
IN THE MATTER OF
THERMOCHEMICAL PRODUCTS, INC., ET AL.

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

Docket 8725. Complaint, Jan. 9, 1967—Decision July 25, 1969

Order requiring a New York City marketer of water repellent paints and coatings to cease misrepresenting that it is a division of Union Carbide Co. or any other large company, exaggerating the earnings of prospective franchised dealers, misrepresenting the quality of its paints, using a fictitious subsidiary to collect its accounts, failing to reveal that its purchase contracts may be negotiated to third parties, making false guarantees, and using other deceptive means to recruit salesmen and dealers to sell its products.

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 Ther-

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mochemical Products, Inc., a corporation, and Jeannette Vine and Beatrice Freeman, also known as Beatrice Jacobs, individually and as officers of said corporation, and Charles A. Jacobs and David Jacobs, individually and as managers of said corporation, and Wolmart Discount Corporation, a 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 Thermochemical Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1860 Broadway, New York, New York.

Respondents Jeannette Vine and Beatrice Freeman, also known as Beatrice Jacobs, are officers of said corporate respondent and their address is the same as that of said corporate respondent Thermochemical Products, Inc.

Respondents Charles A. Jacobs and David Jacobs are managers of the said corporate respondent and their address is the same as that of the said corporate respondent Thermochemical Products, Inc.

Respondent Wolmart Discount Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1841 Broadway, New York, New York. It is a wholly owned subsidiary of respondent Thermochemical Products, Inc.

Respondents Jeannette Vine and Beatrice Freeman, also known as Beatrice Jacobs, as officers, and Charles A. Jacobs and David Jacobs as managers, formulate, direct and control the acts and practices of the corporate respondent Thermochemical Products, Inc., including the acts and practices hereinafter set forth.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of water repellent paints and coatings to dealers for resale to the public under the trade names, among others, of "Aqua-Chek," "Vivilume" and "Vin-L-Brush-On."

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 and transported from their place of business in the State of New York to purchasers thereof located in various other States of the United States and maintain, and at all times hereinafter mentioned have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent Walmart Discount Corporation is now, and for some time past has been, engaged in the collection of past due or delinquent accounts and negotiable paper for the respondent Thermochemical Products, Inc., and others.

PAR. 5. In the course and conduct of its business, respondent Walmart Discount Corporation is now, and for some time last past has been, receiving accounts and negotiable paper for collection from outside the State of New York. In addition thereto said respondent has sent and received, by means of the United States mail, letters, checks and documents to and from States other than the State of New York and maintains, and at all times herein mentioned has maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as that sold by respondents.

PAR. 7. In the course and conduct of their business, respondents have operated, and continue to operate, a sales plan by means of which they secure dealers for the sale and distribution of their products to the purchasing public. These dealers are solicited and secured by salesmen employed by said respondents, such salesmen having been selected and trained by said respondents for this purpose. The primary function of these salesmen is to establish said dealerships and to obtain orders for the products of said respondents by means of written contracts or so-called "special dealership agreements" with which are combined an initial order for one of said respondents' products. This special dealership agreement assigns to the said dealer a particular territory within which he may operate and sell said respondents' products. The dealer has the option of paying for the merchandise purchased within a specified time, usually 10 days, or of paying the amount in installments, usually by executing three trade acceptances which are immediately transferred to a finance or discount com-

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pany. When, in the course of attempts to enforce payment of such trade acceptances, dealers protest that their contracts with respondents were obtained as a result of misrepresentation, the position is asserted in opposition to such protest that the finance company is a holder in due course and not subject to such defenses.

It is the said respondents' usual practice to follow up this transaction within a few weeks by having another salesman, called a "back man," visit the dealer and, using the same tactics as the first salesman, attempt to sell the dealer an order of a different one of respondents' products than that which was included in the first sale.

During the course of the sales presentations, as aforesaid, the said respondents' salesmen use physical demonstrations to portray the water repellent properties of the particular product being sold. The equipment for these demonstrations is supplied to the salesmen by the said respondents. When the product is delivered it is sometimes different from that used by the salesmen in the demonstrations and the dealer cannot perform the same demonstrations for his customers as did the salesman.

PAR. 8. In the course and conduct of their business, as aforesaid, and for the purpose of inducing the sales of their products, respondents have made certain statements and representations to prospective dealers, by and through oral statements of their salesmen and representatives and by means of brochures and other written and printed material, directly or by implication.

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

1. That the respondent Thermochemical Products, Inc., is a subsidiary of, a division of or is affiliated with Union Carbide Company, General Electric Company or Aluminum Company of America.
2. That the products of the said corporate respondent are manufactured, or have been developed, by one of the aforesaid companies.
3. That products sold by the respondents are unconditionally guaranteed for five or ten years as the case may be.
4. That respondents' dealers will realize various profits up to \$18,000 per year from the resale of respondents' products.
5. That the respondents' dealers may return to the respondents any merchandise that is not sold or that the respondents will transfer it to another dealer.

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6. That respondents' products are waterproof.
7. That respondents' products are suitable for both inside and outside of a building.
8. That a survey has been made of the territory in which the prospective dealer is located, prior to the visit of the respondents' salesman to the dealer.
9. That one coat of any of respondents' products will be sufficient to cover the surface to be painted.
10. That respondents will assist the dealer in making sales by sending a representative to contact prospective customers of the dealer, by erecting billboards for display, by furnishing newspaper mats for the use of the dealer free of charge and by preparing suitable mailings on the dealer's letterhead which are to be sent to prospective customers of the dealer.

PAR. 9. In truth and in fact:

1. Respondent Thermochemical Products, Inc., is not a subsidiary of, a division of or is not affiliated with Union Carbide Company, General Electric Company, Aluminum Company of America or any other corporation.
2. The products of the corporate respondent Thermochemical Products, Inc., are neither manufactured nor developed by any one of said companies, although one of the ingredients in said products may have been manufactured by one or the other of said corporations and is placed in combination by the respondents with other ingredients not manufactured by such company.
3. The products sold by the respondents are only guaranteed in a limited way and not unconditionally.
4. Few, if any, dealers earn \$18,000 per year from the resale of respondents' products or whatever lesser amount was represented to them at the time of the purchase and in many cases make no profit at all, but sustain a substantial loss.
5. Respondents seldom, if ever, permit the return of unsold merchandise or transfer such merchandise to other dealers.
6. Respondents' products are not waterproof but only water repellent.
7. Respondents' products are not suitable for use on the inside of a structure.
8. No survey has ever been made of the territory in which the prospective dealer is located for the purpose of ascertaining the potential sales within that territory.

9. One coat of any of respondents' products is not sufficient to cover the surface to be painted.

10. Respondents do not assist the dealer in making sales either by sending a representative to contact prospective customers of the dealers, by erecting billboards and other displays, by furnishing newspaper mats for the use of the dealer free of charge, or by preparing suitable mailings on the dealer's letterhead.

PAR. 10. When trade acceptances are taken in payment of merchandise purchased they are discounted with Ambassador Factors Corporation or some other discount company claiming to be holders in due course. After a default in the payment of such trade acceptances, the same are assigned to respondent Wolmart Discount Corporation which company brings suit in its name, alleging that it is an assignee of a holder in due course and therefore entitled to all the rights of a holder in due course.

PAR. 11. In truth and in fact, said Wolmart Discount Company is a wholly owned subsidiary of the respondents, so that the effect of such assignment is the same as if the paper had been assigned to the other corporate respondent, the original holder thereof.

PAR. 12. The fact of assignment to Wolmart Discount Corporation and the bringing of suit in its name as assignee has had, and now has, the tendency and capacity to mislead and deceive dealers against whom suit is brought into the erroneous and mistaken belief that the said representations and implications are true and to induce the said dealers to refrain from asserting defenses they may have against the respondents and to make payments which they might otherwise not have made.

PAR. 13. The use by the respondents of the aforesaid false, deceptive and misleading statements and representations with respect to their said products and the status of Wolmart Discount Corporation, has had, and now has, the capacity and tendency to mislead and deceive a substantial number of their said dealers as well as members of the purchasing public into the erroneous and mistaken belief that such statements and representations were, and are, true and to cause substantial numbers of said dealers, as well as members of the purchasing public, to purchase substantial quantities of the said respondents' products because of such erroneous and mistaken belief.

PAR. 14. 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

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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. Roy B. Pope and Mr. Herbert S. Forsmith for the Commission.

Mr. Miles Warner, of Philadelphia, Pa., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER
DECEMBER 11, 1968

The complaint, issued in this proceeding on January 9, 1967, charges Thermochemical Products, Inc., a corporation, Jeannette Vine, Beatrice Freeman, also known as Beatrice Jacobs, individually and as officers of said corporation, Charles A. Jacobs and David Jacobs, individually and as managers of said corporation, and Wolmart Discount Corporation, a corporation, hereinafter referred to as respondents, with using false, deceptive and misleading statements and misrepresentations to recruit dealers for respondents' paints and coatings, in violation of Section 5 of the Federal Trade Commission Act.

Through counsel, respondents answered the complaint and denied the substantial allegations. Hearings have been held in Los Angeles and San Francisco, California, Chicago, Illinois, Houston, Texas, Greensboro, North Carolina, and New York, New York, to receive testimony offered by complaint counsel. Defense hearings were delayed due to the illness of the individual respondent, Charles A. Jacobs. Defense hearings have now been completed and proposed findings of fact and conclusions of law have been filed by respective counsel. All proposed findings and conclusions not found or concluded herein are denied. Upon the basis of the entire record, the hearing examiner makes the following findings of fact and conclusions of law, and issues the following order:

FINDINGS OF FACT

1. The respondent, Thermochemical Products, Inc., is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 1860 Broadway, New York, New York (Answer, Par. 1).
 2. The individual respondent, Beatrice Freeman, is the wife of the individual respondent, David Jacobs (Tr. 1663-64), but does
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business under her maiden name, Beatrice Freeman (CX 133A). The individual respondents, Jeannette Vine and Beatrice Freeman Jacobs, are the officers and directors of Thermochemical Products, Inc., Jeannette Vine being president and treasurer, and Beatrice Freeman Jacobs being Secretary thereof (Tr. 1663, 1669, 1670, 1674; CX 134A; Answer, Par. 1). Jeannette Vine and Beatrice Freeman Jacobs own all of the outstanding capital stock of the corporate respondent, Thermochemical Products, Inc. (Tr. 1664; CX 135 and 187).

3. The individual respondents, Charles A. Jacobs and David Jacobs, are agents of the individual respondents, Jeannette Vine and Beatrice Freeman Jacobs, appointed to operate Thermochemical Products, Inc. As such agents, Charles A. Jacobs and David Jacobs are managers of said corporate respondent. Their business addresses are the same as that of corporate respondent (CX 133A and B; Answer, Par. 1). As such managers, the said Charles A. Jacobs and David Jacobs control the acts and practices of Thermochemical Products, Inc., as agents for the individual respondents, Jeannette Vine and Beatrice Freeman Jacobs (CX 187; Tr. 1690-91, 2194).

4. The gross business of respondent Thermochemical Products, Inc., for the year ending October 31, 1967, amounted to approximately \$2,000,000 (Tr. 1967).

5. The respondent, Walmart Discount Corporation, is a corporation organized under the laws of the State of New York on December 17, 1964 (Glantz, Tr. 1932). No stock has been issued by Walmart Discount Corporation, and no capital stock paid in. There are no directors, and the only officer is Bruce Mund, who is acting as secretary (Glantz, Tr. 1933; Mund, Tr. 1812). Walmart Discount Corporation had no bank account until November 18, 1965 (Mund, Tr. 1874).

6. Thermochemical Products, Inc., along with the individual respondents named herein and above referred to, is now, and for some time last past has been, engaged in the offering for sale, sale, and distribution of paints and coatings to dealers for resale to the public under the trade names, among others, of "Aqua-Chek," "Permalume," "Vivilume," and "Vin-L-Brush-On" (Answer, Par. 2; CX 133A and 133B).

7. Prior to the formation of Thermochemical Products, Inc., the respondents, Charles A. Jacobs and David Jacobs, were engaged in the offering for sale, sale, and distribution of paints and coatings under the corporate names of Ohmlac Painting and Re-

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fining Company, Inc., Sterling Materials Company, Inc., and Carbozite Coatings, Inc., and their sales methods were similar to those now used by Thermochemical Products, Inc. The Federal Trade Commission entered an order against the said Charles A. Jacobs and David Jacobs, and the three corporations named in the preceding sentence, directing the respondents to cease and desist from certain practices found therein to be deceptive (Docket No. 6426, 52 F.T.C. 909; Jacobs, Tr. 2229). A civil penalty proceeding was brought against said respondents in Docket No. 6426 for violation of the order entered therein, which resulted in a consent judgment for \$28,000 against the said respondents (CX 129 and 130).

