

IN THE MATTER OF  
COOPER INDUSTRIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND  
SECTION 7 OF THE CLAYTON ACT

*Docket C-2970. Complaint, June 18, 1979 — Decision, June 18, 1979*

This consent order, among other things, requires a Houston, Texas manufacturer of hand tools, compressors and other products used by the oil and gas industries to timely divest, subject to FTC approval, its Rotor Tool Division and the gas compressor business acquired through its merger with the Gardner-Denver Company. Additionally, the firm is barred for ten years from acquisitions in the two product areas without prior Commission approval.

*Appearances*

For the Commission: *Tom D. Smith, Harry L. Hobgood, Marilyn L. Richmond, Robert C. Jones and Dennis F. Johnson.*

For the respondent: *Richard P. Keeton, Vinson & Elkins, Houston, Texas.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Cooper Industries, Inc. ("Cooper"), a corporation subject to the jurisdiction of the Commission, has entered into a merger agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. Definitions

1. For purposes of this complaint, the following definitions apply:

(a) "Compressors" means machines which elevate gaseous materials (including air, natural gas, and process gases such as oxygen and nitrogen) to higher pressures.

(b) "Reciprocating gas compressors" means machines which are used to elevate natural gas to higher pressures by confining successive volumes of the gas within a closed space, and in which the

compressing element is a piston which has a reciprocating motion within a cylinder.

(c) "Integral reciprocating gas compressors" means reciprocating gas compressors in which the compressor and the driving engine are enclosed in a common casting, and in which both the driving pistons and the compressing pistons are connected to a common crankshaft.

(d) "Separable reciprocating gas compressors" means reciprocating gas compressors manufactured independently of the engines used to drive them.

(e) "Hand-held Industrial Pneumatic tools" means all tools that are powered by air motors, and which are utilized, or designed to be utilized, in or for manufacturing operations and are operated, or designed to be operated, while being held or supported by an individual's hands, and includes air motors capable of powering such tools and parts for all such tools or motors.

## II. The Acquisition

2. On January 22, 1979, Cooper and Gardner-Denver Company ("G-D") entered into agreements whereby Cooper plans to acquire G-D in a transaction valued at approximately \$630.3 million. Under the terms of the agreements, Cooper commenced a cash tender offer on February 14, 1979 for 8.6 million shares of G-D common stock, constituting approximately 45 percent of G-D's outstanding common shares. Approximately 12.6 million shares were tendered before the expiration of the offer. Following completion of the tender offer, Cooper intends to acquire the remaining 55 percent of G-D's common stock through an exchange of G-D common shares for fractional shares of Cooper common stock and a new issue of Cooper convertible preferred stock, with the merger scheduled for completion on or about April 30, 1979.

## III. Cooper Industries, Inc.

3. Cooper is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal place of business located at Two Houston Center, Houston, Texas.

4. Cooper is a major manufacturer of compressors and other supplies for the oil and gas industries, a major manufacturer of hand tools, and also provides overhaul and repair services for aircraft jet engines.

5. In 1978, Cooper had total revenues of \$782.0 million, net income of \$68.2 million, assets of \$360.4 million, and was ranked by

Fortune magazine as the nation's 307th largest industrial company based on 1977 sales of \$678.8 million.

6. Cooper's Cooper-Bessemer division manufactures large gas compressors in sizes ranging from 900 horsepower to 30,000 horsepower. Cooper's Ajax division manufactures integral reciprocating gas compressors in sizes ranging from 30 horsepower to 600 horsepower. Cooper's Superior division manufactures separable reciprocating gas compressors in sizes ranging from 300 horsepower to 2,750 horsepower. In 1978, Cooper's Ajax and Superior divisions had total sales of reciprocating gas compressors of approximately \$40.0 million.

7. Cooper's Rotor Tool Division manufactures and sells a broad line of hand-held industrial pneumatic tools. In 1978, Cooper's sales of hand-held industrial pneumatic tools were approximately \$12.0 million.

#### IV. Gardner-Denver Company

8. G-D is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal place of business located at 8585 Stemmons Freeway, Dallas, Texas.

9. G-D manufactures a wide range of drilling equipment used by the construction, petroleum and mining industries, and is also a major producer of compressors, hand-held industrial pneumatic tools and other industrial products.

10. G-D had 1978 revenues of \$652.0 million, net income of \$51.4 million, assets of \$387.1 million, and was ranked by Fortune magazine as the nation's 389th largest industrial company based on 1977 sales of \$502.4 million.

11. G-D is a major manufacturer of compressors. G-D manufactures and sells reciprocating gas compressors in sizes ranging from 20 horsepower to 650 horsepower. In 1978, G-D had total sales of reciprocating gas compressors of approximately \$1.9 million.

12. Through its Pneutronics Division, G-D manufactures and sells a broad line of hand-held industrial pneumatic tools. In 1978, total sales by G-D of hand-held industrial pneumatic tools were approximately \$19.5 million.

#### V. Jurisdiction

13. At all times relevant to this complaint, Cooper and G-D have been engaged in the manufacture and sale of various products, including those products relevant to this complaint, in interstate

commerce and have been engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. At all times relevant to this complaint, the businesses of both Cooper and G-D have been in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

## VI. Trade and Commerce

### 14. The relevant markets are:

a. The manufacture in the United States of reciprocating gas compressors in sizes ranging from 30 horsepower to 1,000 horsepower, and the sale of such compressors, as well as any submarket thereof.

b. The manufacture in the United States of hand-held industrial pneumatic tools, and the sale of such tools, as well as any submarket thereof.

## VII. Actual Competition

15. Cooper and G-D are now, and have been since at least 1973, actual competitors of each other in both of the relevant markets enumerated in Paragraph Fourteen of this complaint.

### A. Reciprocating Gas Compressors

16. In 1978, Cooper was the largest domestic manufacturer of reciprocating gas compressors in sizes ranging from 30 horsepower to 1,000 horsepower, in terms of units shipped, with a market share of approximately 30%. In 1978, G-D was the seventh largest manufacturer of reciprocating gas compressors in sizes ranging from 30 horsepower to 1,000 horsepower, in terms of units shipped, with a market share of approximately 3%.

17. In 1978, the market share of the top four domestic manufacturers was over 60%, in terms of units shipped, for reciprocating gas compressors from 30 horsepower to 1,000 horsepower.

18. G-D and Cooper compete in the manufacture and sale of reciprocating gas compressors ranging in size from 30 horsepower to 1,000 horsepower.

### B. Hand-held Industrial Pneumatic Tools

19. In 1977, G-D was the third largest manufacturer of hand-held industrial pneumatic tools with a market share of 10.0%, in terms of dollar sales. In 1977, Cooper was the fifth largest manufacturer of hand-held industrial pneumatic tools with a market share of 5.5%, in terms of dollar sales.

20. In 1978, the market share of the top four domestic manufac-

turers was over 60%, in terms of dollar sales, for hand-held industrial pneumatic tools.

21. G-D and Cooper compete in the manufacture and sale of hand-held industrial pneumatic tools.

#### IX. Effects of the Acquisition

22. The effects of the proposed acquisition may be to substantially lessen competition or tend to create a monopoly in the relevant markets enumerated in Paragraph Fourteen of this complaint in the following ways, among others:

(a) actual competition between Cooper and G-D in the manufacture and sale of reciprocating gas compressors will be eliminated;

(b) concentration in the manufacture and sale of reciprocating gas compressors will be increased and the possibilities for eventual deconcentration may be diminished;

(c) actual competition between Cooper and G-D in the manufacture and sale of hand-held industrial pneumatic tools will be eliminated; and

(d) concentration in the manufacture and sale of hand-held industrial pneumatic tools will be increased and the possibilities for eventual deconcentration may be diminished.

#### X. Violations Charged

23. The proposed acquisition set forth in Paragraph Two, if consummated, would violate Section 7 of the Clayton Act, as amended, (15 U.S.C. 18).

24. The proposed acquisition set forth in Paragraph Two, if consummated, would violate Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

25. The merger agreements described in Paragraph Two violate Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

#### DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of the proposed acquisition of Gardner-Denver Company by Cooper Industries, Inc. (hereinafter referred to as "Cooper"), and Cooper 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 Cooper with violation of Section 7 of the

Clayton Act (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45); and

Cooper, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Cooper 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 Cooper 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 Cooper has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Cooper is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at Two Houston Center, Houston, Texas.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Cooper, and the proceeding is in the public interest.

