence in an altered form of the underlying abuse shown to exist here—use of bait and switch tactics. For, as noted above, the administrative law judge's prohibition on express misrepresentations would be unconscionably evadable if respondents were able to engage instead in disparagement of bait products.

We should note that the order we propose is not meant to preclude respondents from making "fair comment" concerning the items they may sell. Sellers, even those who have engaged in the activities shown here, must have the right, for the sake of consumers as well as themselves, to point out genuine shortcomings in advertised and unadvertised products. This is "fair comment," and while the distinction between it and "disparagement" cannot be all-inclusively articulated, we think that in practice it is evident enough where the line should be drawn.

II. SIGNATURES ON BLANK DOCUMENTS

Complaint counsel argue that the record shows that respondents induced consumers to sign blank mortgage agreements by misrepresenting the nature of the documents the consumers were being asked to sign, and that an order provision prohibiting the practice is therefore warranted. While the testimony of certain witnesses presented by complaint counsel would, if believed, establish a *prima facie* case for the violation alleged, respondents introduced, in defense, transcripts of voice recordings of conversations between the witnesses in question (or their spouses) and the finance company to which their contracts were assigned. Upon consideration of these transcripts the administrative law judge concluded that the testimony of complaint counsel's witnesses to the effect that respondents had misrepresented the nature of documents they were asked to sign could not be credited.

Complaint counsel challenge the admission of the transcripts into evidence here. The recordings in question were made by a third party, North American Acceptance Corporation, to which respondents assigned many of their contracts. The finance company routinely, it appears, contacted consumers by telephone upon receiving their contracts (but before making payment to respondents) to discuss various facets of their deal with them. The consumers were notified that their conversations were being recorded, although no "beeper tone" as required by

FCC regulations was employed. A number of voice recordings were subpoenaed from North American by respondents, who prepared transcripts of what they deemed to be relevant portions of the recordings. An official of the finance company testified as to the substantial accuracy of the transcripts.

Complaint counsel argue on appeal that the transcripts were admitted despite the fact that they were not furnished to complaint counsel by the date required in the pretrial order governing the case. [See Section 3.21(d) of the Commission's Rules of Practice.] The administrative law judge in reviewing this claim, however, determined that he would make an exception to his order, and permit introduction of the recordings (Order Denying Motion of Complaint Counsel to Strike Voice Recordings, 1/23/73, p. 3, citing Tr. 304). The Rules of Practice permit modification of a pre-trial order to "prevent manifest injustice." While the administrative law judge would have been within his authority to rule otherwise, we do not think under the circumstances that his decision to amend the pre-trial order was a reversible abuse of the somewhat flexible standard governing such matters. Our view would be otherwise if we could discern any substantial prejudice to complaint counsel's case resulting from the modification. The implication in respondents' brief that adherence to agency procedures is a one-way street must be categorically rejected. Agency rules are designed not only to provide due process for respondents, but to ensure prompt, orderly, and economical administration of justice for the protection of the public. Dilatory behavior by respondents, in violation of pre-trial orders, which impedes or renders more expensive the presentation of the government's case, is as contrary to the public interest as delay by the government which denies due process. Here, however, we do not find convincing reason to think that complaint counsel's case was materially harmed by the delay of respondents in providing transcripts.

While the procedures used for admission of the taped material into evidence were perhaps not the best imaginable, they were certainly reasonable. Transcripts were prepared by respondents, and their accuracy was attested to by a witness from the finance company, under oath and subject to cross-examination. Only excerpts of the conversations were introduced by respondents, due apparently to the length of the recordings, but complaint counsel were given the opportunity to listen to all the recordings and introduce any portions thereof which they felt would have assisted their case or undercut that of respondents. Under these circumstances, the admission of only excerpts of conversations, and the administrative law judge's reliance upon them, was not improper.

We also reject the arguments of complaint counsel that the tapes

were inadmissible because (a) no beeper tone was employed on the telephone, in violation of FCC tariffs, (b) the tapes were not "business records," and (c) the transcripts actually introduced were not the "best evidence" available. It is acknowledged that all parties to the conversations consented to their being made, and in such a case precedent and good sense favor the admissibility of the tapes, despite lack of a beeper tone. [See *Battaglia* v. *United States*, 349 F.2d 556, 559 (9th Cir. 1965), *cert denied*, 382 U.S. 955, *reh. denied*, 382 U.S. 1021, in which consent of one party to a recorded telephone conversation overcame absence of a beeper tone for evidentiary purposes.]

As to business records status, a witness for the finance company testified, and the administrative law judge found, that the tapes were made in the normal course of the company's business. The fact that one purpose of the tapes was for use in litigation that might arise with some consumers does not in itself destroy their admissibility as business records. As to the "best evidence" argument, we think that the decision of the administrative law judge to permit introduction of verified transcripts rather than the tapes themselves was a reasonable exercise of discretion. It is considerably easier to review a record consisting of transcripts rather than tapes themselves (whose admission would require that of a listening device as well), and this procedure is one commonly employed by both sides in Commission cases.

For all these reasons we believe the administrative law judge did not act improperly in admitting the transcripts. Slight departures from the technical rules of evidence followed in court trials may be countenanced in agency proceedings, *Phelps Dodge Refining Corp.* v. *Federal Trade Commission*, 139 F.2d 393, 397 (2d Cir. 1943); *Stanley Laboratories* v. *Federal Trade Commission*, 138 F.2d 388, 392 (9th Cir. 1943), in the interests of maximizing the availability of relevant information.

Based on his review of the transcripts, the administrative law judge concluded that the testimony of several witnesses who had indicated on direct examination that respondents had misrepresented the character of blank documents they were asked to sign could not be credited. The inferences drawn by the administrative law judge in evaluating the witnesses' credibility were not unreasonable, and we should be reluctant to set them aside. He concluded that testimony by consumer witnesses concerning transactions that had occurred several years earlier, to the effect that respondents' sales agents had made certain misrepresentations, could not be believed in the face of evidence from tape recordings of conversations occurring shortly after those transactions that suggested the misrepresentations had not occurred. To be sure, the fact that the witnesses, or in one case a witnesses' spouse, did not show "surprise" at being informed by the finance company that a

mortgage had been taken on their houses, or acted in certain other ways, does not logically *compel* a conclusion that the witnesses' testimony as to misrepresentations at the time of sale should not be believed, and we might well be equally indisposed to reverse his conclusion had the administrative law judge reached the opposite result. Evaluation of witness credibility, however, is a matter for which the administrative law judge is best situated, and absent good cause to challenge that evaluation, we will not disturb it.[2]

III. HOLDER-IN-DUE-COURSE

Complaint counsel seek order provisions preventing respondents from negotiating consumers' contracts to third parties in such fashion as to create "holder-in-due-course" status for the third parties. The requested order provision would require respondents to include in their contracts a warning to third party assignees that an assigned contract would remain subject to any defenses which the consumer might have asserted against the seller-assignor.

Counsel base their request on the contention that respondents' sales personnel affirmatively represented to consumers that respondents themselves would finance their contracts. In fact, respondents assigned their contracts to a finance company. The finance company presumably would qualify as a holder-in-due-course under certain circumstances, invulnerable to defenses which otherwise could be raised by consumers who might decline to complete their payments because of inadequacy of merchandise sold them. The administrative law judge concluded, however, that respondents had not been shown to have affirmatively represented to their customers that they would do their own financing. We find no reason to quarrel with this finding[3] but our inquiry does not end there. Unfairness and deception in the use of holder-in-due-course do not arise only when express misrepresentations are made. As the Commission noted in *All-State Industries of North Carolina, Inc., et al.*, 75 FTC 465 (1969), *aff'd*, *All-State Industries of North Carolina, Inc.* v. *Federal Trade Commission*, 423 F.2d 423 (4th Cir. 1970), *cert. denied*, 400 U.S. 828:

> * * * the Commission has had sufficient experience in this area to take official notice of the fact—which appears almost self-evident—that in the absence of an affirmative disclosure to the contrary, a substantial number of purchasers, having no reason to believe otherwise, will assume that they will be indebted to the seller for the goods they have

[2] Compare *Certified Building Products, Inc., et al.*, Docket No. 8875 (Oct. 5, 1973) [83 F.T.C. 1004] in which the testimony of 22 consumer witnesses was uniform and uncontradicted by any evidence.

[3] As with allegations that respondents misrepresented the nature of blank documents, here witnesses presented by complaint counsel testified that respondents had told them they would finance their own contracts, but evidence from the transcripts of tape recordings discussed *supra* tended to contradict this testimony. For the reasons noted in our discussion of blank documents, *supra*, we find no reversible error in the administrative law judge's determination on this factual issue.

> purchased and that all rights and liabilities between the parties to the sale, and those parties only, will persist. Where, as here, the seller in fact routinely assigns negotiable instruments executed in connection with his sales to finance companies or other third parties without disclosing to the purchaser that this may be done, the purchaser is thus deceived. (PP. 493–94, footnotes omitted.)

Here, as in *All-State*, respondents did not affirmatively disclose to consumers that their contracts would be assigned, and, more significantly, that they might thus lose all legal right to withhold payment in the event goods purchased turned out not to conform to the promises made for them when sold. The harm threatened by use of negotiable instruments is especially great in such a case as here, where misrepresentations are shown to have been made in connection with sales, for the likelihood is thereby enhanced that the buyer will desire to assert defenses against full payment, which defenses are unavailable against the due-course holder.