8. In the course and conduct of its business, Thermochemical Products, Inc., and the individual respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped and transported from their place of business in the State of New York, or from the place where such products are manufactured in the State of New Jersey, to purchasers thereof located in various other States of the United States, and maintain, and at all times herein mentioned have maintained, a substantial course of trade in said products in commerce (Answer, Par. 3).

9. In the conduct of its business, the corporate respondent, Thermochemical Products, Inc., has been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of products of the same general kind and nature as that sold by respondents (Answer, Par. 6).

10. The charging allegations of the complaint allege, among other things, that:

In the course and conduct of the business of Thermochemical Products, Inc., the respondents have operated, and continue to operate, a sales plan by means of which they secure dealers for the sale and distribution of their products to the purchasing public. These dealers are solicited and secured by salesmen employed by respondents, such salesmen having been selected and trained by respondents for this purpose. The primary function of these salesmen is to establish said dealerships and obtain orders for the products of Thermochemical Products, Inc., by means of written contracts or so-called "Special Dealership Agreements" with which is combined an initial order for one of respondents' products. This Special Dealership Agreement purports to assign to the said dealer a particular territory within which the dealer may op-

erate and sell respondents' products. The dealer has the option of paying for the merchandise purchased within a specified time, usually ten days, or of paying the amount in installments, usually by executing three trade acceptances which are immediately transferred to a finance or discount company.

11. The complaint further alleges that it is the respondents' usual practice to follow up this original transaction within a few weeks by having another salesman, called a "back man," visit the dealer and, using the same or similar representations as the first salesman, attempt to sell the dealer an order for a product similar to that purchased by the dealer from the first salesman, but under a different trade name.

12. The complaint further alleges that, during the course of the sales presentations by respondents' salesmen, said salesmen use physical demonstrations to portray the water repellent properties of the particular product being sold. The equipment for these demonstrations is supplied to the salesmen by the respondents. When the product is delivered to, and received by, the dealer, it is generally different from that used by the salesmen in the demonstrations, and the dealer cannot perform the same demonstration with the product as did the salesmen.

13. The complaint further alleges that, in the course and conduct of their business, and for the purpose of inducing the sales of their products, respondents have made certain statements and representations to prospective dealers, by and through oral statements of their salesmen and representatives and by means of brochures and other written and printed material, directly or by implication; and that, typical and illustrative, but not all inclusive, of said statements and representations, are the following:

(a) That the respondent Thermochemical Products, Inc., is a subsidiary of, a division of or is affiliated with Union Carbide Company, General Electric Company or Aluminum Company of America; whereas, in truth and in fact, respondent Thermochemical Products, Inc., is not a subsidiary of, a division of or is not affiliated with Union Carbide Company, General Electric Company, Aluminum Company of America or any other corporation.

(b) That the products of the said corporate respondent are manufactured, or have been developed, by one of the aforesaid companies; whereas, in truth and in fact, the products of the corporate respondent Thermochemical Products, Inc., are neither manufactured nor developed by any one of said companies, although one of the ingredients in said products may have been

manufactured by one or the other of said corporations and is placed in combination by the respondents with other ingredients not manufactured by such company.

(c) That products sold by the respondents are unconditionally guaranteed for five or ten years as the case may be; whereas, in truth and in fact, the products sold by the respondents are only guaranteed in a limited way and not unconditionally.

(d) That respondents' dealers will realize various profits up to \$18,000 per year from the resale of respondents' products; whereas, in truth and in fact, few, if any, dealers earn \$18,000 per year from the resale of respondents' products or whatever lesser amount was represented to them at the time of the purchase and in many cases make no profit at all, but sustain a substantial loss.

(e) That the respondents' dealers may return to the respondents any merchandise that is not sold or that the respondents will transfer it to another dealer; whereas, in truth and in fact, respondents seldom, if ever, permit the return of unsold merchandise or transfer such merchandise to other dealers.

(f) That respondents' products are waterproof; whereas, in truth and in fact, respondents' products are not waterproof but only water repellent.

(g) That respondents' products are suitable for both inside and outside of a building; whereas, in truth and in fact, respondents' products are not suitable for use on the inside of a structure.

(h) That a survey has been made of the territory in which the prospective dealer is located, prior to the visit of the respondents' salesman to the dealer; whereas, in truth and in fact, no survey has ever been made of the territory in which the prospective dealer is located for the purpose of ascertaining the potential sales within that territory.

(i) That one coat of any of respondents' products will be sufficient to cover the surface to be painted; whereas, in truth and in fact, one coat of any of respondents' products is not sufficient to cover the surface to be painted.

(j) That respondents will assist the dealer in making sales by sending a representative to contact prospective customers of the dealer, by erecting billboards for display, by furnishing newspaper mats for the use of the dealer free of charge and by preparing suitable mailings on the dealer's letterhead which are to be

sent to prospective customers of the dealer; whereas, in truth and in fact, respondents do not assist the dealer in making sales either by sending a representative to contact prospective customers of the dealers, by erecting billboards and other displays, by furnishing newspaper mats for the use of the dealer free of charge, or by preparing suitable mailings on the dealer's letterhead.

14. The complaint further alleges that, when trade acceptances are taken in payment of merchandise purchased from respondents, the trade acceptances are discounted with Ambassador Factors Corporation or some other discount company which claims to be a holder in due course; and, when the discount company or factor attempts to enforce payment of such trade acceptances, and the dealer claims that the purchase of corporate respondent's product and the execution of the trade acceptances were obtained by misrepresentation, the finance company or factor asserts that it is a holder in due course and not subject to such a defense.

15. The complaint further alleges that, after a default in the payment of such trade acceptances, the same are assigned to the respondent, Walmart Discount Corporation, which company brings suit in its name, alleging that it is an assignee of a holder in due course and therefore entitled to all the rights of a holder in due course; that, in truth and in fact, said Walmart Discount Corporation is a wholly owned subsidiary of the respondents, so that the effect of such assignment is the same as if the paper had been assigned to the other corporate respondent, the original holder thereof; that the fact of assignment to Walmart Discount Corporation and the bringing of suit in its name as assignee has had, and now has, the tendency and capacity to mislead and deceive dealers against whom suits are brought into the erroneous and mistaken belief that the said representations and implications are true and to induce the said dealers to refrain from asserting defenses which they may have against the respondents and to make payments which they might otherwise not have made.

16. The complaint further alleges that the use by the respondents of the aforesaid false, deceptive and misleading statements and representations with respect to their products and the status of Walmart Discount Corporation has had, and now has, the capacity and tendency to mislead and deceive a substantial number of their said dealers, as well as members of the purchasing public, into the erroneous and mistaken belief that such statements and representations were true and to cause substantial numbers of said dealers and members of the purchasing public to purchase

substantial quantities of respondents' products because of such erroneous and mistaken belief; and that the aforesaid acts and practices of respondents were and are to the prejudice and injury of the public and of respondents' competitors and 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.

17. To establish the allegations of the complaint, especially with respect to the allegedly false representations made by respondents' salesmen to prospective dealers for the resale of respondents' products, complaint counsel offered the testimony of approximately 40 persons engaged in various types of retail businesses, who had been personally solicited by respondents' salesmen to purchase respondents' products and become local retail dealers therefor. It is the allegedly false, deceptive, and misleading statements and representations made by respondents' salesmen to these prospective dealers which constitute a substantial portion of the testimony offered by complaint counsel to establish the violations of Section 5 of the Federal Trade Commission Act alleged in the complaint. The evidence shows that respondents' salesmen called on and solicited prospective dealers among persons who operated retail businesses in various sections of the United States. At hearings held in California, 11 residents of that State testified concerning representations made to them by respondents' salesmen. In addition to the testimony of these 11 operators of businesses, two investigators from the District Attorney's office in Santa Clara County testified at the hearings held in San Francisco concerning representations made to them by salesmen for Thermochemical Products, Inc. (Howard B. Hamilton, Tr. 655-703; William D. Reed, Tr. 704-717). Ten witnesses testified at hearings held in Chicago, Ill., including three witnesses who resided in Ohio, two in Michigan, two in Indiana, one in Wisconsin, and two in Illinois. Eleven persons who resided in various sections of Texas testified at hearings held in Houston, Texas. Six persons who resided in North Carolina testified at hearings held in Greensboro, North Carolina. Two persons who resided in Pennsylvania and two from New York State testified at hearings held in New York, N.Y., concerning representations made to them by respondents' salesmen, along with other witnesses who testified on other phases of the case, including employees of respondents and the individual respondents. The testimony of each of these witnesses will not be discussed separately in this decision.

The discussion will be limited to a representative number who testified at hearings in various sections of the country, and whose testimony clearly shows a pattern of the types of representations made by respondents' salesmen to prospective dealers.

18. The first witness who testified was Mr. Paul Mauerhan, a master plumber, of Glendale, California. Mr. Mauerhan testified as follows: On April 24, 1967, pursuant to an appointment made by telephone, Mr. Mike Evans and an associate (whose name Mr. Mauerhan did not remember), representing the corporate respondent, Thermochemical Products, Inc., called at the office of Mr. Mauerhan's plumbing business, Mauerhan Plumbing, Inc., in Glendale, California, for the announced purpose of demonstrating Thermochemical's paint products and to set Mr. Mauerhan and his company up as a distributor of said products (Tr. 72, 74; CX 1 and 2). Mr. Evans proceeded to demonstrate one of Thermochemical's products, called "Aqua-Chek" (CX 1). Mr. Evans stated that the silicones contained in the paint were a product of General Electric Company (Tr. 86). Mr. Evans stated that the product was guaranteed for five years on outside use and for ten years when used inside. In Mr. Mauerhan's presence, Mr. Evans applied a clear liquid material to a brick, which caused the brick to appear to Mr. Mauerhan to be made waterproof. This clear liquid material was contained in a can bearing the name, Thermochemical, and which Mr. Evans had brought with him. Mr. Mauerhan asked Mr. Evans for a sample of the liquid material, but Mr. Evans stated that he was out of samples, as well as brochures. Mr. Evans then exhibited a piece of screen, and stated that he had put one coat of Aqua-Chek on the screen. The material on the screen had a high gloss, was very thick and flexible. Mr. Evans also produced a thin piece of metal on which the Aqua-Chek paint had been placed, and which, when twisted back and forth, the paint stayed on "beautifully," and which Mr. Evans stated was scratch-resistant. Mr. Mauerhan removed a key from his key chain and attempted to "scratch it, but it wouldn't scratch. It was a very tough—it was really an excellent material" (Tr. 75-76). Mr. Evans also produced an asphalt shingle which he stated was coated with this material and would stand up to 500 degrees in temperature. As a result of the demonstration, Mr. Mauerhan executed what is denominated as a "SPECIAL DEALERSHIP AGREEMENT," dated April 24, 1967 (CX 1), by which, among other things, Mauerhan Plumbing, Inc., purchased \$982.80 worth of Aqua-Chek from corporate respondent, Thermochemical Prod-

ucts, Inc. In payment therefor, Mr. Mauerhan executed three trade acceptances due June 10, July 10, and August 10, 1967, respectively.

19. After receipt and delivery of the Aqua-Chek paint purchased from Thermochemical Products, Inc., and also sample cans of the product, Mr. Mauerhan decided to perform some tests of his own on the Aqua-Chek paint. He placed a coating of the colored Aqua-Chek on a piece of screen and found that it was entirely different from the product on the screen which Mr. Evans demonstrated to Mr. Mauerhan. The Aqua-Chek which Mr. Mauerhan applied on the screen was received in evidence as CX 3. Mr. Mauerhan further testified that he placed some of the Aqua-Chek on a piece of tile and it flaked off like chalk (CX 4). Mr. Mauerhan applied some of the Aqua-Chek to a piece of metal and it also flaked off like chalk (CX 6). Mr. Mauerhan testified that Mr. Evans told him that the Aqua-Chek paint would be ideal for "painting showers, waterproofing and painting and resurfacing showers" (Tr. 94). Mr. Mauerhan stated that the Aqua-Chek finish would not hold up for a period of five years and be water-resistant. Mr. Mauerhan described CX 5, which is a piece of plywood. Mr. Mauerhan testified that he applied two coats of Aqua-Chek to this piece of plywood as a test to verify whether or not it would be waterproof. After applying the first coat of Aqua-Chek, he waited twenty-four hours before applying the second coat. Mr. Mauerhan then "put it in water and it took on water like a piece of wood that was uncoated" (Tr. 96). Mr. Mauerhan testified that he applied two different colors of Aqua-Chek paint on the piece of galvanized metal (CX 6), in order to see how it would stay on a galvanized surface and how it would stand up to exterior use (Tr. 97-98). Mr. Mauerhan further testified that Mr. Evans stated that only one coat of Aqua-Chek would be required, and that there was no necessity for an undercoating or primer (Tr. 101). Mr. Mauerhan further stated that Mr. Evans promised, among other things, that, after the Aqua-Chek paint was delivered, Thermochemical Products, Inc., would send a person to assist in getting sales started, but that no one ever appeared. Contrary to the statement of Mr. Evans that only one coat of Aqua-Chek was necessary, the cans containing the Aqua-Chek paint, which were delivered to Mr. Mauerhan, had labels bearing directions which specified that an undercoat was required on some of the Aqua-Chek and some might require two coats of Aqua-Chek (Tr. 102).