#### ORDER

##### I

*It is ordered,* That the following definitions shall apply herein:

- (1) "Reciprocating gas compressors" means all machines which are used to elevate natural gas to higher pressures by confining successive volumes of the gas within a closed space, and in which the compressing element is a piston which has a reciprocating motion within a cylinder.
- (2) "Hand-held industrial pneumatic tools" means all tools that are powered by air motors, and which are utilized, or designed to be utilized, in or for manufacturing operations and are operated, or designed to be operated, while being held or supported by an individual's hands, and includes air motors capable of powering such tools and parts for all such tools or motors.
- (3) "Gas compressor business" means the Gardner-Denver Compa-

ny's ML Horizontal Series, RL and RLT Horizontal Series, LA and LB Vertical Series, AOL Vertical "V" Type Air Cooled Series product line of reciprocating gas compressors, related parts, developmental units (including the 13F and MLQ) and the jigs, patterns, dies, designs, drawings, technical data and literature, appropriate royalty-free license for all patents and patent applications, bills of materials and specialized goods that are unique to, or necessary for, the manufacture of such reciprocating gas compressors and which are currently in existence or which are produced prior to divestiture.

(4) "Rotor Tool Division" means the Rotor Tool Division of Cooper, and includes all assets, properties, titles to property, interests, rights and privileges of whatever nature, tangible and intangible, including, but not limited to, all real property, buildings, machinery, equipment, tools, raw materials, inventory, customer lists, trade names, patents, patent applications, trademarks and all other property of whatever description presently owned or operated by Cooper for the manufacture of the products produced by the Rotor Tool Division, together with all additions, replacements, and improvements hereafter made by Cooper to the Rotor Tool Division.

## II

*It is further ordered,* That Cooper, its officers, directors, agents, representatives and employees shall:

(1) Within twelve (12) months from the date this order becomes final, divest absolutely, to an acquiror which meets with the prior approval of the Federal Trade Commission, the gas compressor business acquired by Cooper as a result of its merger with Gardner-Denver Company; and

(2) Within eighteen (18) months from the date this order becomes final, divest absolutely, with the prior approval of the Federal Trade Commission, the Rotor Tool Division as a going concern in the manufacture and sale of hand-held industrial pneumatic tools.

## III

*It is further ordered,* That in connection with the divestiture of the gas compressor business required by Paragraph II of this order, Cooper shall offer to any prospective acquiror the right to enter into a contract to buy from Cooper, if Gardner-Denver Company manufactured them during any part of the calendar year 1978, replacement parts for, and parts normally used in or for the gas compressor business (excluding parts for developmental equipment), which

contract will, at the acquiror's option, include one or both of the following provisions:

(1) The contract will continue for a minimum of two (2) years or for a shorter period of time at the sole discretion of the acquiror;

(2) Prices for such replacement parts and parts will be not more than inventory cost (before any adjustment for LIFO valuation) as of the date of divestiture plus 29% of such inventory cost during the first twelve (12) month period and plus 50% of such inventory cost during the second twelve (12) month period. Further, the acquiror shall have the right to have Cooper's books and accounts inspected by an independent accounting firm, which firm shall be subject to approval by Cooper, and which approval shall not be unreasonably withheld, for the purpose of confirming such inventory cost.

#### IV

*It is further ordered.* That in connection with the divestiture of the gas compressor business required by Paragraph II of this order, Cooper shall:

(1) Make available, at their place of employment, all former Gardner-Denver personnel in the employ of Cooper who are familiar and associated with the gas compressor business for advice and assistance and such detailed explanation of the gas compressor business as the acquiror may request for a period of one (1) year following the date of divestiture;

(2) License royalty-free, for a period of two (2) years following the date of divestiture, the name "Gardner-Denver" to the acquiror for use in connection with the gas compressor business;

(3) Not use, in connection with the manufacture or sale of reciprocating gas compressors, for a period of two (2) years following the date of divestiture, the name "Gardner-Denver;"

(4) Refrain, for a period of five (5) years from the date of divestiture, from manufacturing or selling the reciprocating gas compressors comprising the gas compressor business or replacement parts for use in the gas compressor business, except in accordance with Paragraph III of this order, *provided, however,* that Cooper shall have the right to sell replacement parts to owners of such reciprocating gas compressors if, after Cooper has notified the acquiror in writing, the acquiror fails to provide parts for such reciprocating gas compressors within ninety (90) days.

#### V

*It is further ordered,* in connection with the divestiture of the



Rotor Tool Division required by Paragraph II of this order, that Cooper shall:

(1) Beginning 20 days after the date this order becomes final, until divestiture, maintain and operate the Rotor Tool Division as a separate division with separate books and accounts, separate management, separate assets, and separate personnel, and not transmit, or permit the transmittal of, the Rotor Tool Division's technical data, marketing plans or pricing information to Cooper, except that Cooper may continue to receive the Rotor Tool Division's profit forecasts and continue to monitor the Rotor Tool Division's performance against such forecasts, and may continue to provide the following corporate services: banking, industrial relations, legal, insurance, safety, tax, and pension management;

(2) Not sell, lease, otherwise dispose of, or encumber, without the consent of the Federal Trade Commission, any substantial property or other assets of the Rotor Tool Division;

(3) Prior to divestiture, not hire or employ, except as an employee of the Rotor Tool Division, any individual employed by the Rotor Tool Division during any part of the period from March 15, 1979, to the date of divestiture without the prior approval of the Federal Trade Commission, except for the following named individuals: Frank X. Linsenmeyer, Jr., and E. Ralph Smith III; *provided* that such named individuals shall not be associated with the Rotor Tool Division in any way for more than one (1) year from the date this order becomes final, unless such individuals are hired or employed by the acquiror; and *further provided* that Cooper shall not interfere in any way with the acquiror's soliciting employment agreements from, or negotiating employment agreements with, such named individuals;

(4) For a period of three (3) years following divestiture, not hire or employ, without the prior approval of the Federal Trade Commission, any individual employed by the Rotor Tool Division during any part of the period from March 15, 1979 to the date of divestiture;

(5) Pending divestiture, maintain the Rotor Tool Division as an independent entity and take no action to impair such entity's economic or financial position; and

(6) Pending divestiture, not allow the deterioration of the Rotor Tool Division in a manner that impairs its viability.

## VI

*It is further ordered.* That Cooper shall cease and desist, for a period of ten (10) years from the date this order becomes final, from

acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock or share capital of any corporate or noncorporate concern engaged in the United States in, or any assets utilized in, the manufacture, distribution, importation or sale of (a) reciprocating gas compressors in sizes ranging from 30 to 1,000 horsepower, or powered by engines in sizes ranging from 30 to 1,000 horsepower, or (b) hand-held industrial pneumatic tools.

## VII

*It is further ordered,* That Cooper shall, within sixty (60) days from the date this order becomes final, and every sixty (60) days thereafter until Cooper has accomplished the divestitures required by Paragraph II of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which Cooper intends to comply or has complied with Paragraphs II, III, IV and V of this order. All such reports shall include a summary of contacts or negotiations with anyone for the specified assets, the identity of all such persons, and copies of all written communications to and from such persons.

## VIII

*It is further ordered,* That annually on the anniversary of the date this order becomes final, for a period of ten (10) years, Cooper shall submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which Cooper intends to comply or has complied with Paragraph VI of this order.

## IX

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

IN THE MATTER OF  
ARNAUDVILLE INDUSTRIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION AND MAGNUSON-MOSS  
WARRANTY ACTS

*Docket C-2972. Complaint, June 21, 1979 — Decision, June 21, 1979*

This consent order, among other things, requires an Arnaudville, La. manufacturer and seller of mobile homes to cease improperly designating its warranties; and failing to include in its warranties all the information required by the Disclosure Rule, 16 CFR 701 (1977). The order further requires that purchasers of firm's products manufactured after July 4, 1975, whose warranties are still in effect, be informed, as prescribed, of their legal rights and the firm's obligations under warranties.

*Appearances*

For the Commission: *Michael E.K. Mpras, Bernard Fensterwald III*  
and *Rachel Miller*.

For the respondent: *Robert G. Szabo*, Arnaudville, La.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("Warranty Act") and the implementing rules promulgated under the Warranty Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Arnaudville Industries, Inc., a corporation, sometimes referred to in the complaint as respondent, has violated the provisions of said Acts and implementing rules, 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 Arnaudville Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana with its principal office and place of business located at Highway 31, P.O. Box 79, Arnaudville, Louisiana.

PAR. 2. Respondent has been, and is now, engaged in the manufacture, distribution and sale of mobile homes to the public.

PAR. 3. In the course and conduct of its business, respondent is a supplier of consumer products distributed in commerce, as "suppli-

er," "consumer product," and "commerce" are defined by Sections 101(4), 101(1) and 101(13) and (14) of the Warranty Act respectively. In connection with the distribution in commerce of its consumer products, manufactured subsequent to July 4, 1975, respondent offers a written warranty, as "written warranty" is defined by Section 101(6) of the Warranty Act, and is therefore a warrantor, as "warrantor" is defined by Section 101(5) of the Warranty Act.

