

Complaint

67 F.T.C.

Commissioner Reilly concurring in the decision except for the holding that respondent advertising agency, W. B. Doner & Company, should be included in the order to cease and desist. Commissioner MacIntyre dissented as to that portion of the decision relating to fictitious pricing, and has filed a dissenting opinion.

IN THE MATTER OFJOHN A. GUZIAK TRADING AS SUPERIOR
IMPROVEMENT COMPANY

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

Docket 8614. Complaint, Jan. 20, 1964—Decision, June 28, 1965

Order requiring a Little Rock, Ark., distributor of aluminum and simulated stone siding materials to cease making deceptive pricing and discount representations, falsely guaranteeing its products, misrepresenting that it is connected with any aluminum manufacturer, and representing to any prospective purchaser that his house will be used as a "model home."

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 John A. Guziak, an individual, formerly trading through the instrumentality of General Aluminum Company, a corporation, and now trading through the instrumentality of Superior Improvement Company, a corporation, hereinafter referred to as the respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent John A. Guziak is an individual formerly trading through the instrumentality of General Aluminum Company, a Tennessee corporation with his principal office and place of business located at 630 Third Avenue, South, in the city of Nashville, State of Tennessee, and now trading through the instrumentality of Superior Improvement Company, an Arkansas corporation, with his principal office and place of business located at 1605 Main Street, in the city of Little Rock, State of Arkansas.

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

1158

Order

or indirectly, the purchase of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations or misrepresentations prohibited in paragraph A. above.

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

III

Respondent W. B. Doner & Company and its officers, agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of foods, drugs, cosmetics or devices, do forthwith cease and desist from:

A. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, through the use or display of any words, emblem, seal, symbol, certification, or otherwise, that merchandise has been approved or endorsed by an independent organization engaged in protecting the interests of consumers or in determining objectively the merits of such merchandise: *Provided*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondent to establish either that such representation is truthful in every material respect or that respondent neither knew nor had reason to know of the falsity of such representation.

B. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations or misrepresentations prohibited in paragraph A. above.

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

It is further ordered, That the charges contained in paragraphs seven, nine, twelve and thirteen of the complaint be, and they hereby are, dismissed.

Complaint

67 F.T.C.

being used only as a means to induce resistant purchasers into the buying of said merchandise under the mistaken impression that they were receiving some sort of special price because of their willingness to allow their homes to be used for this purpose and that they would receive a bonus of \$100 for each sale made by the respondent as a result of using that person's home as a model.

(2) Purchasers do not receive enough, if any, bonus money to offset the cost of their siding job.

(3) Respondent is not a manufacturer of siding materials.

(4) Aluminum siding materials sold by respondent are not manufactured by Alcoa, Kaiser or Reynolds Aluminum Company.

(5) Respondent is not connected or affiliated with Reynolds Aluminum Company.

(6) Aluminum siding sold by respondent is not applied by factory trained personnel.

(7) Aluminum siding sold by respondent will require painting and maintenance.

(8) The simulated stone siding sold by respondent will chip or crack, will require maintenance, and is not completely fireproof.

(9) Respondent's guarantee is not unconditional and it fails to set forth the nature and extent of the guarantee and the manner in which the guarantor will perform.

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

PAR. 6. In the conduct of his business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of aluminum and simulated stone home and building siding materials of the same general kind and nature as that sold by respondent.

PAR. 7. The use by the respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

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

of aluminum and simulated stone home and building siding materials to the public.

PAR. 3. In the course and conduct of his business, respondent now causes, and for some time last past has caused, his said products, when sold, to be shipped from his places of business in the States of Tennessee and Arkansas to purchasers thereof located in various other States of the United States and maintains, and at all times mentioned herein has maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his business and for the purpose of inducing the purchase of his products, respondent has, by statements and representations in advertisements in newspapers, in direct mail advertising, and by direct oral solicitations, represented, directly or by implication:

(1) That persons who allowed the siding materials installed by respondent to be used for model home demonstration purposes would receive,

(a) A special discount price from respondent's usual and regular price, and,

(b) A bonus of \$100 for each sale made by respondent as a result of using that person's home as a model.

(2) That purchasers can be assured of receiving enough bonus money from the use of their home as a model to offset the cost of their siding job.

(3) That respondent is a manufacturer of siding materials and consequently can offer such materials at lower prices.

(4) That aluminum siding materials sold by respondent are manufactured by Alcoa, Kaiser or Reynolds Aluminum Company.

(5) That respondent is connected or affiliated with Reynolds Aluminum Company.

(6) That respondent's siding materials are applied by factory trained installers.

(7) That aluminum siding sold by respondent will never need any painting and will never require maintenance.

(8) That the simulated stone siding sold by respondent will never chip or crack, will never require maintenance and is completely fireproof.

(9) That the application of siding materials by the respondent is unconditionally guaranteed.

PAR. 5. In truth and in fact:

(1) Respondent did not intend to use, nor did he use, the home of any of his purchasers for demonstration purposes, this statement

Initial Decision

67 F.T.C.

Tennessee, and on September 25, 1964, at Hopkinsville, Kentucky, at which testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. At the conclusion of the hearings on September 25, 1964, the record was closed and in due course both parties filed proposed findings of fact, conclusions of law and briefs in support thereof. Consideration has been given to the proposed findings of fact, conclusions of law and briefs submitted by the parties and all proposed findings of fact hereinafter not specifically adopted are rejected. Based upon the entire record and his observation of the witnesses, the hearing examiner hereinafter makes his findings of fact, conclusions and order.

The Complaint

It should be noted at the outset that under the complaint as drafted, John A. Guziak, as an individual, is the sole respondent in this proceeding. Although the General Aluminum Company, a corporation, and Superior Improvement Company, a corporation, are referred to in the caption of the complaint, they were not joined as named parties in this proceeding, but were merely added for descriptive purposes to typify the individual respondent trading as said companies. At the opening of the hearings in Little Rock, Arkansas, on September 15, 1964, counsel for the individual respondent moved to dismiss this proceeding for the reason that the acts and practices complained of were the acts of the aforesaid corporations and that the individual respondent was carrying out his duties as an officer of said corporations. It was also counsel for respondent's position that without the two corporate entities being joined as parties to this proceeding, the complaint did not lie against the individual respondent. In denying the motion to dismiss, the hearing examiner expressed the opinion that notwithstanding the non-joinder of the two corporate entities, the complaint would be in proper form provided that it could be established that the individual respondent actively formulated, directed, managed, and controlled the policies of both of the corporations, or was aware of, responsible for or personally participated in the acts and practices complained of herein. The examiner, however, believes that it would have been preferable practice to have joined the corporate entities in this proceeding, but as indicated, the failure to do so would not be fatal.

Paragraph Four, the charging paragraph of the complaint, reads as follows:

PARAGRAPH FOUR: In the course and conduct of his business and for the purpose of inducing the purchase of his products, respondent has, by

1270

Initial Decision

Mr. DeWitt T. Puckett supporting the complaint.

Mr. Claude Carpenter and *Moses, McClellan, Arnold, Owen & McDermott* by *Mr. Harry E. McDermott*, Little Rock, Ark., for respondent.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER

DECEMBER 24, 1964

This proceeding was commenced by the issuance of a complaint on January 30, 1964, charging the respondent, John A. Guziak, an individual trading as General Aluminum Company, a corporation, and as Superior Improvement Company, a corporation, with unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act, by making false and deceptive statements and representations in newspapers and direct mail advertisements and in oral solicitations regarding prices, discounts, bonuses, guarantees and other specifically enumerated claims in the sale of aluminum and simulated stone siding materials.

After being served with the complaint, the respondent appeared by counsel and on March 31, 1964, filed his answer admitting a number of the specific allegations in the complaint, but denying generally that he, as an individual, or to his knowledge any of the corporations with which he has been connected, made any of the statements and representations alleged in the complaint.

By order dated April 7, 1964, the hearing examiner scheduled a prehearing conference in this matter for the purposes of, among other things, simplification and clarification of the issues; obtaining stipulations, admissions of fact and authenticity of documents; exchanging lists of witnesses and documents; and the scheduling of the time and places of the hearings. As a result of the prehearing conference, counsel for both parties exchanged lists of witnesses and documents, agreed upon the time and places of the hearings and various other matters.

By order of the Acting Director, Hearing Examiners, dated August 24, 1964, the undersigned hearing examiner was substituted for Loren H. Laughlin, the hearing examiner heretofore appointed to take testimony and receive evidence in this proceeding who because of illness was unavailable.

Hearings were held in this matter on September 15, 16, 17, 1964, in Little Rock, Arkansas, September 21 and 22, 1964, at Nashville,

Initial Decision

67 F.T.C.

was not admissible. In fairness to complaint counsel, it should be noted that he was substituted in this proceeding on March 6, 1964, several months after the complaint was filed, and did not participate in the drafting of the complaint.

FINDINGS OF FACT

1. The respondent, John A. Guziak, is an individual engaged in advertising, offering for sale, sale and distribution of aluminum and simulated stone home and building siding materials to the public (Tr. 19).

2. In the latter part of 1960, respondent organized the General Aluminum Company, a Tennessee corporation, with an office and warehouse located at 630 Third Avenue, South Nashville, Tennessee, for the purpose of engaging in the aforesaid business (Tr. 21). General Aluminum Company closed its office and ceased operations in October or November 1962 (Tr. 21, 38, 54-56).

3. In the latter part of 1962 or early 1963, respondent left Tennessee and organized a similar type of business in Arkansas under the corporate name Superior Improvement Company, an Arkansas corporation, with an office and warehouse at 1605 Main Street, Little Rock, Arkansas. That business is still active (Tr. 21, 38).