20. On cross-examination, Mr. Mauerhan testified, among other things, that: After thirty years in the plumbing business, he knows "whether a material is going to stay on a shower for a reasonable amount of time or not" (Tr. 112). The scratch marks on CX 4 occurred after the paint had dried. Mr. Mauerhan was able to scratch it off with his fingernails. It was not necessary to use a key to scratch the paint, as was done in the case of the piece of metal produced by Mr. Evans (Tr. 112, 113). Unlike the Aqua-Chek which Mr. Mauerhan applied to the piece of galvanized metal (CX 6) and the wire screen (CX 3), the piece of metal which Mr. Evans demonstrated to Mr. Mauerhan contained a substance which clung to the metal. It was very elastic and would stretch with vigorous bending. Mr. Mauerhan testified that he "bent it politely," but that Mr. Evans bent it vigorously. "He had it in the screen and he [Mr. Evans] bent the screen vigorously" (Tr. 115).

21. As a result of the tests which Mr. Mauerhan made from the samples of Aqua-Chek, he refused to pay the trade acceptances, which had been assigned by Thermochemical Products, Inc., to Commercial Progress Corporation, a factoring concern. Mr. Mauerhan did not sell any of the Aqua-Chek paint, and it remained in his possession at the time of the hearing (Tr. 139).

22. Another witness, who testified at the hearing in Los Angeles, California, was Mr. Bryce Lee Long, a manufacturer of cement piers and screw jacks which are used to help support trailer or mobile homes. Mr. Long's plant is located in Orange, California. Mr. Long testified as follows: On February 1, 1967, pursuant to a telephone call made the previous day, a Mr. Winn called on Mr. Long to demonstrate "Permalume" paint. Mr. Winn stated that he was a representative of Thermochemical Products, Inc., and was interested in having Mr. Long become a dealer for its products (Tr. 322-25). Mr. Winn then proceeded to demonstrate the effectiveness of Permalume paint. Mr. Winn produced a sieve or screen which had been painted with Permalume, blew smoke through it, and then poured water on the screen and the screen retained the water. Mr. Winn also produced a spoon which had a split down the center. Mr. Winn then poured water into the spoon, and the spoon held the water (Tr. 326). Mr. Winn stated that he would sell Mr. Long the Permalume paint for \$8 per gallon, which Mr. Long could resell at a price of \$13 per gallon, and that Mr. Long could sell approximately 400 to 500 gallons per month. Mr. Winn stated that Permalume carried a regular guar-

antee for ten years, was very durable, and that one coat was sufficient to cover anything, metal, wood, cement, exterior and interior. Mr. Winn further stated that he would return in two weeks after delivery of the Permalume paint and render sales assistance to Mr. Long. However, he did not return (Tr. 327). As a result of Mr. Winn's demonstration, Mr. Long executed a Special Dealership Agreement, dated February 1, 1967 (CX 27), whereby, among other things, Mr. Long purchased \$737.10 worth of Permalume paint from Thermochemical Products, Inc., and became a so-called dealer for its products.

23. About two weeks later, on or about February 14, 1967, but before delivery of the above order for Permalume paint from Thermochemical Products, Inc., a second representative of Thermochemical Products, Inc., called on Mr. Long for the purpose of selling him an order for one of Thermochemical's other products, Aqua-Chek paint. The name of this representative was Mr. Durbin. Mr. Long stated that Dr. Durbin told him that Aqua-Chek paint was completely waterproof for swimming pools; that for the colored Aqua-Chek, Thermochemical Products, Inc., would give a five-year guarantee, and for the clear Aqua-Chek, a ten-year guarantee; that one coat of Aqua-Chek was adequate for waterproofing any "cement, buildings, swimming pools, or whatever"; and that he (Mr. Long) could return any unsold portion of the Aqua-Chek to Thermochemical Products, Inc. As a result of this visit, Mr. Long signed an order for \$501.00 worth of Aqua-Chek paint (CX 24), agreeing to send his check for \$200.00 in a few days, and the balance payable in three trade acceptances (Tr. 329-332). Mr. Long further testified that: After receiving the shipment of Permalume paint, he made a long distance telephone call and wrote several letters to Thermochemical Products, Inc., requesting sales assistance as Mr. Winn had promised during his sales demonstration on February 1, 1967 (Tr. 333, 368). Finally, Mr. Long received a sales kit (CX 25) from Thermochemical Products, Inc., but the material contained in this sales kit was different and bore no resemblance to the materials used by Mr. Winn in his demonstration (Tr. 333-35). Mr. Long sold one gallon of the Permalume paint, but had to refund the purchase price to the purchaser (Tr. 371). Mr. Long employed a professional painter to assist him in making some practical tests of the Permalume paint which he had purchased from Thermochemical

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Products, Inc. (Tr. 336-38). Mr. Long testified that he took a piece of plywood, cleaned and sanded it, and then applied one coat each of the nine colors of Permalume paint to the piece of plywood, approximately 30 inches long and 8 inches wide, marked and received in evidence as CX 27 (Tr. 339). Two coats of the rose-colored Permalume were applied to the plywood strip, CX 27 (Tr. 340-41). Mr. Long further testified that the colors of the Permalume paint shown on CX 27 are entirely different from the colors of the paint shown to Mr. Long by Mr. Winn during his demonstration (Tr. 341-342). After these tests, Mr. Long wrote a letter to Thermochemical Products, Inc., requesting that it send a representative to visit him as Mr. Winn had originally promised, and stating that, until this was done, Mr. Long would not make any further payment on the trade acceptances. Mr. Long further testified that one coat of the Permalume paint was not sufficient, would not cover, that it streaked, and that the colors were not the same as represented and demonstrated by Mr. Winn (Tr. 344). Mr. Long further stated that Thermochemical Products, Inc., did not ever send the demonstration kit promised by Mr. Winn, which included the strainer Mr. Winn had promised to waterproof and send to Mr. Long for use in demonstrations, together with the spoon and a kit to demonstrate how the Permalume paint was resistant to acid (Tr. 369).

24. A witness who testified in support of the complaint at a session of the hearings held in San Francisco, California, was Mrs. Jean Hixson who, with her husband, Karl Hixson, owns and operates Karl's Radiator Repair Shop in Mountain View, California (Tr. 403-404). Mrs. Hixson testified as follows: On March 20, 1967, a representative of respondent Thermochemical Products, Inc., a Mr. DeLucia, called at their radiator repair shop for the purpose of demonstrating and selling them an order for Aqua-Chek, one of corporate respondent's paint products. Mr. DeLucia stated that Aqua-Chek was a masonry paint that could be used inside and outside, on wood, cement floors, driveways, swimming pools, stucco, and brick (Tr. 405, 412). Mr. DeLucia had with him a satchel which contained, among other things, pieces of brick and cinderblock, aspirin tablets, ink, and a piece of aluminum which had been painted with different colors of paint (Tr. 405-406). Mr. DeLucia then made a demonstration by placing the piece of painted aluminum in muriatic acid to show that the acid would not affect the paint. Mr. DeLucia then produced a piece of cinderblock, half of it

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painted with paint and half not, and he put some drops of ink on the one side which had been painted and the ink just beaded up. It didn't sink in at all. The other side, it sunk right into the brick (Tr. 406).

Mr. DeLucia next

put an aspirin in a cup of water that had been treated with this silicone, and it didn't dissolve, and an aspirin that hadn't been treated and which that dissolved (Tr. 406).

Mr. DeLucia also

put a tissuepaper over the piece of aluminum that was painted and put a cigarette on it and it didn't even burn the paper so—it was on top of the painted material.

*** Then he put some powder *** in a cup of water and stuck his finger down in it and it come down absolutely dry. And in the cup that didn't have it in and, of course, the finger was wet (Tr. 406).

Mr. DeLucia stated that the paint was guaranteed for ten years on the "inside and five on the outside" (Tr. 407). As a result of the demonstration, Mrs. Hixson purchased \$982.80 worth of Aqua-Chek paint and executed a Special Dealership Agreement, dated March 20, 1967, a copy of which was received in evidence as CX 28. The \$982.80 was to be paid in four monthly installments (Tr. 409; CX 28).

25. Mrs. Hixson testified that, after receiving shipment of the paint, she and her husband decided to paint their cement garage floor with the Aqua-Chek. She testified that they cleaned and scrubbed the floor with muriatic acid, a strong solution which they use in cleaning radiators (Tr. 407), and applied the clear Aqua-Chek to the cement garage floor. Mrs. Hixson was interested in preventing grease from sinking into the cement garage floor. After the clear Aqua-Chek had been applied to the floor and had dried, she and her husband poured some oil or grease on it "to see if it would wipe up, and it just smeared on there like there was nothing on the floor" (Tr. 412). After this, Mrs. Hixson, by letter and long distance telephone to Thermochemical Products, Inc., attempted to return the paint (Tr. 412; CX 29 and 30). Thermochemical Products, Inc., refused to accept return of the paint. Mrs. Hixson testified that she gave two quarts of the Aqua-Chek paint to a customer with which to paint some cement work around his place, and which he was to pay for later and probably purchase additional paint. The customer applied the Aqua-Chek paint, but it chipped and washed off and the customer refused to pay for it or to purchase any additional Aqua-Chek paint (Tr. 413-16). In spite of the representations of corporate

respondent's salesman, Mr. DeLucia, that the Aqua-Chek paint was appropriate to be used on cement floors and swimming pools, corporate respondent's letter to Karl's Radiator Repair Shop (CX 30) contradicts the representations of its salesman, Mr. DeLucia, and states, among other things, that Aqua-Chek is not suitable for use in swimming pools or on concrete floors.

26. Mr. C. L. Sweigart, operator of C. L. Sweigart Company, a machine shop, located in San Jose, California, was another witness who testified at the hearing in San Francisco, California. Mr. Sweigart testified as follows: In January 1967, he received a telephone call from a person who gave her name as Mrs. Johnson, who told Mr. Sweigart that she had a new product on the market, a clear plastic coating that would stick to glass, metal, wood, in fact, anything, without any necessary preparation beforehand; that it was rich in General Electric silicones; that Thermochemical Products, Inc., had the exclusive right in the United States to use such silicones in this product; and that Thermochemical Products, Inc., wanted to place this product in Mr. Sweigart's machine shop. Mrs. Johnson further told Mr. Sweigart that he would receive approximately \$4,000 a year extra profit for his machine shop by selling Thermochemical's product. On the following day, January 21, 1976 (CX 31), Mr. Mike Evans, Regional Franchise Director for Thermochemical Products, Inc., called on Mr. Sweigart and demonstrated Thermochemical's product, Aqua-Chek (Tr. 456-59). Mr. Evans told Mr. Sweigart that Aqua-Chek was blisterproof, heat-resistant, and would waterproof just about anything; that it was superior to "Rustoleum" and to duPont's "Lucite." Mr. Evans demonstrated the use of Aqua-Chek by applying Aqua-Chek to one-half of a brick and pouring water over it. The part of the brick that had been treated with Aqua-Chek "shed" the water, made it "waterproof," and the part of the brick that had not been treated with Aqua-Chek absorbed the water (Tr. 460). Mr. Evans then placed some silicones in a glass of water and directed Mr. Sweigart to put his "finger in the water and see how the silicones made it waterproof." Mr. Evans had a piece of metal, supposedly treated with Aqua-Chek, which he bent and scratched to show "me how superior this Aqua-Chek was." Mr. Evans told Mr. Sweigart that Aqua-Chek was to be used anywhere "for waterproofing or color to make the appearance of any building more beautiful"; that it could be used inside and outside; and that no preparation was needed before application (Tr. 461). Mr. Evans also told Mr. Sweigart that one coat of Aqua-Chek

was usually sufficient (Tr. 462). As a result of the demonstration, Mr. Sweigart executed a Special Dealership Agreement (CX 32), in which he purchased \$982.80 worth of Aqua-Chek paint, payable in the form of three trade acceptances which he executed for \$327.60 each, payable 45, 75, and 105 days after date thereof.