#### COUNT I

Alleging violations of the Warranty Act and the Federal Trade Commission Act, as amended, the allegations of Paragraphs One through Three are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 4. In connection with respondent's offering and granting of written warranties on its mobile homes, respondent failed to clearly and conspicuously designate each such warranty as either a "full (statement of duration) warranty" or a "limited warranty."

PAR. 5. Respondent's failure to designate its warranties as described in Paragraph Four of this complaint is a violation of Section 103 of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 6. In connection with its written warranty, respondent has designated such warranty as a "FULL ONE YEAR LIMITED WARRANTY." The use by respondent of such designation has had and continues to have the capacity and tendency to mislead consumers as to the nature or scope of the warranty.

PAR. 7. Respondent's designation of its written warranties as described in Paragraph Six of this complaint constitutes a deceptive warranty in violation of Section 110(c)(2) of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

#### COUNT II

Alleging violations of the Warranty Act and the implementing rule promulgated under the Warranty Act, and the Federal Trade Commission Act, as amended, the allegations of Paragraphs One through Three are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 8. The Federal Trade Commission, pursuant to Title I, Section

1061

## Decision and Order

109 of the Warranty Act, (15 U.S.C. 2309), duly promulgated the Rule concerning the Disclosure of Written Consumer Product Warranty Terms and Conditions on December 31, 1975 (16 CFR 701 (1977)) (effective January 1, 1977) ("Disclosure Rule"). A copy of the Disclosure Rule is marked and attached as Appendix A\* and is incorporated in Count II by reference as if fully set forth verbatim.

PAR. 9. Subsequent to January 1, 1977, in connection with its offering and granting of written warranties on mobile homes, which were manufactured subsequent to January 1, 1977, respondent failed to clearly and conspicuously disclose, in a single document, in simple and readily understood language, the following information:

(1) A statement in the following language as required by Section 701.3(a)(9) of the Disclosure Rule:

This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

(2) A statement in the following language as required by Section 701.3(a)(8) of the Disclosure Rule:

Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

PAR. 10. Respondent's failure to comply with the Disclosure Rule as described in Paragraph Nine of this complaint is a violation of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of section 5 of the Federal Trade Commission Act, as amended.

## 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 Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, the Magnuson-Moss Warranty — Federal Trade Commission Improvement Act ("Warranty Act"), and the Rule Concerning the Disclosure of Written Consumer Product Warranty Terms and Conditions ("Disclosure Rule"); and

The respondent, its attorney, and counsel for the Commission

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\* Not reported herein for reasons of economy.

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Arnaudville Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana, with its office and principal place of business located at Highway 31, P.O. Box 79, in the City of Arnaudville, State of Louisiana.

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. Definitions

For the purposes of this order the definitions of the terms "written warranty" and "consumer product" as defined in Section 101 of the Warranty Act shall apply.

##### II.

*It is ordered.* That respondent Arnaudville Industries, Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or indirectly, through any corporation, subsidiary, division or any other device in connection with the advertising, offering for sale and sale of mobile homes and all other consumer products, do forthwith cease and desist from:

1. Offering or granting a written warranty on consumer products actually costing the consumer in excess of \$10.00 which is not clearly and conspicuously designated as either a "full (statement of duration) warranty" or a "limited warranty."

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Arnaudville Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana, with its office and principal place of business located at Highway 31, P.O. Box 79, in the City of Arnaudville, State of Louisiana.

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. Definitions

For the purposes of this order the definitions of the terms "written warranty" and "consumer product" as defined in Section 101 of the Warranty Act shall apply.

### II.

*It is ordered.* That respondent Arnaudville Industries, Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or indirectly, through any corporation, subsidiary, division or any other device in connection with the advertising, offering for sale and sale of mobile homes and all other consumer products, do forthwith cease and desist from:

1. Offering or granting a written warranty on consumer products actually costing the consumer in excess of \$10.00 which is not clearly and conspicuously designated as either a "full (statement of duration) warranty" or a "limited warranty."

2. Offering or granting a written warranty on consumer products actually costing the consumer in excess of \$15.00, which fails to clearly and conspicuously disclose, in a single document, in simple and readily understood language, the following information:

This warranty gives your specific legal rights, and you may also have other rights which vary from state to state.

3. Offering or granting a written warranty on consumer products actually costing the consumer in excess of \$15.00, and which excludes or limits relief such as incidental or consequential damages, which fails to clearly and conspicuously disclose, in a single document, in simple and readily understood language, the following information:

Some States do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

4. Offering or granting a written warranty on consumer products actually costing the consumer in excess of \$15.00, which fails to comply with the Warranty Act, the Rule concerning the Disclosure of Written Consumer Product Warranty Terms and Conditions (16 CFR 701 (1977)) (effective January 1, 1977) ("Disclosure Rule"), the Rule concerning the Pre-Sale Availability of Written Warranty Terms (16 CFR 702 (1977)) (effective January 1, 1977) ("Pre-Sale Rule"), and the Rule concerning the Informal Dispute Settlement Procedures (16 CFR 703) (1977) (effective January 1, 1977).

### III.

*It is further ordered,* That respondent:

A. Shall, in performing pursuant to its written warranties, meet the minimum requirements of Section 104 of the Magnuson-Moss Warranty — Federal Trade Commission Improvement Act ("Warranty Act") for all consumer products sold by respondent which are still under warranty as of the effective date of the order, and which were manufactured after July 4, 1975. This provision is limited to warranties issued by respondent which did not comply with the Warranty Act and the Disclosure Rule as stated in the complaint.

B. Notify all consumers affected by Paragraph A., above, by mailing to each such consumer the notice set forth in Appendix B of this order within 30 days from the effective date of the order. Respondent shall obtain the names and addresses of such consumers from its files and/or from the files of all retail outlets which sell respondent's products.

C. Shall not raise any defenses arising from the use of the terms



"Limited Warranty" in any case, suit or other proceeding brought against respondent by consumers affected by Paragraph A, above.

D. Notify, within 30 days from the effective date of the order, all its dealers who sell respondent's mobile homes, and all its agents and employees who are authorized to handle warranty claims, of all changes in its written warranties, including, but not limited to, consumer rights and remedies available to them under the warranty and this order.

E. Deliver a copy of this order to cease and desist to all present employees, salesmen, agents, independent contractors and other representatives engaged in the preparation and distribution of written warranties, and in the sale of warranted consumer products on behalf of respondent and secure a signed statement acknowledging receipt of the order from each such person.

F. Maintain complete records for a period of three (3) years from the effective date of the order to be furnished upon request to the staff of the Federal Trade Commission, including but not limited to, copies of complaints, requests for service, service records, letters mailed to consumers pursuant to Paragraph B of the order, written warranties, and any other written communications between respondent and its customers which relate to warranty service and performance.

G. 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.

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

#### APPENDIX B

[NAME AND ADDRESS OF CONSUMER] [DATE]

Dear [Name of Consumer]:

Following a review of our written warranty by the Federal Trade Commission, it was pointed out to us that we had made a few errors in our warranty. We have voluntarily agreed with the FTC to write you this letter as part of a way to correct those errors.

Now you have some added warranty protection for your mobile home.

The Federal Warranty Act requires warranties to be labeled as full warranties or as limited warranties. Because our warranty was titled "full one year limited warranty," we will treat it as a full warranty.

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## Decision and Order

Here is what this means.

(1) If a manufacturing defect shows up in the first year since you got your home, we will fix it free. We will also pay for removal, reinstallation, on-site repairs and shipping if needed.

(2) We will fix the problem within a reasonable time after you tell us about it.

(3) If we try a reasonable number of times and still can't fix the problem, we will replace the defective part. If the problem is sufficiently serious and we can't fix it, we will either give you a new mobile home, or if you prefer, we will give you your money back. However, we will not be responsible for fixing any damage caused by your misuse or abuse of the home, or by such uncontrollable forces as lightning, floods, and the like.

Also, some parts of your mobile home, such as your kitchen appliances, carpets, draperies, furniture and other such items, are not covered by our written warranty. These items are covered by written warranties issued by other manufacturers as indicated in your Owner's Manual.

(4) If you sell your home during the first year, the new owner will get the same protection until the warranty ends. If you have already sold your home, please tell the new owner about this, or tell us and we will write to them.

Also, our warranty said we will not pay for any losses caused by a defective product. We want you to know that in some cases, and in some states, even these are covered.

If you have questions or problems, please feel free to contact your dealer. Or call us collect at (tele. no.). We will be glad to help.

Sincerely,

Arnaudville Industries, Inc.