At a minimum, then, an order provision must be entered requiring respondents to eliminate the potentially damaging deception by disclosing clearly in their contracts the fact that the contracts may be assigned and consumers' defenses thereby possibly destroyed. Complaint counsel would have us go further, however, and prevent respondents from negotiating their contracts in such fashion as to create in the assignees the status of holder-in-due-course.

Complaint counsel argue at some length that the operation of the holder-in-due-course doctrine in consumer transactions is unfair to those consumers who are deprived of legitimate defenses, and that to restrict negotiability in the manner sought would help right the injustices wrought upon the unlucky without unduly hampering business activity or appreciably raising credit costs. Whatever the validity of this argument when applied on an industry-wide basis, standing alone, without evidence of its peculiar applicability to the case at bar, it cannot justify depriving respondents alone of the fruits of unhindered negotiability. What must be shown for this to be warranted, we think, is some evidence of actual or imminent injury from operation of the doctrine in practice, beyond the deception noted above. While respondents' failure to disclose assignment and possible loss of defenses did mislead consumers, there is scant evidence on the record here that negotiation in fact led to consumers being deprived of defenses they wished to assert. Respondents did, it is true, fail to perform many contracts into which they entered (generally for economy products), but there is no evidence that such defaults occurred after negotiation of contracts to a holder-in-due-course,[4] or that consumers were obliged to pay a third party on

[4] It appears, for example, that North American Acceptance Corporation, the usual assignee, checked routinely with consumers to determine that performance had occurred before paying respondents.

claims as to which they could have asserted a defense against the seller. Under these circumstances, we believe that the disclosure order we have entered should be adequate to remedy the abuses shown.[5]

IV. FICTITIOUS REASONS FOR PRICE REDUCTIONS; FICTITIOUS DISCOUNTS

Our review of the initial decision discloses one matter, unchallenged by either side on appeal, which nonetheless cries out for modification.

In Finding 21, the administrative law judge noted that respondents did not have a regular selling price for their deluxe products. Respondent Gladstone testified that salespeople were "instructed to use the words 'initial price' or 'opening price' * * * it wasn't a regular price." (Tr. 1602) Salespersonnel were further instructed to reduce the initial price in order to consummate a sale, by offering various discounts. The administrative law judge observed that:

> in these price negotiations which took place between the salesman and the customer the salesman would employ various stratagems to convince the customer that he was getting a bargain and would advance various reasons for allowing the discount from that initial or offering price. (I.D. 21)

The stratagems employed included telling the customer, falsely, that the *reason* for the alleged price reductions was that the customer's home would be used for display, or for making "before and after" pictures, or for similar purposes of ostensible economic benefit to the seller (I.D. 23).

The administrative law judge declined to find that this system of "initial" prices and discounts amounted to representing falsely that a discount was being given from a "regular selling price." With respect to the use of fictitious reasons for granting the asserted discounts, the judge opined:

> I see nothing wrong in a seller's use of a fictitious reason for reducing his sales price, provided he actually reduces his sales price. (I.D. 23)

There is something grossly wrong with this practice. The reason given by the seller for the offer of an asserted "bargain price" is one factor which the consumer takes into account in determining whether the price actually quoted is a good one or not, and whether the discount offered should be taken or not. Particularly in a case in which the consumer has little or no immediate way to shop for comparable prod-

[5] We do not mean to imply that a limitation on negotiability on an industry-wide basis, via rulemaking, necessarily requires a showing that the use of holder-in-due-course has resulted in deprivation of consumer defenses as to customers of *every company* in the industry. It may well be, as complaint counsel argue, that the injury wrought and threatened by the doctrine justifies an across-the-board prohibition, whose accomplishment would leave all creditors on an equal footing and not unduly restrict credit selling. Clearly, however, to deprive a single seller of the right to invoke the doctrine does place that seller at a serious disadvantage, and requires, therefore, a showing that use of the doctrine has resulted in injury irremediable by disclosure.

ucts, she or he must rely on other clues to determine whether a quoted price should be accepted, or whether delay and examination of alternatives might be warranted. An important clue may be the vendor's stated reason for selling at a particular price.

One is likely to assume, and with good reason, that prices offered at a truthfully denominated "distress sale" are genuine bargains. It may well be sensible for a merchant who is under the gun, facing imminent loss of goods, to sell at below-market prices, and perhaps even below cost. Thus, the announcement that a particular price is being given under duress leads to an inference that such price is a good one, and the buyer may not stop to consider alternatives. Similarly, the announcement that a seller is receiving some extrinsic economic benefit from making a particular sale (for instance, the prospect of added volume due to use of the vendee's home as a model), may lead to the inference that a discount offered in consideration thereof yields a bargain price, for again it appears quite rational for the vendor to be offering a bargain price, since a compensating benefit is being received. One would be considerably more skeptical, however, and with equally good reason, if informed that a particular discount were being offered because the original price had yielded disappointing sales, or if given no reason at all for the discount. Under such circumstances a plausible inference might be that the reduced price may not be a real bargain but that the original price may have been too high. The new reduced price will thus draw closer scrutiny, and comparison of alternatives is likely.[6]

In the case at bar, the administrative law judge found that respondents had no fixed selling price for certain items. Salesworkers were instructed to begin by quoting an "initial" or "opening" price, from which "discounts" were routinely offered to consumers (I.D. 21). The administrative law judge concluded that this in itself could not be challenged, since respondents did not represent that the "initial" price was a "regular" price (which they did not have), and since they were presumably willing to sell at the opening price to anyone willing to buy. We have doubts about the validity of this conclusion, discussed below, but in any event it is clear beyond question that actionable misrepresentation was introduced when respondents supplied plausible but *false* reasons for the reductions they offered to consumers. Instead of telling consumers the truth—that the "discount" was being offered to many people and that the "initial price" was somewhat arbitrary, or instead of leaving the consumer to draw his or her own conclusions from the readiness of the sales agent to offer a discount, respondents' personnel

[6] Consider two department stores, both with identical regular prices, both offering identical reductions. One advertises "Discounts! Going Out of Business," the other "Discounts! Fall Sale." Which is the consumer likelier to patronize absent opportunity to compare all prices?

supplied reasons for the proffered discounts that could only make it appear as though the particular vendee were receiving a genuine bargain, which it was in respondents' own pecuniary interests to confer.

Whether this practice resulted in harm to customers of respondents hardly depends upon whether or not the first-quoted price was actually lowered, which it obviously was, but rather upon *whether or not consumers would have bought at the reduced price had they been told the real reason why it was being offered, or had they at least not been given a fictitious reason.*

An illustration of the effects of this selling system is suggested by the testimony of consumer witness Ferraro. She testified that a deluxe model pool had originally been offered at $5000. The sales agent, however, offered to reduce the price to $3600 if respondents could use her home as a demonstrator. Presumably feeling this to be a good price, she bought (Tr. 69). Subsequently, Ferraro discovered that an identical pool had been sold to witness Parker for only $2900 or so. She then demanded that the price of her pool be reduced, which it was (Tr. 76). It is, of course, difficult or impossible to know in a given case to what extent a particular misrepresentation results in a consumer choice that would not otherwise have been made. Testimony from consumers on this precise point would have been at best speculative. Suffice it to say, as indicated above, that use of fictitious reasons for price reductions presents considerable potential for affecting consumer behavior and inducing purchases that would otherwise be eschewed. Such deception cannot be countenanced, and is clearly forbidden by Section 5 of the Federal Trade Commission Act.

We shall, thus, on our own motion, amend Paragraph I(10) of the order entered by the administrative law judge to prohibit respondents from (additions underlined):

> 10. Falsely representing, directly or by implication, that the home of any of the respondents' purchasers, or prospective purchasers, will be used for any type of advertising or demonstration purpose or as a model home and, that as a result of such use, respondents' purchasers or prospective purchasers *will receive a reduced price or* will earn discounts, referral fees or allowances of any type.

This addition is in conformity with the notice order issued with the complaint in this matter, and is fully justified by the findings of fact made at trial and unchallenged on appeal.

In addition, we must express serious reservations about the legality of respondents' use of such terms as "discount" and "reduced price" and their general approach to selling their deluxe products, apart from the use of false reasons for lowering the initial offering price. Based on his

finding that respondents had misrepresented the regular price of their *economy* products, the administrative law judge entered an order provision prohibiting respondents from

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

Complaint counsel had argued that the practices used in advertising economy items and selling deluxe items in the home justified this provision, but the administrative law judge, as noted, found nothing wrong in the *deluxe* selling practices. From our review of the evidence, we have serious doubts that the techniques used by respondents' salespeople to merchandise *deluxe* items would comply with the order provision entered. Whether respondents used the term "regular price," or "offering price," or whatever is immaterial, in view of their subsequent representations to consumers that they would be offered a "reduction" or "discount" from the initial quotation. It is hard to see what impression could be conveyed to the consumer by such a practice *except* that the initially quoted price was offered in good faith, with some expectation of selling there, and that the so-called "reduced price" was a price less than some other price at which respondents had made some sales or reasonably expected to.