27. On or about February 9, 1967, but before delivery to Mr. Sweigart of the \$982.80 worth of Aqua-Chek paint which Mr. Sweigart purchased on January 21, 1967, another representative of Thermochemical Products, Inc., a Mr. Durbin, telephoned Mr. Sweigart and stated that he wished to visit him. Mr. Durbin visited Mr. Sweigart's machine shop and sought to interest Mr. Sweigart in purchasing another product of Thermochemical Products, Inc., called "Permalume." Mr. Durbin stated that Permalume was a superior automotive finish; that it was used on General Motors' Cadillacs; and that Ford also used it, and would probably use it entirely in their Lincoln line. Mr. Durbin stated that Permalume would "stay in 1165 degrees," and that the product was guaranteed for ten years due to the superior quality of the pigments, which were imported from Germany (Tr. 465). Mr. Durbin also told Mr. Sweigart that, if Mr. Sweigart became a dealer, Mr. Durbin would give Mr. Sweigart an exclusive franchise for Santa Clara County, and that Mr. Sweigart could expect about 1,000 gallons a month in sales. Mr. Sweigart signed a purchase order, dated February 9, 1967, for \$962.20 worth of Permalume paint, for which he gave his check for \$350 as a down-payment.

28. Mr. Sweigart further testified that: After receiving delivery of the Aqua-Chek paint, he attempted to make the tissue-paper test which had been demonstrated to him by Mr. Evans, but it "leaked right through there like a sieve" (Tr. 468). Mr. Sweigart also applied the Aqua-Chek paint to a piece of metal which he had first prepared by cleaning with a wire brush, emery cloth, and steel wool. Mr. Sweigart then applied one coat of Aqua-Chek to the piece of metal. After application, Mr. Sweigart was able to "peel it off" (Tr. 469).

29. Mr. Hugh W. Silsby, operator of the Silsby Implement Company, a seller of farm implements, of Mason, Michigan, was one of the witnesses who testified at a session of the hearings held in Chicago, Illinois. Mr. Silsby testified as follows: In January 1967, Mr. Silsby was called on the telephone by a person, ostensibly from New York, N.Y., who asked Mr. Silsby if he was interested in a business proposition on a new product (Tr.

781-82). Later, a man by the name of Mr. Andre, accompanied by another person, called on Mr. Silsby and stated that they were representatives of Thermochemical Products, Inc. Mr. Andre made a demonstration of one of Thermochemical's paint products, Aqua-Chek. Mr. Andre produced a spray can which he represented as containing a clear silicone paint, which he sprayed on Mr. Silsby's shoes, the threshold entrance to the store, a cement slab in front, a brick, and on a tile block on the adjoining building. After the paint had dried on each of these items, Mr. Andre then poured water over them and "the water beaded up and rolled off." Mr. Andre then produced a piece of flexible metal, which he stated had been coated with Aqua-Chek and on which he poured battery acid. Mr. Andre also poured the battery acid on the metal cover of a can, to which he then applied the heat from an acetylene torch. The heat from the torch did not mar the surface of the flexible piece of metal coated with Aqua-Chek; it boiled away the acid, but the Aqua-Chek coating remained on the flexible piece of metal. However, the heat from the torch boiled away the acid from the can cover, but discolored the surface of the can cover. Mr. Andre also produced two pieces of Kleenex. On one of the pieces, he sprayed the Aqua-Chek, and then allowed the Aqua-Chek to dry. He next poured water on each piece of Kleenex; the water did not pass through the piece of Kleenex which had been sprayed with the Aqua-Chek, but the water ran through the piece which had not been sprayed (Tr. 785-86). Mr. Andre represented to Mr. Silsby that Aqua-Chek was available in spray cans and would be helpful and useful in the home. For example, he stated that spraying Aqua-Chek on window drapery materials exposed to the sunlight would prevent their discoloration, and, when sprayed on furniture, would impregnate it against soiling. Mr. Andre also stated that Thermochemical Products, Inc., had a "practically unlimited warranty or guarantee"; that Aqua-Chek was a new product and could be applied on any material; and that one coat would be sufficient (Tr. 787-88). As a result of the demonstration and sales presentation by Mr. Andre, Mr. Silsby signed a Special Dealership Agreement, dated January 12, 1967, in which he agreed, among other things, to become a dealer for Aqua-Chek, and purchased \$591.60 worth of Aqua-Chek, for which he gave his check for \$147, with the balance payable in the form of three trade acceptances which he executed, due on or before 60, 90, and 120 days after date thereof (Tr. 795; CX 60). Mr. Andre stated that it would be possible for

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Mr. Silsby to "increase our profit by four to five thousand dollars very easily" (Tr. 789).

30. After delivery of the Aqua-Chek, Mr. Silsby applied some of the clear Aqua-Chek from a can to his daughter's snow boots for the purpose of stopping the boots from leaking; however, the Aqua-Chek did not stop the boots from leaking. Later, another person, who stated that he was a representative of Thermochemical Products, Inc., called on Mr. Silsby. This person stated that he was not a salesman, but had been instructed to ascertain if Mr. Silsby wanted another Thermochemical product on a limited basis, because the production was not very great (Tr. 788). Mr. Silsby informed the representative of the failure of the Aqua-Chek to stop his daughter's snow boots from leaking, and the representative told Mr. Silsby that his daughter had worn the snow boots too soon after application of the Aqua-Chek, and that more than an overnight period was necessary for the Aqua-Chek to form crystals and dry (Tr. 789). The representative of Thermochemical Products, Inc., wrote up a tentative order for the new type of paint which they had discussed, but Mr. Silsby did not sign the order at that time. He intended to discuss it with his brother, a partner with him in the implement business, before signing the purchase order (Tr. 790). Following the instructions of the second Thermochemical representative, Mr. Silsby applied the clear Aqua-Chek to his daughter's snow boots on a Friday evening and his daughter did not wear the boots until the following Monday morning; however, the boots still leaked at that time (Tr. 789). Mr. Silsby telephoned the secretary of a trade association to which he belonged, Farm & Power Equipment Association, and inquired about Thermochemical Products, Inc. (Tr. 791). As a result of this inquiry, Mr. Silsby telephoned the office of Thermochemical Products, Inc., in New York City, and attempted to cancel the \$591.60 order for Aqua-Chek paint. It was finally agreed that Mr. Silsby should pay \$200, keep the paint, and corporate respondent returned the three trade acceptances which Mr. Silsby had executed. At the time of the hearing, Mr. Silsby had not sold any of the paint.

31. Another witness, who testified at the hearing in Chicago, Illinois, was Mr. Richard D. Small, operator of a service station in Michigan City, Michigan. Mr. Small testified as follows: In January 1967, a person called him on the telephone, telling Mr. Small that he was a representative of Thermochemical Products, Inc., in New York, N.Y.; that Thermochemical Products, Inc.,

had just discovered and was placing on the market a new protective coating, and inquired if Mr. Small was interested in seeing a demonstration of the product. Subsequently, a man appeared, stating that he was the representative of Thermochemical Products, Inc., and proceeded to demonstrate the use of his company's product, Aqua-Chek, with a clear color, from an aerosol spray can. The representative sprayed some of the contents from the can on a piece of wood, a piece of metal, and a paper napkin. He poured water on these articles that had been sprayed with the Aqua-Chek to show how the Aqua-Chek repelled water. The representative stated that the Aqua-Chek would last for ten years, and that one coat would be sufficient to cover (Tr. 881-884, 888). Mr. Small inquired from the representative if the Aqua-Chek came in different colors, and the representative went to his automobile and returned with a can of paint. With paint from this can, the representative painted a piece of wood which Mr. Small had in his service station. This paint was a rose color and looked very well (Tr. 885). As a result of this demonstration, Mr. Small executed a Special Dealership Agreement on the form produced by the representative, dated January 23, 1967 (CX 73). Mr. Small did not remember the name of the representative, but CX 73 bears the signature of M. Andre as the representative of Thermochemical Products, Inc. According to the terms of CX 73, Mr. Small purchased \$819 worth of Aqua-Chek, and executed three trade acceptances for the balance due in payment therefor. After the Aqua-Chek was delivered, Mr. Small painted a wooden cabinet in his service station with some of the Aqua-Chek. On the following day, after the Aqua-Chek had completely dried, Mr. Small moistened a rag with water and rubbed it on the wooden cabinet which he had painted with the Aqua-Chek. The paint washed off (Tr. 887). Mr. Small then employed an attorney who arranged with the "company" to return the trade acceptances to him (Tr. 888).

32. Mr. T. E. Reese, a partner with Mr. Robert C. Maynard, in the operation of Metal Forms Company, a metal stampings business, of Grand Prairie, Texas, was one of the witnesses who testified at the hearing held in Houston, Texas. Mr. Reese testified as follows: In September 1965, he received a telephone call from a Mr. Wichita, who stated that he represented Thermochemical Products, Inc., and that Metal Forms Company was one of two companies that had been chosen from the Dallas area to be representatives of Thermochemical's product, Aqua-Chek. Subse-

quently, Mr. Wichita visited the place of business of Metal Forms Company in Grand Prairie, and made the representations complained about (Tr. 1243-45). Mr. Wichita stated that Thermochemical Products, Inc., was a part of the General Electric Company organization and used General Electric silicones in its paint products. These representations were the primary reasons Mr. Reese became interested in the Aqua-Chek paint. Mr. Wichita produced some brochures containing, among other things, a picture of an atomic submarine that had been painted with Aqua-Chek, and pictures of houses, with one-half of the house painted with Aqua-Chek and the other half unpainted, and portions of haydite brick construction painted with Aqua-Chek and portions not painted (Tr. 1249). Mr. Whichita described Aqua-Chek "as a water repellant paint-waterproof paint" (Tr. 1245); that Aqua-Chek could be used on metal surfaces for waterproofing, for painting on wooden surfaces, house eaves to waterproof them, to paint on concrete brick, haydite brick to waterproof, or to make it water-resistant, and for cellars (Tr. 1264). Mr. Wichita had with him a box or kit which contained bricks, a tea strainer, a bottle of Aqua-Chek, and bottles containing silicones and chemicals used in the Aqua-Chek paint to make it waterproof. Mr. Wichita then took two pieces of the firebrick, one of which he placed in water, and the brick absorbed the water. Mr. Wichita then painted the other brick with Aqua-Chek. After allowing the Aqua-Chek to dry for approximately three to five minutes, Mr. Wichita placed the brick in water, and "the brick would float, completely dry" (Tr. 1251). Mr. Wichita painted the brick in Mr. Reese's presence. Mr. Reese further testified that Mr. Wichita also showed me a tea strainer where you could paint this coating on the tea strainer then let it completely dry and it would hold water. He also showed me the paint on a Kleenex would make it water tight, where it would hold together, it would not leak out (Tr. 1251).

Mr. Wichita also "put some material on his finger and stuck it in a container, put it in a glass of water, when it came out it was dry" (Tr. 1252). Mr. Wichita told Mr. Reese that this material was a powdered silicone (Tr. 1252). As a result of the demonstration, Mr. Reese purchased \$942.30 worth of Aqua-Chek paint, and executed a Special Dealership Agreement, dated September 9, 1965 (Tr. 1253; CX 102). Simultaneously, Mr. Reese executed three trade acceptances for a portion of the purchase price (Tr. 1255). Mr. Wichita further told Mr. Reese that, if he could not resell the Aqua-Chek paint, Mr. Reese could return it to Thermo-

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chemical Products, Inc., and Thermochemical Products, Inc., could sell it to another company (Tr. 1258). Mr. Wichita further told Mr. Reese that, if his percentage return on sales was normal, Mr. Reese could expect "approximately fourteen hundred a month" in earnings (Tr. 1266-67). By the time the first and second trade acceptances, which Mr. Reese had executed, came due, the Aqua-Chek paint had not been received by Mr. Reese. Mr. Reese did not pay the first and second trade acceptances when they came due, but paid a portion and made an agreement for the remainder (Tr. 1267-68). When the Aqua-Chek paint finally arrived, Mr. Reese and his partner, Mr. Maynard, attempted to test it in the same type of demonstrations that Mr. Wichita had used, but Mr. Reese stated that their tests "were not effective, the material to us, apparently to us wasn't the same material" (Tr. 1262). Mr. Reese applied the Aqua-Chek paint to firebrick, letting it dry

a couple of minutes, three minutes, and on up to thirty minutes in several sequences to see what would make it work, we even soaked it in the material, it still wouldn't work. * * * It still wasn't waterproof as it was demonstrated to us. We also tried the Kleenex and the tea strainer and where Aqua-Chek was used in Mr. Wichita's demonstrations (Tr. 1263).