4. Respondent Guziak is president of both corporations, sole owner of all the stock of each corporation and formulates, directs, manages and controls the policies, acts and practices of the two corporations (Tr. 20-24, 55-56).

5. Respondent Guziak was never a manufacturer of aluminum or simulated stone siding materials (Tr. 39, 44, 67-68), but purchased them during all times covered by the complaint herein from the following suppliers (Tr. 40-41, 43-44):

U.S. Aluminum Siding Corporation,
Franklin Park, Illinois
Terox Corporation of America,
Franklin Park, Illinois
Brixite Corporation,
South Carney, New Jersey
Pfeifer Wire Company,
Tuscaloosa, Alabama
Wolverine Corporation,
Michigan

Said products are shipped by the aforesaid suppliers from their above-mentioned addresses to respondent Guziak's warehouses in Nashville, Tennessee, or in Little Rock, Arkansas (Tr. 39-40). As materials are required for various jobs, the carpenters or workmen

1270

Initial Decision

statements and representations in advertisements in newspapers, in direct mail advertising, and by direct oral solicitations, represented, directly or by implication:

- (1) That persons who allowed the siding materials installed by respondent to be used for model home demonstration purposes would receive,
 - (a) A special discount price from respondent's usual and regular price, and,
 - (b) A bonus of \$100 for each sale made by respondent as a result of using that person's home as a model.
- (2) That purchasers can be assured of receiving enough bonus money from the use of their home as a model to offset the cost of their siding job.
- (3) That respondent is a manufacturer of siding materials and consequently can offer such materials at lower prices.
- (4) That aluminum siding materials sold by respondent are manufactured by Alcoa, Kaiser or Reynolds Aluminum Company.
- (5) That respondent is connected or affiliated with Reynolds Aluminum Company.
- (6) That respondent's siding materials are applied by factory trained installers.
- (7) That aluminum siding sold by respondent will never need any painting and will never require maintenance.
- (8) That the simulated stone siding sold by respondent will never chip or crack, will never require maintenance and is completely fireproof.
- (9) That the application of siding materials by the respondent is unconditionally guaranteed.

During the course of the hearings, it developed that additional statements and representations regarding "free gift offers" and "the terms and conditions of financing" had been made by the respondent. Counsel for respondent objected to this line of testimony on the grounds that these matters were not included within the scope of Paragraph Four of the complaint. Complaint counsel was unable to relate these matters to any of the nine (9) specific sub-paragraphs of Paragraph Four, but took the position that such testimony fell within the overall scope of Paragraph Four. Upon reading Paragraph Four, the hearing examiner noted that the usual "catch-all" language was not included. In previous complaints, the examiner has observed that it was Commission practice to include, immediately after the introductory sentence and before the specifically enumerated sub-paragraphs, the following language:

Typical and illustrative of such statements and representations, but not all inclusive thereof, are the following.

(See *In the Matter of Solmica, Inc.*, Docket No. C-817 [66 F.T.C. 566].) In view of the absence of such or similar language in the subject complaint, the examiner ruled that unless the additional matter was reasonably related to one of the nine sub-paragraphs of the complaint, such testimony or evidence would not be material and

Initial Decision

67 F.T.C.

these contracts were entered into by one of his salesmen who did not have authority to enter into contracts in Kentucky or to solicit jobs in Kentucky (Tr. 70-72, 623), but the record shows that the contract with Thomas and Nora Glass was personally signed by respondent (CX 44). In cases where respondent signs a contract, he has seen the customer (Tr. 26). Furthermore, Thomas and Nora Glass testified Guziak personally negotiated the transaction at their home in Kentucky (Tr. 550-570). With regard to the other two contracts performed in Kentucky, it appears that all contracts had to be approved by either respondent or one of his two office secretaries who had authority to approve or reject contracts (Tr. 25, 57, 75), and these contracts were so approved (Tr. 72-75). It should also be noted that each contract provided a space at the lower left hand corner for it to be "Accepted for General Aluminum Company," and the salesman merely signed in a box entitled "Order taken by" (CX 43, 44). Although it appears that in these two cases his agents negotiated these contracts without his knowledge and contrary to his instructions, the approval of these contracts by his office (Tr. 75), the release of the materials to the subcontractors by his office (Tr. 77) and respondent's subsequent action in permitting the work to be completed (Tr. 73, 622-625), constitutes ratification of the salesman's acts. In view of the foregoing, the examiner finds that of the three identified jobs performed in Kentucky, respondent personally executed one and either he or one of his office staff approved the other two contracts. Accordingly, to the extent of these three or four contracts, the examiner further finds that the respondent was doing business in Kentucky.

9. Respondent, trading as General Aluminum Company and Superior Improvement Company, contacts his prospective customers in four ways: by telephone solicitation (Tr. 28, 60); by direct approach, that is, respondent Guziak or one of his salesmen or both together contact home owners in person (Tr. 28); by newspaper advertising (CX 19); and by "direct mailing" of a circular or brochure to prospective customers (CX 8, 13, 20, 27, 28, 39). The last method is used most frequently.

10. The "direct mailing" of the circular or brochure is done by respondent's wife from Medford, Wisconsin, to home owners in Tennessee and Arkansas (Tr. 604, see also postmark on CXs 8, 13, 20, 27, 28). Medford, Wisconsin, is respondent's "home town" and where he has maintained a residence from 1946 to the present (Tr. 517). The circulars or brochures contain, on one side, pictures of houses to which siding materials appear to have been attached and various statements relative to such materials. On the other side of the circu-

who apply them pick them up at respondent's warehouses and haul them to the homes or buildings of respondent's customers. The carpenters or workmen who perform the labor and transport the materials are paid for their services by respondent on a job or contractual basis (Tr. 45-46, 68, 69, 228-229, 239).

6. Respondent, trading as General Aluminum Company and Superior Improvement Company, employs only two office girls and some part-time telephone solicitors paid by the hour (Tr. 51). The carpenters or workmen who perform the labor are subcontractors; the man in charge of the crew is paid on the basis of so much a square and he in turn pays his own workers (Tr. 45-56). Respondent's salesmen are paid on a commission basis, do not work full time and may be working for some other corporation at the same time (Tr. 46-50). Respondent supplies his salesmen with blank contract forms and sample cases of the materials (Tr. 62-63; CX 34, 38 a-c; RX 2, 3). Respondent instructs his salesmen on what to put in the contract and not to misrepresent the siding materials (Tr. 62). Respondent's salesmen operate under his supervision and control (Tr. 61-64). Materials from suppliers arrive at respondent's warehouses approximately once a month in large vans and are unloaded by hourly wage rate laborers obtained from the Tennessee Security Employment Office (Tr. 52).

7. The merchandise, equipment and parts used for Superior Improvement Company sales are never shipped direct from the manufacturers to the customer's residence, but are always picked up by the subcontractor's vehicles at its warehouse at 1605 Main Street, Little Rock, Arkansas, and delivered to the job site in Arkansas (Tr. 28, 35-36, 38-40, 79).

8. The merchandise, equipment and parts used on contracts entered into by General Aluminum Company, are similarly transported from its warehouse at 630 Third Avenue, South Nashville, Tennessee, to the job sites in Tennessee (Tr. 68) with the exception of three contracts and possibly a fourth entered into and performed in and around Hopkinsville, Kentucky. (See testimony of Robert E. Frommel, Tr. 527-542; John C. Spurlin, Tr. 542-549; Thomas Glass, Tr. 550-563; Nora Glass, Tr. 564-570; Guziak, T. 78, 625; CX 43, 44).¹ On these contracts, the materials were transported from respondent's warehouse in South Nashville, Tennessee, to the job sites in and around Hopkinsville, Kentucky (Tr. 314). Respondent testified that

¹ Robert E. Frommel's contract was for \$3,240 (CX 43); John C. Spurlin's contract was for \$2,240 (Tr. 546); Thomas Glass' contract was for \$2,880 (CX 44) or a combined total of \$8,360.

pany for a siding job on their homes.² Sixteen of said witnesses testified that they received a circular through the mail, similar to or identical with CX 8; that they detached, signed and returned the self-addressed card, similar to or identical with the ones appearing as part of CX 28 or CX 39, and that thereafter Guziak and/or a representative of General Aluminum Company in Tennessee or Kentucky, or Superior Improvement Company in Arkansas, called on them.³ Irrespective of the method by which they were contacted, twenty-eight of the witnesses testified that Guziak or said representative stated that the prospect's house would be used for demonstration purposes and that for each house sold as a result thereof the prospective customer, the witness, would receive a bonus of one hundred dollars.⁴ With one exception, said witnesses testified that their houses were not used for demonstration purposes and that they never received any bonus payments. Thirteen of the customer-witnesses testified that respondent Guziak or the company representative represented that said witness would receive a special discount price from respondents usual and regular price (*i.e.*, at cost, a factory price or demonstration price), but that they never received a discount.⁵ Twelve of the witnesses testified that Guziak or his representative represented to them that they would receive enough bonus money from the use of their home as a model to offset the cost of their siding job, and each further testified that they never received any bonus money whatsoever.⁶

Respondent testified that he had never instructed his salesmen to make any bonus offers, that when it came to his attention, he instructed his salesmen to discontinue such practice and had fired salesmen for such activities (Tr. 508). Guziak, however, testified that he himself had made statements to customers that their houses would be used as demonstrators and that they would receive a \$100 bonus (Tr. 509-510):

The Witness: I have made that statement, yes, sir, acting in the authority as an officer of the corporation. (Tr. 510, lines 11-12.)

In subsequent testimony, the respondent also gave contradictory testimony (Tr. 628, lines 21-25, Tr. 629, lines 1-3).

² Tr. 98, 116, 181, 200, 215, 250, 255, 321, 335, 346, 357-8, 374, 379, and others. CX 1, 3, 5, 9, 10, 11, 12, 14, 15, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 43, 44 and RX 1.