The American marketplace is not an Oriental bazaar. The legitimate expectations of consumers in the two differ considerably. In the typical commercial transaction involving a relatively fungible item sold by a large seller, the consumer has every right to suppose that the first price quoted is not understood by the seller to be a total fabrication, intended for bargaining purposes only. The consumer has the right to expect that if a salesperson announces without clarification that a "discount" is being offered, or a "reduced price" being conferred, such price is actually less than some other price at which the seller reasonably expected to, even if he or she did not actually, sell the product. Once again, as in the case of using fictitious reasons, the injury and deception of fictitious "offering" prices results from the misleading impression that is subsequently conveyed by the mere announcement that a "discount" is being conferred. One is induced to buy by the thought that the quoted price somehow represents a better price than some other price at which the seller hopefully possessed of some business sense and subject to some competitive constraints, has previously sold or expected to sell.

In the instant case, it is not entirely clear whether or not respondents had any basis for the initial offering prices. There is some suggestion in

the testimony that the "initial prices" corresponded to manufacturers' suggested prices and some consumers may have been told this. There is also some suggestion, however, that the initial prices were wholly arbitrary, established simply for the purpose of being able subsequently to offer spectacular "discounts" to consumers and with no expectation of selling at them. (It is also unclear whether any sales were ever made at those initial prices.) Given the ambiguity of the situation, we shall merely record our qualification of the conclusions of the administrative law judge that respondents' sales techniques were

> not the same as telling the customer that the contract price is a reduction from the seller's regular selling price * * * . I conclude, therefore, that respondents' salesmen did not tell their customers that they were receiving various discounts from the regular selling price of the deluxe product. (I.D. 21)

Respondents may not have used the words "regular selling price" to describe their initial offerings, but the effect may have been identical. Without resolving this issue finally here (in view of the ambiguity of the record and its immateriality to the final order), we would note that we construe order provision I(5) to prohibit in the future the quotation of initial prices, however they are denominated, followed by the offer of "reductions" or "discounts" unless either (a) a substantial number of sales have been made by respondents in the recent regular course of business at the initially quoted price, or (b) it is made clear to the consumer what the initially quoted price signifies so that no misleading implication is conveyed.

* * * * * * *

Finally, we shall, on our own motion, add a third paragraph to part III of the order, requiring the individual respondent in this case to notify the Commission within thirty days following affiliation with any new business of his business address and the nature of his business duties. It was pointed out at oral argument that corporate respondents in this case are inoperative and the individual respondent has changed jobs. Monitoring by the Commission of compliance with this order as respects the individual respondent would be impossible were it not kept minimally aware of his current employment.

* * * * * * *

For the reasons noted hereinabove, the appeal of complaint counsel will be granted in part, and the order of the administrative law judge modified. An appropriate order is appended.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having granted, in part, the appeal, and having modified the decision on its own motion;

It is ordered, That the following findings and conclusions of the administrative law judge are adopted as findings of fact and conclusions of law of the Commission:

Findings of fact 1–13, 15–22, and 24–36; finding of fact 14, except for the last five sentences therein; finding of fact 23, except for the second sentence therein; conclusions of law 1–4 (but not including the section entitled "*The Remedy*").

Other findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

It is further ordered, That the order entered by the Administrative law judge be supplemented and as supplemented be, and it hereby is, entered:

ORDER

I

It is ordered, That respondents, Southern States Distributing Company (formerly known as Southern Cross Discount Company, Inc.), a corporation trading and doing business as Southern States Decorators, Southern Cross Pools, Southern Cross Windows, Miracle Plastic Roofers and Carpet Discount Outlet, or under any other name, its successors and assigns, and Emanuel I. Gladstone, individually and as an officer of said corporation, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution or installation of home improvement products including residential siding, swimming pools or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making representations purporting to offer products, installations or services for sale when the purpose of such representations is not to sell the offered products, installations or services, but to obtain leads or prospects for the sale of other products, installations or services at higher prices.
2. Discouraging the purchase of any product, installation or ser-

vice by failing to deliver or perform as obligated to, or disparaging any product advertised or offered for sale by respondents.

3. Representing, directly or by implication, that any product, installation or service is offered for sale by respondents when such offer is not a bona fide offer to sell such product, installation or service.

4. Representing, directly or by implication, that any of respondents' offers to sell products or installations or services is limited as to time or restricted or limited in any other manner, unless such represented limitations or restrictions are actually in force and in good faith adhered to.

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

6. Failing to maintain adequate records (a) which disclose the facts upon which any savings claim, including former pricing claims and comparative value claims of the type discussed in Paragraph 5 of this order are based; and (b) from which the validity of any savings claim, including former pricing claims and similar representations of the type described in Paragraph 5 of this order can be determined.

7. Representing, directly or by implication, that any of respondents' products, installations or services are warranted or guaranteed unless the nature and extent of the warranty or guarantee, the identity of the warrantor or guarantor and the manner in which the warrantor or guarantor will perform thereunder, are clearly and conspicuously disclosed in immediate conjunction therewith; and unless respondents promptly and fully perform all of their obligations and requirements, directly or impliedly represented under the terms of each such warranty or guarantee.

8. Falsely representing, directly or by implication, that their aluminum siding materials will not require painting or other type of restorative maintenance; or misrepresenting in any manner the efficacy, durability, efficiency, composition or quality of any of respondents' products, installations or services.

9. Falsely representing, directly or by implication, that respondents' salesworkers or representatives are connected or affiliated with any manufacturer or manufacturers of products sold by re-

spondents; or misrepresenting, in any manner, the connections, affiliations or sponsorships of respondents, their salesworkers or representatives, or the nature or scope of respondents' business activities.

10. Falsely representing, directly or by implication, that the home of any of the respondents' purchasers, or prospective purchasers will be used for any type of advertising or demonstration purpose or as a model home and, that as a result of such use, respondents' purchasers or prospective purchasers will receive a reduced price or will earn discounts, referral fees or allowances of any type.

11. Failing to disclose, orally prior to the time of sale and in writing on any trade acceptance, conditional sales contract, promissory note, or other instrument of indebtedness executed by the purchaser, with such conspicuousness and clarity as is likely to be observed and read by such purchaser:

(a) The disclosures, if any, required by federal law or the law of the state in which the instrument is executed;

(b) Where negotiation of the instrument to a third party is not prohibited by the law of the state in which the instrument is executed, that the trade acceptance, conditional sales contract, promissory note or other instrument may, at the option of the seller and without notice to the purchaser, be negotiated or assigned to a finance company or other third party; and

(c) Where the law of the state in which the instrument is executed does not preserve as against any holder of the instrument all the legal and equitable defenses the purchaser may assert against the seller, that in the event the instrument is negotiated or assigned to a finance company or other third party, the purchaser may have to pay such finance company or other third party the full amount due under his contract whether or not he has claims against the seller's merchandise as defective; the seller refuses to service the merchandise; or the seller is no longer in business, or other like claims.

II

It is further ordered, That the respondents, Southern States Distributing Company (formerly known as Southern Cross Discount Company, Inc.), a corporation, trading and doing business as Southern States Decorators, Southern Cross Pools, Southern Cross Windows, Miracle Plastic Roofers and Carpet Discount Outlet, or under any other name, its successors and assigns and Emanuel I. Gladstone, individually and as an officer of said corporation, and respondents' officers, agents,

representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or any advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR §226) of the Truth in Lending Act (Pub. L. 90–321, 15 U.S.C. . . . 1601, *et seq.*), do cease and desist from:

1. Failing to disclose the "annual percentage rate" in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. 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 the annual percentage rate; and

   (v) deferred payment price.

3. Failing to keep record evidence of compliance with the consumer credit cost disclosure requirements of Regulation Z for two years, as required by Section 226.6(i) of Regulation Z.

III

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 respondent named herein shall notify the Commission of the discontinuance of his present business or employment and of his affiliation with any new business or employment, within thirty (30) days following affiliation with the new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or

employment in which he is engaged, as well as a description of his duties and responsibilities.

It is further ordered, That 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.

Commissioner Hanford did not participate in this proceeding since oral argument was heard prior to her assumption of office.

IN THE MATTER OF

STEVEN RIZZI, ET AL., TRADING AS FREIGHT LIQUIDATORS

ORDER OF DISMISSAL, ETC., AS TO AN INDIVIDUAL RESPONDENT, IN REGARD TO ALLEGED VIOLATIONS OF THE TEXTILE FIBER PRODUCTS IDENTIFICATION AND FEDERAL TRADE COMMISSION ACTS

Docket 8937. Complaint, July 30, 1973—Decision, Jan. 3, 1974

Order dismissing complaint against Steven Rizzi, individual respondent who was alleged to be a partner of Freight Liquidators, but was found to be merely an employee with no responsibility for acts alleging false claims, misbranding and advertising textiles deceptively.

Appearances

For the Commission: *Everette E. Thomas, Maureen C. McGill* and *Alice C. Kelleher*.

For the respondent: *David W. Ralston*, McLean, Va.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that the parties named in the caption above, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the rules and regulations promulgated under the Textile Fiber Products Identification 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 Steven Rizzi is an individual and a copartner of respondent Joseph W. Green, trading and doing business as Freight Liquidators at 7515 Lee Highway, Merrifield, Va.

Respondent Mike McKeever is an individual and a copartner of respondent Joseph W. Green, trading and doing business as Freight Liquidators at 552 Kenilworth Avenue, Riverdale, Md.

Respondent Jerry M. Lytell is an individual and a copartner of respondent Joseph W. Green, trading and doing business as Freight Liquidators at 1065 West Broad Street, Falls Church, Va.

Respondent Herbert Millstein is an individual and a copartner of respondent Joseph W. Green, trading and doing business as Freight Liquidators at 442 Eastern Boulevard, Essex, Md. and at 4801 Suitland Road, Suitland, Md.