The firebrick and the Kleenex absorbed water (Tr. 1263). Mr. Reese applied Aqua-Chek paint to a piece of screen and water would run through the screen. Mr. Reese also applied Aqua-Chek to aluminum, outside, in the weather, and the paint cracked. He also tried it on wooden surfaces, and they were not "waterproofed" (Tr. 1265). Eventually, Mr. Reese worked out an arrangement with Mr. Glantz, an attorney for the respondent, Wolmart Discount Corporation, whereby Mr. Reese paid a portion of the amount of the trade acceptances in full satisfaction of the total amount thereof (Tr. 1268-1270).

33. Mr. Ben R. Fleming, Jr., operator of the Fleming Floor Covering Company, Landis, North Carolina, testified at a session of the hearings held in Greensboro, North Carolina. Mr. Fleming testified as follows: During the month of October 1964, Mr. Fleming received a telephone call from Mr. Mike Hirsch, requesting an appointment for 9 o'clock on the following morning (Tr. 1381). Mr. Hirsch stated that he was a representative of Thermochemical Products, Inc., and wished to establish Mr. Fleming as a franchised dealer in the Landis territory for Aqua-Chek paint, one of Thermochemical's products. Mr. Hirsch appeared for his appointment at the specified time. Mr. Hirsch had in his possession a

half-pint can and a paint brush with which he painted a spot on one of Mr. Fleming's toolboxes, then poured water on it (Tr. 1382). Mr. Hirsch had a piece of aluminum, a piece of asphalt, and a piece of cement block, which he stated had previously been sprayed with Aqua-Chek, on which he poured water (Tr. 1383). Mr. Hirsch stated that Aqua-Chek could be used on any type of material, sheet rock, wood, metal, concrete blocks, cinder blocks, asphalt shingles, asbestos shingles, and brick (Tr. 1404). Mr. Hirsch further told Mr. Fleming that Thermochemical's advertising department would provide Mr. Fleming with an advertising sign which he could place in front of his place of business, provided Mr. Fleming paid the cost of installation. Mr. Fleming testified that he agreed to this (Tr. 1384). Mr. Fleming further testified that Mr. Hirsch promised that Mr. Fleming would receive a demonstration kit containing materials similar to those used by Mr. Hirsch in his Aqua-Chek demonstration, such as the piece of aluminum, asphalt, cement block, etc. (Tr. 1384). Mr. Hirsch stated that Mr. Fleming should be able to earn five or six thousand dollars extra in addition to his regular floor covering business, and that, if his relations with Thermochemical Products, Inc., were not satisfactory, Mr. Fleming could telephone Thermochemical Products, Inc., long distance, and Thermochemical Products, Inc., would pick up the Aqua-Chek paint. During Mr. Hirsch's visit, Mr. Fleming executed a Special Dealership Agreement, dated October 22, 1964, in which he purchased \$488.10 worth of Aqua-Chek paint, payable in the form of three trade acceptances (Tr. 1388; CX 107). Mr. Hirsch stated that Aqua-Chek would cover from six to eight hundred feet per gallon, and that Mr. Fleming's order of Aqua-Chek would be delivered by Thermochemical's own truck at a cost of ten cents per gallon; however, Mr. Fleming's order of Aqua-Chek paint was delivered by a commercial motor freight line at a freight charge of thirty cents per gallon, which Mr. Fleming paid (Tr. 1389). Mr. Fleming sold some of the Aqua-Chek paint to his father-in-law, who lived in Kannapolis, North Carolina, and Mr. Fleming observed his father-in-law apply one coat of the Aqua-Chek paint on the rear of his house in Kannapolis, on a trial basis. Mr. Fleming testified that, after the Aqua-Chek was applied, it

looked to me more like chalk than it did paint. Also in a short time, less than a year's time—I don't know just exactly how long—the paint started chalking off and scaling off, which Mr. Hirsch told me that it absolutely would not do (Tr. 1403).

Mr. Hirsch had stated that only one coat of Aqua-Chek was needed for any surface (Tr. 1402-1403). Upon Mr. Fleming's failure to pay the trade acceptances when they came due, Mr. Fleming was advised by attorneys for respondent, Walmart Discount Corporation, that suit would be, and had been, instituted for collection of the amount due under the trade acceptances (CX 108, 109, and 110).

34. Mr. Earl B. Hockenberry, who, with a partner, Mr. Gerald Lewis, operates Lewis & Hockenberry, Inc., a sawmill and wood products company in Emporium, Pennsylvania, was one of the witnesses who testified at a session of the hearing held in New York, N.Y. Mr. Hockenberry testified as follows: In 1967, a man who gave his name as Mr. Brown, called at Mr. Hockenberry's office in Emporium, stated that he was a representative of Thermochemical Products, Inc., and inquired if Messrs. Hockenberry and Lewis were interested in becoming dealers for Thermochemical's products (Tr. 1554-56). Mr. Brown stated, among other things, that Messrs. Hockenberry and Lewis would become dealers for Thermochemical's products if they purchased Aqua-Chek paint (Tr. 1557). Mr. Brown described Aqua-Chek as being 100% waterproof, which could be painted on any surface, such as the inside of swimming pools, basements inside and out, sidewalks, and "any surface that you wanted waterproofed," and that one coat was sufficient (Tr. 1558). Mr. Brown told Messrs. Hockenberry and Lewis that, if they purchased the Aqua-Chek paint, they should not try to sell it, but that Thermochemical Products, Inc., would do the selling; that Thermochemical Products, Inc., knew more about selling than Messrs. Hockenberry and Lewis; and that Thermochemical Products, Inc., would furnish Messrs. Hockenberry and Lewis with brochures and advertising material for the Aqua-Chek paint which they could distribute to the public. Mr. Brown further stated that Thermochemical Products, Inc., had conducted a survey of the Emporium, Pennsylvania, area, and that Thermochemical Products, Inc., "could bring up the sales to make us an \$8000 profit" (Tr. 1526). Messrs. Hockenberry and Lewis signed a Special Dealership Agreement, dated April 6, 1967, whereby they purchased \$2,381.70 worth of Aqua-Chek paint, payable \$594.44 down, and the balance in three trade acceptances, due May 15, June 15, and July 15, 1967, respectively (Tr. 1560; CX 121). Mr. Hockenberry further testified that the Aqua-Chek paint, which was actually delivered to him, did not correspond with the advertising literature which had been fur-

nished to him by Thermochemical Products, Inc., and, for this reason, he did not send out any letters or sales literature to the public (Tr. 1560-61). After receiving the Aqua-Chek paint, Mr. Hockenberry applied one coat to the wall in the basement of his home. One coat did not cover nor waterproof the wall; water still came through (Tr. 1565). Approximately sixty days following Mr. Brown's visit, a second Thermochemical salesman called on Messrs. Hockenberry and Lewis, and attempted to sell them another Thermochemical product, a vinyl and plastic paint. Mr. Hockenberry could not remember the name of the second salesman, but the second salesman promised Mr. Hockenberry that his earnings from sales of the vinyl and plastic paint would be from ten to eighteen thousand dollars per year (Tr. 1562). Mr. Hockenberry paid the sum of \$2,381.70 for the Aqua-Chek paint, including the three trade acceptances (Tr. 1568, 1572).

35. From a preponderance of all the evidence, it is found that Thermochemical Products, Inc., salesmen represented to prospective dealers that Thermochemical Products, Inc., was a subsidiary or division of Union Carbide Company or General Electric Company (Mrs. Helen Lucas, Tr. 741-42, 763; Mohler, Tr. 822), whereas, Thermochemical Products, Inc., is not a subsidiary or division of Union Carbide Company, nor a part of the General Electric Company organization (Tr. 823).

36. It is further found that the allegations contained in subparagraph 2 of Paragraph Eight of the complaint (see subparagraph (b) of paragraph 13 hereof) to the effect that the products of Thermochemical Products, Inc., are manufactured or have been developed by Union Carbide Company, General Electric Company, or Aluminum Company of America have not been established by a preponderance of the evidence. A preponderance of the testimony from the dealer witnesses is to the effect that one of these companies developed the silicones or one or more of the ingredients contained in Thermochemical's products. The paint products which Thermochemical Products, Inc., sells are actually manufactured by the Pur-All Paint Company of Carlstadt, New Jersey (Tr. 2028).

37. It is further found that Thermochemical's salesmen have represented to prospective dealers that products sold by Thermochemical Products, Inc., are unconditionally guaranteed for five or ten years (Mauerhan, Tr. 75-76; Mrs. Hixson, Tr. 407; Sweigart, Tr. 465). As a matter of fact, Thermochemical's products are not unconditionally guaranteed. The guarantee is limited to

the extent that Thermochemical Products, Inc., will supply a sufficient amount of the product involved to repaint and cover the painted portion of the structure or other surface which leaks. The guarantee expressly provides that it is limited to the furnishing of the product, and does not cover the cost of labor to apply it (CX 58, CX 63; Krueger, Tr. 1609).

38. It is further found that salesmen for Thermochemical Products, Inc., have represented to prospective dealers that such dealers will realize various profits, ranging up to \$18,000 per year, from the sale of Thermochemical's products (Long, Tr. 327; Mrs. Hixson, Tr. 407; Sweigart, Tr. 466; Silsby, Tr. 789; Reese, Tr. 1266-67; Fleming, Tr. 1386; Hockenberry, Tr. 1526); whereas, there was no testimony that any dealer made a profit from the handling of Thermochemical's products, much less make a profit of \$18,000. The testimony from most of the dealers was that they sold very little, if any, of Thermochemical's paint. Mr. Long sold one gallon and had to refund the money (Tr. 336); Mrs. Hixson testified that one man picked up a sample and never came back (Tr. 411); Mr. Jiminez did not sell any of the paint (Tr. 525); Mr. Silsby did not sell any of the paint (Tr. 789); Mr. Sensmeier did not sell any of the paint (Tr. 980); Mr. Williams did not sell any of the paint (Tr. 1189); Mr. Boudreaux did not sell any of the paint (Tr. 1289); Mr. Gelston did not sell any of the paint (Tr. 1361); and Mr. Hockenberry did not sell any of the paint (Tr. 1560-61).

39. It is further found that salesmen for Thermochemical Products, Inc., have represented that prospective dealers may return to the seller, corporate respondent, any merchandise that is not sold by the prospective dealer, or that Thermochemical Products, Inc., will transfer the merchandise to another dealer (Mauerhan, Tr. 86-87; Damewood, Tr. 164; Long, Tr. 330; Reese, Tr. 1258; Fleming, Tr. 1386); whereas, Thermochemical Products, Inc., seldom, if ever, accepts the return of any unsold merchandise or effects the transfer of such merchandise to another dealer (Lucas, Tr. 746; Barosh, Tr. 1041; Ruzicka, Tr. 1107-1114; Boyd, Tr. 1334; Fleming, Tr. 1387; Dalton, Tr. 1496; Garrison, Tr. 1517).

40. It is further found that Thermochemical Products, Inc., through its salesmen, advertising, and promotional literature, has represented to prospective dealers that its products are waterproof (Mauerhan, Tr. 75, 146-48; Damewood, Tr. 160; O'Shea, Tr. 211; Long, Tr. 330; Sweigart, Tr. 460; Sensmeier, Tr. 967;

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Reese, Tr. 1245; Hockenberry, Tr. 1558, 1578); whereas, Thermochemical's products are not waterproof (Mrs. Hixson, Tr. 411; Jiminez, Tr. 525; Sensmeier, Tr. 969-971, 987; Hockenberry, Tr. 1565). For example, the written guarantee issued by Thermochemical Products, Inc., for Aqua-Chek and Vivalume paints, CX 58 and 63, respectively, states:

We Hereby Guarantee to the registered holder hereof, that should the application described on the reverse side leak where AQUA-CHEK [or VIVALUME, as the case may be] has been applied, we will replace free of charge the amount of AQUA-CHEK [VIVALUME] necessary to cover the leaking area * * *.

The representation that the surface to which the product is applied will not "leak" is a representation that water will not penetrate the surface to which the product is applied. This representation is false.

41. It is further found that salesmen for Thermochemical Products, Inc., have represented that Thermochemical's products are suitable for application on both the inside and outside of a building (Long, Tr. 327-330; Sweigart, Tr. 461; Ricci, Tr. 616; Mohler, Tr. 827; Bell, Tr. 905; Sensmeier, Tr. 972; Betts, Tr. 1065, 1069); whereas, Thermochemical's products are not suitable for use on the inside of a building (Velloney, Tr. 1019; Mauerhan, Tr. 75). The brochures contained in CX 58 specifically state that Aqua-Chek is suitable for use only on exterior surfaces. Mr. Chaleff, president of the company which manufactures the paint products which Thermochemical Products, Inc., sells and distributes, testified that Vivalume was suitable for use on exterior surfaces (Tr. 2034, 2036), and was to be used mainly for decorative purposes (Tr. 2035).