³ Tr. 95, 110, 127, 143, 156, 169, 181, 195, 234, 296, 454, 544, and others.

⁴ Tr. 97, 111, 128, 144, 151, 157, 182, 196, 206, 215, 223, 236, 251, 260, 285, 296, 326, 331, 350, 371, 381, 455, 464, 471, 531, 546, 556, 567.

⁵ Tr. 96, 128, 151-2, 181-2, 196, 207, 287, 305-6, 355, 361, 371, 528, 546.

⁶ Tr. 251-2, 331, 337, 342, 457, 471 and others.

lar appears the name and address of a home owner, or a space therefor, the postmark "Medford, Wisconsin," an offer of a free gift to addressees who return the self-addressed, detachable card at the bottom of the circular. The detachable card is addressed to General Aluminum Company, 546 South 2nd Avenue, Medford, Wisconsin (CX 28), and Superior Improvement Company, 546 South 2nd Avenue, Medford, Wisconsin (CX 39), as the case may be.

11. The newspaper advertisement (CX 19) appeared on Sunday, April 29, 1962, in The Nashville Tennessean. The newspaper has a daily circulation of 564 and a Sunday circulation of 1,725 in Christian County, Kentucky, which includes Hopkinsville, Kentucky (Tr. 481). The copy for the advertisement was brought to respondent's attention by a salesman who worked for a company in Birmingham, Alabama, which had used the ad successfully. The ad was mailed to respondent's office in Nashville by the salesman and although respondent was out of town at the time and did not actually see it before it was run, he discussed it over the telephone with his office girl who, with his knowledge, approved the ad for publication (Tr. 594-597). Respondent admitted that when he saw the ad late on Saturday evening, as the first editions of the paper were being circulated, he became aware of obvious discrepancies and errors in the ad of which he did not approve and would never have run had he known of them in advance (Tr. 595-598).

12. When one of the detachable cards from a circular is mailed in or a telephone inquiry is received as a result of the newspaper ad, the prospective customer is called upon by either a salesman or respondent, or both. During the course of this visit, or as in some cases several visits, the customer is given a sales talk. If a transaction is consummated, a printed form contract is signed by the homeowner and his wife on the one hand, and the salesman or respondent, as the case may be, on the other hand. The customer's credit rating is then checked by respondent's office and, if approved by his office (Tr. 511), respondent's subcontractors in due course pick up the materials at respondent's warehouse, transport them to the customer's home and install the siding. After the job is completed, the customer is asked to sign a completion certificate (Tr. 33-34, see summary of witnesses' testimony, *infra*).

13. Thirty-two customers of respondent were called as witnesses and testified in support of the complaint. All of the aforesaid witnesses, except one, testified that they signed a contract with either General Aluminum Company or with Superior Improvement Com-

(Tr. 117), and that he signed a contract (CX 3). On cross-examination, the witness testified he was not really sure it was Guziak who came to see him (Tr. 121).

Thomas S. Taylor, Bauxite, Arkansas (Tr. 127-140), testified he "received a pamphlet through the mail" from Superior Improvement Company, that he wrote them he was interested, that Mr. Guziak came to his house (Tr. 127), that Guziak "demonstrated the siding, beat on it, showed how strong it was, and he said the insulation behind it was termite-proof and that the aluminum itself was guaranteed for life," that Guziak stated "the paint on it was guaranteed for twenty years of service," that Guziak stated "he was letting me have it at factory price for a demonstrating—for letting him demonstrate it and show it on television, and that he was going to bring people by there and each one that he brought by that I would have a bonus of a hundred dollars if they bought a siding job from him," that Guziak never brought anybody to look at it and he has never received any bonus payments (Tr. 128), that Guziak said he "would receive a written guarantee" which he has never received (Tr. 129), and that he signed a contract (CX 5).

H. D. Tompkins, Benton, Arkansas (Tr. 140-149), testified he got a card (CX 8) through the mail from Superior Improvement Company, that he and his wife detached the card, filled it out and mailed it back (Tr. 142), that Upchurch, a salesman came to his home and "made an appointment for a night," that "Mr. Guziak and him come back that night" (Tr. 143), that "he went on giving a sales talk about the aluminum and giving us a price, and he showed us the bonus we would get if we sold a job or if they brought somebody by there to look at our house and if they bought we would get a hundred dollars for every time, they would bring somebody by who bought the siding job, or if we gave them some contact and they made a sale we would get a hundred dollars" up to the amount of their contract (Tr. 144), that they "would guarantee the work, that all work would be guaranteed" (Tr. 145), that no one was ever brought by to look at the house and they never received any one hundred dollar bonus payments (Tr. 146), and that he signed a contract (CX 9, CX 10).

Opal Tompkins, Benton, Arkansas (Tr. 150-155), amplifying her husband's testimony, testified, looking directly at Guziak, that "he told that this stone or fiberglass would never chip, crack, fade or soak up with water, or anything like that, and I asked him then if the aluminum would ever need paint, and he said no. He said it would never need paint, and it was a life-time guarantee. And about the

14. In view of the apparent discrepancies between the 32 customers' testimony and respondent's, and the specific contradictions in respondent's own testimony, a summary of the 32 customers' testimony is hereinafter set forth:

Lawrence G. Wendel, Mt. Vernon, Arkansas (Tr. 93-109), testified that he received a circular in the mail from Superior Improvement Company (Tr. 94), that he tore off and mailed in a coupon attached, that Mr. Upchurch and Mr. Guziak came to his house, that Mr. Guziak did most of the talking (Tr. 95), that Mr. Guziak showed him samples of aluminum siding and terox stone, that Mr. Guziak "told us that we were at a good location * * * and that he was going to make our place a show place * * * that he would sell us the material at cost, and that there wasn't going to be any salesman's commission and he [Guziak] would pay for the installation," that "the workmanship would be the very best, and that the workmen were factory-trained to install the materials" (Tr. 96), that he [Guziak] had 20 salesmen working for him, that he [Guziak] would bring prospective customers out to see his house, that if any of these customers bought he would receive a bonus payment of one hundred dollars for each customer sold up to his cost of \$2,170, that neither Guziak nor his salesmen ever brought any prospective customers out to see his house, that he never received any bonus payments (Tr. 97), that Guziak said the siding "came from Reynolds Aluminum," that the "aluminum was guaranteed for life" and "that we would not have to paint it for 20 years," that the terox finish was fireproof, chip-proof and would not crack or break (Tr. 99), and that he signed a contract (CX 1). On cross-examination, he testified that the workmen failed to caulk around the windows, and the walls were not covered with siding completely to the ground (Tr. 109).

John Zuber, Little Rock, Arkansas (Tr. 110-123), testified that his "wife answered an advertisement that she got through the mail" from Superior Improvement Company, that Mr. Guziak and another man came to the house (Tr. 110), that "they looked the house over and said it would be a good house to advertise their business and demonstrate it and they would knock off a thousand dollars off the original cost" (Tr. 111), that "they would use the house as a demonstration" (Tr. 112), that for everybody who saw the house and put on their siding "they would knock off a hundred dollars off the cost of the house," that "they never did bring anybody by to see the house like they said they would" (Tr. 113), that he never received any bonus payments of \$100 (Tr. 123), that they said "it was guaranteed for a lifetime, the siding was, and it never would need paint"

Initial Decision

67 F.T.C.

siding because she liked the material and she replied, "Not necessarily. Of course, I would have liked and appreciated having some reduction on it, but it was mainly because I wanted the insulation and the savings to paint" (Tr. 162).

Mrs. Glenn Vineyard, Little Rock, Arkansas (Tr. 167-179), testified that she received through the mail a circular from Superior Improvement Company (Tr. 168), that she "took the card out and returned (mailed) it to the company to permit a salesman to come out and talk to us" (Tr. 169), that she and her husband own their home and had been planning to either brick their house or put aluminum siding on (Tr. 169), that a salesman came out (Tr. 172), that the salesman came in response to her mailing the card (Tr. 173), and that after a discussion took place, no contract was signed (Tr. 174).

Clay Edmonson, Harrison, Arkansas (Tr. 179-193), testified that he received through the mail a circular from Superior Improvement Company, that his wife detached, filled out and mailed back a card which had been attached to the circular (Tr. 180), that Mr. Collins, a representative of Superior, came to see them, that they signed a contract (CX 11), that he was induced to sign the contract because he received a special price (Tr. 181), that the reason for the special price was that "I would be the first one there in the community to have this, and that he could show it to other people for advertising purposes," that "he did say that it would be a hundred dollars deducted when he sold to someone that had come by and looked at my house," that he never received any such payments (Tr. 182), that Collins said "all the labor was factory trained" (Tr. 183). On cross-examination, the witness testified that Mr. Collins first came to his house and that later Mr. Guziak was there and that "Both of them was there" (Tr. 188), that he was sure about the statement that factory trained personnel would install the siding (Tr. 188). On redirect examination, the witness stated both Guziak and Collins were present when he signed the contract (Tr. 190). On recross-examination, the witness testified that immediately prior to the hearing, the complaint counsel showed him a copy of the complaint which had certain portions marked with an "X," that complaint counsel directed him to read those portions (Tr. 191-192).