Respondent Sam Katz is an individual and a copartner of respondent Joseph W. Green and Jerry M. Lytell, trading and doing business as Freight Liquidators at 14811 Washington Boulevard, Laurel, Md.

Respondent Harold J. Green is an individual and a copartner of respondent Joseph W. Green, trading and doing business as Freight Liquidators at 4689 King Street, Alexandria, Va.

Respondent George Edward Ommeret is an individual and a copartner of respondents Joseph W. Green and Herbert Millstein, trading and doing business as Freight Liquidators at 309 North Frederick Avenue, Gaithersburg, Md.

Respondent John W. Green is an individual and a copartner of respondent Joseph W. Green, trading and doing business as Freight Liquidators at 7849 Eastern Avenue, Silver Spring, Md. and 8651 Richmond Highway, Alexandria, Va.

Respondent Peter W. Galarneau is an individual and a copartner of respondent Joseph W. Green, trading and doing business as Freight Liquidators at 9112 Center Street, Manassas, Va., and 1727 Wilson Boulevard, Arlington, Va.

Respondent Gerald Gautcher is an individual and a copartner of respondent Joseph W. Green, trading and doing business as Freight Liquidators at 939 York Road, Towson, Md.

Respondent Joseph W. Green is an individual and a coparnter of each of the above respondents. His principal office is located at 380 West Maple Avenue, Vienna, Va., and his places of business are the same as those of his copartners above.

All of the aforementioned respondents have cooperated and acted together in the performance of the acts and practices of the businesses which they have conducted and are conducting under the name of Freight Liquidators, including the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of

rugs, sewing machines, stereo radios and phonographs, and various other articles of merchandise, to the purchasing public.

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 have caused, and now cause, the dissemination of certain advertisements concerning the aforesaid articles of merchandise, by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers of interstate circulation, and by means of radio broadcasts transmitted by radio stations located in the Commonwealth of Virginia, 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 respondents' said merchandise.

In the further course and conduct of their business, as aforesaid, respondents have caused, and now cause, their said merchandise to be shipped across state lines between their various retail outlets located in the Commonwealth of Virginia and State of Maryland, for sale to purchasers thereof located in the Commonwealth of Virginia and State of Maryland, and the District of Columbia. Thus, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. By means of advertisements inserted in newspapers and disseminated as aforesaid, and by means of advertising circulars disseminated by hand delivery to numerous places of residence in the Commonwealth of Virginia and State of Maryland and the District of Columbia, respondents have made various statements and representations of which the following are typical and illustrative, but not all inclusive thereof:

PUBLIC NOTICE

(4 DAYS ONLY!)
LIQUIDATION SALE

BANKRUPTCY STOCK—FACTORY & MILL CLOSEOUTS
ALL NEW MERCHANDISE—FAMOUS BRAND NAMES.

$1,287,350 WORTH OF PRE-CUT RUGS AND MILL-END ROLLS, TELEVISIONS, STEREOS AND COMPONENTS & SEWING MACHINES

(HUNDREDS OF ITEMS NOT SHOWN BELOW ARE ALSO ON DISPLAY.)
BE EARLY FOR BEST SELECTION

* * * * * * *

STEREO

UNCLAIMED FREIGHT

BANKRUPTCY STOCK FACTORY CLOSEOUTS

TRUCK LOAD LIQUIDATION

All New Merchandise
LAST NOTICE FOR THIS WEEKEND
FRIDAY, SATURDAY, SUNDAY & MONDAY

ONLY $88

New 1972 (in cartons), 5-piece Stereo Component Units, 40 Watts, AM/FM radio, deluxe 4 spd. BSR turntable, 4-speaker sound system, equipped for 8 track tape player, tape recorder, etc. Only $88.

Only $147

New 5-Piece Components 4-speed Deluxe Turn Tbl., 100 watts, AM/FM radio, deluxe 4-spd. turntable w/diamond stylus, 4-speaker air suspension audio system. Equip. for 8-trk. cassette. Orig; $329. Yours for $147.

Only $108

New 1972 (in cartons), famous make, 100 watt tuners w/AM/FM multiplex equipped for 8 track or cassette. Only $108.

From Only $88

New console stereo, various sizes & finishes. Lge. assortment w/AM/FM radio & deluxe 4 spd. changer.

FREIGHT LIQUIDATORS

Deal With The Store Near You * * *

* * * * * * *

RUGS
12x9's $19

WAREHOUSE LIQUIDATION

4 DAYS ONLY!

All 100% nylon, acrilan, polyester pile. Full sizes 9x12, 12x12, 12x15, 12x21, 6x9, also odd sizes and various size ovals. In gold, green, red, blue, and other exciting colors. Shags, plushes, twists and sculptured. Will give a warm look to your apt.

OVALS—FRINGED $8

WE LIQUIDATE RUGS FOR FAMOUS SOUTHERN MILLS. ALL ARE GUARANTEED PERFECT.

MASTER CHARGE, BANKAMERICARD, TERMS AVAILABLE

FREIGHT LIQUIDATORS WAREHOUSES

*   *   *   *   *   *   *

FREIGHT LIQUIDATORS

Deal With The Store Near You * * *

BRAND NEW SEWING MACHINES $63

You may own a 1971 "Touch–N–Stitch" Zig-Zag, new stretch stitch, embroiders, monograms, appliques, makes buttonholes, etc., all without attachments. Ordered for schools, "UNCLAIMED BY THEM." 25-year, guarantee and instructions.

*   *   *   *   *   *   *

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

1. By and through the use of said name "Freight Liquidators," separately or in connection with the foregoing statements and representations or by said statements and representations alone, that they are liquidators, authorized adjustors or agents engaged in the sale or disposition of bankrupt, salvage, distrained or other distress or transportation company surplus merchandise for the purpose of liquidating, adjusting, paying off or otherwise settling indebtedness or claims.

2. By and through the use of said name "Freight Liquidators," separately or in connection with the foregoing statements and representations or by said statements and representations alone, that merchandise advertised by respondents is bankrupt, salvage, distrained, distress or transportation company surplus merchandise, and therefore has a unique or special disposition.

3. Because of the unique or special disposition of the advertised merchandise, it is being offered at prices below those usually and customarily charged at retail.

4. Purchasers of the advertised merchandise are afforded savings equal to the differences between respondents' advertised prices and those at which the same merchandise is usually and customarily sold at retail.

5. The amount designated as "Orig." was the price at which the merchandise advertised had been sold by respondents in the recent, regular course of their business.

6. Purchasers of the merchandise advertised are afforded savings equal to the differences between the higher and lower prices listed in said statements.

7. Respondents are making a bona fide offer to sell the advertised merchandise at the price and on the terms and conditions stated in the advertisements.

8. Respondents are making a bona fide offer to sell a complete sewing machine without attachments for the advertised price.

9. Certain of respondents' products are unconditionally guaranteed for various periods of time such as twenty-five (25) years.

10. The quantities of merchandise and the time during which such are available for sale are limited.

PAR. 6. In truth and in fact:

1. Respondents are not liquidators, authorized adjustors or agents engaged in the sale or disposition of bankrupt, salvage, distrained or other distress or transportation company surplus merchandise for the purpose of liquidating, adjusting, paying off or otherwise settling indebtedness or claims. Instead, respondents are in the business of purchasing the advertised merchandise from manufacturers or suppliers and selling it at retail for their own account to the purchasing public.

2. Merchandise advertised by respondents is not bankrupt, salvage, distrained, distress or transportation company surplus merchandise, and therefore does not have a unique or special disposition.

3. The advertised merchandise is not being offered at prices below those usually and customarily charged at retail.

4. Purchasers of the advertised merchandise are not afforded savings equal to the differences between respondents' advertised prices and those at which the same merchandise is usually and customarily sold at retail.

5. Said merchandise had not been customarily and usually sold at retail by respondents in the recent, regular course of their business for the amounts set out in the advertisements as "Orig."

6. Purchasers of the merchandise advertised are not afforded savings equal to the differences between the higher and lower prices listed in said statements.

7. Respondents are not making a bona fide offer to sell the advertised merchandise 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 merchandise similiar to that advertised. Members of the purchasing public who respond to said advertisements are either told by respondents' salesmen that the advertised merchandise is not available, or are shown higher priced merchandise of superior quality, which by comparison disparages and demeans the advertised merchandise. By these and other tactics, purchase of the advertised merchandise is discouraged, and respond-

ents, through their slaesmen, attempt to sell and frequently do sell the higher priced merchandise.

8. Respondents are not making a bona fide offer to sell a complete sewing machine without attachments for the advertised price. The advertised price is for a sewing machine head and does not include such essentials as a base or stand, without which the head of the machine is useless.

9. Respondents' products are not unconditionally guaranteed for the period of time stated in said advertisements or orally represented by respondents' salesmen. To the contrary, the only guarantee for respondents' products is that which is provided by the manufacturers thereof, and such guarantees are subject to conditions and limitations not disclosed in respondents' representatives' oral representations.

10. The quantities of merchandise and the time during which such are purportedly available for sale are not limited. In fact, this representation is designed to act as the inducement for the practices set forth in Paragraph Six 7., hereof.

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 individuals in the sale and distribution of merchandise of the same general kind and nature as that 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 by reason of said erroneous and mistaken belief.