42. It is further found that salesmen for Thermochemical Products, Inc., have represented to prospective dealers that Thermochemical Products, Inc., has conducted a survey of the area in which the prospective dealer is located, prior to the time of the salesman's visit, for the purpose of ascertaining the prospective market for Thermochemical's products (O'Shea, Tr. 210; Boudreaux, Tr. 287; Boyd, Tr. 1317, 1353; Carter, Tr. 1472; Garrison, Tr. 1506; Hockenberry, Tr. 1562); whereas, no survey was ever made of the territory in which such prospective dealer was located for the purpose of ascertaining the prospective market for Thermochemical's products within that area (Sydney, Tr. 1787, 1793; Cohn, Tr. 1800).

43. It is further found that salesmen for Thermochemical

Products, Inc., have represented to prospective dealers that one coat of any of Thermochemical's products will be sufficient to cover the surface on which the product is applied (Mauerhan, Tr. 101, 144; Damewood, Tr. 164; O'Shea, Tr. 214; Long, Tr. 327; Sweigart, Tr. 462; Jiminez, Tr. 520; Silsby, Tr. 788; Mohler, Tr. 827; Fleming, Tr. 1389; Hockenberry, Tr. 1558); whereas, one coat of any of Thermochemical's products is not sufficient to cover the surface on which it is applied (Mauerhan, Tr. 144; Damewood, Tr. 166; Roberts, Tr. 260; Jiminez, Tr. 520; Rumer, Tr. 863; Rhode, Tr. 946-47; Velloney, Tr. 1012; Betts, Tr. 1074; Boudreaux, Tr. 1292-93; Boyd, Tr. 1324-25, 1329; Hockenberry, Tr. 1565; Krueger, Tr. 1614).

44. It is further found that Thermochemical Products, Inc., through its promotional literature, advertising, and oral statements by its salesmen, has represented that Thermochemical Products, Inc., would assist the prospective dealer in making sales by sending a representative to visit prospective customers of the prospective dealer, provide and furnish advertising displays and newspaper mats for the use of the dealer, at no cost to the dealer (Mauerhan, Tr. 102; Damewood, Tr. 165; O'Shea, Tr. 217; Keeling, Tr. 288, 292; Long, Tr. 327, 376; Sweigart, Tr. 742; Silsby, Tr. 788; Reese, Tr. 1271; Fleming, Tr. 1384; McCann, Tr. 1452; Carter, Tr. 1472; Best, Tr. 1545; Mohler, Tr. 825; Moore, Tr. 920; Williams, Tr. 1176; Williamson, Tr. 1185, 1194); whereas, Thermochemical Products, Inc., does not assist the dealer in making sales, either by sending a representative to visit prospective customers of the dealer, or by supplying advertising and newspaper mats for use by the dealer, at no cost to the dealer (Mauerhan, Tr. 102; Damewood, Tr. 173; Keeling, Tr. 292; Long, Tr. 327, 368, 376; Lucas, Tr. 742; Mohler, Tr. 825; Moore, Tr. 920; Rhode, Tr. 944; Sensmeier, Tr. 973; Velloney, Tr. 1011; Barosh, Tr. 1042; Betts, Tr. 1064; Ruzicka, Tr. 1117; Hatcher, Tr. 1139; Mrs. Hatcher, Tr. 1162; Williams, Tr. 1213; Boudreaux, Tr. 1294, 1299, 1301; Boyd, Tr. 1338; Fleming, Tr. 1385; Davis, Tr. 1441; Hockenberry, Tr. 1558).

45. It is further found that salesmen for Thermochemical Products, Inc., promised prospective dealers that Thermochemical Products, Inc., would furnish the dealer a sales kit containing materials and articles which were identical with those used by the salesman during his demonstration of Thermochemical's product; whereas, in many instances, no sales kit was delivered, and, if delivered, was less elaborate and did not contain any of the

items used by the salesman in his demonstration (Long, Tr. 334; Betts, Tr. 1062-63; Boudreaux, Tr. 1299-1300).

46. The use by Thermochemical Products, Inc., and the individual respondents herein of the aforesaid false, deceptive, and misleading statements and representations with respect to their said products has had, and now has, the capacity and tendency to mislead and deceive a substantial number of prospective dealers into the erroneous and mistaken belief that such statements and representations were, and are, true and to cause substantial numbers of said prospective dealers to purchase substantial quantities of said respondents' products because of such erroneous and mistaken belief.

47. It is further found that, when Thermochemical Products, Inc., receives trade acceptances for merchandise purchased by prospective dealers from Thermochemical's salesmen, Thermochemical Products, Inc., then sells and discounts said trade acceptances to various finance companies (Nadler, Tr. 1994). In the event the dealer refuses to pay the trade acceptance and default is made thereon, the finance company then assigns the trade acceptance to the corporate respondent, Walmart Discount Corporation, for collection. Walmart Discount Corporation then generally brings suit thereon, alleging in such suit, among other things, that said trade acceptances were executed by the dealer defendant named in the suit in payment for merchandise purchased from Thermochemical Products, Inc., and

that thereafter, the said trade acceptances were duly endorsed by THERMOCHEMICAL PRODUCTS, INC. and so endorsed were, prior to maturity, duly negotiated and delivered for value, without notice of any defect or defense, to the plaintiff's [Walmart Discount Corporation's] assignor, COMMERCIAL PROGRESS CORP-EQUITABLE DISCOUNT CORPORATION which thereupon became the owner and holder thereof, and who thereafter duly assigned said trade acceptances to the plaintiff herein (CX 52, 69, 88, and 118).

Walmart Discount Corporation does not enter the picture unless and until default is made in the payment of a trade acceptance, at which time the trade acceptance is assigned to Walmart Discount Corporation for collection and possible filing of suit (Tr. 1938).

48. Paragraph Twelve of the complaint herein alleges (see paragraph 15 hereof) that:

The fact of assignment [of the trade acceptances] to Walmart Discount Corporation and the bringing of suit in its [Walmart's] name as assignee

has had, and now has, the tendency and capacity to mislead and deceive dealers against whom suit is brought into the erroneous and mistaken belief that the said representations and implications are true and to induce the said dealers to refrain from asserting defenses they may have against the respondents and to make payments which they might otherwise not have made.

Complaint counsel did not offer any evidence to show that any dealer against whom suit was brought, or his attorney, was misled and induced to refrain from asserting any defense which he may have had against any suit brought by Walmart Discount Corporation for collection of any trade acceptance, or that any dealer made any payment which he might otherwise not have made, except for the statements made in any suit for collection of a trade acceptance.

49. Complaint counsel request that an order should be issued against Walmart Discount Corporation for the reason, among others, that Walmart Discount Corporation is owned and controlled by Thermochemical Products, Inc., and that Walmart Discount Corporation brings suit in its own name against defaulting dealers and alleges in such suits that it is an assignee of a holder in due course. Because of such allegation, complaint counsel assert, the dealers and their attorneys believed there were no defenses open to them in suits for collection of trade acceptances. As above found, there is no evidence in the record to show that any statement by Walmart Discount Corporation in any suit for collection of a trade acceptance misled or induced any dealer, much less his attorney, to refrain from asserting any defense to such suit or made any payment thereon which he might otherwise not have made, except for the allegations in such suit.

CONCLUSIONS

The aforesaid acts and practices of Thermochemical Products, Inc., and the individual respondents herein 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. This proceeding is in the interest of the public. Under the facts of record, no order should issue against Walmart Discount Corporation.

ORDER

It is ordered, That the respondents Thermochemical Products, Inc., a corporation, and its officers, and respondents Jeannette Vine and Beatrice Freeman, also known as Beatrice Jacobs, individually and as officers of said corporation, and Charles A. Jacobs and David Jacobs, individually and as managers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of any water repellent paint or paint products or coatings or franchises in connection therewith, or any other articles of merchandise of franchises in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that:

1. Respondents are a subsidiary of, a division of or are affiliated with Union Carbide Company, General Electric Company or Aluminum Company of America or any other corporation entity; or misrepresenting, in any manner, respondents' trade or business connections or affiliations.

2. Respondents' products are guaranteed unless the nature, conditions 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.

3. Dealers will earn any stated gross or net amount; or representing, in any manner, the past earnings of dealers unless in fact the past earnings reported are those of a substantial number of dealers and accurately reflect the average earnings of those dealers under the circumstances similar to those of the dealer to whom the representation is made.

4. Respondents' dealers may return any unsold merchandise or that respondents will transfer unsold merchandise to other dealers.

5. Respondents' products are waterproof or will cause any surface to which they are applied to become waterproof; or misrepresenting in any manner, the performance characteristics of respondents' products.

6. Respondents' products are suitable for use on the

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inside of a structure; or misrepresenting in any manner, the use characteristics of respondents' products.

7. A survey has been made of the territory in which a prospective dealer is located for the purpose of ascertaining the sales potential of the particular territory.

8. One or more coats or applications of respondents' products is sufficient to achieve or to produce a certain stated or implied result.

9. Respondents will send a representative to contact prospective customers of the dealer, or erect billboards and other displays, or furnish newspaper mats free of charge, or prepare suitable mailings on the dealer's letterhead; or misrepresenting, in any manner, the assistance which will be given the dealer in making sales of the particular product purchased.

B. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products and services and failing to secure from such salesmen or other persons a signed statement acknowledging receipt of said order.

It is further ordered, That the respondent Thermochemical Products, Inc., shall forthwith distribute a copy of this order to each of its operating divisions, if any.

It is further ordered, That the complaint herein against respondent Walmart Discount Corporation be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

JULY 15, 1969

BY ELMAN, *Commissioner*:

I

The complaint in this proceeding, issued January 9, 1967, charged that respondents had violated Section 5 of the Federal Trade Commission Act by engaging in unfair methods of competition and in unfair and deceptive acts and practices in the offering for sale, sale and distribution of water repellent paints and coatings to dealers for resale to the public. Respondents filed answers denying the allegations and concurrently filed motions to dismiss the complaint.¹ These motions were denied by the hearing

¹ Walmart Discount Corporation filed an answer and a motion to dismiss separate from those filed by the other respondents.

examiner on May 11, 1967. On August 18, 1967, respondent Wolmart filed an action in the United States District Court for the District of Columbia seeking to enjoin and ultimately to dismiss administrative proceedings against it as outside the jurisdiction and authority of the Federal Trade Commission.² On September 6, 1967, the district court dismissed this action on the grounds that Wolmart had failed to exhaust its administrative remedies.

After full evidentiary hearings,³ the examiner issued an initial decision on December 11, 1968, in which he upheld the major charges of the complaint as they related to all respondents except Wolmart. As to Wolmart, the examiner dismissed the complaint. The case is before us on the cross-appeals of respondents and complaint counsel.

Respondents contend that insufficient evidence was produced to support the findings of the examiner, that the examiner's findings include matters not pleaded in the complaint as to which respondents were not given notice and the opportunity to defend, and that the examiner erred in crediting certain witnesses called by complaint counsel and in excluding certain matter which respondents attempted to offer in evidence at the hearings. Complaint counsel contends that the examiner erred in dismissing the complaint as to Wolmart, and in dismissing one of the charges against the other respondents.

II

The facts are adequately set forth in the initial decision; the examiner's findings, to the extent they are not inconsistent with the findings made in this opinion, are hereby adopted as those of the Commission.

Thermochemical Products, Inc., is a corporation organized and doing business under the laws of the State of New York, with its

² It was alleged by Wolmart that the Commission was proceeding against it for practices not previously considered to be in violation of the Federal Trade Commission Act and further, that the proceeding constituted an unauthorized invasion of the "law merchant" by the Commission.

³ Hearings were held in six cities, viz.: Los Angeles and San Francisco, California; Chicago, Illinois; Houston, Texas; Greensboro, North Carolina; and New York, New York. Section 3.41 (b) of the Commission's Rules of Practice provides that the examiner shall have authority to order hearings at more than one place only "in unusual and exceptional circumstances for good cause stated on the record." In *Universe Chemicals, Inc.*, Docket 8752, issued April 2, 1969, we held that unsubstantiated assertions by complaint counsel of hardship to witnesses and added expense to the government if hearings are held only in one place did not constitute a sufficient showing of "unusual and exceptional circumstances" within the meaning of Rule 3.41(b). No stronger showing of support for hearings in multiple locations was presented in this case. However, respondents made no issue of this at any stage in the proceedings. Respondents did request leave to file an interlocutory appeal from the examiner's order fixing hearing dates, but this request raised only the issue of the timing of the hearings, not their location.

office and principal place of business located at 1860 Broadway, New York, New York. Respondent Jeannette Vine is the president and treasurer of Thermochemical, and respondent Beatrice Freeman Jacobs is secretary of the company.⁴ All of the outstanding capital stock of Thermochemical is owned by Jeannette Vine and Beatrice Jacobs, each having fifty percent of said stock.