Complaint

93 F.T.C.

IN THE MATTER OF  
MADISON MOBILE-MODULAR HOMES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION AND MAGNUSON-MOSS  
WARRANTY ACTS

*Docket C-2973. Complaint, June 21, 1979 — Decision, June 21, 1979*

This consent order, among other things, requires an Ontario, Calif. manufacturer and seller of mobile homes to cease failing to properly designate its written warranties; disclose in its warranties all the information required by the Disclosure Rule, 16 CFR 701 (1977); and note in its warranty registration cards that warranty coverage or performance is not conditioned on the return of the cards. The firm is further required to notify purchasers of respondent's mobile homes manufactured after July 4, 1975 of their implied warranty rights; and make available to these consumers all the relief provided under applicable state laws. Additionally, the order restrains the firm for four years from raising any defenses relating to the disclaimer of implied warranties in suits brought by affected purchasers.

*Appearances*

For the Commission: *Michael E.K. Mpras, Bernard Fensterwald III and Rachel Miller.*

For the respondent: *Dan Holden, Anaheim, Calif.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("Warranty Act") and the implementing rules promulgated under the Warranty Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Madison Mobile-Modular Homes, Inc., a corporation ("respondent"), has violated the provisions of said Acts and implementing rules, 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 is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 1555 S. Cucamonga Ave., Ontario, California.

PAR. 2. Respondent has been, and is now, engaged in the designing, manufacture, distribution and sale of mobile homes to the public.

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## Complaint

Respondent distributes its mobile homes primarily in California, Arizona, and Nevada.

PAR. 3. In the course and conduct of its business, respondent is a supplier of consumer products distributed in commerce, as "supplier," "consumer product," and "commerce" and defined by Sections 101(4), 101(1) and 101(13) and (14), respectively, of the Warranty Act. In connection with the distribution in commerce of its consumer products, manufactured subsequent to July 4, 1975, respondent offers a written warranty, as "written warranty" is defined by Section 101(6) of the Warranty Act, and is therefore a warrantor, as "warrantor" is defined by Section 101(5) of the Warranty Act.

## COUNT I

Alleging violations of the Warranty Act and the Federal Trade Commission Act, as amended, the allegations of Paragraphs One through Three are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 4. In connection with respondent's offering and granting of written warranties on mobile homes which cost the consumer in excess of \$10.00, respondent failed to clearly and conspicuously designate each such warranty as either a "full (statement of duration) warranty" or a "limited warranty."

PAR. 5. Respondent's failure to designate its warranties as described in Paragraph Four of this complaint is a violation of Section 103 of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

## COUNT II

Alleging violations of the Warranty Act and the Federal Trade Commission Act, as amended, the allegations of Paragraphs One through Three are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 6. In connection with respondent's offering and granting of written warranties on mobile homes, respondent has disclaimed all implied warranties available to consumers under state law with respect to the mobile homes sold by respondent, including the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

PAR. 7. Respondent's disclaimer of the implied warranties as described in Paragraph Six of this complaint is a violation of Section

108(a) of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

### COUNT III

Alleging violations of the Warranty Act and the implementing rule promulgated under the Warranty Act, and the Federal Trade Commission Act, as amended, the allegations of Paragraphs One through Three are incorporated by reference in Count III as if fully set forth verbatim.

PAR. 8. The Federal Trade Commission, pursuant to Title I, Section 109 of the Warranty Act, (15 U.S.C. 2309), duly promulgated the Rule Concerning the Disclosure of Written Consumer Product Warranty Terms and Conditions on December 31, 1975 (16 CFR 701 (1977)) (effective January 1, 1977) ("Disclosure Rule"). A copy of the Disclosure Rule is marked and attached as Appendix A\* and is incorporated in Count III by reference as if fully set forth verbatim.

PAR. 9. Subsequent to January 1, 1977, in connection with its offering and granting of written warranties on mobile homes costing the consumer in excess of \$15.00 which were manufactured subsequent to January 1, 1977, respondent failed to clearly and conspicuously disclose, in each written warranty the following information:

(1) A statement in the following language as required by Section 701.3(a)(9) of the Disclosure Rule:

This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

(2) A statement in the following language as required by Section 701.3(a)(8) of the Disclosure Rule:

Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

A step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation, including the persons or class of persons authorized to perform warranty obligations. This includes the name of the warrantor, together with the mailing address of the warrantor, and/or the name or title and the address of any employee or department of the warrantor responsible for the performance of warranty obligations, and/or a telephone number which consumers

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\* Not reported herein for reasons of economy.

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## Complaint

may use without charge to obtain information on warranty performance, as required by Section 701.3(a)(5) of the Disclosure Rule.

PAR. 10. Respondent's failure to comply with the Disclosure Rule as described in Paragraph Nine of the complaint is a violation of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 11. In connection with respondent's offering and granting of written warranties, respondent has made the following statements and representations in its written warranties and warranty coupons:

To validate this warranty, the warranty [sic], the warranty coupon attached hereto shall be fully executed and returned to the manufacturer within (5) days after the initial delivery of the mobile home to the original retail purchaser.

Return warranty coupon immediately to assure warranty . . .

Note: mail to Madison Mobile — Modular Homes, Inc., within three (3) days after delivery to address below where home was purchased.

PAR. 12. By and through the statements and representations described in Paragraph Eleven of the complaint, respondent has represented, directly or by implication, that the consumer's obligation to return the warranty coupon within five days (or three days) after delivery of the mobile home is a condition precedent to warranty coverage and performance.

PAR. 13. In truth and in fact, respondent, in many instances, does not require the return of the warranty coupon as a condition precedent to warranty coverage and performance. It is respondent's policy to service the mobile homes under warranty whenever the consumers demonstrate any reasonable evidence of date of purchase.

PAR. 14. The use by respondent of the statements and representations in its written warranties as described in Paragraph Eleven of this complaint has had and continues to have the capacity and tendency to mislead consumers into the mistaken and erroneous belief that warranty coverage and performance is only obtainable if the warranty coupon has been returned by the consumer within the stated time. Therefore, the statements and representations as set forth in Paragraph Eleven of the complaint were and are false, misleading and deceptive.

PAR. 15. Respondent's statements and representations as described in Paragraphs Eleven through Thirteen of the Complaint constitute a deceptive warranty in violation of Section 110(c)(2) of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, are

unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 16. In connection with its written warranties, respondent has failed to disclose in such warranties that the return of the warranty coupon is not a condition precedent to warranty coverage and performance, as required by Section 701.4 of the Disclosure Rule.

PAR. 17. Respondent's failure to comply with the Disclosure Rule as described in Paragraph Sixteen of the Complaint is a violation of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

#### 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 Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, the Magnuson-Moss Warranty — Federal Trade Commission Improvement Act ("Warranty Act"), and the Rule Concerning the Disclosure of Written Consumer Product Warranty Terms and Conditions ("Disclosure Rule"); and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent, Madison Mobile-Modular Homes, Inc. is a corporation organized, existing and doing business under and by virtue of

the laws of the State of California, with its office and principal place of business located at 155 S. Cucamonga Ave., in the City of Ontario, State of California.

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. Definitions

For the purposes of this order the definitions of the terms "written warranty" and "consumer product" as defined in Section 101 of the Warranty Act shall apply.

### II.

*It is ordered,* That respondent Madison Modular-Mobile Homes, Inc., a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or indirectly, through any corporation, subsidiary, division or any other device in connection with the advertising, offering for sale and sale of mobile homes and all other consumer products, do forthwith cease and desist from:

1. Offering or granting a written warranty upon consumer products actually costing the consumer in excess of \$10.00 which is not clearly and conspicuously designated as either a "full (statement of duration) warranty" or a "limited warranty."

2. Offering or granting a written warranty upon any consumer product which limits, modifies or disclaims, in any manner, the implied warranties available to the consumer, including, but not limited to, the implied warranty of merchantability and the implied warranty of fitness for a particular use; *provided, however,* that nothing contained in this paragraph shall prevent respondent from limiting the duration of such implied warranties to the duration of a limited written warranty pursuant to Section 108(b) of the Warranty Act (15 U.S.C. 2308(b)). Any such limitation shall be immediately followed by the statement specified in 16 CFR 701.3(a)(7).

3. Offering or granting a written warranty upon consumer products actually costing the consumer in excess of \$15.00, which fails to clearly and conspicuously disclose in the warranty the following items of information:

(a) A statement in the following language:



This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

(b) A step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation, including the persons or class of persons authorized to perform warranty obligations. This includes the name of the warrantor, together with the mailing address of the warrantor, and/or the name or title and the address of any employee or department of the warrantor responsible for the performance of warranty obligations, and/or a telephone number which consumers may use without charge to obtain information on warranty performance.

4. Offering or granting a written warranty upon consumer products actually costing the consumer in excess of \$15.00, and which excludes or limits relief such as incidental or consequential damages, which fails to clearly and conspicuously disclose in the warranty a statement in the following language:

Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

5. Offering or granting a written warranty upon any consumer product actually costing the consumer in excess of \$15.00 which employs the use of any card such as an owner's registration card, warranty registration card, warranty coupon, or the like, unless it is clearly and conspicuously disclosed in the warranty that the return of such card or coupon is not a condition precedent to warranty coverage and performance.