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 violation of the Textile Fiber Products Identification Act and the implementing rules and regulations 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. 10. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, of textile fiber products including rugs and floor covering and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 11. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and of the rules and regulations promulgated thereunder, in that they were falsely and deceptively advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

PAR. 12. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote, and to assist, directly or indirectly, in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the rules and regulations promulgated under said Act.

PAR. 13. Among such textile fiber products, but not limited thereto, were rugs which were falsely and deceptively advertised in *The Washington Post,* a newspaper published in the District of Columbia, having a wide circulation in the District of Columbia and various other States of the United States, in that said rugs were described by such fiber connoting terms among which, but not limited thereto, was "Acrilan," and the true generic name of the fiber contained in such rugs was not set forth.

PAR. 14. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondent has falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act in that said textile fiber products were not advertised in accordance with the rules and regulations promulgated thereunder in the following respects:

1. In disclosing the fiber content information as to floor coverings

containing exempted backings, fillings, or paddings, such disclosure was not made in such a manner as to indicate that such fiber content information related only to the face, pile or outer surface of the floor covering and not to the backing, filling or padding, in violation of Rule 11 of the aforesaid rules and regulations.

2. A fiber trademark was used in advertising textile fiber products, without a full disclosure of the fiber content information required by said Act, and the Regulations promulgated thereunder, in at least one instance in said advertisement, in violation of Rule 41(a) of the aforesaid rules and regulations.

3. A fiber trademark was used in advertising textile fiber products, containing only one fiber and such fiber trademark did not appear, at least once in the said advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type, in violation of Rule 41(c) of the aforesaid rules and regulations.

PAR. 15. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and rules and regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, and unfair methods of competition, in commerce, under the Federal Trade Commission Act.

SUMMARY INITIAL DECISION AND ORDER DISMISSING COMPLAINT AS TO STEVEN RIZZI BY MILES J. BROWN, ADMINISTRATIVE LAW JUDGE

NOVEMBER 13, 1973

This matter has been presented to the administrative law judge for decision pursuant to the provisions of Section 3.22 of the Commission's Rules of Practice. Respondent Steven Rizzi has moved for summary decision of dismissal and counsel supporting the complaint have moved for summary decision against dismissal. Contained in the motion against dismissal is a "Stipulated Statement of Facts" and attached to that motion are Mr. Rizzi's affidavit, six letters and a form-draft of a partnership agreement.

It is the opinion of the administrative law judge that the motion for summary decision of dismissal should be granted. Because there appear to be no genuine issues of fact and because this decision completes the case as to Mr. Rizzi, this decision will constitute an initial decision as required by Section 3.24 of the Commission's Rules of Practice.

FINDINGS AS TO THE FACTS

The stipulated statement is supported by the matters set forth in the attachments to the motion against dismissal and is adopted as the findings of fact:

During an investigational hearing on Mar. 8, 1973, Joseph W. Green testified that he was engaged in a merchandise retail business with various partners, however these agreements were not reduced to writing. Mr. Green further testified that "Rizzi is in charge of marketing. That would be generally in the sales end of the company." Mr. Green also affirmed that he intended to make Mr. Rizzi vice president in charge of marketing in the Delaware corporation. On Apr. 14, 1973, Jerome I. Silverman, accountant for Joseph W. Green, in a telephone conversation with complaint counsel stated that a Mr. Chac's partnership with Joseph W. Green had been dissolved and that Mr. Steven Rizzi was the new partner on a 50/50 basis in the Lee Highway, Virginia store.

Respondent Steven Rizzi was never a formal partner with any of the named respondents in this matter (see affidavits and correspondence). He was employed by respondent Joseph W. Green from Jan. 1972 until Sept. 1972.

Respondent Rizzi's duties during his approximate nine month employment with Joseph W. Green included: (1) selling Freight Liquidator partnerships to individuals wanting to go into business with Mr. Green; (2) ordering and purchasing carpeting; (3) correlating sales information from the Freight Liquidators' stores; and (4) other administrative work which included being on call for any problems which might arise in the stores.

Respondent Rizzi was compensated by Joseph W. Green on the basis of a 5 percent commission on the initial payment of $25,000 by partnership applicants. All instruction and direction in respondent Rizzi's employment was provided by Joseph W. Green. Mr. Rizzi was aware of complaints from customers of Freight Liquidators. He was also knowledgeable of the Freight Liquidators overall method of doing business including the advertising and sale of merchandise.

Prior to his employment with Freight Liquidators, respondent Rizzi worked as a salesman for Price-Radin Associates, a land development corporation. After his termination with Freight Liquidators he established a retail carpet store in Alexandria, Va., under the trade name Merchandise Distributors, on Nov. 15, 1972. He went out of business on Oct. 22, 1973, and is presently employed as sales manager for Anthony Pools.

* * * * * * *

Counsel supporting the complaint concede that contrary to the information received during the investigation of this matter these stipulated facts demonstrate that Mr. Rizzi was not an actual partner of any of the respondents. They contend, however, that these facts do establish that he and other respondents "cooperated and acted together in the performance of the acts and practices" challenged in the complaint (Motion Against at 3). Counsel argue that they expect to show "that the acts and practices complained of were the joint responsibility of a number of individual participants, all of whom shared in the ill-gotten proceeds and have the potential for continuing such practices in the future" (*ibid.*).

The principal focus of the complaint is on the advertising and sales practices of a group of proprietorships trading under a common name. The complaint alleged that each of the individual respondents, including Mr. Rizzi, was the partner of respondent Joseph W. Green trading and doing business as Freight Liquidators at a particular location. The complaint further alleged as follows (Par. 1):

> All of the aforementioned respondents have cooperated and acted together in the performance of the acts and practices of the businesses which they have conducted and are conducting under the name of Freight Liquidators, including the acts and practices hereinafter set forth.

Significantly, although named as individuals, the complaint does not name any person merely as an employee of any respondent, but rather identifies all respondents as individuals trading as Freight Liquidators.

On the basis of the findings of fact it is apparent that Steven Rizzi was merely an employee of Mr. Green. His enumerated duties[1] did not place him in a position of responsibility for the challenged acts and practices in advertising or sales. Nor was Mr. Rizzi ever a manager of a store.

It is concluded that Mr Rizzi did not "conduct" business or trade under the name Freight Liquidators, nor did he "cause" or "engage" in or have control over the challenged acts and practices. It is further concluded that, as a matter of law, Mr. Rizzi was not "responsible" severally or jointly with others for such practices.

In this respect, I am not aware of, nor have counsel cited, any contested Federal Trade Commission case which has named an employee as respondent or specifically named an employee in an order merely because of his employment. Some involvement in management or some overt act involving the challenged conduct or some control over such conduct of others appears to be necessary.[2] Mr. Rizzi does not

[1] (1) selling Freight Liquidators' partnerships to individuals wanting to go into business with Mr. Green; (2) ordering and purchasing carpeting; (3) correlating sales information from the Freight Liquidators' stores; and (4) other administrative work which included being on call for any problems which might arise in the stores.

[2] For example, the finding that an individual "formulated, directed, and controlled corporate policies and practices" was sufficient to hold him responsible in *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F.2d 313, 325 (8th Cir. 1965), *cert denied*, 384 U.S. 939 (1966). More recently, a finding that an individual stockholder, officer and director was "deeply involved in the important business affairs of all the corporate [petitioners]" was deemed sufficient. *Sunshine Art Studios, Inc.* v. *Federal Trade Commission*, 1st Cir. No. 73-1037 (decided July 23, 1973).

appear to meet these requirements. Moreover, mere knowledge of the existence of challenged conduct does not appear to be sufficient grounds for inclusion. On the other hand, coverage of the order is generally extended to persons not named as respondents by including in the preamble of the order such generic terms as "agents, representatives, employees, successors and assigns." In my view, should the Commission desire to extend its enforcement of Section 5 of the Federal Trade Commission Act to cover employees it would be better to do so forthrightly rather than develop such law in a situation involving such variance from the actual tenor of the complaint.

In the circumstances it would appear to be grossly unfair to require Mr. Rizzi to participate as a respondent in a trial where the actual facts are so different from those originaly reported during investigation and alleged in the complaint. The mere possibility that some additional facts may turn up upon which counsel supporting the complaint might argue complicity and thus joint responsibility for the acts and practices is not, in my opinion, reasonable grounds for retaining Steven Rizzi as a respondent throughout this proceeding.

Finally, it should be noted, that although the parties have argued whether it would be appropriate or necessary to have the type of order recommended in the complaint run against Steven Rizzi specifically, in view of the result already reached, no opinion is expressed as to that other issue.

ORDER

It is ordered, That the compliant be, and the same hereby is, dismissed as to Steven Rizzi.[3]

FINAL ORDER

No appeal from the summary initial decision of the administrative law judge dismissing the complaint as to individual respondent Steven Rizzi having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.51 of the Commission's Rules of Practice (effective Aug. 15, 1971), the initial decision should be adopted and issued as the decision of the Commission:

It is ordered, That the initial decision of the administrative law judge shall, on the 3rd day of Jan. 1974, become the decision of the Commission.

[3] This dismissal does not relieve Mr. Rizzi from his responsibility to respond to any subpoena that may require his appearance and testimony in the adjudicative proceedings.

IN THE MATTER OF

LORILLARD, DIVISION OF LOEWS THEATRES, INC., ET AL.

