

IN THE MATTER OF
INTER-STATE BUILDERS, INC., ET AL.

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

Docket 8624. Complaint, May 14, 1964—Decision, July 28, 1967

Order requiring a Cincinnati, Ohio, distributor of aluminum and insulated siding products to cease misrepresenting that a customer's house will be used as a model, that its salesmen are factory representatives, that its prices are reduced, and that its products are guaranteed.

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 Inter-State Builders, Inc., a corporation, and Milton S. Gottesman, individually and as a director of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Inter-State Builders, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 1902 Dana Avenue, Cincinnati, Ohio.

Respondent Milton S. Gottesman is a director of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of aluminum and insulated siding products to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of Ohio to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, and substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of respondents' products, respondents' salesmen or representatives have represented, directly or indirectly, in oral solicitations to prospective purchasers:

1. That the homes of prospective purchasers have been specially selected as model homes for the installation of respondents' siding, that after installation such homes would be used as points of reference for advertising purposes by respondents and that as a result of allowing their homes to serve as models, purchasers would receive special or reduced prices for respondents' products and/or commissions from sales made to other buyers who purchased respondents' products after observing the model home in respondents' advertising.

2. That respondents' salesmen or representatives were special representatives from the factory, thereby implying that purchasers would be dealing directly with the manufacturer.

3. That respondents' salesmen or representatives were representatives of United States Gypsum Company.

4. That respondents' products are "guaranteed" or "unconditionally guaranteed," thereby representing that said products are guaranteed in every respect for an unlimited period of time.

PAR. 5. In truth and in fact:

1. The homes of prospective purchasers were not specially selected as model homes, and respondents never intended to use, nor did they use, purchasers' homes as points of reference for advertising purposes. In addition, respondents did not give special prices or discounts to purchasers who agreed to have their homes used as models, and purchasers did not receive commissions on sales due to the fact that respondents never advertised the "model homes."

Complaint

72 F.T.C.

2. Respondents' salesmen or representatives are not factory representatives, and purchasers do not deal directly with the manufacturer of such products, but with respondents.

3. Respondents' salesmen or representatives are not representatives of United States Gypsum Co.

4. Respondents' products are not guaranteed in every respect nor are they guaranteed for an unlimited period of time.

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

PAR. 6. Further, in the course and conduct of their business, respondents have made certain statements and representations with respect to their products in direct mail circulars. Among and typical of such statements and representations are the following:

Special Money-Saving Offer
Tremendous Savings
Save up to 50% on materials.

PAR. 7. Through the use of the aforementioned statements, and others similar thereto, not specifically set out herein, respondents have represented, directly or by implication, that they were conducting a special sale and that the prices of the advertised products constituted a reduction from the actual bona fide prices at which such products had been offered to the public on a regular basis for a reasonably substantial period of time in the recent, regular course of respondents' business, and that savings were thereby afforded to purchasers.

PAR. 8. In truth and in fact, respondents were not conducting a special sale and the prices of the advertised products did not constitute a reduction from the actual bona fide prices at which such products had been offered to the public on a regular basis for a reasonably substantial period of time in the recent, regular course of respondents' business, and savings were not thereby afforded to purchasers.

Therefore, the statements and representations set forth in Paragraphs Six and Seven hereof are false, misleading and deceptive.

PAR. 9. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of aluminum and insulated siding products of the same general kind and nature as those sold by respondents.

PAR. 10. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has

had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

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

Mr. Thomas J. Whitehead, and Mr. John T. Walker supporting the complaint.

Mr. James L. Ostrander, Cincinnati, Ohio, and Mr. G. Duane Vieth, Mr. James F. Fitzpatrick, and Mr. Richard B. Sobol of Arnold, Fortas & Porter, Washington, D.C., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

SEPTEMBER 9, 1966

The complaint in this proceeding, issued by the Federal Trade Commission on May 14, 1964, and amended at the hearing on the record, alleges that Inter-State Builders, Inc., a corporation, and Milton S. Gottesman, individually and as a director of said corporation, hereinafter called respondents, violated the provisions of the Federal Trade Commission Act by making false and deceptive statements and representations both orally and in newspaper advertisements and other printed advertising material in connection with the sale of aluminum siding and other home improvement materials to the public.

Respondents answered and denied the substantial allegations of the complaint. Thereafter, a hearing was held in Cincinnati, Ohio, at which time oral testimony and documentary evidence were offered in support of and in opposition to the allegations of the complaint. Proposed findings of fact and conclusions of law were filed by respective counsel.

Thereafter, on January 21, 1965, the hearing examiner issued an initial decision finding that the allegations of the complaint had been sustained and that respondents had violated Section 5 of the Federal Trade Commission Act. Respondents were ordered to discontinue their false pricing, savings, guarantee, and affiliation claims to sell aluminum siding or other products.

Respondents appealed to the Commission from this decision, urging, among other grounds, that the hearing examiner erred in refusing to make available to respondents' counsel for cross-examination and impeachment purposes interview reports prepared by Commission investigators which recounted their prior interviews with consumer witnesses who testified at the hearing in support of the allegations of the complaint.

Upon consideration of the appeal, the Commission vacated said initial decision and remanded the matter to the hearing examiner to:

- (1) examine the interview reports made with respect to each of the witnesses (other than Milton S. Gottesman) called by counsel supporting the complaint to determine whether such reports contain pre-hearing statements which should be made available to respondents' counsel under the "Jencks rule" as described in the Commission's opinion dated April 22, 1966 [69 F.T.C. 1152];

- (2) deliver to respondents' counsel any of such reports or portions thereof found by him to be statements within the meaning of the "Jencks rule" and to be relevant for the purposes of cross-examination;

- (3) if requested by respondents' counsel, reconvene the hearing-in-chief to permit respondents' counsel to utilize such reports or portions thereof for the purpose of cross-examining any of such witnesses whom respondents' counsel requests be recalled for such purpose; and

- (4) issue a new initial decision which should include specific findings with respect to the issues presented on this remand.

Thereafter, pursuant to said order of remand, the hearing examiner scheduled a hearing for August 15, 1966, at which hearing counsel supporting the complaint was requested to produce the original or an exact copy of the investigation report made by the Commission investigator of his interview with each of the eighteen consumer witnesses who testified at the original hearing in support of the allegations of the complaint.

Accordingly, a hearing was held on August 15, 1966, in Washington, D.C. At said hearing counsel supporting the complaint produced what he represented as being authentic copies of each of the eighteen investigation field reports made by the Commission investigator. The hearing examiner examined each of said reports "in camera" to determine whether any or all of said reports contained "Jencks statements" as enunciated in the majority opinion of the Commission issued on April 22, 1966 [69 F.T.C. 1152].

After examining each of said reports, the hearing examiner announced on the record that he was able to determine from the face of each report that it did not contain a "Jencks statement," but was a mere summary of the investigator's interview with the witness. The hearing examiner then stated that he would prepare and issue a new initial decision which would embody findings of fact and conclusions of law based upon the record made at the original hearing as well as his examination of the eighteen investigation field reports. Respective counsel have informally advised the hearing examiner that they each waive the refile of proposed findings of fact, conclusions of law, and proposed order based upon the hearing held in Washington, D.C., on August 15, 1966.

Upon the basis of the entire record, the undersigned hearing examiner makes the following findings of fact and conclusions of law, and issues the following order:

FINDINGS OF FACT

1. The respondent Inter-State Builders, Inc., is a corporation organized and doing business under the laws of the State of Ohio, with its office and principal place of business located at 1902 Dana Avenue, Cincinnati, Ohio (45207). The individual respondent Milton S. Gottesman is a director and manager of the corporate respondent. He formulates, directs and controls the acts and practices of that corporate respondent (Tr. 48), including the acts and practices hereinafter found. His address is the same as that of the corporate respondent.

2. Respondents are now, and for some time past have been engaged in the offering for sale, sale and distribution of aluminum and insulated siding products to the public. In the course and conduct of their business, respondents now cause, and for some time past have caused their said products, when sold, to be shipped from their place of business in the State of Ohio to purchasers thereof located in various other States of the United States, including Kentucky, Indiana, and West Virginia (Tr. 53), and maintain and have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. The gross dollar sales of corporate respondent Inter-State Builders, Inc., for the fiscal year 1962 (October 1, 1961, to September 30, 1962) were \$853,478.26, and for 1963 (October 1, 1962, to September 30, 1963) were \$875,495.71. (Tr. 326.)

3. Inter-State Builders, Inc., obtains most of its business from

Initial Decision

72 F.T.C.

newspaper advertisements or direct mail advertising. Mr. Gottesman, Inter-State's director and manager, places advertisements in newspapers on behalf of Inter-State, similar to CX 1, 2, 3, and 4, soliciting the business of homeowners who may be interested in having new aluminum or other types of siding, roofing material, doors, windows, etc., installed on their homes. An example of respondents' newspaper advertising is CX 2, an advertisement which appeared on behalf of Inter-State Builders, Inc., in the April 17, 1962, issue of the Dayton, Ohio, Journal Herald. This advertisement contained, among other statements, the following:

Inter-State Builders, Inc. will select 25 homes in the area to cooperate in their advertising program * * * for those cooperating, the homeowners will save hundreds of dollars on the installation of aluminum siding * * * For the 25 homes selected not only is the price sharply discounted, but special terms will be arranged with no money down * * *. If you think your home will qualify and if you would like aluminum siding at a sharply reduced rate call Cincinnati—Collect ME 1-5300 * * *. Leave your name, address and phone number and a local representative will call on you for an appointment. If a phone is not handy drop a card or letter to Inter-State Builders, Inc., 1902 Dana Avenue, Cincinnati 7, Ohio.

These newspaper advertisements sometimes contain a coupon on which the interested homeowner may write his name, address, and phone number, then detach and mail to Inter-State Builders, Inc., at the address given in the advertisement, its office located at 1902 Dana Avenue, Cincinnati, Ohio (45207).