Herman D. Thomason, Berryville, Arkansas (Tr. 193-202), testified that he received an advertising circular through the mail from Superior Improvement Company, that his wife tore off a self-addressed return reply card, filled it out and mailed it in (Tr. 194), that "one evening about 6:00 o'clock, why, a Cadillac pulled in the

1270

Initial Decision

hundred dollars certificate, we signed it, and it was a paper just about that square (indicating), and he said we wouldn't get a copy of that, that it would be sent to the company, but our number would be on file with the company, and I told him that night, I said that I had read somewhere that you never—that you sign these things and you never got any money for them, and he said—well, he asked me if I was a Baptist, and I told him no, and he said, 'That's the reason, you haven't got any faith,' and then he went ahead and talked and told me that we would get it, and if they brought someone by and made a sale that we would get the hundred dollars, and if we sold it that we would get a hundred dollars if we made a sale to someone on our own" (Tr. 150-151). Mrs. Tompkins also stated that a neighbor girl was present when Guziak arrived that night and "he said he couldn't talk in front of her because he was giving us a demonstrator price and that he couldn't offer it to everyone like that, and we could understand why he couldn't talk in front of other people, so this little girl went in the bedroom with my daughter" (Tr. 151-152). On cross-examination, Mrs. Tompkins testified that she had "not seen Guziak from the time we signed the contract until today," that "we tried to get them to come out and they wouldn't come" (Tr. 153), that "he didn't bring anyone there either," and that she has never received any bonus payments of one hundred dollars (Tr. 154).

Mrs. Irene Medlin, Conway, Arkansas (Tr. 155-162), testified that she received a circular in the mail and mailed it back to Superior Improvement Company, that Mr. Guziak and Mr. Upchurch came to her house (Tr. 156), that they demonstrated the siding, that she had a corner lot, that Guziak "stated that this would be a good place to have it as a show place and they would like to bring somebody to show it to them so as to induce them to buy the material, and I agreed to that, and they told me I would have a bonus or refund * * * "(Tr. 157), that no one was ever brought around, that she never received any bonus payments, that "factory-trained men would put the job up" (Tr. 158). As an afterthought, the witness stated on direct examination that "I don't know if I stated this before or not, but he did state that if I sold another person on this kind of material that I would get a bonus from it. But I didn't sell anybody and couldn't get anybody to agree to buy it, so, of course, I didn't receive anything from it" (Tr. 159). The witness also stated that "I thought if I got a little reduction to start with, naturally, that would influence me buying." (Tr. 161.) On cross-examination, the witness was asked if she did not make the contract to purchase the

him except through his secretary," and that the work has never been done (Tr. 200).

Mr. Marion L. Hackney, Little Rock, Arkansas (Tr. 202-210), testified that a salesman called upon him, showed him a circular (CX 8), asked him "if he could bring a feller out that night to talk to me about it * * * so he brought, I believe, a Mr. Page," that Mr. Page showed him samples of siding, that he liked it, that "he started figuring," that he told him that the price seemed "pretty high" (Tr. 203), that he also needed a roof, that he [Page] figured in the cost of the roof, and he signed a contract (Tr. 204). The witness also testified that Page and other salesman, in order to induce him to sign the contract, told him that "they had factory-trained mechanics," that "they would give me a hundred dollars for every time I would get a customer, a contract, or give them somebody that they could contact and make a sale, or some prospect that would buy, and I was to get a hundred dollars on each job, either by check * * * or put it on my contract" (Tr. 206), that to his knowledge they never brought any prospective customers to see his house and that he never received any bonus payments of one hundred dollars (Tr. 207). On cross-examination, the witness stated he was positive they told him it would be put on by "factory-trained mechanics" (Tr. 209).

Mrs. Geneva Eloise Long, Little Rock, Arkansas (Tr. 210-220), testified she received a pamphlet in the mail from Superior Improvement Company (CX 13), that she detached a reply card and mailed it in (Tr. 212-213), that Mr. Page and Mr. Kays, salesmen, came to see her as a result of the card she mailed in to Superior (Tr. 213-214), that the reply card was self-addressed to the firm, that the salesmen told her they represented Superior (Tr. 214), that she signed a contract, that before she signed the contract Page told her "that he had just gotten to town, that Mr. Guziak had set up this office here and had purchased all this material and was the local representative, that he was the Little Rock man, and that he had just gotten to town, and I [the witness] was the first person they had contacted, and they were going to take pictures of my house before and after the job was done, and it would be advertised in national magazines, also on television, and also on radio locally, and that I would receive a rebate of \$100 for every job they sold as a result of people seeing my home, and I told them I wanted to think the situation over and they said that I wouldn't have time for it, that they wouldn't have time because there were so many other people who were anxious to do this, and that Mr. Page was not going to be in town, but he was going to leave, and he was the sales repre-

driveway and there was an elder-like feller come up and introduced himself. He was Mr. Collins, and he was coming about this here card, which he had there and handed me * * * the card was sent in," that "he said that Mr. Guziak was there and he would see if he wanted to talk to me, and then they both came back in and we went to talking and he [Guziak] commenced telling me that he really was a religious man and belonged to the Baptist church here in Little Rock (Tr. 195) and, as I kind of have respect for these people, I trusted him, and then he [Guziak] showed me samples and told me all about it. He [Guziak] didn't want to give me no estimate (Tr. 196) but I showed him the plan of my house and he [Guziak] give me an estimate on it, and he told me that he [Guziak] would sell it to me at about a thousand dollars less than cost," that "he [Guziak] said then it would be used as a demonstration house and anybody that come out there and they sold the siding to, that he would pay me a hundred dollars on the deal that we would make," that Guziak said "if we could find it any other place for less money that he would put it in the house free, so we signed the contract" (CX 12), that later he [Thomason] found he could get it considerably cheaper (Tr. 196), that he [Thomason] found he "had been hooked," that he went to the bank to stop payment on the check, but it had been cashed when the bank opened the next morning, that he tried to call Guziak but couldn't reach him, that he talked to Guziak's secretary, but couldn't get a hold of Guziak, that he went to his office to see him, but he [Guziak] was out of town, that Guziak's secretary promised she would reach him and write to the witness, that she did write him, but he never heard from Guziak, so he turned the matter over to the Better Business Bureau (Tr. 197). The witness further testified that Guziak stated that "he was representing this here aluminum which he had the franchise for in this part of the country, * * *. He had the franchise, he said, over this Alcoa Aluminum, and if I got it any other place that it would have to come through him and he would get a cut out of it, and that he was the cheapest that I could buy, * * *." (Tr. 198), that "when I got to checking around, why, I found different," that "he [Guziak] said to say a little prayer, and pray to the Lord and let Him guide us as to whether to sign the contract," that he [the witness] "got suspicious and went and checked the prices," that he "went to an attorney and got his advice," that he "tried to get a hold of Mr. Guziak to tell him that he was off, that he had misrepresented this to me (Tr. 199) but I [the witness] never could get in touch with

of the talking, that they eventually signed a contract (CX 14), that he (the witness) told them he worked for Reynolds Aluminum Company and he wanted to be sure he got Reynolds Aluminum, that they showed him some samples of siding and "it had the Reynolds insignia on the side, on the aluminum, and so I told them that was good enough for me since the insignia was there," that they told him "it would be put on by trained men * * * (Tr. 235), that it was a lifetime product * * * it was guaranteed and it would not chip or anything like that * * * that it would not need painting and would not peel off or anything," that he "could pay for that house, or pay a big lot of it, or help out on it by getting out and showing it, or telling other people about it, and that he would give us a hundred dollars for each one that we caused to be sold," that he and his wife never found any actual customers (Tr. 236). On cross-examination, the witness stated that it was his understanding that the aluminum siding demonstrated by respondent was made from aluminum material manufactured by Reynolds (Tr. 239-240) and that the siding put on his house was the same as the samples he saw (Tr. 240). On re-direct examination, the witness stated he believed the material on his house "is Reynolds aluminum" (Tr. 242).

John A. McClain, Russellville, Arkansas (Tr. 247-254), testified that he received a telephone call from a young lady wanting to know if he was interested in aluminum siding, that he told her he was not, that she asked if she could send a man out to talk to him, that the next day a man named Miller came out (Tr. 248), that Miller stated "he was with the Improvement Company," that he [the witness] told him he was not interested, that Miller "stayed around there 30 or 40 minutes and then left, and so John Guziak came up" (Tr. 249), that Guziak said "'Now, can you pay by the month?' I said I had bought lots of automobiles by the month, and then he said, 'Could you pay \$75.00 a month?' I told him no, that we were living off our social security. Then he said, 'Can you pay \$50.00?' I said that we couldn't. He said then, 'Can you pay \$25.00 then?' I said that we could, and then he went to writing, and at 6% interest, and so went on and wrote the papers and we signed them" (Tr. 250, CX 15). The witness then testified that over the weekend he studied the contract and called Guziak's office to cancel it, that he was unsuccessful, that the next morning Guziak and two workmen came out and started putting the siding on (Tr. 250), after some words and threats, Guziak left and the workmen completed the job (Tr. 251). The witness also testified that before sign-

sentative and the only one who could okay or authorize the contract" (Tr. 215). The witness further testified that Page told her "they were going to put seven salesmen on the job * * * and that if each of them would sell—well, I [the witness] said each ought to sell one job, and Mr. Page said, 'Well, they better sell two because I have a wife and some children who have to eat,' * * * so I [the witness] of course, expected to get some refund or rebate on these houses" (Tr. 216), that "they were going to bring these people by there to see what a pretty job they had done on my house, * * * and, as a result, the people would buy," that she "would get a rebate of a hundred dollars for every job they sold as a result of showing my place," that Page and Kays assured her that she "would get one hundred dollars every time they sold a job" (Tr. 217), that she never received anything and that to her knowledge they never brought anyone by to see her house (Tr. 218). The witness also testified that they told her that "they were going to have factory-trained employees put this work on, and they had two teen-age boys that did it," that she asked the oldest boy "who taught the other one how to do it, and he said his dad was a carpenter and he learned all he knew from him, and he was showing this other boy how to do it (Tr. 218).