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

Docket C-2486. Complaint, Jan. 7, 1974—Decision, Jan. 7, 1974

Consent order requiring a New York City manufacturer, seller and distributor of cigarettes, among other things to cease misrepresenting the manner in which any promotion game, contest or device will be judged and failing to determine or judge entries in accordance with the published rules. Further, the order requires respondent to rejudge the "Kent Castle Contest," a 1971 promotion for Kent cigarettes, with Lorillard paying up to $100,000 in costs for Blue Ribbon Promotions, Inc., a co-respondent, to rejudge the contest.

Appearances

For the Commission: *Ellis M. Ratner*, *F. Kaid Benfield* and *Richard A. Olderman.*

For the respondents: *Martin Kleinbard* of Paul, Weiss, Rifkind, Wharton & Garrison, New York, N.Y. and *James M. Nicholson* of *Nicholson Carter*, Washington, D. C. for Lorillard, Division of Loews Theatres, Inc. *Steven P. Raymond* of *Weisman, Celler, Spett, Modlin Wertheimer*, New York, N.Y. for Blue Ribbon Promotions, Inc. and Donald Jagoda.

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 Lorillard, a Division of Loews Theatres, Inc. hereinafter sometimes referred to as Lorillard, a corporation, and Blue Ribbon Promotions, Inc., a corporation, and Donald Jagoda, individually and as officer of Blue Ribbon Promotions, Inc., hereinafter referred to as respondents have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Lorillard, Division of Loews Theatres, Inc., a corporation, 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 200 East 42nd Street, in the city of New York, State of New York.

Respondent Blue Ribbon Promotions, 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 doing business located at 366 Fifth Avenue in the city of New York, State of New York.

Respondent Donald Jagoda is an individual and officer of respondent Blue Ribbon Promotions, Inc. He formulates, directs and controls the acts and practices of the corporate respondent of which he is an officer, including the acts and practices herein set forth. His address is the same as that of respondent Blue Ribbon Promotions, Inc.

The aforementioned respondents cooperated and acted together in carrying out the acts and practices herein set forth.

PAR. 2. Respondent Lorillard is now, and for some time last past has been engaged in the manufacturing, advertising, sale and distribution of cigarettes.

Respondent Blue Ribbon Promotions, Inc. and Donald Jagoda, individually and as officer of said corporation, are now, and for some time last past have been engaged in the planning, creating, administering and judging of sweepstakes, contests, incentive and premium programs and other promotional programs and devices used in and to induce the sale of cigarettes and various other products.

PAR. 3. In the course and conduct of their aforesaid businesses, and at all times mentioned herein, respondents have been and now are in substantial competition in commerce with corporations, firms and individuals in the sale and distribution of their respective products and services.

PAR. 4. In the course and conduct of their aforesaid businesses, respondents cause their respective products and services to be sold, placed and distributed throughout the United States and at all times mentioned herein have maintained a substantial course of trade in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their respective businesses, respondents have acted separately or in concert for the purpose and with the result of conducting, in commerce, a promotional game known as "Kent Castle Contest" in connection with and for the purpose of inducing the sale of Kent cigarettes. The aforesaid "Kent Castle Contest" was a promotional device in the nature of a game of skill.

PAR. 6. In the course and conduct of their aforesaid businesses, 'espondents made certain statements the representations in connection vith the operation of the aforementioned "Kent Castle Contest." Typical and illustrative of said statements and representations, but not ıclusive, is the following:

With "Kent Micronite Filter Cigarettes" word contest, you'll get more than smoking ›asure.

Enter Kent's CASTLE CONTEST

50 GRAND PRIZE WINNERS—Win a Kent Castle trip for two. Enjoy a lavish one week stay at the elegant Churchill, London's newest Hotel, including fabulous Castle tour and medieval banquet, roundtrip transportation via Pan Am 747 Jet Clipper and $500 spending money.

1,000 SECOND PRIZE WINNERS—Win attractive golden toned sets of Kent Castle ladies' brooch and man's tie tac specially created by famous Trifari.

1. Using only the letters from the words "KENT MICRONITE FILTER CIGARETTES," make as many English words as you can consisting of four letters or more. Ex.: RENT, SCENT, Use letters appearing in the phrase, "KENT MICRONITE FILTER CIGARETTES" as often as you wish. Ex.: MINIMAL, KNOCK. Winners will be judged by highest total of eligible words made.

2. You may NOT use proper nouns, abbreviations, contractions, words with a hyphen or apostrophe. Decisions on word eligibility will be made by an independent judging organization whose decisions are final. Only words appearing in the main body of Webster's Seventh New Collegiate Dictionary are eligible.

3. Word lists must be legibly typed or printed by hand on paper of your choice. You must also show total number of words made, plus your name, address and zip code. This is your entry.

4. Include with your entry the bottom flaps from any two packages of KENT or KENT MENTHOL cigarettes. Mail your entry and bottom flaps to KENT CONTEST. P.O. Box #1, Murray Hill Station, New York, New York 10016. Enter as often as you like; each entry must be mailed separately with two bottom flaps enclosed and postmarked by May 15, 1971, and received no later than May 25, 1971. Entries become property of Lorillard. Winners will be notified by mail.

5. Entries for this contest of skill must be wholly the work of the person in whose name the entries are submitted and winners will be determined on the basis of the highest totals of eligible words.

PAR. 7. In the further course and conduct of their aforesaid businesses in connection with the promotional device "Kent Castle Contest," respondents determined the winning entries in the following manner. An initial cut-off score of 8,000 words was set. That figure was later raised to 9,000 words. All entries containing fewer than 8,000 or 9,000 words were eliminated. Those entries above the 8,000 or 9,000 word cut-off were first checked against a master list for words beginning with the letter "K." Respondents determined the total number of eligible "K" words to be 162. Any entry with less than 161 eligible "K" words was eliminated as a contender for the grand prize. Each of the remaining entries was then checked against the master list for words beginning with the letter "O." Respondents determined the total number of eligible "O" words to be 248. Any entry with fewer than 246 eligible "O" words was eliminated as a contender for the 50 grand prizes. Similarly, the remaining entries were next checked against the master list for the letter "I" at which time the top 50 entries were isolated. The second prize winners were judged by their performance in creating words beginning with the letter "K."

PAR. 8. By and through the use of the aforesaid representations, directions, explanations, rules and other statements of similar import and meaning not set out specifically herein, respondents represented to a vast segment of the general public, directly and by implication that the judging method used in the contest would insure the identification and selection of those qualified entries containing the greatest number of total eligible words.

PAR. 9. In truth and in fact, the judging method used in the contest did not insure the identification and selection of those qualified entries containing the greatest number of total eligible words.

Therefore, respondents' said statements and representations, as set forth in Paragraphs Six and Eight hereof, were, and are false, misleading and deceptive.

PAR. 10. By and through the aforesaid statements, representations, acts and practices, respondents have utilized a method of judging in connection with the "Kent Castle Contest," that was not consistent with the published rules and which, furthermore, contained significant opportunity for error. As a result, those entrants to whom prizes were awarded may not have submitted the entries superior under the terms of the published contest rules. Respondents' failure to employ a method of judging calculated to insure that winners be selected and prizes be awarded in accordance with the terms of the published contest rules is an unfair act or practice.

PAR. 11. The use by respondents of the false, misleading and deceptive statements, representations, as aforesaid, has had, and now has, the capacity and tendency to mislead a substantial portion of the general public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of Kent cigarettes by reason of said erroneous and mistaken belief, and furthermore, respondents' failure to employ a method of judging calculated to insure the selection of winners and awarding of prizes in accordance with the terms of the published contest rules was, and is now, an unfair act or practice.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and continue to be all to the prejudice and injury of the public and the respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of 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

Respondents Lorillard, Blue Ribbon Promotions, Inc., and Donald Jagoda 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 consititute 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 has 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 agreement, placed such agreement on the public record for a period of thirty (30) days, and received and considered comments, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission thereby issues its complaint, makes the following jurisdictional findings, and enters the following order.

1. Respondent, Lorillard, a Division of Loews Theatres, Inc., is a division of a corporation organized, existing and doing business under ane by virtue of the laws of the State of New York, with its principal office and place of business located at 200 East 42nd Street, in the city of New York, State of New York.

Respondent Blue Ribbon Promotions, 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 doing business located at 350 Fifth Avenue in the City of New York, State of New York.

Respondent Donald Jagoda is an individual and officer of respondent Blue Ribbon Promotions, Inc. He formulates, directs and controls the acts and practices of the corporate respondent of which he is an officer, including the acts and practices herein set forth. His address is the same as that of respondent Blue Ribbon Promotions, Inc.

ORDER

It is ordered, That respondent Lorillard, a Division of Loews Theatres, Inc., a division of a corporation, Blue Ribbon Promotions, Inc., a corporation, and Donald Jagoda, individually and as officer of Blue Ribbon Promotions, Inc., and their respective officers, agents,

representatives and employees, directly or through any corporate or other device, in connection with the preparation, advertising, sale, distribution or use of the "Kent Castle Contest" or any other promotional game, contest or device which involves or offers an opportunity to receive a prize or anything of value, by any means, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. a. Misrepresenting the manner in which any promotion game, contest or device, will be judged;

   b. Failing to determine or judge entries in accordance with the published rules.