4. Inter-State also obtains business from direct mail circulars similar to CX 17 and CX 18. These circulars state, among other things, the following:

Special Money-Saving Offer
Tremendous Savings
Save up to 50% on materials

At the bottom of the circular is a printed, postage-guaranteed postcard addressed to Inter-State Builders, Inc., 1902 Dana Avenue, Cincinnati, Ohio (45207). On the reverse side of the card are spaces for the name, address, and phone number of the interested homeowner to be filled in. A perforation allows the card to be detached from the circular for mailing to Inter-State at its address printed on the card.

5. After the coupon or postcard has been returned to and received by Inter-State, Inter-State then turns the name, address and phone number of the answering prospect over to a salesman, or as Mr. Gottesman, in his testimony characterized, a "broker." The "broker" then calls the prospect by telephone and makes an appointment for the "broker" to call in person at the residence

of the homeowner.¹ At this meeting, the "broker" attempts to "sell" the prospect by obtaining from the homeowner a signed contract for the installation of the home improvements at a specified price. Inter-State Builders, Inc., receives a commission of 12 percent from the "broker" on all sales where the lead for the sale was furnished by Inter-State. The "broker" estimates the actual cost of the completed job, adds an amount for his profit, and inserts this total amount in the sales contract and signs the contract along with the homeowner purchaser. (Tr. 73.) Inter-State supplies its "brokers" with contract forms, credit applications, promissory notes, "pitch" books, etc. (Tr. 70-72.) It also supplies them with a time payment schedule for computation of financing charges for their use in case the contract is to be signed on an installment basis. (Tr. 90.)

6. At the time of the hearing, one "broker," Mr. Jack Maschmeier, of Cincinnati, Ohio, was employing three girl telephone solicitors who were using three telephones located in one of the rooms of corporate respondent's offices at 1902 Dana Avenue, Cincinnati, Ohio (45207). This office and the three telephones were provided by corporate respondent without any charge to the "broker," Mr. Maschmeier. (Tr. 424-425.) At the direction of Mr. Maschmeier, the girl telephone solicitors used the sales "pitch" described in CX 51, to the general effect that the girl calling was not a sales person but was an employee of the U.S. Outdoor Advertising Company, which was making a survey of the homeowner's area for one of the country's leading manufacturers of building materials, for the purpose of selecting one home which was to be used to advertise a brandnew permanent covering for the outer walls of the house, etc., etc. The girl would attempt to make an appointment for the "special representative" of U.S. Outdoor Advertising who was "in town for a few days" to call on the homeowner. If she was successful in making the appointment, the "special representative of U.S. Outdoor Advertising Company," in reality Mr. Maschmeier, would then make a personal call on the homeowner and attempt to obtain a signed contract for the installation of the siding or other improvements at a specified price set out therein, and generally providing for monthly payments over a

¹ Some "brokers" employ so-called "telephone solicitors," who call the prospects by telephone and make appointments for the "broker" to visit the home of the prospect. In some instances, the telephone solicitors obtain prospects for the "broker" by dialing the numbers of persons listed in the telephone directory of a particular city or town and inquiring if such person is interested in having new siding or other materials installed on his or her home. Also, some "brokers" employ men called "canvassers," who go from house-to-house and solicit home improvements. If the homeowner is interested, the "canvasser" makes an appointment for the "broker" to call at the home of the prospect.

one-, two-, or three-year period. Copies of approximately thirteen signed contracts from thirteen different homeowners were received in evidence at the hearing, CX 20, 22, 24, 27, 30, 34A-B, 35, 37, 40, 43, 46, and 48. (Mr. Maschmeier testified as a witness for respondents.)

7. Each contract is on a printed form called a "Sales Contract," provided by Inter-State Builders, Inc., with its name and address listed at the top of the form, and reciting that the homeowner who signed the contract would be called the "Purchaser" and that "Inter-State Builders, Inc., and/or Inter-State Construction Co."² would thereafter be called the "Contractor," etc. Each of the thirteen homeowners who signed a contract was called as a witness by counsel supporting the complaint.³ Their testimony, as well as the testimony of five other homeowners who had been solicited by Inter-State's salesmen but did not sign contracts for the installation of siding or other home improvements, with slight variations, took one or all of the following forms: that the prospect's home had been selected as a model for the installation of Inter-State's siding; that, if the prospect purchased and had corporate respondent's materials installed and permitted the "improved" home to be shown as a model to other prospects, the purchaser would receive a special or reduced price, and/or would receive a commission⁴ on sales made by the salesman to other homeowners as a result of having viewed the purchaser's improved model home. As a matter of fact, the corporate respondent did not select houses to be used as models and did not give special or reduced prices to purchasers of its installed home improvements for advertising purposes. (Tr. 93-94.)

8. Some of corporate respondent's salesmen or "brokers" represented to prospects that they were "from the factory," thereby implying that they were employed by the factory which manufactured the siding products and that the purchasers would be purchasing directly from the manufacturer and, for this reason, might receive a lower price. (See the testimony of Mrs. Albert Johnson, Tr. 105-130; Miss Wilma Rayles, Tr. 147-153; Mr. James Kelley, Tr. 177-187; Mrs. Dorothy Chapman, Tr. 188-199; Mrs. Mildred Heffelmire, Tr. 219-242; and Mrs. Marlene Kelley, Tr. 298-311.) Some salesmen also represented themselves to be

² Inter-State Construction Co., was formerly operated by Mr. Gottesman in Louisville, Kentucky. (Tr. 49.)

³ Counsel also called five additional witnesses who did not sign sales contracts but who testified concerning the representations made to them by corporate respondent's salesmen in their attempt to sell corporate respondent's home improvements.

⁴ The amount of the commission varied in amounts, \$25, \$50, or \$100.

representatives of the United States Gypsum Company. (See testimony of Messrs. Vincent Ehemann, Tr. 204-210; Carl Moritz, Tr. 212-218; Dale Trester, Tr. 263-276; Scott Jewell, Tr. 277-288; and Mrs. Clair Cornett, Tr. 289-297.) As a matter of fact, said salesmen were not representatives of any factory or of the United States Gypsum Company, but were salesmen for corporate respondent. Corporate respondent's salesmen also represented to their prospects that its products and installations were "guaranteed" or "unconditionally guaranteed," thereby representing that said products and completed jobs were guaranteed in every respect for an unlimited period of time. As a matter of fact, there are limitations on Inter-State's guarantees and corporate respondent's guarantees are limited to "the labor and materials" (testimony of the individual respondent, Mr. Gottesman, Inter-State's manager and operating head, Tr. 91-96).

9. By respondents' use of the statements referred to in Paragraph 4 herein, such as "Special Money-Saving Offer," "Tremendous Savings," "Save up to 50% on materials," in their direct advertising circulars (CX 17 and CX 18), respondents represented that they were conducting a special sale and that the prices of the advertised products constituted a reduction from the actual bona fide prices at which such products had been offered to the public on a regular basis for a reasonably substantial period of time in the recent, regular course of respondents' business and that savings were thereby afforded to the purchasers. The testimony of the individual respondent Gottesman refutes the claim that corporate respondent ever conducted a special sale or that its prices were reduced. Corporate respondent could not have a special sale because, by Mr. Gottesman's own testimony, Inter-State did not have a regular price for materials alone or for a completed job, and the completed price of a siding job varies from home-to-home and the completed price estimate varies from "broker" to "broker." (Tr. 80, 83-84.)

10. Respondents seek to avoid any legal liability or responsibility for the false representations of such salesmen or "brokers" on the ground that such salesmen or "brokers" were not in the employ of respondents, but were independent contractors working only for themselves. It may be true that the salesmen or "brokers" were not paid a salary by corporate respondent but only received their remuneration from sales of home improvements made for and on behalf of the corporate respondent. Nevertheless, the respondents clothed said salesmen or "brokers" with apparent authority to bind respondents for representations made by said salesmen.

Respondents furnished said salesmen or "brokers" with printed contract forms bearing the name of corporate respondent Inter-State Builders, Inc., for the use of such salesmen in selling and obtaining signed contracts for the installation of home improvements on behalf of said corporate respondent. The respondents also furnished said salesmen or "brokers" with credit applications, time schedule payment forms, "leads" to prospective purchasers, manufacturer's "pitch" books (Tr. 70-72, 90), and the use of an office and three telephones, all without charge to said salesmen (Tr. 424-425). The Federal Trade Commission Act was passed by the Congress as an aid to protect the public against unscrupulous business practices such as those found to have been practiced here, and respondents cannot escape responsibility for such unlawful acts and practices committed by their agents by claiming that said salesmen are independent contractors.

11. As argument in support of their contention that said salesmen or "brokers" are not employees of respondents, respondents say that said salesmen or "brokers," after obtaining signed contracts from homeowners for the purchase and installation of respondents' aluminum siding or other home improvement materials, is not obligated to "sell" the contract to Inter-State Builders, Inc., but is free to "sell" the contract to some other home improvement company. This type of argument begs the question. Even should it be assumed that the salesman or "broker" is free to "sell" the contract to some other home improvement company, this does not relieve respondents of their responsibility for any false representations made by said salesmen or "brokers" while purporting to act for respondents. The complaint herein involves only alleged false representations made by salesmen who were soliciting home improvements on behalf of the corporate respondent Inter-State Builders, Inc., not some other company. The contracts were on forms provided by the respondents and with the name "Inter-State Builders, Inc." printed thereon. The salesmen or "brokers" represented and led the homeowner to believe that the salesman or "broker" was obtaining the contract for and on behalf of Inter-State Builders, Inc., and that Inter-State Builders, Inc., would install the home improvements called for in the contract. The evidence and testimony is conclusive that the salesmen or "brokers" were acting for and on behalf of Inter-State Builders, Inc., at the time they made the false representations complained about in this proceeding. After clothing such salesmen or "brokers" with ostensible authority to act on their behalf and accepting the benefits accruing from such signed contracts which had been obtained

by said salesmen or "brokers" at least partly as a result of such false representations, respondents cannot now escape responsibility by disowning such salesmen or "brokers" as their agents.