T. D. Frazier, Pine Bluff, Arkansas (Tr. 221-225), testified that somebody from Superior Improvement Company came out and offered to put aluminum siding on the house for \$1,500, that he told them it was too much (Tr. 221), that they came back a second time, that he told them he could not pay for it and "the place was not mine * * * that it was my son-in-law and daughter's house" (Tr. 222), that they told him that they "would make a demonstrator out of this house * * * so it would be a better job," that he signed a contract (Tr. 223), that they started work on it, that they got one side pretty well finished and about half way finished on another side, that they wanted him to sign a mortgage, that since he had no deed to the property, he could not sign a mortgage, that the job was left unfinished and remains unfinished (Tr. 222). On cross-examination, the witness could not remember the name of the company.

William R. Oliver, Bauxite, Arkansas (Tr. 232-243), testified that he and his wife received a card in the mail from Superior Improvement Company, that they filled it out and mailed it back to the company (Tr. 234), that an agent for Superior called on them with the card, that the agent asked if he could bring Guziak out to see them and they agreed, that one evening Guziak, accompanied by the agent, called on them (Tr. 234), that Mr. Guziak did most

enough off of it to make these payments, get these payments down * * * (Tr. 285), that Guziak asked if he could pay \$50 a month and he said he could not, that Guziak asked if he could pay \$25 and he said he might be able to, that Guziak said, "Well, we'll just put it at that" and that Guziak put down \$25, that Guziak said, "If you can't pay that, if you don't get enough to pay that, I don't want to make it hard on you and we'll change that and make it where you can make the payments * * *," that Guziak said he could sell enough people around there—that he was satisfied that he had ten houses around there that he could sell right away—that the salesman added, "Why, I believe I can sell 20 in here, 18 or 20," that he [the witness] said, "Well, that would be more than a hundred dollars a house, that would be paying it out," that Guziak said, "Well, if we can make money on your house, we are glad to divide the profits with you * * * if we sell 20 houses, it will pay for your house" (Tr. 287), that Guziak said the \$1,888 was a special price and it should be about \$2,500 or \$2,700, that Guziak told him never to tell anyone that he was letting him have it for that amount, that he signed a contract (CX 17, Tr. 287). The witness also testified that he never received any \$100 payments from respondent and that to his knowledge no one came by to look at the house (Tr. 293-294).

Vernon Gilbert, Little Rock, Arkansas (Tr. 294-304), testified that he received an advertising circular through the mail from Superior Improvement Company, that his daughters detached and mailed in a reply card to get a free set of dishes that was offered, that a Mr. Collins came out and talked to him about siding, that he told him he was not financially able to make the payments, that Collins said, "Well, I believe my boss can arrange that for you * * * my boss is rich, he's got plenty of money that he ain't spent and he is wanting to spend that money somewhere out in here," that Collins returned with Guziak (Tr. 300), that they said he had "a good location and they would like to put siding on our house and show it * * * that with the siding he would put on my house that he could sell enough jobs off my siding there to do my house * * *," that they said, "Now, we will give you a hundred dollars a job, for every job that is sold off your house we will give you a hundred dollars," that they said they would bring prospects out there to sell them the job, that "he ain't brought anyone by there yet to see it in order to sell a job, or even to look at the house" (Tr. 296, 301), that he signed a contract for \$1,958 (RX 1, Tr. 302-303).

Charles H. Treadway, North Little Rock, Arkansas (Tr. 304-313), testified that a man from Superior Improvement Company ap-

1270

Initial Decision

ing the contract Guziak told him "Every time we show a house, or you sell a siding job, I will give you a hundred dollars * * * you can pay for your house that way" (Tr. 251-252), that he has never received any bonus payments (Tr. 254).

Amos Hutcherson, Russellville, Arkansas (Tr. 255-276), testified that he received a telephone call one night from a lady (Tr. 256-57), she identified herself as secretary of the "Sevier Aluminum Company" (Tr. 258), that (after being shown the contract he signed (CX 16)), it was the "Superior Company," that a salesman came to see him three days later (Tr. 260), that the salesman came as a result of the phone call and his indication to the girl that he was interested (Tr. 261), that the salesman returned a second time with his boss, Guziak (Tr. 262), that Guziak told him he [the witness] "could sell 15 or 20 houses there in the neighborhood, because the neighborhood was building up around there around the Arkansas River, and I had lots of friends and I thought I could. He made it sound so good" (Tr. 262), that if the witness sold any he "would get a hundred dollars out of each one," that he never sold a house, that he never tried to sell any because "after I seen I got beat I was too ashamed to try anybody else" (Tr. 263). On cross-examination, the witness stated his complaint was over the financing, although he testified he had read the contract before signing it and understood it was payable either upon completion of the work in cash for \$2,180 or a time payment plan in five yearly installments of \$582 (Tr. 269), CX 16).

Willis O. Threlkeld, Russellville, Arkansas (Tr. 278-294), testified that Superior Improvement Company telephoned him to ascertain if he was interested in siding on his house and to arrange an appointment (Tr. 281), that a salesman from Superior called at his house (Tr. 282), that he and his wife told the salesman they were not interested, that the salesman asked if he could bring his boss to talk to them, that later that day Mr. Guziak and the salesman came to talk to them (Tr. 283), that he told Guziak he was retired and did not have much money, that Guziak measured the house and gave him a price of \$1,888, that he told Guziak he could not pay that much, not even \$500 (Tr. 284), that he had just retired from the Corps of Engineers, did not know the amount of his retirement benefits, had not been paid for 58 days of accrued annual leave yet and was short of funds, that Guziak said, "on account of my house being right in town * * * the main business part of town * * * on the corner * * * if I would let him put it on that he could sell enough and use this house to show people and he could sell

Initial Decision

67 F.T.C.

"We have picked your house as an example for advertising * * * we want to make a real model home out of it * * * we have the main man coming down from Nashville on Sunday * * * this will be the last chance" (Tr. 331), that the salesman returned the next day, Sunday, with a Mr. L. T. Page, that this time Page did most of the talking (Tr. 333) and he said again "this will be your last last chance, and we have picked your house for a model home and it will not cost you one dime * * * I'll take the whole end of West Tennessee and every deal that is sold from Memphis to Brownsville you'll get \$100 deducted from this job until its paid off, then you won't get anything else" (Tr. 331, see also Tr. 333), that Page also said "We've already sold another job and you'll get a check within a week for \$100 and we know almost that we've got another one" (Tr. 333), that he signed a contract (CX 22), that he never heard from the salesman or company again, that he wrote to the company's Nashville address but got no answer, that he sent the company eight prospects' names, that he later sent another letter to the company with 12 prospects' names, but heard nothing from either letter (Tr. 337), that he sent another letter asking why he had not heard and made three long distance telephone calls, but the manager was out each time, that on the last call he left his number and asked the secretary to have the company manager call him, that over 14 months have passed and no one has returned his call (Tr. 338), that to his knowledge no one has ever been brought by the company to see his house and he has never received any \$100 bonus payments (Tr. 339, see also Tr. 342), that under his contract he was supposed to get "genuine Reynolds Aluminum" that he "carried some of the materials to Reynolds Aluminum in Memphis and they did not recognize the material and said it was not theirs" (Tr. 333).

Martin Gregory Bates, Nashville, Tennessee (Tr. 345-353), testified that he first gained knowledge of General Aluminum Company through their advertisement (CX 19; Tr. 345), that he called the telephone number given on the ad, that Guziak and a salesman came out (Tr. 346-347), that Guziak showed him samples of the material (Tr. 348), that they told him "if there happened to be any jobs sold we would receive a reimbursement of \$100 per unit," that he had never received any such payments (Tr. 350), that he signed a contract (CX 23), that to the best of his knowledge no one has ever been brought to see his house (Tr. 351).

Harold Raymond Green, Nashville, Tennessee (Tr. 353-367), testified that he saw General Aluminum Company's ad in the Nashville Tennessean (CX 19), that he telephoned General Aluminum and

1270

Initial Decision

proached him about siding and asked if he could send a Mr. Collins and Mr. Page out to talk to him about a "special deal that they had, because they wanted a house out by Rose City for a model," that he let them come and they brought some samples of siding materials (Tr. 305), that they told him "they would give me a special price and then for each house that they would sell, my house being a model, that they would give me a hundred dollars," that he signed a contract, that after they left he "didn't think it sounded right" (Tr. 306), that he went to the Better Business Bureau and talked to them, that they gave him a pamphlet on Superior to read, that he went to Superior's office to cancel the contract but Guziak was out, that his uncle had a store on the corner across from Superior, that his uncle knew Guziak and arranged to have his contract cancelled (Tr. 307-308). On cross-examination, the witness stated that the Better Business Bureau pamphlet on Guziak indicated he [Guziak] left town before he completed jobs and the owner had to pay the full amount anyway (Tr. 312).

Mrs. Dewey Avriett, Portland, Tennessee (Tr. 317-329), testified that she first gained knowledge of General Aluminum Company through an advertisement which appeared in the Nashville Tennessean, Sunday, April 29, 1962 (CX 19), that she telephoned the General Aluminum Company at the number given in the ad, that she told the girl who answered the telephone that she was interested in aluminum siding (Tr. 323), that a salesman from the General Aluminum Company visited her at her former home in East Nashville, Tennessee, and later returned with Mr. Guziak (Tr. 324), that she and her husband had a long conversation with Guziak and the salesman, that Guziak said, "that this aluminum was the best material, made by Reynolds and Alcoa" (Tr. 325), that he (Guziak) said he would use their home in Portland, Tennessee, for "a model for others to see and a sample that they would sell, other aluminum siding for other houses, from that deal," that she "would be paid \$100 for every house that was handled and having siding put in as a result of seeing that house" (Tr. 326), that she signed a contract (CX 21) that she has never received any \$100 payments and to her knowledge no one has ever been brought around to look at the house (Tr. 327-328). On cross-examination, the witness stated her complaint was that she did not get the material or workmanship that was represented to her and the price was too high (Tr. 328).