6. Offering or granting a written warranty on consumer products actually costing the consumer in excess of \$15.00, which fails to comply with all of the requirements of the Warranty Act and amendments thereto, and all rules promulgated thereunder.

*It is further ordered.* That respondent:

A. Label or title its warranty coupon, owner's registration card, warranty registration card, or the like, according to the purpose or purposes for which it is intended, *e.g.*, "marketing research card."

B. Disclose, clearly and conspicuously, in simple and readily understood language, and in the largest type that appears on the warranty coupon (appropriately labeled pursuant to paragraph A., above,) the following information:

1. The purpose(s) for which such coupon or card is utilized.
2. That the consumer is not required to fill out or mail the coupon or card for, or as a condition precedent to, warranty coverage and performance.

C. For four years after the effective date of the order:

1. Shall not raise any defenses pertaining to the disclaimer of implied warranties in any case, suit or other proceeding brought against respondent by consumers who have purchased any of respondent's warranted products manufactured between July 4, 1975 and the effective date of the order.

2. Provide all consumers who have purchased any of respondent's warranted products manufactured between July 4, 1975 and the effective date of the order, which do not comply with all of the implied warranties, with all relief available to them by applicable state laws.

D. Notify all consumers who (1) have purchased any warranted product manufactured between July 4, 1975 and the effective date of the order, manufactured by respondent, and (2) received a warranty which does not comply with the Warranty Act and the Disclosure Rule as stated in the complaint, by mailing to each such consumer the notice set forth in Appendix B of this complaint and order. Respondent shall obtain the names and addresses of such consumers from the warranty coupons which have been mailed to respondent by buyers of respondent's products. In the event that respondent does not have the names and addresses of all such affected consumers, respondent shall contact all retail outlets which sell respondent's products and use every means possible, including securing copies of sales invoices in the possession of such retailers, to obtain the names and addresses.

E. Notify, within 30 days from the effective date of the order, all its dealers who sell respondent's mobile homes, and all its agents and employees who are authorized to handle warranty claims, of all changes in its written warranties, including, but not limited to consumer rights and remedies available to them under the warranty and this order.

F. 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 change in the corporation which may affect compliance obligations arising out of the Order.

G. Deliver a copy of this order to cease and desist to all present and future employees, salesmen, agents, independent contractors and other representatives engaged in the preparation and distribution of written warranties and in the sale of warranted consumer products on behalf of respondent, and secure a signed statement acknowledging receipt of the order from each such person.

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H. Maintain, for a period of three (3) years from the effective date of the order, complete business records of the manner and form of respondent's continuing compliance with all the terms and provisions of the order, to be furnished upon request to the staff of the Federal Trade Commission during normal business hours and upon reasonable advance notice.

I. 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 this order.

## APPENDIX B

[Name and Address of Consumer]

[Date]

Dear [Name of Consumer]:

You have some added warranty protection for your mobile home. The Federal Trade Commission has told us to write you about it.

The warranty you got says you have no implied warranties under state law. This isn't so. You have these warranties, for at least four years from the date of purchase.

First, you have a warranty of "merchantability." This means your home must be in livable condition.

Second, you may have a warranty of "fitness for a special purpose." If, when you bought your home, you relied on our advice or our ads that it was fit for a special purpose, it must live up to that promise.

If your home doesn't live up to one of these warranties, and we can't make it do so, you may have a legal right to cancel your purchase and make a claim for some of your money back. If you feel this is the case, please contact your dealer, or call us collect at (telephone number).

However, we will not be responsible for fixing any damage caused by your misuse or abuse of the home, or by such uncontrollable forces as lightning, floods, and the like.

Our warranty also said you had to send us your registration card. Again, this isn't so. We'll accept any reasonable proof of purchase or delivery date. A sales slip or receipt will be okay.

Also, our warranty said we will not pay for any incidental or consequential losses caused by a manufacturing defect in the product. We want you to know that in some cases, and in some states, even these are covered.

Please excuse these mistakes in our warranty.

Sincerely,

Madison Mobile-Modular Homes, Inc.

IN THE MATTER OF  
MOTHERHOOD MATERNITY SHOPS, INC.

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

*Docket C-2974. Complaint, June 21, 1979 — Decision, June 21, 1979*

This consent order, among other things, requires a Santa Monica, Calif. manufacturer and seller of maternity wearing apparel and related products and its corporate owner to cease establishing, maintaining and enforcing resale prices and sale periods for their products; soliciting, exchanging or disseminating price information; and compelling adherence to such prices and sale periods through persuasion or coercion. Respondents are additionally prohibited from withholding advertising allowances, or otherwise taking adverse action against recalcitrant retailers.

*Appearances*

For the Commission: *Sandra L. Bird and Elliot Feinberg.*

For the respondents: *George Zachary, Rosenfeld, Meyer & Susman, Beverly Hills, Calif.*

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 Motherhood Maternity Shops, Inc., a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Motherhood Maternity Shops, Inc. (hereinafter sometimes referred to as Maternity Shops) is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business at 1330 Colorado Ave., Santa Monica, California.

PAR. 2. Respondent MMS of Delaware, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1330 Colorado Ave., Santa Monica, California.

MMS of Delaware, Inc. acquired all of the stock of Motherhood Maternity Shops, Inc. in July 1977, through the merger of Motherhood Maternity Shops, Inc. and MMS of California, Inc., a wholly-owned subsidiary of MMS of Delaware, Inc.

PAR. 3. Respondent Maternity Shops is now, and has been, engaged

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(2) advertising a product at a price other than that which respondent Maternity Shops has established or suggested.

PAR. 9. The acts, practices and methods of competition engaged in, followed, pursued or adopted by respondent, as hereinabove alleged, are unfair methods of competition and unfair acts or practices because they have the tendency to, or the actual effect of:

- (a) fixing, maintaining or stabilizing the prices at which respondent Maternity Shops' products were resold;
- (b) suppressing or eliminating price competition between or among resellers selling respondent Maternity Shops' products and between such resellers and respondent Maternity Shops; and
- (c) depriving consumers of the benefits of competition.

PAR. 10. The aforesaid acts, practices and methods of competition, constitute unfair methods of competition and unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

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 the complaint which the New York 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, as amended; and

The respondents, their attorney, 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 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 consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules,

the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Motherhood Maternity Shops, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 1330 Colorado Ave., Santa Monica, California.

Respondent MMS of Delaware, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1330 Colorado Ave., Santa Monica, California. Respondent Motherhood Maternity Shops, Inc. has been merged with MMS of California, Inc., a wholly-owned subsidiary of MMS of Delaware, Inc. The surviving corporation, Motherhood Maternity Shops, Inc., is a wholly-owned subsidiary of MMS of Delaware, Inc.

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

#### ORDER

For purposes of this order, the following definitions shall apply:

“Product” is defined as any item of wearing apparel and any related accessory and any other merchandise, service or thing which is manufactured, offered for sale, or sold by respondents or any of their subsidiaries.

“Reseller” is defined as any corporation, firm or person which sells or which requests to sell any product sold or distributed by respondents or any corporation or firm owned or operated by respondents, but excluding persons, partnerships or corporations operating retail outlets owned or operated by respondents or any of their subsidiaries.

“Resale price” is defined as any price, price floor, price ceiling, price range, or any mark-up, formula, or margin of profit used by any reseller for pricing respondents' products. Such term includes but is not limited to any suggested, established or customary resale price as well as the retail price in effect for retail outlets or departments owned or operated by respondents or any of their subsidiaries.

“Sale period” is defined as any time period during which retail outlets or departments owned or operated by respondents or any of their subsidiaries offer any product for sale at resale prices lower than those in effect during the usual and ordinary course of business; or any suggested, authorized or customary time for selling or

advertising apparel at prices lower than suggested, established or customary resale prices.

"Company-owned store" is defined as any retail outlet owned or operated by respondents or any of their subsidiaries.