12. At the hearing held in this proceeding on August 15, 1966, pursuant to the Commission's order of remand issued April 22, 1966 [69 F.T.C. 1152], the hearing examiner examined the field report prepared by the Commission investigator reporting his interview with each of the eighteen consumer witnesses who testified at the hearing in this proceeding and finds that neither of said investigation field reports contains a so-called "Jencks statement" as defined in the Commission's opinion issued April 22, 1966, but contain mere summaries of the investigator's interview with the witness. It is plain from the face of each field report that the report does not contain a "Jencks statement," that is, a substantial verbatim recital of an oral statement made by the witness to the Commission investigator and recorded contemporaneously with the making of such statement, but is a mere summary.

13. It is further found that the representations made by respondents in their newspaper and direct mail advertising and by their salesmen or "brokers," as found herein, are false and deceptive. The use by respondents of the aforesaid false and deceptive statements and representations has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

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

CONCLUSIONS

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

It is further concluded that neither of the investigator's reports of interviews with the eighteen consumer witnesses contain a "Jencks statement" but were mere summaries of the investigator's

interviews with each witness. There is nothing in any of the interview reports which would indicate that the report or any part thereof or any statement made therein by the Commission investigator had been approved by the witness or purported to be "a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such statement." On the contrary, each report shows on its face that it is a mere summary of the investigator's interview with the witness.

ORDER

It is ordered, That respondents Inter-State Builders, Inc., a corporation, and its officers, and Milton S. Gottesman, individually and as a director of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of aluminum siding or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that the home of any of respondents' customers or prospective customers had been selected as a model home to be used as a point of reference for advertising purposes, unless in every instance the home has in fact been selected as a model, and unless in every instance the home is used for such purposes;
2. Representing, directly or by implication, that any special price, allowance, discount or commission is granted by respondents to purchasers in return for permitting the premises on which respondents' products are installed to be used for model home demonstration purposes, unless respondents grant such special price, allowance, discount or commission in every instance;
3. Representing that respondents' salesmen or representatives are factory representatives, or otherwise misrepresenting the status of such salesmen or representatives;
4. Representing that respondents' salesmen or representatives are representatives of the United States Gypsum Company, or representing that respondents or their representatives are affiliated with any company or organization with which they are not in fact affiliated;
5. Representing, directly or by implication, that any of respondents' products are guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor and the

manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed;

6. Representing that respondents' customers are granted any reduction in price for their products, unless the price offered constitutes a substantial reduction from the actual bona fide price at which such products had been offered for sale on a regular basis for a reasonably substantial period of time in the recent, regular course of respondents' business;

7. Misrepresenting in any manner the savings available to purchasers of respondents' merchandise.

OPINION OF THE COMMISSION

JULY 28, 1967

BY JONES, *Commissioner*:

This matter is before the Commission for the second time on appeal by respondents. After appeal from the first initial decision by the hearing examiner issued on January 21, 1965, the Commission, without considering the merits, remanded the case to the examiner to reconsider certain interview reports of witnesses called by complaint counsel [69 F.T.C. 1152]. The examiner issued his second initial decision on September 9, 1966, confirming his earlier exclusion of the interview reports as attorney's work product and reaffirming his findings and conclusions on the merits of the case. The case is again before us on respondents' appeal from these decisions of the examiner.¹

The complaint, issued on May 14, 1964, charged that respondents violated Section 5 of the Federal Trade Commission Act and alleged that respondents' "salesmen or representatives" had falsely represented in oral solicitations that prospective purchasers of respondents' aluminum and insulated siding products would receive discounts on purchases in return for allowing their homes to serve as models of respondents' products or would receive commissions on sales made to other buyers who purchased respondents' products after observing the purchasers' remodeled homes; that respondents' prices were advertised as special sales prices and as

¹ Counsel for both sides advised the examiner during the hearing on remand that they would waive the refiling of proposed findings of fact, conclusions of law and proposed orders which had been originally submitted prior to the initial decision of the examiner on January 21, 1965 (Suppl. I.D. p. 375). On September 9, 1966, the examiner's supplemental initial decision issued incorporating the findings and conclusions of his first decision except for some deletions in par. 8 of his first initial decision and except for the findings and conclusions relating to the production of the interview reports as to which new findings and conclusions were entered by the examiner. Since the examiner's second initial decision encompassed the findings and conclusions of his first decision as to the merits of the case as well as his findings and conclusions on remand, we will refer in this opinion only to his second initial decision.

reductions from respondents' regular price of such merchandise and that respondents falsely represented that their guarantees were unconditional. Respondents denied that the alleged representations with respect to model homes, guarantees and special sales prices were false, alleged that, if made, they were not material in inducing the purchases of respondents' products and finally, claimed that the persons through whom their products were sold were not their "salesmen or representatives" and that they did not direct or control the representations made by these persons.

The hearing examiner concluded that respondents were responsible for the representations of the persons through whom they sold their products (I.D. pars. 10-11) and that respondents had made the representations with respect to the discounts or commissions which purchasers would receive if their homes were used for display purposes, as well as those respecting special prices and unconditional guarantees and that those representations were false (I.D. pars. 3-7, 13). Finally, the examiner concluded that the contested interview reports were not producible within the meaning of the Jencks rule as discussed in the Commission's opinion on remand (I.D. par. 12).

In their appeal, respondents do not challenge the examiner's findings that respondents' prices were falsely represented and that additionally respondents' customers had been falsely advised that their homes would be used as demonstration models for respondents' other potential customers and that they would receive commissions on sales to such potential customers (Resp. Suppl. Br. p. 2).

Respondents, however, do challenge the examiner's findings and conclusions that they are responsible for the representations of their salesmen and that they had misrepresented their guarantees. Respondents also contend that the prohibition in the proposed order with respect to respondents' representations that commissions will be paid prospective purchasers permitting their homes to be used for demonstration purposes was not supported by the examiner's findings. Finally, respondents argue as a threshold issue the correctness of the examiner's conclusions with respect to the non-producibility of the interview reports and contend alternatively that the reports are producible as Jencks rule statements or that at least the examiner should have ordered a *voir dire* to determine this point. Thus respondents urge that the case be reversed and remanded (Resp. Suppl. Br. p. 2).

We will consider each of these issues seriatim.

I

*The Producibility of the Interview Reports**A. The Hearing Examiner's Decision*

On remand of this matter to the examiner a hearing was held on August 15, 1966, at which complaint counsel produced copies of the interview reports with respect to each of the 18 consumer witnesses who testified in support of the complaint.² The examiner called a recess for an unspecified period of time during which he apparently examined the interview reports.³ After reconvening the hearing he announced that he had concluded that the reports did not contain any statements within the meaning of the Jencks rule. However, he requested complaint counsel to deliver copies of the reports to respondents' counsel; complaint counsel did so without objection. After examining the reports respondents' counsel returned them to the hearing examiner and stated that in his judgment the reports were producible either as substantially verbatim statements "or conceivably the reports were drawn from notes which might have been read back in part or in whole to witnesses and approved by them" (Tr. 478). Respondent argued that there was enough on the face of the reports which "should have triggered a *voir dire* examination to determine whether or not the statement was substantially verbatim" (Tr. 478-79, 481, 482, 485-86). The examiner declined to do so. In his decision on remand he stated that after an examination of the documents, he was able to determine from the face of each report that it did not contain a Jencks statement. In his initial decision he concluded:

* * * that neither of the investigator's reports of interviews with the eighteen consumer witnesses contain a "Jencks statement" but were mere summaries of the investigator's interviews with each witness. There is nothing in any of the interview reports which would indicate that the report or any part thereof or any statement made therein by the Commission investigator had been approved by the witness or purported to be "a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such statement." On the contrary, each report shows on its face that it is a mere summary of the investigator's interview with the witness (I.D. pp. 381-382).

² The hearing examiner's order dated July 26, 1966, scheduled the remand hearing for August 15, 1966, and stated that at that time he "will examine and inspect the so-called field reports made by the Commission's investigators * * * in order that the hearing examiner may determine whether said reports made by the investigators were 'Jencks statements.'"

³ On oral argument, respondents' counsel contended that this interval did not exceed 10 minutes (Tr. Oral Argument p. 3). Complaint counsel vigorously disagreed with this estimate and contended the interval was at least 45 minutes (Tr. Oral Argument pp. 33-34). Neither counsel noted for the record at the time the exact length of time taken by the examiner (Tr. Oral Argument p. 34). We do not believe the time of the interval is of any legal significance.

The interview reports have been placed under seal and delivered to the Commission on this appeal. Both counsel agree, and indeed respondents' counsel strongly argued in his brief, that it is proper for the Commission to examine these reports and to draw its own conclusions as to their producibility (Resp. Br. p. 2; Compl. Counsel's Br. pp. 1-2).

The issues raised by respondents with respect to the producibility of the 18 interview reports in issue are three: (1) do these interview reports constitute substantially verbatim statements of the witnesses interviewed, (2) were these interview reports shown to and adopted or approved by the witnesses, and (3) can the producibility of these reports be determined on their face without recourse to a *voir dire*. Before considering the particular interview reports involved in this case, it will be useful to summarize the applicable case law respecting the criteria which have been used by the Courts in determining what constitutes a producible statement within the meaning of the Jencks rule.

B. *The Applicable Law Relative to Producibility of Witnesses' Interview Reports*

The Courts are clear that any substantially verbatim statement of a witness or any report of a witness' statement which has been adopted or approved by a witness should be produced.

The question of whether a report has been signed, adopted or approved by the witness is of course a question of fact which must be determined either from the face of the report or on the basis of extrinsic evidence. In *United States v. Lamma*, 349 F. 2d 338, 341 (2nd Cir. 1965), the Second Circuit held that in the ordinary case, it is the Court's obligation to examine the report to determine whether it raises on its face any suggestion that adoption or approval might have occurred. If such an inference is raised from the face of the document the Court is then under a duty to conduct a *voir dire* to determine the issue. If no such inference appears from an examination of the document, it is respondents' duty to adduce some facts which would create such an inference. Absent such facts suggesting the possibility of an adoption or approval, the Court is not required to conduct a *voir dire* and is free to decide the question on the basis of an examination of the document itself.