Respondents Charles A. Jacobs and David Jacobs are agents of Jeannette Vine and Beatrice Freeman Jacobs, who, as agents, are managers of Thermochemical.⁵ As managers, they control the acts and practices of Thermochemical.⁶

The gross business of Thermochemical for the fiscal year ending October 31, 1967, was approximately \$2,000,000.

Respondent Wolmart Discount Corporation was issued a certificate of incorporation by the State of New York on December 17, 1964. No stock has been issued by Wolmart and no capital has been paid in. The company has no directors and its sole officer is one Bruce Mund, who acts as its secretary. Wolmart had no bank account until November 18, 1965. Wolmart's *raison d'être* is to collect payment as the holder of defaulted trade acceptances originally given to Thermochemical in partial payment for merchandise sold by Thermochemical salesmen to "franchise dealers."

Respondents are engaged in the offering for sale, sale and distribution of paints and coatings to dealers for resale to the public

⁴ Beatrice Jacobs is the wife of respondent David Jacobs. She does business under her maiden name, Beatrice Freeman.

⁵ This is not the first time that the individual respondents Charles Jacobs and David Jacobs have been involved in proceedings before this agency concerning alleged deceptive practices in the sale and distribution of paint and paint products. On March 6, 1956, a consent order was entered in *Sterling Materials Co., Inc.*, 52 F.T.C. 909, which ran against three associated New York paint firms and against, *inter alia*, Charles Jacobs, individually and as an officer of Ohmlac Paint and Refining Company, Inc., and David Jacobs, individually and as an officer of Sterling Materials Company, Inc., 1860 Broadway, New York, New York. David Jacobs was president and treasurer of Sterling Materials Company, and Charles Jacobs was president of Ohmlac Paint and Refining Company. The consent order prohibited misrepresentations as to exclusive sales territories and sales and promotional assistance granted by the companies to "franchise dealers," misrepresentations that the companies had been selling their paint products for 30 to 35 years, and misrepresentations that many well-known manufacturers, industrial firms, railroads, and agencies of the federal government used and approved said products. On February 6, 1962, a consent judgment was entered by the United States District Court for the Eastern District of New York for civil penalties aggregating \$28,000 for violations of that order.

On February 24, 1962, a consent order was issued in *Ohmlac Paint and Refining Co., Inc.*, 60 F.T.C. 419, which ran against Charles Jacobs, individually and as an officer of Betty Jordan Paint Factories, Inc. (The complaint was dismissed as to Ohmlac.) The order prohibited misrepresentations as to the prices of paint and paint products. Ohmlac has since gone through bankruptcy and the other corporations against which these orders were issued are no longer in business.

⁶ Counsel for respondents conceded, during the course of the hearings, that any order entered against Thermochemical Products, Inc., should also be entered against the four individual respondents named in the complaint. (Tr. 1690-91, 2194).

under the trade names, *inter alia*, "Aqua-Chek," "Vivilume," and "Vin-L-Brush-On." Respondents furnish to salesmen literature, samples, contracts, display materials, and trade acceptances. Armed with these materials, the salesmen then contact prospective dealers in various areas throughout the nation. The complaint alleges, and the examiner found, that, in the course of such contacts, many misrepresentations are made concerning the status of Thermochemical Products, Inc., the nature and quality of its products, and the terms under which the products are sold.

Specifically, the examiner found that respondents' salesmen have falsely represented to prospective dealers that Thermochemical Products, Inc., is a division or subsidiary of Union Carbide Company or General Electric Company, that the products sold by Thermochemical are unconditionally guaranteed for five or ten years, that dealers of Thermochemical Products will realize profits ranging up to \$18,000 per year from the sale of such products, that Thermochemical normally will accept return of any merchandise unsold by its dealers and transfer such merchandise to other dealers, that Thermochemical's paints and coatings are waterproof, that the products are suitable for application on both the interior and exterior of buildings, that Thermochemical has conducted a survey of the area in which a prospective dealer is located to determine the prospective market for Thermochemical Products in that area, and that one coat of Thermochemical's products will be sufficient to cover the surface on which the product is applied. The examiner further found that Thermochemical, through its promotional literature and advertising, as well as by oral statements by its salesmen, has falsely represented that it will assist prospective dealers in selling the company's products by providing, without charge, advertising displays and newspaper mats for the use of the dealer. He also found that salesmen had falsely represented that Thermochemical would furnish to dealers sales kits which were identical to those used by salesmen in their demonstrations of Thermochemical products.

We have read the record and find that the evidence amply justifies the examiner's findings listed above. Complaint counsel called forty witnesses who had purchased respondents' products and had become "franchise dealers" thereof after having been solicited personally by respondents' salesmen. These witnesses, in most instances, were engaged in small businesses of a type not usually carrying paint or paint products for sale at retail to the

public.⁷ In general, they testified that they agreed to become franchise dealers and purchased respondents' products after having witnessed demonstrations performed by respondents' sales representatives supposedly showing the water-proof character and other superior qualities of these products. The normal pattern was for a new dealer to execute a Special Dealership Agreement under which the dealer purchased an agreed amount of respondents' products in return for receiving a franchise to sell respondents' products in a specified territory. In most instances, the balance of the purchase over the downpayment was payable in the form of three trade acceptances executed by the new dealer at that time. When the dealer subsequently received his shipment of respondents' products, he found the products woefully lacking in the qualities demonstrated by respondents' salespeople, and, in most instances, the dealer found himself unable or unwilling to sell respondents' products to the public.⁸ In the event that a dealer refused to pay the trade acceptances on the basis that his contract with respondent was obtained as a result of misrepresentation, Walmart Discount Corporation, to which the trade acceptances are assigned in the event of default, asserts in opposition that it is the assignee of a holder in due course of these acceptances.

The testimony of Mrs. Jean Hixson (Tr. 403-54), who, with her husband, owns and operates a radiator repair shop in Mountain View, California, is typical of that given by the dealer-witnesses contrasting the representations of respondents' salesmen with the manner in which respondents' products actually performed.⁹ Mrs. Hixson testified that a Mr. DeLucia, a sales representative of Thermochemical Products, called at her family's radiator repair shop for the purpose of demonstrating respondents' Aqua-Chek paint. Mr. DeLucia represented that Aqua-Chek was masonry paint suitable for inside and outside use, for use on wood, cement floors, driveways, swimming pools, stucco and brick. Mr. DeLucia presented a series of demonstrations to show

⁷ For example, dealer-witness Mauerhan was a plumber (Tr. 72), dealer-witnesses Roberts and Boyd operated garages (Tr. 253, 1318), dealer-witness Keeling operated a wholesale nuts and bolts business (Tr. 285), dealer-witness Sweigart ran a machine shop (Tr. 455), dealer-witnesses Jiminez and Ricci were grocers (Tr. 508-09, 614), dealer-witness Rumer operated a saw-mill and pallet factory (Tr. 844), dealer-witness Small a service station (Tr. 882), and dealer-witness Sensmeier operated a feed and grain business (Tr. 963).

⁸ *E.g.*, dealer-witnesses Long, Velloney, and Betts each sold one gallon (Tr. 366, 1005, 1061) and dealer-witnesses Hixson, Jiminez, Sensmeier, Williams, Boudreaux and Gelston sold none (Tr. 411, 526, 973-80, 1189, 1289, 1361).

⁹ Pages 120-135 of the initial decision recount at length the testimony of nine dealer-witnesses concerning their experiences with respondents' salesmen and respondents' products.

the merits of Aqua-Chek. He placed a piece of aluminum, allegedly painted with Aqua-Chek, in muriatic acid to show that the acid did not affect the paint. He produced a piece of cinderblock half painted and a half unpainted, on which he placed drops of ink which sank into the unpainted portion of the brick but which just beaded and remained on the surface of the painted portion. He next put an aspirin supposedly treated with respondents' product in a cup of water and the aspirin did not dissolve. He also engaged in further demonstrations purportedly showing the water-proof and fire-resistant nature of Aqua-Chek paint. As a result of this, Mrs. Hixson purchased \$982.80 of respondents' Aqua-Chek paint and executed a Special Dealership Agreement (CX 28), under which she became a franchised dealer of respondents' product.

After receiving shipment of the paint, Mrs. Hixson and her husband painted their cement garage floor with Aqua-Chek. Prior to painting, the couple cleaned and scrubbed the floor with muriatic acid, a strong solution used in cleaning radiators. They hoped the painting would prevent grease from sinking into the cement floor. After the Aqua-Chek had been applied and had dried, Mrs. Hixson and her husband poured some oil and grease on it "to see if it would wipe up, and it just smeared on like there was nothing on the floor." (Tr. 412). Thermochemical refused to accept return of the paint.

Respondents contend that the testimony of the dealer-witnesses was insufficient to justify the conclusion that misrepresentations of respondents' salesmen were anything more than isolated acts insufficient to justify an order. We find that, to the contrary, the evidence not only is sufficient to warrant issuance of an order, but demonstrates a clear pattern of misconduct by respondents' salesmen. We also find no merit in respondents' contention that the misrepresentations of their salesmen were unauthorized by respondents. Even if such assertions had been proven, it would not have excused the misrepresentations of respondents' salesmen, nor relieved respondents from their responsibility therefor. *Parke, Austin, & Lipscomb, Inc. v. Federal Trade Commission*, 142 F. 2d 437, 439-40 (2d Cir. 1944), *cert. denied*, 323 U.S. 753.

Respondents also object to certain specific provisions of the order as not being supported by the evidence. We find no merit in any of these objections, which we treat below.

Respondents contend that there is no basis for the examiner's finding that respondents' products "are not suitable for use on the inside of a building" because there was no testimony that respondents' products were less effective for one type of painting than another. However, the label on respondents' Aqua-Chek paint, which was not seen by dealers prior to purchase, states that the product is "for exterior surfaces" (see CX 58) and the president of Pur-All Paint Company, which manufactures the products sold by respondents, testified that the product Vivilume was to be used only on exteriors and then primarily for decorative purposes (Tr. 2034-36). Nevertheless, respondents' salesmen represented these products to prospective dealers as suitable for both interior and exterior use.¹⁰

Respondents also contend that the representation that one coat of its products would cover satisfactorily was not false despite the testimony of the dealer-witnesses that they were unable to achieve satisfactory one-coat coverage with respondents' products.¹¹ Respondents assert that one-coat coverage will be sufficient if their products are "properly applied to surfaces of normal porosity." Testimony to that effect was given by employees of the company which manufactures respondents paints, who were called by respondents as expert witnesses. This testimony did not support the representations made by respondents' salesmen, who failed to indicate to prospective franchise dealers that any unusual care was required to obtain satisfactory one-coat coverage with respondents' products. Nor could any subsequent qualifications by respondents cure these initial misrepresentations. *Carter Products, Inc. v. Federal Trade Commission*, 186 F. 2d 821, 824 (7th Cir. 1951).

Respondents' position is not enhanced by the testimony of one of their expert witnesses concerning the physical exhibit prepared by him purporting to show that one coat of respondents' products, properly applied, would cover satisfactorily (RX 15). The witness recognized that, on that exhibit, a board painted in several colors, the portion painted in white is poorly covered. He testified that such unsatisfactory results were to be expected

¹⁰ Sweigart, Tr. 461; Ricci, Tr. 616; Mohler, Tr. 827; Bell, Tr. 905; Sensmeier, Tr. 972; Betts, 1065, 1069; Hatcher, Tr. 1124; Boyd, Tr. 1320; Best, Tr. 1544; Cepar, Tr. 1590; Krueger, Tr. 1614-15.

¹¹ Damewood, Tr. 166; Roberts, Tr. 260 (3 coats unsatisfactory); Jiminez, Tr. 520; Rumer, Tr. 863 (application of two coats to an exterior surface was washed off by first subsequent rain; water soaked into coat applied to floor); Rhode, Tr. 945-47; Velloney, Tr. 1012; Betts, Tr. 1074 *et seq.*; Boudreaux, Tr. 1292-93; Boyd, Tr. 1324-26, 1329-30 (boat still leaked after application of four coats by witness); Hockenberry, Tr. 1565; Krueger, Tr. 1614.

when one used the white paint sold by respondents or any other white paint. (Tr. 2090-91) However, there is no evidence that such important qualifications as to the coverage of respondents' white paints were made by respondents at any time, nor have respondents asserted that such qualifications were made.