2. Engaging in or promoting, directly or indirectly, the use of any such promotional game, contest or device by means of any announcement notice, or advertisement unless:

   a. The rules, and entry blanks where used, relating to promotional games, contests, or devices of skill shall clearly and conspicuously present a fair summary of the manner in which any such promotional games, contests, or devices of skill will be judged; moreover, such rules and entry blanks shall state all of the requirements, terms and conditions for participating therein and for entitlement to prizes or other awards;

   b. All offered prizes or other awards are distributed to those participants so entitled under the rules;

   c. Following the awarding of prizes in any promotional games, contests, or devices, respondents shall furnish to participants, upon request, the names and city and state of all winners, or with regard to sweepstakes contests, of all winners of prizes having a retail value of fifty dollars ($50) or more, their respective winning scores, and a detailed statement enunciating the basis or method used to determine entitlement to prizes; furthermore, respondents shall clearly and conspicuously present in the statement of the rules, and entry blanks where used, pertaining to any such promotional games, contests, or devices the fact that such information will be furnished to participants therein upon such request.

   d. For the purpose of 2(a) and 2(c) hereof, clearly and conspicuously shall be satisfied only if the required presentation appears in bold face type so as to distinguish it from that type used to state the text of the rules.

3. Lorillard shall pay the costs and expenses of rejudging the "Kent Castle Contest" which rejudging shall be conducted in the following manner.

a. Each entry in the Kent Castle Contest which discloses, pursuant to the rules of the contest, a word total within such entry of 9,700 or more words, shall be segregated from all entries in such contest with lower word total.

b. All entries of 9,700 words or more, so segregated, shall be numbered for identification and judging in accordance with the procedures set forth below. (Such entries are hereinafter referred to as "Entries to be Judged.")

c. Research Triangle Institute or such other person or organization mutually satisfactory to Lorillard and the Federal Trade Commission (hereinafter referred to as "Institute") shall prepare 100 separate word lists (hereinafter referred to as "First Stage Lists"), each consisting of 200 words selected at random from the master word list. Master word list means the list previously prepared by Blue Ribbon Promotions, Inc. (hereinafter referred to as "Blue Ribbon") for the original judging of the Kent Castle Contest.

d. Institute shall number the first stage lists and shall assign, at random, one first stage list to each entry to be judged. Institute shall then select at random 1,000 entries to be judged and shall determine the number of words in each such entry to be judged that appear on the first stage list assigned to such entry. Upon completion of this determination, Institute shall analyze and evaluate the statistical information thus developed and shall report and set forth the method or methods which reasonably could be used in judging the remaining entries to be judged, and furthermore, shall set forth, in declining order of confidence levels, each such method and the alternate statistical approach set forth in e. below. Blue Ribbon shall thereupon "cost" the method or methods set forth in the institute report. If any method contained in the Institute report offers a higher level of confidence than the alternate statistical approach, as determined by Institute in its report, and if the cost of judging all entries by applying such method to judging the remaining entries to be judged shall not thereby exceed $100,000, then such method shall be followed by Blue Ribbon in judging the Kent Castle Contest. If more than one such method is found, the method offering the highest confidence level shall be followed. Otherwise, the Kent Castle Contest will be judged by Blue Ribbon in accordance with the alternate statistical approach set forth in e. below.

e. In the event there is no method suggested in the Institute report which provides a higher confidence level within the

maximum cost limitation than the alternate statistical approach set forth below, then Blue Ribbon shall undertake the judging pursuant to the following procedure (hereinafter referred to as the "Alternate Statistical Approach"):

(i) It is understood and agreed between the parties to this order that the maximum cost to Lorillard for Blue Ribbon's judging of the Kent Castle Contest under the alternate statistical approach, as more specifically set forth in 3e(ii) of this order, shall not exceed $100,000. However, whatever the actual cost of judging may be, Blue Ribbon shall complete the judging in accordance with the procedures outlined in 3e(ii). Institute shall furnish to Blue Ribbon such word lists, random selection of numbers, analyses, and other data as may be necessary to permit Blue Ribbon to judge the contest strictly and solely in accordance with this order.

(ii) Blue Ribbon shall judge each entry to be judged against the first stage list assigned to it by Institute and shall determine the number of words in each entry to be judged that appear on the first stage list against which it is judged. Blue Ribbon shall determine the 500 entries to be judged which contain the highest number of words appearing on its first stage list. Blue Ribbon shall then judge those 500 entries to be judged against word lists containing 400 words each, (hereinafter referred to as "Second Stage Lists") in the manner described with respect to the first stage judging. The second stage lists to be used in judging the 500 entries to be judged shall be supplied to Blue Ribbon by Institute. Blue Ribbon shall then certify to Lorillard, with a copy to the Federal Trade Commission, the 50 entries to be judged which contain the greatest number of words on the first and second stage lists against which they were judged, and certify and declare those 50 entries to be judged grand prize winners of the Kent Castle Contest.

4. Lorillard shall award prizes in the amount of $2,000 each to each of the winners so certified by Blue Ribbon which winners have not been previously awarded a grand prize as a result of the winning of the Kent Castle Contest.

5. The sole responsibility of Lorillard with respect to the judging of the Kent Castle Contest shall be to pay the expenses and fees of the Institute in an amount to be agreed upon by Lorillard and the Institute, and the expenses and fees of Blue Ribbon in an amount

not to exceed the $100,000 as set forth in Paragraph 3e(i) above, and, if Blue Ribbon for any reason shall fail to judge the contest as provided above, any other expenses and fees which may be necessary in order that the contest be judged by an individual or organization acceptable to the Commission in the manner set forth in Paragraph 3 above. This provision shall not affect the obligation of Blue Ribbon to judge the contest in the manner set forth in Paragraph 3 above regardless of the actual cost of judging the contest.

6. Except for the initial activities of the Institute set forth herein, Blue Ribbon shall be solely responsible, and Lorillard shall not be responsible, for the execution of the judging of the Kent Castle Contest pursuant to this consent order, except as set forth in Paragraph 5 above.

7. A person or organization satisfactory to the Federal Trade Commission shall examine the judging by Blue Ribbon and shall certify to the Commission the accuracy of the judging hereunder by Blue Ribbon. Such examination may be by periodic observation and by sampling of judged entries against the results certified by Blue Ribbon.

8. Where reference is made to "Blue Ribbon" in connection with rejudging, the obligation for such rejudging is also applicable to respondent, Donald Jagoda.

9. As progress payments are made by Lorillard to Blue Ribbon for its rejudging, 25 percent of each payment which Lorillard is obligated to make, pursuant to its agreement with Blue Ribbon, shall be withheld by Lorillard until completion of the judging. Judging shall be deemed completed for the purposes of this paragraph upon the certification by Blue Ribbon pursuant to Paragraph 3e(ii) above.

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

It is further ordered, That the corporate 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 a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

It is further ordered, That respondents 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 complied with the order to cease and desist.

IN THE MATTER OF

CHRYSLER CORPORATION

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATIONS OF THE CLAYTON AND FEDERAL TRADE COMMISSION ACTS

Docket C-2484. Complaint, Jan. 9, 1974—Decision, Jan. 9, 1974

Consent order requiring Chrysler Corporation, a manufacturer and seller of residential and commercial air conditioners, to cease interlocking its directors with General Electric Company.

Appearances

For the Commission: *Jonathan E. Gaines.*

For the respondent: *William E. Huth* of *Ziegler, Dykhouse, Wise & Huth,* Detroit, Mich.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated the provisions of Section 8 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the interest of the public, issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Chrysler Corporation (Chrysler) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at Detroit, Mich. At all times relevant to this complaint, Chrysler had capital, surplus, and undivided profits aggregating in excess of 1 billion dollars. In 1971 it had revenues of approximately 8 billion dollars.

PAR. 2. General Electric Company (General Electric) is a corporation organized and existing under and by virtue of the laws of the State of New York, maintaining its principal place of business at 570 Lexington Avenue, New York, N.Y. At all times relevant to this complaint, General Electric had capital, surplus, and undivided profits aggregating in excess of 2 billion dollars. In 1971 General Electric had revenues of approximately 9.4 billion dollars.

PAR. 3. Mr. Edmund W. Littlefield is a resident of the State of California. In 1964 he was elected to the board of directors of General Electric and has served in that capacity from the time of his election to and including the date of this complaint. In 1969 he was elected to the board of directors of Chrysler, and he was a director of Chrysler from that time until Mar. 22, 1973. He resigned from Chrysler's board having

been notified of the Commission's intention to issue a complaint in this matter.

PAR. 4. General Electric's and Chrysler's respective businesses each encompasses the manufacture and sale of residential and commercial air conditioners.

PAR. 5. (a) General Electric and Chrysler by the nature of their business and location of operations are competitors of each other with respect to residential and commercial air conditioners.

(b) The elimination of competition by agreement between General Electric and Chrysler would hinder, foreclose, and restrain competition or tend to create a monopoly in the residential and commercial air conditioner markets.

PAR. 6. (a) The products referred to in Paragraph Four are sold and distributed by General Electric and Chrysler from locations in various States of the United States to purchasers located in many other States of the United States.

(b) General Electric and Chrysler each engages in commerce as that term is defined in the Clayton Act and Federal Trade Commission Act.

PAR. 7. The director interlock, as hereinabove alleged, constitutes a violation of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respodennt with violation of Section 8 of the Clayton Act and Section 5 of the Federal Trade Commission Act; and

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

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

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

1. Respondent Chrysler Corporation (Chrysler) is a corporation organized and existing under and by virtue of the laws of the State of Delaware, maintaining its principal place of business at Detroit, Mich.