## I

*It is ordered*, That respondents Motherhood Maternity Shops, Inc., a corporation, and MMS of Delaware, Inc., a corporation, their successors and assigns, and respondents' officers, their agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, offering for sale, sale, distributing or advertising of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Fixing, establishing, controlling, stabilizing, maintaining or enforcing, directly or indirectly, the price at which any reseller may advertise, promote, offer for sale or sell any product.
2. Establishing, exacting assurances to comply with, continuing or enforcing any contract, agreement, understanding or arrangement with any reseller to fix, establish, control, stabilize, maintain or enforce, directly or indirectly, the price at which any product is to be resold or advertised.
3. Establishing, exacting assurances to comply with, continuing or enforcing any contract, agreement, understanding or arrangement with any reseller to tie any resale price of any reseller to any resale price in effect at any company-owned store.
4. Suggesting, communicating, publishing, disseminating, circulating or providing by any means any information concerning resale prices or sale periods to any reseller. The advertising to consumers of actual resale prices by any company-owned store shall not be deemed as violation of this paragraph.
5. Soliciting, gathering or exchanging, directly or indirectly, information concerning any resale price or sale period of any reseller.
6. Establishing, exacting assurances to comply with, continuing or enforcing any contract, agreement, understanding or arrangement with any reseller to fix, establish or control the form, content or timing of the advertising of any product by any reseller.
7. Suggesting, recommending, advising, persuading, inducing or coercing any reseller to establish, maintain, issue, adopt or adhere to

any resale price, or to establish, maintain, issue, adopt or adhere to any sale period.

8. Communicating with any reseller concerning any deviation or alleged deviation from any resale price or sale period.

9. Suggesting, recommending, advising, persuading, inducing or coercing any reseller to refrain from or to discontinue advertising any product at a certain resale price.

10. Representing directly or by implication that any action may or will be taken against any reseller who deviates from any resale price or sale period.

11. Securing or attempting to secure any promise or assurance from any reseller regarding the price at which such reseller will or may advertise or sell any product; or requesting or requiring any reseller to obtain approval from respondents for any price at which such reseller may or will advertise or sell any product.

12. Threatening to withhold or withholding advertising allowances or any other assistance, payment, service or consideration from any reseller, or limiting or restricting eligibility of any reseller to receive such benefits because said reseller advertises or sells any product at certain resale prices.

13. Taking any action to hinder or preclude the lawful use by any reseller of any trademark of any respondent in conjunction with the sale or advertising of any product.

14. Terminating, suspending, delaying shipments to, or taking or threatening any action against any reseller because the reseller has, or was alleged to have sold or advertised any product at a certain resale price, or because the reseller may engage in any such activity in the future.

## II

*It is further ordered,* That respondents shall:

1. Within thirty (30) days after the date of service of this order, mail under separate cover a copy of this order to every past reseller. An affidavit of mailing shall be sworn to by an official of respondents verifying that said mailing of this order was completed.

2. Mail a copy of this order to any reseller that purchases any products from respondents within five (5) years after the date of service of this order. The mailing required by this provision shall occur within thirty (30) days after the first purchase by said reseller.

3. Within thirty (30) days after the date of service of this order distribute a copy of this order to each of their operating divisions and subsidiaries and to all officers, supervisory sales personnel, sales



agents and representatives selling to resellers, and to advertising agencies retained by respondents and secure from each entity or person a statement acknowledging receipt of said order.

### III

*It is further ordered, That respondents:*

1. Notify the Commission at least thirty (30) days prior to any proposed change in the respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporations which may affect compliance obligations arising out of this order.

2. Maintain complete business records which fully disclose the manner and form of respondents' compliance with the Order, including but not limited to any records referring or relating, in whole or in part, to:

- (a) any communication between any respondent and any reseller relating to any price at which any reseller, person or firm is selling, proposes to sell, is advertising or proposes to advertise any product;
- (b) the termination of any reseller for any reason; or
- (c) the refusal to deal with any reseller for any reason.

Respondents shall maintain the records required by this paragraph for at least three (3) years from the date such records were created or received by respondents. The records required by this paragraph shall be made available to Commission staff upon reasonable notice.

3. 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

## CROWN TUFT, INC., ET AL.

*Docket C-1192. Interlocutory Order, June 26, 1979*

ORDER DENYING MOTION TO MODIFY OR VACATE CONSENT  
ORDER

By letter dated May 9, 1979 individual respondent Arthur B. E. Lauman petitioned the Federal Trade Commission to reopen the proceeding in the above-docketed matter to vacate the order as it pertains to him as an individual and as it pertains to the named corporation, dissolved sometime after 1971.

Mr. Lauman states that he had "no personal knowledge" of and he did not "condone in any fashion, any of the charges contained within the consent order agreement;" he sold Crown Tuft, Inc. to Johns-Manville Corporation in 1968; he was employed by Crown Tuft until 1971; he is "no longer engaged by or associated with either the existing company or the company to which Crown Tuft, Inc. was sold;" to the best of his knowledge, Crown Tuft, Inc. was dissolved and Johns-Manville Corporation "disposed of the carpet division some years ago."

The order issued against the respondents on April 11, 1967 (see 71 F.T.C. 646) forbids them from misbranding textile fiber products and requires them to disclose the names and amount of constituent fibers contained in carpets, on labels, tags, invoices, and advertisements, pursuant to the provisions of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder.

It is axiomatic that corporations can only act through individuals, and it is well settled that the Commission may properly name officers, directors, and sole stockholders of corporate respondents in their official as well as their individual capacities in order to prevent the evasion of its order. *F.T.C. v. Standard Education Society*, 86 F.2d 692 (2d Cir. 1936), *rev'd. on other grounds*, 302 U.S. 112, 120 (1937); *Abel Allan Goodman v. F.T.C.*, 211 F.2d 7, 14-15 (2d Cir. 1954). The purpose of doing so is to make the order fully effective in preventing recurrence of the practices found to be unlawful, for the Commission has recognized that a corporate respondent is not the only vehicle through which individuals, who have been personally involved in unlawful practices, may in the future continue to engage in such practices. *Tractor Training Service v. F.T.C.*, 227 F.2d 420, 425 (9th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956); *Consumer Sales Corp. v. F.T.C.*, 198 F.2d 404, 407-408 (2d Cir. 1952), *cert. denied*, 344 U.S. 912

## Interlocutory Order

93 F.T.C.

(1953). The U.S. Court of Appeals for the Fourth Circuit stated in *Pati-Port, Inc. v. F.T.C.*, 313 F.2d 103, 105 (1963):

... it would seem in cases of this sort to be a futile gesture to issue an order directed to the lifeless entity of a corporation while exempting from its operation the living individuals who were responsible for the illegal practices.

There was, accordingly, no miscarriage of justice in making the order effective against individual respondent Lauman, and there is no overriding public interest in vacating the order now.

Where the illegal practice is capable of being resumed, the Commission may take measures to prevent any possible invasion of its orders, even upon a showing that the corporation has been dissolved, and that the named individual has not been for several years and is not now engaged in the sale of carpets.

Petitioner has not set forth any changed condition of fact or law in support of his request, nor has he advanced any argument to demonstrate how the public interest would be served by setting aside this order. Accordingly, the petition is hereby denied.

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**Revocation of Advisory Opinion issued to Don Odessky, Inc., 87  
F.T.C. 1426. [File No. 763 7002, Don Odessky, Inc.]**

*Letter Denying Stay of Revocation*

January 22, 1979

Dear Mr. Meisburg:

This responds to your letter of January 16, 1979, on behalf of Don Odessky, Inc., requesting an immediate stay of the Commission's order of January 11, 1979 revoking its advisory opinion in the above-referenced matter and publication of that order.

Having given careful consideration to your request, the Commission has determined that it should be denied. The request advances no basis on which the revocation should be reconsidered, and the Commission is aware of none. Moreover, the Commission is of the opinion that its revocation is a discretionary act not subject to review in the Court of Appeals or otherwise. See 15 U.S.C. Section 45(c); *Florsheim v. Engman*, 494 F.2d 949 (D.C. Cir. 1973). In addition, the Commission believes that a delay in publication would be contrary to the public interest in promptly informing the public of its official acts.

By direction of the Commission.

*Revocation Letter*

January 11, 1979

Dear Mr. Meisburg:

On January 27, 1976, the Commission issued to Don Odessky, Inc., an advisory opinion concerning a tripartite promotional assistance plan, featuring aisle-end displays.<sup>1</sup> The Commission conditioned this advisory opinion on the following reporting requirement:

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<sup>1</sup> 85 F.T.C. 1426.

To assure that the plan is implemented so as to provide allowances to all competing purchasers on proportionally equal terms, Don Odessky, Inc., should report to the Commission, after the plan has been in operation for one year, the full extent of retailer and supplier participation, including time periods and products involved, and the total allowances paid to each participating retailer by each supplier under the plan.<sup>2</sup>

Pursuant to this reporting requirement, on March 3, 1977, the Commission received a submission from Don Odessky, Inc.

The Commission has determined that this submission failed to disclose "the full extent of retailer and supplier participation," "the time periods and products involved," and "the total allowances paid to each participating retailer by each supplier under the plan." Based on the information provided, therefore, the Commission is unable to determine whether competing purchasers receive payments under the program on equal terms.