Harry Albert Fite, Brighton, Tennessee (Tr. 329-345), testified that a salesman for General Aluminum Company came into his store on Saturday afternoon (Tr. 330), that the salesman said,

Initial Decision

67 F.T.C.

place," that he [Guziak] had taken a picture of it, that he [Guziak] would bring people around and show it and for every job he [Guziak] sold he would pay him \$100, that no one was ever brought around and he has never received any bonus payments (Tr. 381), that he signed a contract (CX 26).

Mrs. Homer Hendrix, Dyersburg, Tennessee (Tr. 453-459), testified that she received a pamphlet through the mail from General Aluminum Company (Tr. 453), that she detached a card and mailed it back to General Aluminum Company, that a representative of the company came to her home (Tr. 454), that he returned the next Sunday with a Mr. Klein, that they asked if they could use her house as a model, that they told her she would "receive \$100 for each house that was finished in Dyersburg" and that she "would get \$100 for each name that she sent in," that she did send in some names, that one of the persons whose name she sent in did put on the siding, that she never received the \$100, that she wrote and asked about it, but they told her they had no record of her sending the name in (Tr. 455), that a representative of the company once brought some people to look at her house, but she has never received any bonus payments (Tr. 456), that she and her husband signed a contract (CX 31).

Lottie Lovell, Medina, Tennessee (Tr. 461-466), testified that she was first contacted by a salesman for General Aluminum Company (Tr. 462), that he arranged to bring Guziak to talk to her and her husband, that Guziak came to see them (Tr. 463), that they couldn't afford the siding, but were persuaded by the statements of Guziak that they "might get some help by using it as a model house and by other people seeing our house" and they could get a discount off of theirs (Tr. 464), that they were told by Guziak that they "would get \$100 each time that it was sold for another house," that they never received any compensation (Tr. 465), that they signed a contract (CX 32).

On cross-examination, respondent's counsel asked:

Q. Now, isn't it true that Mr. Guziak told you that you shouldn't rely on this, that you might receive one or that you might receive several, or you might receive not any, depending on whether or not there was any sales made, either on leads from the company or leads that came from the house and using the house as a demonstration. Now, isn't that a true statement.

A. Yes, he said it was going to be used as a demonstration. Now, he didn't tell me definitely. I mean, he didn't guarantee any of this would be put on, but, as I said, the way he told me about it, that was one of the things that swayed me toward buying it. I didn't mean that he guaranteed me any payments on it, you know. That's what I meant (Tr. 466).

1270

Initial Decision

told the woman he was interested (Tr. 354), that the "special discount prices" featured in the ad appealed to him (Tr. 355), that later a salesman from the company came out and set up an appointment for Guziak (Tr. 356), that Guziak and the salesman came to his house a few nights later, that they brought with them samples of aluminum siding and terox (fiberglas) stone (Tr. 357), that they stated the aluminum siding was of high quality and made by an out-of-State manufacturer (Tr. 360), that they also stated his house had been selected as a model for display purposes and he was the only one in the area to be given a special "factory discount" and would also receive a bonus of \$100 for each customer that was sold after seeing his house (Tr. 361), that no one was brought to see his house and he has never received any bonus payments (Tr. 361-362), that he signed a contract (CX 24).

James G. Kent, Gallatin, Tennessee (Tr. 368-375), testified that he received an advertising folder through the mail from General Aluminum Company, that he tore off, filled out and mailed in a reply card to the company, that a salesman from the company came to his house and made an appointment for Guziak to come out (Tr. 369), that Guziak and the salesman returned about 6 o'clock the same day, that they brought samples of aluminum siding and demonstrated its qualities (Tr. 370), that Guziak made him a price and told him that it "was a wholesale, or advertising price, that would be published over television and radio and newspapers for advertising purposes and if anybody came to look at that house and bought aluminum siding from seeing that house that I would be given \$100 for each one that was sold" (Tr. 371), that he signed a contract (CX 25), that the workmanship on the job was poor (Tr. 371-372), that no one came by to look at his place and he has never received any payments (Tr. 372). The witness also testified that when the salesman originally contacted him, he told him that "Guziak was partly interested in that factory that made that aluminum siding and that's where he was coming from that particular day," that they told him "that there would be some experienced people to put that siding on" (Tr. 373).

Odell Woodall, Portland, Tennessee (Tr. 376-381), testified he received a card through the mail from General Aluminum Company, that he filled it out and returned it, that a few days later Guziak came out and demonstrated the aluminum siding (Tr. 377), that Guziak said the siding would be put on by trained mechanics (Tr. 378), that Guziak told him he wanted to use his house as a "show

Initial Decision

67 F.T.C.

nolds Aluminum, that Ruse said he would give him a "special deal," that Ruse stated he was getting five homes to use as samples, that the "special deal" was only offered for that week (Tr. 528, 536), that Ruse promised to use his house as a model home, that "he [Ruse] would pay \$100 for everybody that looked at it" (Tr. 531, 536), that no one ever came to look at his house (Tr. 536), that he signed a contract (CX 43) that the siding put on his house was not the same as the sample he was shown (Tr. 535).

On cross-examination, the witness stated that complaint counsel had given him, earlier that morning, a copy of the complaint in this matter to look over before testifying.

John C. Spurlin, Hopkinsville, Kentucky (Tr. 542-549), testified that he and his wife received a card through the mail from General Aluminum Company (Tr. 543), that they mailed in the attached reply card to General Aluminum (Tr. 544-545), that Mr. G. G. Ruse from General Aluminum came to their house (Tr. 545), that Ruse showed them samples, that Ruse told them he would give them a "special deal" if they would let him use their house as a model, that he said he would take pictures of it for use on TV and in newspaper advertisements, that they "would receive \$100 for each house that was sold," that Ruse said these payments would help offset their cost on it, that their house was never advertised on TV or in the newspapers, that they never received any \$100 payments (Tr. 546), that they signed a contract (Tr. 547), that no one ever came by to look at their house (Tr. 548).

Thomas Glass, Pembroke, Kentucky (Tr. 550-563), testified that he received a postcard from General Aluminum Company through the mail, that his daughter detached and mailed back the reply card, that a salesman from the General Aluminum Company came to his house (Tr. 554), that the salesman left and returned later in the day with Guziak (Tr. 555), that Guziak said he would take pictures of the house, advertise it on TV and radio, and "if there is any sold in your community or in the surroundings here, why, you will get paid \$100 on your payments and that will lower your payments, it will eventually take care of your putting it on" (Tr. 556), that Guziak said he had responsible men to put the siding on, but "it is coming off" (Tr. 556), that he has never received any \$100 payments (Tr. 560), that he signed a contract (CX 44).

On cross-examination, the witness testified that just prior to signing the contract he had been in the hospital (Tr. 560), that at the time Guziak came he was taking medicine which made him groggy (Tr. 562), and that he could not "remember clearly everything that was said, or exactly anything that they said" (Tr. 562).

Mrs. Grady Parimore, Covington, Tennessee (Tr. 467-476), testified she first noticed an advertisement of General Aluminum Company (Tr. 468), that she answered the advertisement (Tr. 469), that a salesman from the company came to her house with the card she had sent in, that he showed her samples of aluminum, that he asked to return when her husband was home (Tr. 470), that the original salesman, Mr. Miller, and a Mr. Page returned, that they told her and her husband the job might not cost them a cent because they had a corner lot, that they told them they wanted to use the house as a sample house, that Page said that for every other house that the company put the siding on they would get \$100, that in the long run, they said it would not cost them anything (Tr. 471), that they signed a contract (CX 33), that Miller and Page also said they would take pictures before and after the siding was put on, that the pictures would be used in television and newspaper advertising, that Mr. Page said, "Well, I know where Mr. Miller can get two houses here in this town * * * since I do know that I'll take \$200 off right now and we will reduce this \$200," that they have never received any other \$100 payments (Tr. 472), that Page and Miller told them that factory-trained employees would put the siding on (Tr. 473).

On cross-examination, the witness stated that before testifying complaint counsel gave her a marked copy of the complaint in this matter and asked her to read paragraph 4, subparagraphs 1 to 9 of the complaint which set forth the nine misrepresentations alleged in the complaint (Tr. 474-476).

Robert Armstrong, Dyersburg, Tennessee (Tr. 476-480), testified that he received an advertising folder in the mail from General Aluminum Company, that he filled it out and mailed it in, that a salesman from General Aluminum Company came to his house (Tr. 477), that the salesman returned that night with a Mr. Miller, that Miller told him he was getting a bargain (Tr. 478), that Miller said, "Well, now, Mr. Armstrong, every job you get me I'll give you \$100 off of your job," that he signed a contract, that he called the company in Nashville and gave the girl several names, that he called her back several times, but they never did check on the leads, that the girl finally told him, "Just don't call back anymore. We are not interested," that he quit calling and never has received any payments (Tr. 479).

Robert E. Frommel, Hopkinsville, Kentucky (Tr. 527-542), testified that Mr. Ruse, a salesman for General Aluminum Company, called upon him at his home, that he showed him samples of Rey-

Initial Decision

67 F.T.C.

Based upon the foregoing oral and written representations, the examiner finds that the respondent has directly and by inference represented that he is a manufacturer of siding materials.

Respondent Guziak is not and never was a manufacturer of siding materials (Tr. 39, 44, 67-68, 502).

17. Respondent, in his advertising, has represented as follows (CX 19):

ALUMINUM SIDING
by
ALCOA
KAISER
REYNOLDS

As found above, respondent is not a manufacturer of siding materials and, as previously found in Finding No. 5, purchases aluminum siding from U. S. Aluminum Siding Corporation, Franklin Park, Illinois. The aluminum siding materials used by respondent are not manufactured by Alcoa, Kaiser or Reynolds (Tr. 502).