In determining what constitutes a record of a substantially verbatim statement, the general rule applied by the Courts is that any report which can fairly be said to reflect a witness' own words should be produced. Reports which constitute merely an attorney's

summary of a witness' remarks just as importantly need not be produced. *Palermo v. United States*, 360 U.S. 343, 350 (1959). As the Supreme Court stated in *Palermo*, the utmost caution must be exercised in ordering production of reports which do not fairly represent the witness' statement since it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selection, interpretations and interpolations" (360 U.S. at 350). The Court went on to point out that:

It was important that the statements could fairly be deemed to reflect fully and without distortion what had been said to the government agent. Distortion can be a product of selectivity as well as the conscious or inadvertent infusion of the recorder's opinions or impressions. It is clear from the continuous congressional emphasis on "substantially verbatim recital," and "continuous, narrative statements made by the witness recorded verbatim, or nearly so * * *," see Appendix B, post 79 S. Ct. page 1228, that the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital. Quoting out of context is one of the most frequent and powerful modes of misquotation. We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions (pp. 352-53).

Thus the Courts have demonstrated that if the Jencks Act should be applied as the Commission is here applying it, not only is the concept of that legislation fair, but so is its application.

This same rationale was emphasized by the Second Circuit in *United States v. Lamma*, 349 F. 2d 338, 340 (2nd Cir. 1965) in which the Court observed that where an alleged recorded statement of a witness is to be used for impeachment purposes, "it should be his own statement and not someone else's interpretation of what the witness said or what he thought the witness said."

In determining whether a report reflects a witness' statement or merely the attorney's summary of what the witness told him, the Courts have indicated that some or all of the following factors should be looked to:⁴

1) The extent to which the report conforms to the language of the witness;

⁴ *United States v. Lamma*, 349 F. 2d 338, 340 (2nd Cir. 1965); *Williams v. United States*, 338 F. 2d 286, 288 (D.C. Cir. 1964); *Saunders v. United States*, 316 F. 2d 346, 349-50 (D.C. Cir. 1963); *United States v. Aviles*, 315 F. 2d 186, 191 (2nd Cir. 1963); *United States v. McKeever*, 271 F. 2d 669, 674-75 (2nd Cir. 1959); *United States v. Waldman*, 159 F. Supp. 747, 749 (D. N.J. 1958).

- 2) The length of the report in comparison with the length of the interview;
- 3) The lapse of time between the interview and the preparation of the report;
- 4) The appearance in the report of the substance of the witness' remarks;
- 5) The use of quotation marks;
- 6) The presence in the report of the comments or ideas of the interviewer.

The Court is not under any absolute obligation to conduct a *voir dire* in order to determine the issue of whether a report is or is not a statement of the witness within the meaning of the Jencks rule. This is a matter for the discretion of the Courts. *Campbell v. United States*, 365 U.S. 85, 93 (1961); *Palermo v. United States*, 360 U.S. *supra* at 354-55; *United States v. Lamma*, 349 F. 2d 338, 341 (2nd Cir. 1965); *United States v. Hilbrich*, 232 F. Supp. 111, 121 (N.D. Ill. 1964). As the Supreme Court stated in *Palermo*:

It is also the function of the trial judge to decide, in the light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement. *In most cases the answer will be plain from the statement itself.* In others further information might be deemed relevant to assist the court's determination. This is a problem of the sound and fair administration of a criminal prosecution and its solution must be guided by the need, reflected in so much of our law of evidence, to avoid needless trial of collateral and confusing issues while assuring the utmost fairness to a criminal defendant (360 U.S. 354-55), (emphasis added).

It is against the background of these general principles that we must make our decision as to the correctness of the hearing examiner's conclusion that the 18 interview reports were not producible within the criteria laid down by our earlier opinion on remand.

C. Description of the Interview Reports

The 18 field reports under consideration were prepared by two attorneys on the staff of the Commission each of whom drew up nine reports. For convenience of reference each of the series of nine reports will be referred to respectively as the Burger reports and the Rynerson reports.

The nine Burger reports were prepared on the basis of three days of interviews, two interviews on November 8, 1962, in two different cities in Ohio, three interviews on November 9, 1962, again in two different cities, and four interviews on November 10,

1962, all in the same city. All of the Burger interview reports were dated either January 3 or 4, 1963, almost two months after the dates of the interviews reported. Five of these reports record joint interviews of husband and wife attributing the facts or information recited in the report to "informants" under such variations as "informants first learned of * * * " or "informants did not know * * * " and the like. The other four reports concern interviews of either husband or wife.

None of the nine Burger reports contain any indications or notations that either the reports or the notes, if any, on the basis of which they were prepared had been shown to or approved or adopted by the witnesses.

Each of the Burger reports, whether reporting interviews of husband and wife teams or of individuals, commences with the opening paragraph "Upon being informed as to the purpose of the interview, the informant(s) advised the writer substantially as follows:"

Six of the Burger reports, of which three were interviews of husband and wife jointly, are organized in a substantially similar manner and contain identically titled sections, frequently listed in the same order, bearing the headings "1. Relationship of Informant to Investigation," "2. Method of Solicitation," "3. Salesman," "4. Product," "5. Solicitation Representation" and "6. Basic Sales Pitch," (further broken down into subtopics entitled "model home representations," "referrals" and "debt consolidation") and "7. Sales Contract." It is clear from a mere examination of these reports that they are not verbatim recitals of witnesses' statements. We can take official notice of the fact that, however, much as we might wish, witnesses do not respond in interviews in such neat, precise and organized fashion. It is certainly clear that six witnesses will not narrate their experiences in virtually the same order, picking out virtually the identical items to discuss. The language of these reports is clearly the language of the attorney summarizing and capsulating those facts stated by the witnesses which in the attorney's mind was relevant to her inquiry.

The other three Burger reports, while not organized under precise headings, in general followed the same pattern of organization and in many instances employ identical language in detailing the facts. Thus, for example, two of the reports, not organized into sections, start the paragraph with the identical sentence to the effect that "The [name of interviewee's family] first contact with Interstate was * * * " etc. Moreover, the vocabulary and style of these latter three reports is substantially similar to the

other six more tightly organized Burger reports and again clearly appear to be the work of the attorney and not the words of the interviewees. It is also noteworthy that this vocabulary and style of all of these reports is the same whether the interviewees were individuals or a husband and wife team. Again it is obvious that nine witnesses will not detail their experiences in the same sequential order of events nor will they use identical language.

In some of the Burger reports, some material is set off by parentheses and in one case by the notation "Writer's Note." It is clear from reading these reports that the purpose of this differentiation was to distinguish those facts recited in the report which emanated from the witnesses and those which were known to Miss Burger. Thus in these reports, this differentiation does not create the inference, as respondents' counsel's cursory perusal of these reports thought it did, that the material not so set off therefore represented the witness' statements.

The Burger reports also occasionally contain words or phrases set off in quotation marks. In some instances these quotation marks are used to set off proper nouns such as "'plasticrylic.'" More frequently they appear around isolated words or phrases in the middle of a sentence. Typical of this usage of quotation marks in the Burger reports (represented by the inner quotations) is the following excerpt from a joint composite husband and wife interview:

For allowing their home to be the "first in the neighborhood", "a model" "to advertise" the products, the K * * * s would receive the opportunity of a lifetime: a "reduced price" on the expensive material; "factory prices", "wholesale," "factory to your." * * * Mr. W[* * *] stated that the K * * * s could get the siding "cheap" now.

These same words appear also in quotation marks in other Burger reports. It is clear from the way in which these words are used that they are intended to remind the investigating attorney of individual words used by the witness and to highlight them as such in her mind. However, in no sense could excerpts of them if given to respondents' counsel be of any value as reflecting the witness' narrative of events discussed.

The nine Rynerson reports were prepared virtually contemporaneously with the conducting of the interview with a two or three day interval elapsing between interview and report. Eight of these interviews took place on October 26 and one on October 25, 1963. Eight of the reports of these interviews were apparently dictated on October 28 and one on October 29, 1963. Two of the Rynerson reports record interviews of husband and wife jointly

without differentiating in most cases the facts recited in the report between those contributed by the husband and those by the wife.⁵ None of these reports indicate that they had been approved or adopted by the parties or that the notes, if any, which formed the basis for their preparation had been shown to or approved or adopted by the interviewees.

Six of the nine Rynerson reports, start with an opening paragraph identifying the interviewees followed by the words "informant(s) stated in substance as follows." This pattern is followed irrespective of whether the interviewees were a husband-wife team or simply one person. In five of the reports this same format is also used to introduce facts attributed by the interviewees to respondents' salesmen. Thus these Rynerson reports describe these facts with the sentence: "the salesmen stated in substance as follows:"

The format, style and language of the nine Rynerson reports are almost identical. Eight of these reports in fact use the identical words in describing respondents' salesman. Thus these eight reports whether respondents' salesmen were or were not "pushy," or whether they tried to "rush" the interviewees into signing contracts. In two of these cases the report was a composite husband and wife interview. It is obvious that these words are either the words of the attorney capsulating his impression of the sense of what the witnesses reported to him or reflected the witnesses' responses to precise questions of the attorney rather than their own volunteered narrative of their experiences with respondents' representatives.

There are other examples of facts attributed to the interviewees appearing in these reports in identical language, such as the representations attributed by the interviewees to respondents' salesmen as to whether the siding "would need to be painted, would not need maintenance for a lifetime, would not burn, would resist all kinds of weather, would insulate, would save on heating bills, would not dent or peel or was indestructible." Again, it is highly unlikely that nine interviewees narrating what nine different representatives of respondents told them would use virtually identical language in describing the various representations of painting, maintenance, peeling, burning, etc. or would recite these representations in the same sequence. It is also inconceivable that witnesses will volunteer to an interviewer facts with respect both to representations which *were* made as well as to representations

⁵ In one instance facts were attributed to one or the other of the spouses such as "Mrs. B recalled in response to questions, that * * *."

which *were not* made. Unless prompted by specific questions, witnesses do not narrate negative representations as to what salesmen had *not* represented.