Due to the failure and refusal of Don Odessky, Inc., to comply with the reporting requirements of the Commission's opinion, the Commission has decided to revoke the advisory opinion. By this action, the Commission's advisory opinion to Don Odessky, Inc. is rendered null and void. After the date of service of this letter, representations by Don Odessky, Inc. that the Federal Trade Commission in any manner condones or approves any business proposal by that firm would be deceptive and untrue, and could result in such further action by the Commission as would be in the public interest.

By direction of the Commission.

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<sup>2</sup> *Id.* at 1427.

**Proposed statistical reporting program entailing the forecasting of annual sales and captive use of selected thermoplastic resins.**  
[793 7002, *Society of the Plastics Industry, Inc.*]

May 1, 1979

Dear Mr. Bercovici:

This responds to your request for an advisory opinion on the use by the Society of the Plastics Industry (SPI) of a proposed statistical reporting program entailing the forecasting of annual sales and captive use of selected thermoplastic resins.

The Commission understands that SPI is a trade association with membership open to all firms in the industry upon payment of annual dues graduated according to sales volume, and that current membership accounts for approximately 95% of the total domestic production of plastics raw materials. The Commission further understands that under the proposed program, resin suppliers would be invited to report their respective forecasts for the current year and each of the following four years to an independent accounting firm, which would compute the mean and median of the reported forecasts and publish the low forecast, the high forecast, the mean, and the median (not broken down by type or grade). There would be no exchange or disclosure whatever of individual firm data and no narrative or interpretation will be placed on the compiled figures. Nonmember producers would be invited to participate in the program on the same basis as members and will receive copies of the forecasts. The reports would also be available by subscription to the public after a trial period. No forecast would be reported, however, unless at least four industry members, excluding any firm with more than 65% of any reporting category, submit forecasts. Initially, the program would encompass six of the major plastics materials: polyvinyl chloride (PVC); low density polyethylene (LDPE); high density polyethylene (HDPE); polypropylene; polystyrene; and acrylonitrile-butadiene-styrene (ABS).

Some types of forecast arrangements among competitors do raise serious antitrust concerns in particular market environments. On the basis of available information concerning the slowing rate of growth, the degree of concentration, the relatively small number of firms engaged in the manufacture of the individual thermoplastic resins,

and the specifics of the proposed plan, the Commission is of the view that there is a significant risk that SPI's program could be used to foster an anticompetitive consensus on production levels. The Commission is therefore unable to approve use of the proposed statistical reporting program.

By direction of the Commission.

*Letter of Request*

January 31, 1978

Dear Mr. Thomas:

On behalf of the Committee on Resin Statistics of the Society of the Plastics Industry, Inc., we respectfully request that the Commission issue an advisory opinion, pursuant to Section 1.1 of its rules of General Procedures, concerning the statistical program described below which the Committee contemplates implementing in 1978.

The Society of the Plastics Industry, Inc. (SPI), is the major national trade association of the plastics industry. It is comprised of more than 1200 member companies which supply raw materials, fabricate manufactured plastics components and products, engineer or construct molds or similar accessory equipment for the plastics industry, and engage in the manufacture of machinery used to make plastic products or materials of all types. Its membership is responsible for an estimated 95% of the total production of some 27 billion pounds of plastics raw materials in this country.

The Committee on Resin Statistics (CRS) is one of 52 operating units of SPI. The Committee is charged with the responsibility to develop meaningful, timely and accurate statistics concerning plastic resins for use by members of the industry, government agencies and other interested parties. The Committee also gathers information from other trade sources and government sources and compiles and publishes an annual volume of "Facts & Figures of the Plastics Industry". A copy of the 1977 edition of "Facts and Figures" is associated herewith.

The CRS presently conducts statistical programs for approximately forty specific plastics materials or groups of plastics materials.<sup>1</sup>

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<sup>1</sup>The following major materials are included in the CRS programs: ●

Epoxy, polyester, urea  
melamine, phenolic

engineering and specialty plastics  
isocyanates

(footnote continued)

For each of these materials, data is compiled and reported describing both Production and Sales & (Captive) Use, in reporting units based upon weight. Reports are compiled on a monthly, quarterly, semi-annual or annual basis, depending upon the specific materials or group of materials involved. Additionally, for certain of these materials, data is compiled and reported concerning inventory, capacity and/or total dollar value of sales. All present statistical programs report the historical experience pertaining to the included materials.<sup>2</sup>

The Committee on Resin Statistics is presently contemplating, and by this letter requests the Commission's advice concerning, the institution of a statistical reporting program entailing forecasting of annual sales and captive use of selected plastic resins. Such a program is not presently being conducted by CRS; and the institution of such a program, entailing forecasting rather than the reporting of historical data, would represent a departure from current practice.

To develop the proposed annual sales forecast, members of the industry will be requested to voluntarily submit their best estimates of *total* United States demand for plastic resins, i.e., the category presently identified as Sales & Use in SPI's statistical reports.<sup>3</sup> Demand would be forecast in thousands of pounds, for the then-current year and for each of the next four years, for each of the materials the company produces which is included in the program. The data collected and compiled will thus be projected total demand, not directly influenced by such proprietary information as the reporting companies' corporate planning with respect to expanded or constricted production, new marketing programs, etc.

(continued from previous page)

low density polyethylene	polyols
high density polyethylene	polyurethane products
polypropylene	styrene butadiene latexes
ABS	other styrene-based latexes
SAN	other styrene-based polymers
polystyrene	PVC
nylon	polyvinyl alcohol
polyvinyl acetate	other vinyl resins

<sup>2</sup> One minor variant is that capacity figures are reported annually on the basis of capacity both as of December 31 of the year just ended and also as adjusted to December 31 of the current year, with the latter figure incorporating publicly announced plant expansions or contractions.

<sup>3</sup> The "use" element of the Sales & Use category pertains to internal consumption by the resin producer.



The individual company figures will be directly submitted to Ernst & Ernst, the independent public accountants which presently serve all of the CRS statistical programs. Ernst & Ernst will compile and distribute the reports, showing the high and low forecasts and the mean and median averages. There will be no narrative or interpretation placed upon the compiled figures; nor will the reported figures disclose the identity of the participants responsible for the specific forecasts. Moreover, in accordance with the "disclosure" rules governing the CRS programs, no figures will be reported unless there is participation by at least four members of the industry, no one of which is so dominant as to represent more than 65% of any reporting category. Additionally, according to CRS policy for this proposed program, in order to assure that the forecasts represent a valid cross-section of the industry, no program will proceed unless a minimum percent of the present producers participate in the report for each material. That minimum participation, originally established at 70%, is subject to revision. Furthermore, these reports would be available by subscription to the general public, as are other CRS reports.<sup>4</sup> Copies of the draft reporting instructions and format for dissemination of the compiled information are also associated herewith.

Initially, the annual sales forecasting program will encompass six of the major plastics materials. Those materials, and the present volume (sales & use) and number of producers are, as follows:

Material	Sales & Use <sup>5</sup> (millions of lbs.)	Number of Producers <sup>5</sup>
polyvinyl chloride	4,638	21
low density polyethylene	5,765	14
high density polyethylene	3,127	14
polypropylene	2,536	10
polystyrene	3,145	19
acrylonitrile-butadene-styrene (ABS)	925	7

Other materials may be added at a later date.

<sup>4</sup>As with any newly instituted reporting program, reports are not placed on subscription availability until completion of an initial "shake-down" period, generally one or two reporting periods, to allow evaluation of reporting instructions, etc.

<sup>5</sup>Source: Facts and Figures of the Plastics Industry—1977 Edition, The Society of the Plastics Industry, Inc., New York, 1977. Further information concerning these and other plastics materials is contained in the associated copy of Facts and Figures.

The Committee on Resin Statistics foresees substantial benefits flowing from its proposed annual sales and use forecasting survey. Presently there is no source of information of this nature available on a continuous and credible basis. It is understood that consultants have prepared demand forecasts for plastic resins. These reports, however, are sporadic rather than periodic, limited to the sponsors or subscribers and not generally available to the public, and quite expensive. Moreover, in that the forecasting techniques utilized by the consulting firms for such reports are not disclosed, there is no basis for confidence in the reports or comparability among such reports.

From an industry standpoint, the availability of this data may assist the resin producers to better define the capacity needs of the plastics industry by improving upon their understanding of market demand. Fabricators of component or finished plastic products, including users such as the automotive industry, may better be able to plan for their future materials (resins) supplies and requirements by better understanding total projected industry demand *vis-a-vis* present production capacity. Similarly, such projections will assist suppliers to the industry of equipment such as processing (fabricating) machinery, hopper cars, storage silos, conveyers, etc., to plan to serve the future requirements of the plastics industry. Improvement in the long range planning capability is beneficial and desirable in view of the long lead time between planning and start-up of new production facilities and should thereby improve the efficiency at all levels of the supplier, consumer and allied industries.