18. Reading together the language quoted in Findings Nos. 16 and 17 which appeared in close proximity in respondent's ad (CX 19), the examiner finds that there exists a reasonable inference that respondent represented that he was connected with or affiliated with Reynolds, Kaiser or Alcoa. In truth and in fact respondent is not now nor has he ever been connected or affiliated with these companies (Tr. 518). At best, the record shows that some of the aluminum *siding* manufactured by U. S. Aluminum Siding Corporation was made of Reynolds aluminum (Tr. 235, 239-41, 325 and 576-77; RX 3 and 4).

19. Many of the aforesaid 32 witnesses testified that respondent or his representatives represented to them that the siding materials would be applied by factory trained workmen (Tr. 158, 183, 206, 218, 235, 378, 473). Respondent, in his advertisement, also represented that he used "Factory Trained Installers" (CX 19). The record clearly shows that the men who applied the material for respondent were not factory trained men, but were carpenters recruited in the cities where respondent did business (Tr. 218, 226). Two of respondent's workmen, Fred McEwen and John Carr, testified that they were journeymen carpenters and had had no factory training (Tr. 227, 232). Several of the customer-witnesses testified that the workmanship was poor and corner pieces had fallen off (Tr. 327, 334, 371, 557, 568). The only evidence respondent Guziak offered on this point was that some of the men told him they had had factory training (Tr. 503), but he never attempted to verify their statements (Tr. 503-04). Based upon the foregoing testimony,

Nora Glass (Mrs. Thomas Glass), Pembroke, Kentucky (Tr. 564-570), took the witness stand, but before she began her testimony respondent's counsel objected to her holding a marked copy of the complaint in her hands, which was sustained and the copy of the complaint was removed from her possession. The witness then, after some hesitancy, identified Mr. Guziak as the man who came to their house and spoke to them about aluminum siding (Tr. 565-566), the witness testified that Guziak told them "that they would make a picture of the house and they would show it on TV and if there was a house, you know, by showing this, if somebody else put the siding on their house, it would be \$100 off of ours, and the main reason why I signed it is because he was sick and the doctor did not want him to be worried" (Tr. 567), the witness further testified that Guziak "said that the man that would put it on there would know what he was doing, but really he didn't and he made a big mess" (Tr. 568).

15. The examiner, based upon his observation of the 32 customer-witnesses, finds that their testimony is frank, reliable, and credible. The examiner, based upon his observation of respondent and his study of the entire record, also finds that Guziak's testimony is less than candid, evasive, and contradictory and consequently must reject it. Accordingly, the examiner finds that the respondent did make representations that prospects' houses would be used by respondent for demonstration purposes, that for such use the prospective purchaser would receive a special discount price from respondent's usual and regular price, that for each house sold, as a result of its use by respondent as a demonstrator, the purchaser would receive a bonus of one hundred dollars and that purchasers would receive enough bonus money to offset the cost of their siding job. The examiner also finds that respondent did not use these prospects' houses for demonstration purposes, respondent did not make bonus payments as represented, respondent did not offer special discount prices as represented and purchasers did not receive enough bonus payments to offset the cost of the siding job.

16. Respondent or his representatives represented that they were selling at factory prices (Tr. 128, 361), or at cost (Tr. 96). Respondent's advertising read in part as follows (CX 19):

THIS IS A DIRECT-TO-YOU
OFFER AT TOP SAVINGS!
Direct to you! A factory executive
will present this fabulous offer!
The choice is yours! The chance is
now!

respondent has directly or indirectly represented that the said siding materials are fully and unconditionally guaranteed. Respondent's ad and oral representations do not disclose that his guarantee is limited to the workmanship in applying the siding. Moreover, even in this respect, he has failed fully to perform. Accordingly, the examiner finds that respondent does not clearly disclose a) the nature and extent of the guarantee, b) the manner in which the guarantor will perform, and c) the identity of the guarantor.

23. The respondent's statements and representations as found above in paragraphs 13, 14, 15, 16, 17, 18, 19 and 22 relating to the claims:

(1) That persons who allowed the siding materials installed by respondent to be used for model home demonstration purposes would receive,

(a) a special discount price from respondent's usual and regular price, and,

(b) a bonus of \$100 for each sale made by respondent as a result of using that person's home as a model.

(2) That purchasers can be assured of receiving enough bonus money from the use of their home as a model to offset the cost of their siding job.

(3) That respondent is a manufacturer of siding materials and consequently can offer such materials at lower prices.

(4) That aluminum siding materials sold by respondent are manufactured by Alcoa, Kaiser or Reynolds Aluminum Company.

(5) That respondent is connected or affiliated with Reynolds Aluminum.

(6) That respondent's siding materials are applied by factory trained installers.

(7) That the application of siding materials by the respondent is unconditionally guaranteed.

were false, misleading and deceptive.

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

25. The annual dollar volume of business of Superior Improvement Company for each of the years 1963 and 1964 was approxi-

1270

Initial Decision

the examiner finds that respondent represented that the workmen who applied his siding were factory trained, but many of said workmen are not factory trained.

20. Many customer-witnesses testified that respondent or his representatives represented that the aluminum siding sold by respondent would never need any painting and would never require maintenance (Tr. 216, 236, 370, 465, 474, 549). The brochures likewise contained this representation (CX 8 and others). The record contains no substantial evidence that these representations are untrue. At best, the record shows two witnesses testified that merely hosing the aluminum siding down with water will not readily clean it (Tr. 557, 568). Typical of the comments of the witnesses regarding the respondent's materials and workmanship was the testimony of Mrs. Grady Parimore, who said:

The material is holding up all right. The job is not. (Tr. 474).

21. Similarly, respondent or his representatives represented that the simulated stone siding sold by respondent would never chip or crack, would never require maintenance and is completely fireproof (Tr. 99, CX 19). The record contains no substantial evidence that these representations are untrue.

22. Many customer-witnesses testified that respondent or his representatives represented that the "aluminum was guaranteed for life" (Tr. 99, 117, 128, 150, 236, 534, 549). Respondent's newspaper advertisement read, "Lifetime Guarantee" (CX 19). The only guarantee given by respondent is that contained in the form contract signed by the witness-customer (CX 1, 3, 5, 9, 10, 11, 12, 14, 15, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 43, 44 and RX 1) which reads in pertinent part as follows:

On or in the building at the above Job address, SUPERIOR IMPROVEMENT CO. agrees to furnish and install the following materials and GUARANTEES to do the work in a workmanlike manner in accordance with standard practices, and not to use any factory reject, factory seconds, or sub-standard materials.

Respondent admits that he only guarantees the workmanship (Tr. 505-6), and that, if specifically requested, he would provide the customer with the manufacturer's written guarantee (Tr. 607-9, RX 9, 10).

Several witnesses testified that due to the unworkmanlike application of the siding material, the corners were falling off, but either they could not contact respondent or if they did, he failed to keep an appointment to fix the job (Tr. 327, 556). By and through the use of the aforementioned advertising and oral representations,

ent also placed advertisements of his siding materials in publications with an interstate circulation.

It is well settled that "intercourse or communication between persons in different States, by means of correspondence through the mails, is commerce among the States within the meaning of the Constitution, * * *." *International Textbook Co. v. Pigg*, 217 U.S. 91, 107 (1910). This has also been held to include trade in news and the circulation of newspapers across State lines. *Associated Press v. United States*, 326 U.S. 1; *Mabee v. White Plains Publishing Co.*, 327 U.S. 178; see also denial of interlocutory appeal *In the Matter of S. Klein Department Stores, Inc.*, Docket No. 7891, November 18, 1960 [57 F.T.C. 1543].

The Federal Trade Commission only recently expressed its views on this subject *In the Matter of Gadget-of-the-Month Club, Inc.*, Docket No. 7905, July 31, 1963 [63 F.T.C. 1138, 1156, 1157], wherein it said:

The scope of federal power to regulate interstate commerce will never be such as to make it an easy matter to formulate and expound nice compact definitions into which all cases fit. See *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 550-551 (1944). In an economy such as ours with businessmen free to follow the dictates of their own ideas it is sure that new commercial practices unlike any that were known before are bound to make their presence felt. It is for just such unknown eventualities that the commerce power must be comprehensive enough to fit any new situation as it arises. *United States v. South-Eastern Underwriters Association*, *supra* at 551; *Wickard v. Filburn*, 317 U.S. 111, 120 (1942).

There is no question but that, "Interstate communication of a business nature, whatever the means of such communication is interstate commerce regulable by Congress under the Constitution." *Associated Press v. NLRB*, 301 U.S. 103, 128 (1937). In any case where, as here, "the mails and the instrumentalities of interstate commerce are vital to the functioning * * *" of a business enterprise, there can be no doubt of our jurisdiction under the Act. *North American Co. v. SEC*, 327 U.S. 686, 694-695 (1946).

In *Progress Tailoring Co. v. Federal Trade Commission*, 153 F. 2d 103 (7th Cir. 1946), circulars were sent by mail falsely representing that free clothing would be given to salesmen who accepted employment with the respondent. Our finding of jurisdiction was sustained, the court holding that the passage of information from one state to another was a transaction in interstate commerce. 153 F. 2d at 105. See also *Federal Trade Commission v. Civil Service Training Bureau*, 79 F. 2d 113, 114 (6th Cir. 1935). *Bernstein v. Federal Trade Commission*, 200 F. 2d 404 (9th Cir. 1952), involved a respondent in the business of seeking out absconding debtors. Solicitors traveled in several states seeking to get creditors to execute a contract assigning past due accounts for collection. These contracts were mailed to the respondent, who then used the mails to locate the defaulting debtors. The court had no trouble in reaching the conclusion that, " * * * The [respondent] regularly uses the channels of interstate communication. His activities, while not trade in the ordinary sense,

mately \$400,000 (Stipulation, Tr. 313). General Aluminum Company did approximately 475 jobs in Tennessee between 1960 and November 1962. Superior Improvement Company did approximately 450 jobs in Arkansas during 1963-1964 (Tr. 638-639).