Some of the Rynerson reports contain words and phrases in quotation marks. In four of these reports these quotation marks are used to refer to the contents of a mailer received from respondents by the interviewee. The quoted words were those which the witness recalled had been contained in the mailer which the interviewee had not retained and the report expressly stated that they had been elicited from the witness by express questions. It is significant that the paragraph in each of these four reports describing the interviewees' receipt of the mailer and its recollected contents is almost in *haec verba*, thus again negating any inference that these reports reflect the witnesses' own words or narrative of their experience with respondents. In a few instances quotation marks are put around a word or a phrase within a sentence such as "one of the men said he was a representative of Interstate, that is 'a fieldman,'" or in another instance "The C * * * s said 'no' to this price." Similarly statements attributed by the interviewee to what respondents' salesmen said to them are on occasion set off in quotation marks. In no instance in any of these reports was a full sentence ever quoted. It is apparent from reading these reports that the attorney's use of quotation marks was intended to indicate that the quoted word or phrase was that used by the witness.

As with the Burger reports, some of the Rynerson reports record information identified as emanating from Commission files and also contain comments about the witness' demeanor, personality and estimated capability as a witness as well as their stated willingness to appear if called. In some instances this material is set off by parenthesis but in most instances it simply appears as part of the running text of the report in no way differentiated from the facts elicited from the witnesses. The interweaving of material obviously culled from the witness with that which just as obviously emanated from the attorney or from some other source underscores again the inescapable conclusion that these reports are in no sense a recital of a statement by a witness but on the contrary are clearly summaries of facts culled by the attorney from statements made by the interviewees to the attorney and probably in response to precise questions of the attorney.

On the basis of our examination of these 18 reports, we hold that the hearing examiner was correct in his conclusion that none of these reports constitute statements of witnesses which are

producing under the principles laid down in the Jencks Act cases.

The two Rynerson reports and the five Burger reports, recording joint interviews of husbands and wives, clearly constitute a composite record of facts detailed by two persons and we conclude that in no sense could they be regarded as a substantially verbatim statement of a single witness.

The remainder of the Burger and Rynerson interview reports do not record "continuous narrative statements" given by any of these witnesses.⁶ As noted above, the material in seven of the reports was itemized under separate headings. There can be little doubt that this well-organized format is not an accurate reflection of any of the witness' statements but represents an attempt by the attorney to categorize the various remarks which were made for the purpose of facilitating their use in the proceedings. *United States v. Aviles*, 337 F. 2d 552, 559 (2nd Cir. 1964). The other reports, while less rigidly subdivided, also indicate that they are the product of the efforts of the investigators to organize by subject matter the various statements made by the witnesses. This is underscored by the fact that the Burger and Rynerson reports respectively follow a substantially similar organization pattern which clearly negates any possible inference that they record a narrative detailed by a witness. Clearly even the wildest coincidence would not explain the fact that nine witnesses interviewed by one attorney would all detail their story in one organizational pattern and nine other witnesses interviewed by another attorney would all detail their stories in another but also similar organizational pattern. The fact that these reports were organized in such substantially similar patterns and that the language also appears to be substantially similar indicates clearly that the facts reported in each of the reports are the result of the attorney's selection and that only the highlights of the interview which were relevant and useful for the attorney's preparation of the case were recorded.

Moreover, the language of these eighteen reports is clearly that of the attorneys rather than that of the witnesses. The reports consistently detailed the facts in the same words and expressions.

⁶ Ten of these reports are introduced with the statement that the "informant[s] advised the writer substantially as follows." This fact does not in our opinion require the conclusion that the reports are substantially verbatim transcriptions of the witnesses' remarks. Prefatory statements of this nature, which are standard in interview reports, appear to be mere formalities and thus do not indicate the intention of the interviewer or affect the substance of the reports. See *United States v. Williams*, 328 F. 2d 386 (D.C. Cir. 1964) where the court ignored a statement at the opening of a report that "the following is a summary of the witness conversation not read to or by the witness; it is not intended to be a substantially verbatim account," in reaching the conclusion that it was a substantially verbatim recording.

It is inconceivable that 18 witnesses recounting their experiences with different representatives of respondents on 18 different occasions would use such identity of sequence and expression.

Because of the similarity of style and format and even of the words used in all of these reports and because of the intermixture of facts contributed by the witness with facts known to the interviewer, we conclude on the basis of our examination of these reports that they are obviously summaries of relevant facts culled by the interviewing attorneys from what the witnesses told them and in no sense could be regarded as a recital of a continuing narrative told by a witness in his or her own words and style. These field reports clearly indicate on their face that they are not substantially verbatim recordings of the witness' statements and therefore we conclude that the examiner did not err in reaching this conclusion without the benefit of a *voir dire* examination.

The hearing examiner also concluded that these reports had not been signed, approved or adopted by any of the witnesses (I.D. par. 12 and "Conclusions").

We are convinced from our examination of these reports that, under the circumstances of this case, respondents' counsel not having even on this appeal adduced a single fact or circumstance even remotely suggesting that any of these reports were adopted or approved by the witnesses, the examiner was entitled to rely on his examination of the face of these documents and that it was entirely reasonable for him to conclude that there was no adoption or approval. Our own examination of these documents convinces us that he was correct, that the possibility of the adoption or approval of these reports by the witnesses was so remote as to be nonexistent and that under the circumstances of this record there was nothing to warrant the examiner to take extrinsic evidence on the issue of the possible adoption or approval of these reports by the witnesses.

None of the reports was signed by any of the witnesses and none contain any indication on their face that they were shown to or read back to the witnesses or in any other way approved or adopted by the witnesses. Indeed there are other indications on these documents which suggest conclusively that these reports were not shown to the witnesses.

Several of these reports contain references to facts contained in the Commission's files and other facts obviously not known to or contributed by the witness. They also contain in some instances the interviewing attorney's appraisal of the witness' personality and demeanor. These facts strongly negate any possibility that

the reports were or indeed could, under the Commission's Rules of Practice, have been shown to the witness.⁷ Several of the reports affirmatively state that the witness was willing to testify at the proceedings. Surely if the investigating attorneys were careful to note this fact, they certainly would have noted the even more critical fact that the contents of the report had been shown to and approved by the witness.

Moreover, the extrinsic circumstances surrounding the preparation of these reports also tend to negative any inference that either the reports or any notes on which they were based were read back to or approved by the witness. The interviews all took place in cities in which there are no Commission field offices. Since the intervals between the interview and the report ranged from two days to two months, it seems probable that these reports were transcribed by the interviewing attorneys in their own offices in Washington, D.C. To obtain approval by the witness of the report the examining attorney would have been required to return to the witness' home, telephone the witness or deliver a copy to him by mail. Had the investigator taken any of these steps we believe that he would have in some way indicated on the reports that he had done so.

We reach the same conclusion with respect to the question of whether the witnesses may have adopted or approved any notes taken by the attorneys during the course of the interview. Again we are of the view that if such notes had been read back to and approved by the witness, some affirmative indication of such an important factor would have been made on the face of the report. However, in the light of the ultimate format of these reports, whether or not the notes from which they were prepared were checked with the witness, appears to us to be wholly irrelevant. If notes were taken and approved by the witness, there must be some correlation between the notes and the interview report in order for any such adoption of notes to constitute an adoption by the witness of the report. We have concluded that the reports are not substantially verbatim records of statements made by witnesses but represent the summaries of the attorneys encompassing highly selective facts in a sequence organized by the attorneys for their own purposes and convenience. Under the circumstances, it is impossible for us to infer that any notes which

⁷ The fact that these reports refer to Commission files and other data not elicited from the witness would probably make it improper for the attorney to have shown the reports to the witness since disclosure of information from the Commission's files is prohibited by both the Commission's Rules of Practice and Section 10 of the Federal Trade Commission Act which generally prohibits disclosure of documents in the Commission's files.

could have been presented to the witness could have taken the well-organized form of the reports or could have been cast in essentially the same language which appeared in the reports. Accordingly, the factors which led us to conclude that the reports were not substantially verbatim recordings of the witnesses' remarks also compel the conclusion that they were not substantially identical to any interview notes which might have been taken and which might have been read back to the witness.

Respondents argue that in the absence of any express negative statement to this effect appearing on the face of the report, the hearing examiner must order a *voir dire*.⁸ We do not read the cases as laying down such an inflexible rule. Indeed the courts have gone to great pains, even in criminal cases involving even more important rights of individual liberties, to underscore the discretion which the triers of fact have in these matters and the weight which will be accorded their decision. *Campbell v. United States*, 373 U.S. 487, 493-94 (1963); *Palermo v. United States*, 360 U.S. 343, 353, 360 (1959); *United States v. Lamma*, 349 F. 2d 338, 341-42.

In the instant case we hold that under the circumstances of this remand, respondents' counsel failed to bring out or even suggest the existence of facts which might create the barest inference of approval or cast the slightest doubt on what we have concluded are very clear indications of nonapproval appearing on the face of these reports. As the Second Circuit in *Lamma* pointed out, the question of a witness' knowledge of any facts bearing on adoption or approval is a matter for respondents' counsel to elicit.

The Commission's opinion on remand was issued on April 22, 1966 [69 F.T.C. 1152]. In that opinion we laid out the procedure which should be followed by the examiner and stated:

The initial step is for him to inspect the document *in camera*. He may be able to determine from its face whether it is a mere summary or has been approved by the witness. If it is unclear whether the document qualifies as a Jencks statement the examiner should on his own motion conduct a *voir dire* examination into the circumstances surrounding its making (Comm. Op. p. 36 [69 F.T.C. at 1175]).

The examiner scheduled the hearing on remand to be held on

⁸ Respondents also argued that the hearing examiner in failing to conduct a *voir dire* violated the Commission's instructions to him on remand (Resp. Br. p. 2). Respondents are in error in contending that the Commission directed the examiner to hold a hearing "unless there was some indication on the face of the document that the witness had approved it" (Resp. Br. p. 7). The Commission's opinion and order made it quite explicit that the examiner was to examine the documents and "if it was unclear whether the document qualifies as a Jencks statement," a *voir dire* might be conducted (Commission's opinion p. 36 [69 F.T.C. at 1152]; Commission's order par. 1 directing examiner "to determine [this issue] by appropriate procedures, including a hearing if necessary * * *") [69 F.T.C. at 1176].