In addition, to the potential benefits to the plastics industry and its suppliers, the availability of projected demand for plastics resins will be of assistance to those departments and agencies of the Federal Government having responsibility for planning for future energy requirements. Such data will assist with respect to planning for both the consumptive use of energy in the production of plastics materials and products and the productive use of energy in that plastics materials are derivatives of petroleum products. In the event of future critical shortages of petroleum products, such data will assist with respect to the impact analysis pertaining to matters such as feedstock allocation and energy allocation, to the extent that such measures may be necessary. Such forecasts will also be of benefit with respect to projecting future employment levels within the industry and of assistance to the financial community in analyzing the long range prospects of the chemical and plastics industries.

As hereinbefore described, the contemplated course of conduct described herein is not presently being followed by SPI's Committee on Resin Statistics; nor, to the knowledge and information of the staff and officers of the Committee, is such course of conduct being followed by other operating units of SPI. Additionally, neither the Committee staff nor officers are aware of any pending investigation or other proceeding by the Commission or any other governmental agency concerning the matter described herein.

The Committee on Resin Statistics of the Society of the Plastics Industry, Inc., respectfully requests the advice and comments of the Federal Trade Commission with respect to the conduct of the annual sales forecasting program described herein. Any questions concerning the program described herein or any requests for further information necessary for the Commission to reach a conclusion with respect to this matter may be directed to the undersigned.

Respectfully submitted,

*/s/ Martin W. Bercovici*

Assistant General Counsel to  
The Society of the Plastics  
Industry, Inc.

*Second Letter of Request*

May 25, 1978

Dear Mr. Garvey:

We are pleased to respond to your inquiry dated April 26, 1978, requesting clarification with respect to the Request for Advisory Opinion submitted to the Commission on behalf of the Committee on Resin Statistics of the The Society of the Plastics Industry, Inc., pertaining to a proposed statistical reporting program entailing forecasting of annual sales and use of selected plastic resins. The specific issues raised in your letter are addressed, as follows:

- (1) Sales and captive use will be the only data which will be collected in the proposed forecasting program.

- (2) In essence, sales and captive use is the same as production plus or minus adjustments to inventory.\* Variances of a minor nature may occur between production and inventory adjustments on the one hand and sales and captive use on the other due to such factors as product loss which may occur in packaging operations or due to contamination; however, the Committee on Resin Statistics does not address such factors in its statistical programs. The sales and captive use terminology has been employed by the Committee simply as a convenient means of collecting statistical data due to the commonality of the use of these measurements among the various companies. One reason for this is that the six categories of plastic materials which will be encompassed within this program are manufactured in a continuous process, rather than in a batch process. Accordingly, the figures for sales and captive use are more precise than the statistics measuring production itself.
- (3) In forecasts of future sales and captive use, it is not anticipated that adjustment for future inventory will be a material consideration. Inventory adjustments are the net differential between production (and imports) on the one hand and sales and captive use on the other; and the objective of the proposed program is to forecast trends in sales and captive use (i.e., demand) rather than production.
- (4) The term "demand" as used in our request of January 31 is intended merely as another term for sales and captive use. Other than being added to inventory, plastic resins either may be sold by the producers to fabricators or to other parties (e.g., exporters, compounders), or said resins may be used by the producers in captive fabrication operations. Thus, sales and captive use together describe the demand for the particular resins. Demand relates to supply from the standpoint of the latter entailing the availability of plastic resins to meet the demand through production and inventory.

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\*The program as planned is based solely on domestically produced resins and thereby excludes imports. Sales of imported materials may, however, cause a minor variance in a comparison of sales and captive use v. production and inventory adjustments. At present, imports of plastics resins are not a significant factor in the domestic market.

- (5) The proposed statistical program will entail the collection of data on projected sales and captive use, i.e., demand projections, from resin suppliers only rather than from fabricators. Consistent with the underlying goal of the Committee in the conduct of all programs to develop as complete and meaningful data as possible, non-members of The Society which produce plastic resins will be invited to participate in this program on the same basis as member companies.
- (6) SPI has no specific knowledge of the techniques utilized by the resin producers to prepare market forecasts for their own internal corporate purposes; however, it has no reason to believe that data projections as contemplated by the proposed program are presently collected from customers by producers of the six designated plastics raw materials. It is not contemplated that producers will seek such information from their customers as part of the proposed program.
- (7) Based upon available statistics, such as the Census of Manufacture published by the Department of Commerce, it is believed that there are approximately 25,000 establishments which fabricate plastic products in the United States. These firms run the gamut in size from very small individual proprietorships to multi-national corporations; and they vary from those which engage solely in plastics fabrications operations to those which fabricate component parts for assembly in goods manufactured of other materials to those which employ relatively small amounts of liquid plastic resin as a binder or other component of manufacture of various products (e.g., paint, fiberglass, etc.). Of these approximately 25,000 establishments, probably less than 5%, numerically, belong to The Society of the Plastics Industry, Inc. Accordingly, forecasting demand on the basis of sampling or other survey techniques would be quite expensive and time consuming and may or may not lead to valid results. On the other hand, the Committee on Resin Statistics believes the producers are in an adequate position to furnish this information. Through their requirements for remaining alert to economic conditions, socio-economic considerations (e.g., increased use of plastics to less automobile weight to conserve gasoline), product innovation and other factors similarly af-

fecting demand, it is believed that the producers, by the contemplated consensus procedure, will be able to meaningfully forecast trends and future demand requirements.

- (8) Under the proposed program, suppliers will forecast total market demand for the materials which they produce. This projection will be unrelated to the individual producer's plans relating to each company's position as a supplier in the market. For example, a supplier's position may be related to its plant capacity, the level of plant capacity at which the producer operates, its plans and capability for expansion of plant capacity, its supply of feedstocks, its alternate use of those feedstocks, its desire to grow—or even continue to serve—an individual resins market, and its plans and ability to switch production from one resin to another. For the foregoing factors, and considering the procedures to govern the conduct of the program, the Committee believes that individual projections of position will not enter into the data the respondents are requested to furnish.
- (9) The reporting instructions, a draft of which was associated with our request of January 31, do not address the manner in which the respondents will prepare their projections. Accordingly, and consistent with the response to item number 8 above, the answer to item 9 is that the nature of the influence of the described information will not be direct.
- (10) With respect to the benefits to be derived from the program, the Committee on Resin Statistics desires to develop meaningful data so that producers, fabricators, users, equipment suppliers, etc., may individually develop better insights into the marketplace to improve future planning by having the benefit of the collective judgment of the supplier industry as to the potential future of each resin segment. The interpretation and use of the information will be at the sole discretion and judgment of each interested party. Inasmuch as the proposed program will be one source of information, among many, it is believed that the influence of the described information on individual decision-making will not be direct.

We trust the foregoing is responsive to your inquiry. Should you have further questions or desire further information or elaboration, please feel free to contact the undersigned.

Cordially yours,

*/s/ Martin Bercovici*

*Third Letter of Request*

September 6, 1978

Dear Ms. Melman:

This will serve to respond to your recent request for additional data relative to the request for Advisory Opinion we submitted to the Commission on behalf of the Committee on Resin Statistics of the Society of the Plastics Industry, Inc., dated January 31, 1978.

Associated herewith, please find production data for the year 1977 for the six categories of plastics materials encompassed within the contemplated forecasting program. This data is derived from the statistical program conducted by the Committee on Resin Statistics as compiled by Ernst & Ernst. Secondly, we are enclosing abstracts from prior editions of "Facts & Figures of the Plastics Industry" showing estimated capacity, by product and manufacturer, as of January 1, 1973-76. 1973 was the first year of publication of "Facts & Figures" and therefore is the earliest such figures are available. The estimated capacity by manufacturer for 1977 is shown in the 1977 edition of "Facts & Figures," copies of which were submitted with the January 31 request. Additionally, the estimated capacity figures to be published in the 1978 edition of "Facts & Figures" are also enclosed. Please note that the 1978 edition will reflect estimated capacity as of December 31 of the year just ended rather than January 1 of the year of the edition of the "Facts & Figures" publication.

With respect to the capacity information, please note that total capacity, by material, is derived from the Committee's annual survey of capacity compiled by Ernst & Ernst. The figures shown for capacity by individual manufacturing company are derived from publically available sources, such as corporate annual reports, corporate news and publicity releases, trade magazines and other like sources. Any differential between the sum total of the estimated capacity by individual manufacturers and the total as derived through the Committee's statistical program is reconciled by the SPI staff through "guestimated" adjustments to the figures shown for the individual companies. Such a reconciliation procedure is necessary inasmuch as the Committee's statistical programs are conducted on a confidential basis, with all data being reported to Ernst & Ernst, the SPI staff having no access to such data.

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We trust the foregoing is responsive to your request. In the event that further information may be required, please feel free to communicate with the undersigned.

Very truly yours,

*/s/ Martin Bercovici*





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