26. In the conduct of his business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of aluminum and simulated stone home and building siding materials of the same general kind and nature as that sold by respondent (Ans. para. 6).

27. In the course and conduct of his business, (1) respondent has caused significant quantities of his siding materials, when sold, to be shipped from his warehouse in Nashville, Tennessee, to purchasers located in and around Hopkinsville, Kentucky; (2) respondent, as an integral and important part of his business, has used the United States mails to solicit business, obtain important leads to prospective customers and induce substantial sales of his siding materials by disseminating brochures depicting his siding materials from Medford, Wisconsin, to addresses in Tennessee and Arkansas and receiving replies thereto on detachable cards self-addressed to Medford, Wisconsin; and (3) respondent, through the use of newspaper advertising in a Nashville, Tennessee, newspaper having a substantial interstate circulation, particularly in Kentucky, has published statements and representations designed and intended to induce sales of his siding materials. By the aforesaid means in the course and conduct of his business, respondent has been engaged in commerce, as "commerce" is defined in the Constitution and in the Federal Trade Commission Act.

DISCUSSION

Respondent urges that he "has not or is not engaging in interstate commerce," that he "has never made a sale in commerce and most all that can be said is that an overzealous salesman of a corporation of which respondent was president, without authority, entered into contracts for three jobs in another State."

As set forth above in findings numbered 8 and 27, respondent shipped significant quantities of his siding materials from his warehouse in Nashville, Tennessee, to three or four purchasers located in and around Hopkinsville, Kentucky. In addition, respondent disseminated brochures through the United States mails to obtain important leads to prospective customers. The initial leads, of necessity, constitute a vital and important link in respondent's activities without which there would have been no transactions at all. Respond-

Opinion

67 F.T.C.

(3) Respondent manufactures the siding products which he sells.

(4) Aluminum siding materials sold by respondent are manufactured by Alcoa, Kaiser or Reynolds Aluminum Company or misrepresenting in any way the identity of the manufacturer or the source of any of respondent's products.

(5) Respondent is connected or affiliated with Reynolds Aluminum Company, or that respondent is connected with any business concern or organization with which respondent is not so connected or affiliated.

(6) Respondent's products are applied by factory trained personnel.

(7) Respondent's products are unconditionally guaranteed when there are any conditions or limitations to such a guarantee.

(8) Using the word "Lifetime" or any other term of the same import in referring to the duration of a guarantee of a product without clearly and conspicuously disclosing the life to which such reference is made; or representing, in any manner, that the duration of a guarantee is other than respondent can affirmatively establish is the fact.

(9) Any of the respondent's products are guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

OPINION OF THE COMMISSION

JUNE 28, 1965

By REILLY, *Commissioner*:

By its complaint issued on January 20, 1964,¹ the Commission charged respondent with a variety of false and deceptive practices in the advertising and sale of aluminum siding and simulated stone siding. After hearing the testimony of over twenty of respondent's customers, the hearing examiner issued an order sustaining all the charges in the complaint except the charge pertaining to simulated stone siding. Respondent has appealed this decision.

Initially, the claim is made that the respondent is not engaged in commerce and that the proceeding is not in the public interest. Further, respondent asserts that the examiner's decision was "not supported by the weight of the reliable and probative evidence." More specifically, according to respondent, the evidence proved that

¹ Incorrectly shown as January 30, 1964, in the initial decision.

1270

Initial Decision

are a species of commerce and constitute commerce within the meaning of that term as used in the Constitution and in the Federal Trade Commission Act." 200 F. 2d at 405. See *Rothschild v. Federal Trade Commission*, 200 F. 2d 39, 42 (7th Cir. 1952), *cert. denied*, 345 U.S. 941 (1953), recognizing our jurisdiction when the mails are used as a conduit for deception.

It is concluded, therefore, on the basis of the evidence as found that respondent is, or has been during times material to the complaint, engaged in commerce, within the meaning of the Constitution and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44 (1958).

CONCLUSIONS

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

2. The Federal Trade Commission has jurisdiction of and over respondent and the subject matter of this proceeding.

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

4. The public interest requires the issuance of an order to cease and desist to prevent a recurrence of the activities herein found to be illegal.

ORDER

It is ordered, That respondent, John A. Guziak, individually or through any agent, representative, agency or other instrumentality, in connection with the offering for sale, sale or distribution of aluminum and simulated stone home and building siding materials or any other similar products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

(1) Any saving or discount is afforded purchasers or a special or reduced price is granted by respondent, unless such saving, discount or special prices constitutes a reduction from the price which respondent usually and regularly charged for the materials and their application in the recent regular course of his business.

(2) Respondent will pay a bonus, commission or any other compensation to purchasers or prospective purchasers on sales made as a result of demonstrating or advertising the purchaser's or prospective purchaser's house or building.

plication that he will * * * pay a bonus, commission or any other compensation to purchasers or prospective purchasers on sales made as a result of demonstrating or advertising the purchaser's or prospective purchaser's house or building."

In regard to this practice, the record shows that respondent told customers that:

(1) In attempting to sell siding to other prospective purchasers he would show these prospective purchasers the customer's house, and

(2) If as a result of this showing, the prospective purchaser bought respondent's siding, then a bonus would be given to the customer owning the model home.

All but one of the witnesses stated that no one ever came to look at their homes. Further, they all testified that no bonuses were received. On the other hand, respondent Guziak testified that he had made bonus payments; none of the alleged recipients, however, were called to the stand by him. Respondent also argued that "The hearing examiner did not find any instance where the bonus payments were actually *earned* and not paid." (Emphasis added. Resp. Brief p. 11). Perhaps under other circumstances we might be forced to decide the issue of casuality. Here, however, the examiner credited testimony that respondent not only did not pay the bonuses, but never even bothered to show the houses. We find no reason to disturb that factual finding.

And, because on this record the failure to fulfill the promise to display the customer's home prevents any possibility of bonuses being *earned*, we have revised Paragraph (2) of the order, as set out below, to prohibit both deceptive practices.

2(a) Respondent will bring prospective customers to see the purchaser's "model home"; or that respondent will call on prospective purchasers referred to him by his customers.

(b) Respondent will pay a bonus, commission or any other compensation to purchasers or prospective purchasers on sales made as a result of demonstrating or advertising the purchaser's or prospective purchaser's house or building.

We have also slightly modified the language in Paragraph (8) of the order, and as so modified the order² is affirmed.

² We note that respondent seems to find some inconsistency between Paragraphs (3), (4) and (5) of the order. But there is nothing contradictory in prohibiting respondent from representing (1) that it is a manufacturer of the *finished aluminum siding*; (2) that *the materials from which the siding is made* were in turn manufactured by Alcoa, Kaiser or Reynolds; and (3) broadly claiming that it is affiliated with Reynolds or any "organization with which respondent is not so connected or affiliated."

the responsible parties were the corporations involved, not Mr. Guziak, as an individual. Therefore, the corporations should have been joined in the complaint as separate entities. And, the examiner is said to have made an erroneous ruling in not recalling "certain witnesses after it was learned previous witnesses had been shown Federal Trade Commission confidential investigator's report * * *." Finally, error is alleged in not allowing into evidence a letter from the Memphis Better Business Bureau to the Washington Better Business Bureau.

After carefully examining the record in this matter, we affirm the examiner's findings that respondents were engaged in commerce; that the examiner's decision is supported by the weight of the reliable and probative evidence; and that the proceeding is in the public interest.

The complaint names Guziak, trading as General Aluminum Co. and Superior Improvement Co. The order is against Guziak "individually or through any agent, representative, agency or other instrumentality * * *." The record completely justifies such an order. For respondent Guziak is shown by this record to be the prime mover behind the false and deceptive practices proven on this record. There is no question that "respondent Guziak is president of both corporations (General Aluminum Co. and Superior Improvement Company), sole owner of all the stock of each corporation and formulates, directs, manages and controls the policies, acts and practices of the two corporations" (I.D. p. 1276). So we find no fault in the complaint's failure to join the corporations separately, or in the order being limited to Mr. Guziak's activities "individually or through any agent, representative, agency or other instrumentality * * *." To hold otherwise would be to elevate form over substance.

The relevance of the letter from one Better Business Bureau to another is questionable at best. And it is clear that its presence or absence in the record would neither prejudice respondent nor change the result of this case.

Finally, the hearing examiner specifically indicated that little weight would be given to the testimony of witnesses whose memories were refreshed by showing them investigative reports. Moreover, we have given no weight to the testimony of these witnesses. In our opinion, the record, even without any of the allegedly questionable testimony, clearly supports the examiner's findings of fact.

One aspect of the order, however, does trouble us. Paragraph (2) thereof prohibits respondent from representing directly or by im-

Complaint

67 F.T.C.

(6) Respondent's products are applied by factory trained personnel.

(7) Respondent's products are unconditionally guaranteed when there are any conditions or limitations to such guarantee.

(8) Using the word "Lifetime" or any other term of the same import in referring to the duration of a guarantee of a product without clearly and conspicuously disclosing the life to which such reference is made; or misrepresenting, in any manner, the duration of a guarantee.

(9) Any of the respondent's products are guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

It is further ordered, That the initial decision and order, as modified, be, and hereby are, adopted as the decision and order of the Commission.

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