August 15, 1966. In his order he stated that at the hearing he intended to examine the documents in order to determine the issue of their producibility. Respondents' counsel did not indicate that the hearing should encompass anything else. He had ample time and opportunity to ascertain from the witnesses prior to the hearing whether the reports or the notes, if any, on which they were based, had ever been read back to them or whether they had in any other manner approved or adopted these reports. Apparently this was not done, or no such facts were elicited from those witnesses. Despite the Second Circuit's opinion in *Lamma* and our own direction to the examiner, respondents' counsel did nothing. He never raised to complaint counsel or to the examiner the position which he is contending for here, that under no circumstances could this issue of adoption or approval be determined without a *voir dire*. Instead, he came to the hearing called by the examiner and acquiesced in the announced procedure under which complaint counsel produced the eighteen reports in question for examination by the examiner without indicating to the examiner his position that unless the examiner found the reports to be producible the hearing on remand would have to encompass examination of the attorneys or of the 18 witnesses to resolve the issue of approval or adoption. After the hearing examiner announced his conclusion and provided respondents' counsel with an opportunity to examine the reports himself, counsel then inquired from complaint counsel as to whether the Commission files indicated that any notes had been taken and was informed that they did not. Respondents' counsel then requested the examiner to conduct a *voir dire* to resolve the question of whether the reports *were substantially verbatim records* of the witness' statements. Counsel argued in support of this request that *his* examination of the face of these documents indicated to him clearly that the reports were substantially verbatim and therefore as a minimum the examiner should conduct a *voir dire* before ruling. No brief was tendered to the examiner on the point nor any cases cited to him. Respondents' counsel, either by way of affidavit or even oral statement, never once indicated that he had knowledge of any facts, no matter how inferential, that even one of these witnesses might have adopted or approved the report. Thus, respondents' counsel confined his opposition to the examiner's conclusion as to producibility of these reports on the identical source relied upon by the examiner, namely, the face of the documents. We believe that in the face of this argument and in the absence of any suggestion by respondents' counsel of the existence of facts which

might at least raise an inference of approval, the examiner was entitled to resolve the issue as he did on the basis of his examination of the reports.

We also have examined these documents and we conclude that these 18 reports show clearly on their face that they were not signed, approved or adopted by the witnesses, and that therefore the examiner was correct in determining that a *voir dire* was unnecessary since no doubt had been raised by respondents' counsel with respect to the correctness of this conclusion.

II

The Allegations of the Complaint and the Order

A. Alleged Misrepresentations

Respondents concede that the representations made by their field men with respect to the special reduced prices at which their aluminum siding products were being sold, the use of the purchasers' houses as demonstration models and the possibility of additional discounts and commissions which could be earned in other sales made by respondents on the basis of such use, were false and misleading and have not appealed from the examiner's findings and conclusions sustaining these complaint allegations.

The only allegations in the complaint remaining in issue on the merits of the alleged representations therefore are those charging that respondents' salesmen falsely represented that respondents' products were "guaranteed in every respect for an unlimited period of time" (Complaint, Pars. Four (4) and Five (5)).

The examiner found, and respondents concede, that respondents' salesmen in many instances represented that the products and completed jobs were "guaranteed" and "unconditionally guaranteed" (I.D. par. 8; Resp. Br., p. 27; see also Tr. 105, 108, 133, 136, 150, 167, 284, 301, 317). The examiner also found that there were limitations on respondents' guarantees and that many of them were limited to "labor and materials" (I.D. par. 8; Tr. 91-96). He concluded that these guarantees of labor and materials were conditional guarantees and hence that respondents' oral representations were false and misleading (I.D. par. 8).

The evidence is undisputed that respondents' representatives orally represented that respondents' products were unconditionally guaranteed (Tr. 105, 108, 167, 222, 258, 283-84, 301). It is also undisputed that in some instances, the contracts ultimately entered into contained guarantees of labor and materials (CX 22,

370

Opinion

24, 35) and in other instances contained no written guarantees of any kind (CX 20, 30, 40, 46).

Respondents do not dispute these facts. Rather, respondents contend that their guarantees of labor and materials are unlimited guarantees as orally represented and that in any event, "in every case where a representation as to a guarantee has been made, respondents have honored the guarantee" and hence no deception occurred in practice (Resp. Br. p. 28). The hearing examiner made no findings on the facts underlying respondents' defense of performance.

Thus two separate issues are presented: First, were customers deceived when they were orally told that respondents' products were guaranteed and subsequently found out that the unconditional guarantee as written in the contract was expressed in terms of labor and materials? Second, under the circumstances of this case, were customers deceived when after receiving similar oral representations, their contracts contained no written guarantees of any kind?

On the first issue as to whether an oral representation that a product is unconditionally guaranteed is false where the written guarantee is described in terms of labor and materials, we believe that the examiner was wrong on this record in concluding that such oral representations were false (I.D. par. 8). We recognize that unlimited guarantees can, if so expressed, encompass matters other than labor and materials such as time of completion and indeed completion itself. However, the record does not indicate that anything beyond labor and materials was referred to. Respondent Gottesman testified that the guarantee covered "the performance that we have committed as far as the labor and materials are concerned" (Tr. 91). He also testified that only obvious limitations were involved such as an automobile running into the home (Tr. 96). If any time limitations were intended, these would be written into the contract (Tr. 90). Our attention has not been drawn to any such contract provisions. The contracts in evidence, embodying guarantee representations, contained the phrase "labor and materials guaranteed unconditionally" (*e.g.*, CX 24 and CX 35). The examiner failed to indicate in what respect he believed that these contractual guarantees were more limited than those orally represented (I.D. par. 8). We conclude, therefore, that in those instances in which unconditional guarantees of labor and materials were written into the contracts, the salesmen's representations with respect to unconditional guarantees were not false or deceptive.

The examiner did not consider the question of whether customers were deceived in those instances in which oral claims of guarantees were made but no written guarantees were given to the customers or included in the contracts.

In his testimony respondent Gottesman stated that Inter-State "take[s] care" of all complaints in those cases in which the contracts contained specific provisions for unconditional guarantees (Tr. 392). However, Gottesman did not intimate, as respondents' counsel claims, that respondents honor all representations, oral or written (Resp. Br. p. 28). He was able to cite only one instance where respondents repaired a hole in a defective installation under a contract containing no provision respecting guarantees (Tr. 105, 126, CX 20). Moreover, the record demonstrates that respondents' contracts specifically provided in small print that respondents were "not responsible nor bound by any representation not contained in this agreement" (*e.g.*, CX 22). This provision is not only consistent with Gottesman's testimony on the stand, but is also consistent with respondents' contention vigorously urged here on appeal that it is not responsible for the representations made by its field men. In the face of this contract provision which respondent Gottesman's testimony confirmed, evidence of a single isolated incident where a repair was made without a written guarantee hardly provides support for respondents' contention which they now make in their brief that for the life of their products respondents did in fact repair or replace defective products or reimburse the customers for such products, as their salesmen's representations imply, irrespective of whether or not the contract contained any written provision to this effect. Moreover, the evidence in the record indicates that the failure of the contracts to incorporate the salesmen's oral representations of unlimited guarantees in fact operated to prevent customers from even claiming any rights under such oral guarantees. For example, Mrs. Marlene Kelly, an Inter-State customer, testified on cross-examination that this was precisely her reaction. In response to a question as to why she never called Inter-State and asked them to make repairs when some of the siding went bad, she testified:

A. Well, we signed the release contract. What good would it do? They didn't give us a handwritten guarantee (Tr. 308).

We conclude, therefore, that respondents have failed to adduce sufficient probative facts to support their defense that they honor all oral representations of guarantees regardless of whether these appeared subsequently in the contract or not.

We do not have to reach the question, therefore, of whether such a defense is legally sufficient, although we would and do conclude for the reasons already expressed in the Seventh Circuit opinion in *Montgomery Ward and Co., Inc. v. Federal Trade Commission*, 379 F. 2d 666 (7th Cir. 1967) that such a defense, if made out, would be legally insufficient to the charge that oral representations of the existence of guarantees are deceptive where they are not subsequently incorporated into a contract and where the contract specifically provides that the guarantor is not responsible for any representations not contained in the contract.⁹

B. Respondents' Responsibility for the Statements of Their Salesmen

The complaint charged that misrepresentations were made in oral solicitations to prospective purchasers by respondents' "salesmen or representatives." Respondents denied that the persons through whom their products were sold to the public were their salesmen or representatives but claimed that they were "brokers" or "independent contractors" who were not in the employ of respondents and over whose activities respondents exercised no "control or direction" and therefore that "any representations made by such brokers are solely their own" and "may not be attributed to respondents." The examiner, while conceding that it "may be true that the salesmen or 'brokers' were not paid a

⁹ We see no significant difference between the practice here of orally representing the existence of a guarantee which was not subsequently provided for in the written contract and the practice of Montgomery Ward in advertising unlimited guarantees and subsequently giving its customers guarantee certificates containing more limited terms. As the court pointed out in its opinion in *Montgomery Ward and Co., Inc.*:

"Assuming Wards has a policy of honoring guarantees as advertised, the issue is yet not one of performance, but one of advertising, of what a prospective purchaser is likely to think on the basis of the advertising alone. The delivery of limiting guarantee certificates with the product purchased might mislead customers notwithstanding Wards' policy. Given such a certificate, customers are not likely to ignore its limitations when seeking satisfaction under its guarantee, particularly in view of the certificate language, 'the obligations assumed under this warranty are in lieu of all warranties express or implied.' If, on the other hand, each purchaser actually was informed that advertised guarantees would be honored, the certificates were meaningless. The Commission determination that this state of affairs disclosed that purchasers from Wards would be likely to believe they would be bound by the certificate is not unreasonable. That Wards generally intended the certificates to be meaningful is indicated by internal advertising policy directives directing copywriters to accompany promotional copy with a disclosure of guarantee terms.