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 Chrysler Corporation (Chrysler), a corporation, its successors and assigns, do forthwith cease and desist from interlocking the directors of said respondent with General Electric Company (General Electric) through Edmund W. Littlefield, or any other individual, so long as said respondent and General Electric, by virtue of their business and location of operation, compete in the manufacture and sale of any product.

II

It is further ordered, That respondent, Chrysler, for a period of five years from the date of this order, shall, within 30 days after service upon it of this order, as to each existing Chrysler director, and prior to the election hereafter of any director to its board, obtain with respect to each such person, the name, location and most recent annual report of each other corporation, having capital, surplus and undivided profits in excess of $1,000,000, of which such person is also a director. Based on information contained in the foregoing annual reports, Chrysler shall make a determination during such five-year period whether (a) a product is a principal product of both Chrysler and such other corporation, and (b) such other corporation, by virtue of its business and location of operation, is a competitor of Chrysler in the manufacture and sale of said product, and if it concludes, based on such determination, that such a relationship exists, Chrysler shall not permit such person to serve on its board of directors so long as such person continues to serve on the board of such other corporation.

III

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

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

IV

It is further ordered, That respondent herein shall, within 30 days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

MISSOURI QUILTING COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATIONS OF THE FEDERAL TRADE COMMISSION, WOOL PRODUCTS LABELING, AND TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-2485. Complaint, Jan. 10, 1974—Decision, Jan. 10, 1974

Consent order requiring a St. Louis, Mo., manufacturer and seller of wool and textile fiber products, including quilted fabrics, among other things to cease misrepresenting the fiber content of its wool products and failing to maintain records showing the fiber content of its textile fiber products.

Appearances

For the Commission: *John T. Hankins.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939, and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Missouri Quilting Company, Inc., a corporation, and Thomas C. Brown and Frank J. Badami, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939 and the Textile Fiber Products Identification 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 Missouri Quilting Company, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 4193 Beck Ave. St. Louis. Mo.

Respondents Thomas C. Brown and Frank J. Badami are officers of the corporate respondent. They formulate, direct, and control the acts, practices, and policies of said corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents, now and for some time last past, have been engaged in the manufacture and sale of wool and textile fiber products, including quilted fabrics and have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped, and offered for sale, in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a) (1) of the Wool Products Labeling Act of 1939 and rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were quilted fabrics stamped, tagged, labeled, or otherwise identified by respondents as "90/10 acrylic," whereas in truth and in fact, said products contained woolen fibers together with substantially different fibers and amounts of fibers than as represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, labeled, tagged, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, was a wool product with a label on or affixed thereto which failed to disclose the percentage of the total fiber weight of the said wool product, exclusive of ornamentation not exceeding five per centum (5%) of the total fiber weight, of (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool, when said percentage by weight of such fiber was five per centum (5%) or more; and (5) the aggregate of all other fibers.

PAR. 5. The acts and practices of the respondents as set forth above were, an are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce within the meaning of the Federal Commission Act.

PAR. 6. Respondents are now, and for some time last past have been,

engaged in the introduction, delivery for introduction, manufacture for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and the importation into the United States of textile fiber products; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, textile fiber products, which had been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 7. Respondents have failed to maintain proper records showing the fiber content of the textile fiber products manufactured by them, in violation of Section 6 of the Textile Fiber Products Identification Act and Rule 39 of the regulations promulgated thereunder.

PAR. 8. The acts and practices of respondents, as set forth in Paragraph Seven above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that 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 thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Missouri Quilting Company, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 4193 Beck Ave. city of St. Louis, State of Mo.

Respondents Thomas C. Brown and Frank J. Badami are officers of said corporation. They formulate, direct, and control the policies, acts, and practices of said corporation, and their principal office and place of business is located at the above stated address.

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 Missouri Quilting Company, Inc., a corporation, and its officers, and Thomas C. Brown and Frank J. Badami, individually and as officers of said corporation, trading under said corporate name or under any trade name or names, their successors and assigns, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment, or shipment in commerce of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling, or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.
2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents Missouri Quilting Company, ıc., a corporation, and its officers, and Thomas C. Brown and Frank J. ıdami, individually and as officers of said corporation, trading under id corporate name or any other trade name or names, their successors d assigns, and respondents' representatives, agents, and employees,

directly or through any corporate or other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product, or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, or any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from failing to maintain and preserve proper records showing the fiber content of the textile fiber products manufactured by said respondents, as required by Section 6 of the Textile Fiber Products Identification Act and Rule 39 of the regulations promulgated thereunder.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and their affiliation with a new business or employment. Such notice shall include respondents' current business address and 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 respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

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

It is further ordered, That 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

HOLIDAY MAGIC, INC., ET AL.

Docket 8834. Interlocutory Order, Jan. 16, 1974

Order denying respondents' motion to strike application of complaint counsel for

amendment of complaint to substitute executor of estate of decedent respondent, (2) filing with California Superior Court a contingent claim for restitution against the estate of decedent respondent; and setting time for filing of answer to complaint counsel's motion.

Appearances

For the Commission: *Joseph S. Brownman* and *Stuart Cameron.*

For the respondents: *Glen A. Mitchell of Stein, Mitchell & Mezines,* Wash., D.C.

ORDER DENYING MOTION TO STRIKE AND SETTING TIME FOR FILING OF ANSWER TO COMPLAINT COUNSEL'S MOTION

Complaint counsel have filed with the Commission a document entitled "Application to Amend Complaint by Substituting Sam Olivo, Executor for the Estate of William Penn Patrick for Decedent Respondent William Penn Patrick," dated Jan. 14, 1974, by which they request that the Commission (1) amend the compliant to substitute Sam Olivo for William Penn Patrick and (2) file with the Superior Court for the State of California for the County of Marin a contingent claim for restitution against the Estate of William Penn Patrick.

Respondents have replied with a "Motion to Strike, or in the Alternative, to Set Time in Which Answer Should be Filed by Counsel for Respondents to the Application to Amend Complaint by Complaint Counsel," dated Jan. 15, 1974.

Respondents ask that complaint counsel's motion be struck because it does not comport with Commission rules. Complaint counsel's motion is properly made to the Commission, since this matter is no longer within the jurisdiction of the administrative law judge. [See Section 3.51(d) (2) of the Rules of Practice.] Section 3.15 of the rules cited by respondents is not meant to *limit* applications for substitution of parties to the time luring which a proceeding is before the administrative law judge, but nerely to indicate the extent to which the law judge may allow amendnents and the extent to which he must certify requests for them to the 'ommission during that period in which a matter is before him. This atter now being before the Commission, the motion is properly dicted to it.

Section 3.22 (c) of the Rules of Practice provides in relevant part that

> hin ten days after service of any written motion, or within such longer or shorter time nay be designated by the Administrative Law Judge or the Commission, the opposing y shall answer or shall be deemed to have consented to the granting of the relief asked n the motion.

pondents request 30 days to reply to complaint counsel's application, is not struck.

mplaint counsel's application raises two issues. Because the con-

tingent claim for restitution which the Commission is requested to file must be filed by Jan. 24, 1974, if it is to be filed, the time by which respondents' answer to this request in the application must be filed shall be set at 9:00 a.m., Jan. 22, 1974. Respondents' answer to the request in the application that the complaint be amended shall, in view of the issues raised by the application, be due on Feb. 5, 1974. Therefore,

It is ordered, That respondents' request to strike the application of complaint counsel be, and it hereby is, denied.

It is further ordered, That respondents answer by 9:00 a.m., Jan. 22, 1974, complaint counsel's request that the aforementioned contingent claim be filed, and that respondents answer by Feb. 5, 1974, all other requests made in the application.

IN THE MATTER OF

FOOD FAIR STORES, INC., ET AL. D. 8786
H. C. BOHACK CO., INC., ET AL. D. 8787
JEWEL COMPANIES, INC., ET AL. D. 8788
BORMAN FOOD STORES, INC. D. 8789*
FIRST NATIONAL STORES, INC., ET AL. D. 8790

ORDER OF DISMISSAL, ETC., IN REGARD TO THE ALLEGED VIOLATIONS OF SEC. 2(C) OF THE CLAYTON ACT

Complaints, July 10, 1969—Decisions, Jan. 22, 1974

Orders dismissing the complaints issued against 10 corporations and certain individual officers thereof, engaged in various aspects of the food industry for alleged violations of Sec. 2(c) of the Clayton Act on the basis that the evidence relied upon by complaint counsel would not support the charges that respondent had violated Sec. 2(c) of the Clayton Act, amended.

Appearances

For the Commission: *Francis C. Mayer, James C. Donoghue, Martin A. Rosen, Lewis F. Parker, Louis R. Sernoff* and *Eliot G. Disner.*

For respondents: *Shipley, Akerman, Stein & Kaps*, Wash., D.C. and *Stein & Rosen*, New York, N.Y. for Food Fair Stores, Inc. and World-Wide Produce Co., Inc. *Subin, Shams & Rosenbluth*, Orlando, Fla. for Hallee-Boy Sales, Inc. and Ivin Arost. *Collier, Shannon, Rill & Edwards*, Wash., D.C. for John P. Storm, a corporation.

COMPLAINT IN DOCKET NO. 8786

The Federal Trade Commission, having reason to believe that th

*For complaint in D. 8789 see 81 F.T.C. 201. By Commission decision dated Aug. 3, 1972, the complaint was dismis as to respondents P & R Brokerage Co. and Frank V. Condello.