* * * * *

"However, having fully credited Wards with having corporate integrity and a company policy of truthful advertising, the fact remains, as the Commission found, this could not cure 'the capacity to deceive inherent in attaching specific and limited guarantees to products which are then advertised without limitation.' We share the Commission's 'doubt that none but the most aggressive and sophisticated customers will either recall or retain the advertisement which originally led them to consider the purchase, nor will the average customer persist in his demands that Wards disregard the specific guarantee certificate and honor claims under the broader guarantee originally advertised.'"

salary by corporate respondent but only received their remuneration from sales of home improvements made for and on behalf of the corporate respondent," found that since respondents "clothed said salesmen or 'brokers' with apparent authority to bind respondents * * * respondents cannot now escape responsibility by disowning such salesmen or 'brokers' as their agents" (I.D., pars. 10, 11). In their appeal respondents contend that due to their "lack of control or direction over the activities of such brokers they have no responsibility for the latter's representations.

In claiming that their inability to direct or control the activities of their representatives insulated them from their salesmen's misrepresentations, respondents have apparently misconstrued the applicable legal test, under which, as the examiner correctly found, a seller is held liable for deceptive acts in violation of Section 5 of the Federal Trade Commission Act made by individuals whom the seller has invested with apparent authority to act on its behalf and that it is immaterial that respondents have not directed or controlled these persons. This principle was clearly articulated by the Court in *Goodman v. Federal Trade Commission*, 244 F. 2d 584, 588, 592 (9th Cir. 1957) which rejected the precise contention made by respondents in this case:

The petitioner's primary contention is that the salesmen who sold the course were *independent contractors*, for whose actions he was not responsible. The brunt of the argument is based on the claim that because the petitioner carried the salesmen on his books as independent contractors, his agreements with them so stated, and he had no control over their work and the manner of performing it, the connection between him and his salesmen conformed to the classical characteristics which courts have attached to that relationship.

The criteria of direction and control, which govern in determining whether or not such relationship exists, are well recognized in law. * * * However, when interpreting a statute the aim of which is evil practices in it, the courts are not concerned with the refinements of common-law definitions, when they endeavor to ascertain the power of any agency to which the Congress has entrusted the regulation of a business activity or the enforcement of standards it has established. * * *

Thus the courts take the view that the principal is bound by the acts of the salesperson he chooses to employ, if within the actual or apparent scope of his authority, even *when unauthorized* (244 F. 2d pp. 588, 592).

A similar immunity from the statements of representatives was claimed by the respondents in *International Art Co. v. Federal Trade Commission*, 109 F. 2d 393, 396 (7th Cir. 1940) where reliance was placed upon testimony of the representatives "to the effect that the business was being conducted by them independently and that they receive no orders or directions from the Art Company." In response to this contention the court noted that:

* * * each salesman was issued a certificate designating him as the representative of the Art Company; the order was taken in its name; the picture was shipped in its name, and the customer was notified in its name of the time of delivery. All blanks used by the salesmen were furnished by the Art Company and bore its name (109 F. 2d p. 396).

On the basis of this evidence the court concluded:

The customer had a right to believe—in fact, could not have believed otherwise, than that the salesmen were the agents of the Art Company, with full authority in the matter. * * *

Here, the agent was clothed with apparent and, we think, real authority to speak and act for and on behalf of the principal, and the latter is bound thereby. We know of no theory of law by which the company could hold out to the public these salesmen as its representatives, reap the fruits from their acts and doings without incurring such liabilities as attach thereto (*Ibid.*).

See also *Standard Distributors, Inc. v. Federal Trade Commission*, 211 F. 2d 7 (2nd Cir. 1954) and *Steelco Stainless Steel, Inc. v. Federal Trade Commission*, 187 F. 2d 693 (7th Cir. 1951).

There can be no doubt that in this case respondents have conferred upon their agents the actual or apparent authority to speak and act for or on behalf of Inter-State and thus are responsible for their representatives' conduct. Respondents furnished their salesmen with printed contract forms bearing the name of Inter-State (and an affiliated corporation, Inter-State Construction Co.) as well as printed credit applications and time-schedule payments. The salesmen were given specific authority to negotiate the terms of and indeed execute the contracts with purchasers on behalf of and in the name of Inter-State. Indeed, one of these "independent contractors" occupied respondents' office and, in making his solicitations, utilized three telephones, provided and paid for by respondents.

Although the form of respondents' contract indicates in small print that it is subject to acceptance by an officer of Inter-State and/or Inter-State Construction Co., the only signatures appearing on the executed contracts contained in the record are those of the purchasers and the salesmen who signed, not as brokers, but for and on behalf of Inter-State or its affiliate. Respondents claim that "Once a contract is signed with an individual homeowner the broker will take the contract from dealer to dealer attempting to sell it for the best price" (Resp. Suppl. Br. p. 4). The contract, however, provides that it is entered into by Inter-State or its affiliate and must be accepted by one of said companies to be binding. The only conclusion which could be reached by a customer is that he is dealing solely with Inter-State and that the salesman who signs the contract on Inter-State's behalf is its authorized

representative. This conclusion is further buttressed by the fact that the customer's first contact with respondents was typically through respondents' advertisements which contained a coupon to be filled in by any interested person. Thereafter, a salesman called on the customer who had filled in the coupon. The inevitable effect of this practice would be to cause the customers to believe that the salesmen who called on them were authorized representatives of Inter-State rather than brokers who represented suppliers in general.¹⁰

Accordingly, we conclude that respondents, who clothed their salesmen with both actual and apparent authority to represent them are fully responsible for the representations made by these representatives in attempting to sell respondents' products.

C. *The Order*

The order proposed by the hearing examiner is identical to that proposed by counsel supporting the complaint and attached to the complaint issued against respondents.

Respondents attack one paragraph in this order as without substantial foundation in the evidence introduced in the record. Complaint counsel has not appealed from the examiner's proposed order.

The order paragraph opposed by respondents' counsel prohibits respondents from:

Representing, directly or by implication, that any special price, allowance, discount or commission is granted by respondents to purchasers in return for permitting the premises on which respondents' products are installed to be used for model home demonstration purposes, unless respondents grant such special price, allowance, discount or commission in every instance. (Order, par. 2.)

Respondents contend that this paragraph is too broad insofar as it applies to commissions and bonuses.¹¹ Respondents argue that "there was no evidence—and the examiner made no such finding—that Respondents ever misrepresented the facts relating to" the bonuses or commissions available to homeowners (Resp. Br. pp. 30-31 and Suppl. Br. p. 10).

Notwithstanding respondents' assertion, the record is clear, and the hearing examiner found, that respondents' representatives

¹⁰ Although respondents have throughout this proceeding referred to their salesmen as "brokers," it is interesting to note that in all of their advertising and sales brochures appearing in the record (CX's 1, 2, 3, 4, 17, 18), the persons now characterized as "brokers" were always referred to as "representatives."

¹¹ In its original brief prior to remand, respondents' objections to this paragraph were confined to its reference to commissions (Resp. Br. pp. 30-31). In its supplemental brief after remand, respondents broadened their challenge to the application of this paragraph to both "commissions and bonuses" (Resp. Br. pp. 10-11).

falsely assured purchasers that they would receive some type of special pricing concessions on sales made by salesmen to other homeowners. The examiner found that "the corporate respondent did not select homes to be used as models and did not give special or reduced prices to purchasers of its installed home improvements for advertising purposes" (I.D. par. 7). This finding is not challenged by respondents on appeal. Respondents' president, Gottesman, also named as a respondent here, conceded on direct examination that the corporate respondent never used purchasers' homes as models (Tr. 93). While none of the witnesses used the words "bonuses or commissions" in their testimony the clear purport of the evidence in the record is that respondents' sales pitch here was to represent to their prospective customers that they would receive monetary compensation for permitting their homes to be used for demonstration purposes to enable respondents to make sales to other persons. Thus, we are of the opinion that the order need not track the express representations used by respondents' salesmen, but may and indeed must be couched in sufficiently broad terms to ensure that respondents cannot avoid the prohibitions contained in the order by a slight verbal shift in their solicitations.

Accordingly, in our opinion, the examiner did not err in including in the order a prohibition forbidding respondents from misrepresenting that commissions will be paid in return for permitting customers' premises to be used for model home purposes and we reject respondents' appeal on this issue.

Coming to the provisions of the order as proposed by the examiner, we are of the view that they are not sufficiently restrictive to ensure that these respondents will not in the future engage in the same deceptions which they are being directed to terminate in this case.

Paragraphs 1 and 2 of the order, directed at the principal misrepresentations employed by respondents in this case, prohibit respondents from making those representations in the future unless they are in fact true. Paragraph 1 of the order prohibits respondents from representing to their prospective customers that their homes have been selected as model homes to be used in respondents' advertising "unless in every instance the home has in fact been selected as a model, and unless in every instance the home is used for such purposes." Paragraph 2 as noted above qualifies its prohibition on representing that special discounts and the like will be paid for such use "unless respondents grant such special price, allowance, discount or commission in every instance."

The evidence is clear in this record that respondents' method of doing business has never encompassed the use of a customer's home for demonstration purposes.

At the hearing respondent Gottesman conceded on examination by complaint counsel that Inter-State had never used the home of any customer as a model home (Tr. 93). There is no indication in the record that respondents ever intend in the future to use a home as a point of reference for advertising purposes. Since purchasers' premises are not used as models we fail to see how in any case respondents could grant allowances or discounts in return for such use. Moreover, it would make little business sense for respondents in the future to use this type of advertising and thereby discount their own prices when they can simply use photographs of homes, which they are presently doing, in order to illustrate what aluminum siding looks like (*e.g.*, RX 1). Respondents' customers are widely separated. Respondents' primary sales message is their low, low prices and the great benefits which can accrue to the homeowner from the use of aluminum siding. If respondents wish to enhance their sales pitch through the use of testimonials of satisfied customers they can certainly solicit such testimonials if they choose. However, if they in fact paid for such testimonials it would be highly misleading not to disclose this fact. Yet this is in effect what respondents' use of their customers' homes for demonstration purposes would amount to if they truthfully did this and paid the homeowner for such use.

For all of these reasons, we conclude that the "unless" clauses in both prohibitions should be eliminated. If respondents devise a nondeceptive sales message embracing some type of testimonial which might violate these two paragraphs in the order, the Commission's procedures afford such respondents ample opportunity to petition the Commission, either for an interpretation of the order as to whether the new sales program would or would not violate the order, or for a modification of the order if one is clearly necessary in order to permit respondents to engage in what can be demonstrated to be a nondeceptive sales promotional solicitation.

Paragraph 5 of the order prohibits respondents from misrepresenting their guarantees. Since the gravamen of the deception which we have found to exist in this area of respondents' activities was their oral representation of guarantees and their omission of any guarantees in their contracts we are adding to this paragraph a specific prohibition against "making any direct or implied representation that any of respondents' products are guaranteed unless in each instance a written guarantee is given to the purchaser

containing provisions substantially the same as those contained in such oral representation."

Finally, we are also adding a new paragraph to the order respecting respondents' salesmen. As we have noted respondents have attempted to avoid any liability for their salesmen's activities on the ground that they do not "exercise control or direction over the activities of such brokers." While the issue of such actual exercise of control is not relevant to the question of respondents' responsibility for their salesmen's conduct, it is directly pertinent to the issue of relief. Unless respondents are required to take some action to control their salesmen, the order will amount to little more than a vain gesture. Indeed, respondents point out in their brief:

Since Respondents cannot control the brokers' actions, it is futile to issue a cease and desist order directing Respondents to assure that these brokers will not make any further misrepresentations (Resp. Suppl. Br. p. 7).

For this reason, we are revising the order by adding to it a provision which requires respondents to take affirmative steps to (a) prevent their salesmen making any of the representations condemned in the order and (b) to counteract the effect of any such representations which may have been already made.

III

CONCLUSION

In conclusion, the initial decision and order issued by the hearing examiner, as amended to conform to this decision and the order issued hereunder, are adopted as the decision and order of the Commission.

Commissioner Reilly agrees with the opinion and order except with that portion of the opinion dealing with guarantees.

Commissioner Elman dissented and has filed a statement.

DISSENTING OPINION

JULY 28, 1967

BY ELMAN, *Commissioner*:

The *Jencks* rule is a rule of fairness in adjudication. It is concerned with substance, not form. The essential question in determining the producibility of an interview report is whether it recorded the witness's statements with sufficient accuracy and reliability to justify allowing the defense to use the report in cross-examination for purposes of impeaching or discrediting the testi-

mony given at the trial by the witness. *Campbell v. United States*, 373 U.S. 487, 495, 497.

The interview reports in this case were prepared by two able and experienced Commission attorneys. They expressly recite that they set forth the substance of the witnesses' statements during the interviews. They do not purport to be, and obviously are not, verbatim transcriptions of every word that was said. Like almost all FTC interview reports, they are not signed by the witness. We do not know, and the Commission does not think it necessary to hold a *voir dire* hearing to ascertain, whether each witness "adopted" or "approved" the interview report or the attorney's notes. On their face, the interview reports appear to be entirely factual, objective, and accurate accounts of the witnesses' statements to the Commission attorneys.

As Commission counsel point out in their brief on appeal (pp. 2-3), there are numerous discrepancies between the testimony of certain witnesses at the hearing and their prior statements as recorded in the interview reports. This would seem to be all the more reason for making the reports available for cross-examination purposes, rather than withholding them. If the Commission is sustained in its holding here that these interview reports on their face are not producible, and do not even require a *voir dire* hearing, no FTC interview reports will ever be made available to any respondents. If the inquiry is, not whether an interview report accurately reflects the substance but whether it mirrors the style, format, sequence, vocabulary, syntax, and punctuation of the witness's statements, the *Jencks* rule has no practical application to Federal Trade Commission proceedings.

My reasons for disagreeing with the majority on this important question of agency practice have already been spelled out in the dissenting opinion previously filed in this case (69 F.T.C. 1128). I add only that the misgivings earlier expressed have now been realized. The net result of the Commission's approach to the *Jencks* rule is to obliterate it. This is more than unfair to respondents in Commission cases. It provides a continuing source of unnecessary friction and delay in the conduct of adjudicative proceedings. It is clearly contrary to the spirit if not the letter of the recently enacted Freedom of Information Act (Public Law 89-487, 90-23).

The Commission's interest is not to win its cases but to win them fairly. It is as much a public purpose to assure respondents a fair opportunity to make their defense as it is to conduct efficient investigations. Both interests are essential aspects of law enforcement; neither requires subordination of the other. The interview

reports in this case, if made available to respondents, would obviously be useful in furthering their defense. Indeed, they have been used in this case, but only to assist Commission counsel in examining the witnesses. When it comes to assisting defense counsel in cross-examination, however, the reports are treated as "secret" and withheld. So far as the majority is concerned, the interview reports have now fully served their purpose, and will be returned to the "confidential" archives. I do not see how this result can be hailed as a vindication of the public interest. What substantial harm to any legitimate interest of the public would arise from letting counsel use these reports on cross-examination, just as Commission counsel used them on direct? In *Jencks* the Court quoted with approval the statements in *United States v. Reynolds*, 345 U.S. 1, 12, and *United States v. Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944), that "since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. * * * [T]he prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." (353 U.S. at 671.)

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondents from the hearing examiner's initial decision dated September 9, 1966, and upon briefs and oral argument in support of and in opposition to said appeal; and

The Commission having determined for the reasons stated in the accompanying opinion that the appeal of respondents should be denied and that certain of the findings and conclusions and the order contained in the initial decision should be modified to conform to the views expressed in the accompanying opinion:

It is ordered, That the hearing examiner's initial decision, as modified by this order and the accompanying opinion be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the initial decision be modified by striking the order and substituting therefor the following:

It is ordered, That respondents Inter-State Builders, Inc., a corporation, and its officers, and Milton S. Gottesman, individually

and as a director of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of aluminum siding or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that the home of any of respondents' customers or prospective customers has been selected as model home to be used as a point of reference for advertising purposes;

2. Representing, directly or by implication, that any special price, allowance, discount or commission is granted by respondents to purchasers in return for permitting the premises on which respondents' products are installed to be used for model home demonstration purposes;

3. Representing that respondents' salesmen or representatives are factory representatives, or otherwise misrepresenting the status of such salesmen or representatives;

4. Representing that respondents' salesmen or representatives are representatives of the United Gypsum Company, or representing that respondents or their representatives are affiliated with any company or organization with which they are not in fact affiliated;

5. Representing, directly or by implication, that any of respondents' products are guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; or making any direct or implied representation that any of respondents' products are guaranteed unless in each instance a written guarantee is given to the purchaser containing provisions substantially the same as those contained in such representations;

6. Representing that respondents' customers are granted any reduction in price for their products, unless the price offered constitutes a substantial reduction from the actual bona fide price at which such products had been offered for sale on a regular basis for a reasonably substantial period of time in the recent, regular course of respondents' business;

7. Misrepresenting in any manner the savings available to purchasers of respondents' merchandise;

8. Failing —

- (a) To send a copy of the order by certified or regis-

Final Order

tered mail to all present and future "brokers," "salesmen," "contractors," and other representatives;

(b) To advise in writing all such representatives: that respondents will expect such representatives to comply with the provisions contained in the order; that said representatives will be discharged if they disobey this order; and that respondents will accept no contracts or pay any commission or other fee or allowance in connection with the procurement of which representations have been made in violation of this order;

(c) To obtain from all such representatives a signed statement acknowledging the existence of this order and agreeing to abide by it; and

(d) Prior to the acceptance of any contract, to deliver to the customer who has executed the contract a copy of the contract and a separate written statement clearly and conspicuously advising the customer (1) that no oral representation which may have been made by any salesman or representative of respondents and which is not contained in the contract is binding upon respondents; and (2) that such customer may, within a designated period which shall in no case be less than ten days after receipt of such statement from respondents, elect to cancel the contract if in executing it he has relied in whole or in part upon any oral representation not contained in the contract.

It is furthered ordered, That the 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 they have complied with the order to cease and desist set forth herein.

Commissioner Reilly agrees with the opinion and order except with that portion of the opinion dealing with guarantees. Commissioner Elman dissented and has filed a statement.

Order

72 F.T.C.

IN THE MATTER OF

WILLIAM H. RORER, INC.

MODIFIED ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 2 (a) OF THE CLAYTON ACT

Docket 8599. Complaint, Sept. 30, 1963—Decision, Aug. 21, 1967

Order modifying a cease and desist order issued May 9, 1966, 69 F.T.C. 667, pursuant to a decision of the U.S. Court of Appeals, Second Circuit, 374 F. 2d 622, March 20, 1967 (8 S. & D. 432), by limiting the application of the prohibition against price discrimination in pharmaceutical products to competing retail customers.

ORDER MODIFYING ORDER TO CEASE AND DESIST

Respondent having filed in the United States Court of Appeals for the Second Circuit a petition to review and set aside the order to cease and desist issued herein on May 9, 1966 [69 F.T.C. 667]; and the court on March 20, 1967 [8 S. & D. 432], having issued its opinion and on April 17, 1967, having entered its final decree modifying and, as modified, affirming and enforcing said order to cease and desist; and the time allowed for filing a petition for certiorari having expired and no such petition having been filed;

Now therefore, it is hereby ordered, That the aforesaid order of the Commission to cease and desist be, and it hereby is, modified in accordance with the said final decree of the court of appeals to read as follows:

It is ordered, That respondent William H. Rorer, Inc., a corporation, and its officers, representatives, agents and employees, directly, indirectly, or through any corporate or other device, in or in connection with the sale of prescription and nonprescription pharmaceutical products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to some retailers at prices higher than the price charged to any other retailer who, in fact, competes in the resale and distribution of respondent's products with the retailer paying the higher prices.

It is further ordered, That, in addition to an apart from the provisions of the preceding paragraph, if respondent at any time after the effective date of this order institutes a price schedule whereby it charges a different price for its products to any person, group or class of its competing retail customers