Respondents also object to the finding that respondents have represented Thermochemical to be a division or subsidiary of Union Carbide or General Electric. Respondents note that the examiner relied only on the testimony of two dealer-witnesses in reaching that finding, thus implying that this was the only testimony to that effect. In fact, at least eleven dealer-witnesses testified that it was represented to them that respondents had some affiliation or association with either or both of these large, well-known companies, or with the Aluminum Company of America.¹² Contrary to respondents' argument, such misrepresentations were not cured by respondents' practice of subsequently informing new franchise dealers, in telephone conversations recorded by respondents, that respondents' only connection with the General Electric Company or any other company was that General Electric had developed the silicones which are used in respondents' paint products. The law is violated if the first contact or interview is obtained by deception; respondents cannot escape responsibility for the initial misrepresentation by later qualification thereof. *Progress Tailoring Co., v. Federal Trade Commission*, 153 F.2d 103 (7th Cir. 1946).¹³ Indeed, the pains taken by respondents to place these subsequent statements to new dealers on record indicates respondents' awareness that earlier misrepresentations probably had been made by their salesmen.¹⁴

Respondents further contend that there was insufficient evidence to support the finding that it was falsely represented to franchise dealers that they were selected for interviews on the basis of territorial surveys, and the finding that respondents mis-

¹² Damewood, Tr. 161; Keeling, Tr. 287, 301; Sweigart, Tr. 457; Ricci, Tr. 642-44; Lucas, Tr. 741-42, 763; Mohler, Tr. 822; Rumer, Tr. 855-56; Sensmeier, Tr. 965; Williams, Tr. 1188; Reese, Tr. 1248-49, 1284; Boyd, Tr. 1320.

¹³ The fact that some witnesses could not remember whether the exact word used by respondents' salesmen to describe the alleged relation of Thermochemical to larger companies was "subsidiary" or "division" does not support respondents' argument that the testimony of those witnesses was therefore "vague, careless and unobjective." It is not the exact words used, but the impression made by respondents' representation which is vital here. Cf. *Newton Tea & Spice Co. v. United States*, 288 Fed. 475, 479 (6th Cir. 1923).

¹⁴ The employee of respondents who makes this statement in telephone communications with new dealers testified that the statement is made, in unvarying form, to each dealer whose purchase order is received in Thermochemical's office. (Tr. 2166, 2170-72).

represented the potential profits that franchise dealers could reap by selling respondents' products. As to the supposed surveys, respondents do not deny the testimony of dealer-witnesses that such representations were made by respondents' salesmen¹⁵ and they do not contend that the alleged surveys were in fact made. Respondents simply assert that there is insufficient evidence to show that such surveys were not actually made. Respondents state that the examiner gave too much weight to the testimony of two long-time employees of Thermochemical that they had no knowledge of such surveys being made. However, we can find no compelling reason to interfere with the examiner's decision in this regard. Respondents also allege that they were denied the opportunity to prove that such surveys were made because the examiner did not allow proffered testimony by the president of Thermochemical to show that salesmen are trained and instructed to make surveys. Such evidence, however, would have been insufficient to absolve respondents from responsibility for misrepresentation by their salesmen as to surveys. *Federal Trade Commission v. Parke, Austin & Lipscomb*, 143 F. 2d 437, 439-40 (2d Cir. 1944), *cert. denied*, 323 U.S. 753. Respondents "are engaged in the business of selling, not conducting surveys and there is no evidence that they have ever conducted a legitimate survey in the past or intend to in the future." *Consumer Sales Corp. v. Federal Trade Commission*, 198 F. 2d 404, 408 (2d Cir. 1952), *cert. denied*, 344 U.S. 912 (1953).

As to the representation of potential profits, the record is replete with the testimony of dealer-witnesses that respondents' salesmen represented that substantial profits would be made by franchise dealers.¹⁶ Respondents have not shown or offered to show any foundation which would support these representations, or made any showing of the profits actually made by any of respondents' dealers.¹⁷

¹⁵ O'Shea, Tr. 210; Keeling, Tr. 287; Boyd, Tr. 1319, 1353; Carter, Tr. 1472; Garrison, Tr. 1506; Hockenberry, Tr. 1562. The representation that prospective dealers were selected on the basis of surveys showing them to be good outlets for the sale of respondents' products must also be considered in light of the fact that most of the prospects approached by respondents were not engaged in businesses which one would expect to be retailing paint. See note 7, *supra*.

¹⁶ *E.g.*, Sweigart, Tr. 466 (\$4,000 a year profit); Hamilton Tr. 667-68 (\$6,000 a year profit); Silsby, Tr. 789 (\$4,000 to \$5,000 a year profit); Rumer, Tr. 845 (\$10,000 a year profit); Sensmeier, Tr. 972 (\$10,000 a year profit; Velloney, Tr. 1011 (\$7,000 to \$8,000 profit within 6 to 8 months); Barosh, Tr. 1037-38 (\$5,000 to \$7,000 profit a year); Hockenberry, Tr. 1562 (\$8,000 to \$13,000 net profit a year). Many of the dealer-witnesses, upon learning that respondents' paints would not perform as represented, found themselves unable or unwilling to sell any of the paint to the public. See note 8, *supra*.

¹⁷ The only evidence proffered by respondents was testimony by respondent C. A. Jacobs as to: (a) what would be the profit margin of a dealer per gallon if he sold respondents' products

Respondents also complain that many of the findings of the examiner are based on the failure of respondents' paints to adhere properly, whereas the complaint did not specifically make reference to a failure of these products to adhere. However, the complaint clearly apprised respondents of the nature of the charges against them; and the examiner's findings concerning adherence are based on evidence presented throughout the record which was clearly relevant in substantiating the other allegations of the complaint. Under such circumstances, respondents cannot validly raise the questions of notice or variance. See *J. B. Williams Co., Inc. v. Federal Trade Commission*, 381 F. 2d 884, 888 (6th Cir. 1967); *Progress Tailoring Co., v. Federal Trade Commission*, *supra*, 153 F. 2d at 106; *Armand Co., Inc. v. Federal Trade Commission*, 84 F. 2d 973, 974-75 (2d Cir. 1936), *cert. denied*, 299 U.S. 597.

Respondents allege that the examiner gave undue weight to the testimony of witnesses called by complaint counsel.¹⁸ However, the credibility of witnesses is a matter primarily within the province of the examiner, who has heard the evidence, observed the witnesses, and lived with the case throughout the hearings. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 496-97 (1951). We find nothing in this record which would constitute the clear error required to disturb the examiner's findings in this regard.

We have considered the other objections raised by respondents and find them to be without merit. Respondents' appeal is dismissed in all respects.

III

We turn now to the charges which were dismissed by the examiner. The complaint against respondent Wolmart was dismissed on the ground that complaint counsel failed to prove this charge by not producing any evidence showing that respondents' dealers or their attorneys were in fact deceived by the represen-

at the suggested retail price; and (b) whether a dealer who sells "good quality paint" could make money. Although such testimony, which was excluded by the examiner, would have been relevant to the issue of potential profits, respondents suffered no prejudice from the examiner's action. The proffered testimony dealt only with matters not in dispute and would not have been sufficient to rebut the evidence of complaint counsel. Respondents have not contended that there was any other evidence which would give credence to their representations concerning profits.

¹⁸ Respondents contend that the testimony of some of the dealer-witnesses was impeached because it was brought out on cross-examination that these witnesses, prior to testifying, had seen a copy of the Commission's complaint but had not seen a copy of respondents' answer denying the violations charged in the complaint.

tation that Wolmart was the assignee of a holder in due course. In holding that such proof was required, the examiner clearly committed an error of law. A challenged practice must be judged in light of its capacity to deceive or its unfairness; it is not essential that actual injury be proved. *All-State Industries of North Carolina*, Docket 8738 (decided April 1, 1969), p. 9, n. 14 [75 F.T.S. 490].¹⁹

The only question of law presented as to Wolmart is whether the representations made by that company had the capacity to deceive. We believe that it is indisputable that they did. Moreover, a recounting of the manner in which Wolmart is connected with the other respondents clearly shows that Wolmart exists for the sole purpose of deceiving respondents' franchise dealers into believing that it is an innocent purchaser for value of the trade acceptances executed by Thermochemical's franchise dealers.

As earlier noted, when one agrees to become a franchise dealer for Thermochemical Products, he signs a contract designated a "Special Dealer Arrangement," which is, in effect, a purchase order. The new dealer has the option of paying for the merchandise within a specified period of time, or of paying for his purchase in installments. In most instances, installment payments are negotiated by having the dealer execute three trade acceptances. These acceptances are immediately discounted with a factoring company, with Thermochemical receiving 60 percent of the face value of the trade acceptances at the time of discount, and the remaining 40 percent being placed in a reserve account, which is retained by the factor. In the event of default on any of the trade acceptances, the amount that had been previously paid to Thermochemical is charged against the reserve account, although the paper itself is not re-endorsed or returned to Thermochemical, and the acceptances are assigned to Wolmart Discount Corporation for collection. Wolmart then brings suit in its own name against the debtor alleging that Wolmart is the assignee of a holder in due course. Wolmart never enters the picture unless default is made in the payment of a trade acceptance.

Wolmart, as a corporation, is simply a shell for the other respondents. The company has issued no stock, held no meetings, elected no directors, and apparently taken no corporate action beyond securing a certificate of incorporation. Wolmart's Secretary,

¹⁹ See *Montgomery Ward & Co., v. Federal Trade Commission*, 379 F. 2d 666, 670, 671 (7th Cir. 1967); *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F. 2d 676, 680 (2d Cir. 1944).

Bruce Mund, who is the only officer of the corporation, performed many services for Thermochemical and was frequently in Thermochemical's office, where an employee of Thermochemical was normally able to speak to Mr. Mund "over my shoulder." (Tr. 1791) The premises occupied by Wolmart were leased by Thermochemical, which also paid Wolmart's rent and telephone bills. (CX 139, 140, Tr. 1880-82.)²⁰

Employees of Thermochemical were frequently paid by checks drawn on Wolmart.²¹ In at least one instance where Wolmart had brought suit against a dealer who defaulted on payment of trade acceptances, the matter was settled after negotiations between employees of Thermochemical and an attorney for the dealer, resulting in dismissal of the suit and releases from Wolmart and Thermochemical being issued to the dealer. (Tr. 542-608; CXs 52-54.)

In sum, Wolmart must be held under our order because the company is simply a "legal fiction" whose sole purpose is "to forestall a claim made by a customer who had been a victim of the fraudulent sales plan, by pleading itself an innocent purchaser for value." *International Art Co. v. Federal Trade Commission*, 109 F. 2d 393, 396-97 (7th Cir. 1940), *cert. denied*, 310 U.S. 632.²²

Respondents have argued that Wolmart should not be held because the assignee of a holder in due course is not himself a holder in due course when the assignment follows a default. The question before us, however, is not whether, under applicable State law, Wolmart is a holder in due course, but whether Wolmart's representation that it is an assignee of a holder in due course has the capacity to deceive Thermochemical's dealers into believing that Wolmart was an innocent purchaser for value of the trade acceptances. We answer that question in the affirmative.

The examiner also dismissed the charge that respondents falsely alleged that the products sold by Thermochemical are manufactured or were developed by Union Carbide, General Electric or Aluminum Company of America; he found that the "preponderance of the testimony from the dealer witnesses is to the effect that one of the companies developed the silicones of one or

²⁰ A former employee of Thermochemical, referred to the Wolmart office, in her testimony, as "the other office." (Tr. 1642)

²¹ CXs 152-59, 181; Tr. 1547, 1739-52, 1771, 1841, 1969.

²² The only companies other than Thermochemical for which Wolmart has collected are other corporations (now defunct) controlled by respondents Charles A. Jacobs and David Jacobs (Tr. 1899, 1935, 2230).

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more of the ingredients contained in Thermochemical's products" (initial decision, p. 135;).²³ Although this finding may have been somewhat generous to respondents, we cannot say, on the basis of this record, that the examiner has misstated the preponderance of the evidence on this point. However, we disagree that such finding requires a dismissal of the charge. This charge must be considered in the context of the other misrepresentations made by respondents, especially the representation that Thermochemical is a division or subsidiary of the aforementioned companies or otherwise affiliated with them. In light of this, respondents should not be allowed any means which might be used to perpetuate misrepresentations of the kind made in the past. Few of the prospective franchise dealers approached by respondents' representatives are likely to draw any distinction between a paint containing silicones developed by General Electric and a paint developed by General Electric. There is ample precedent for the Commission to prohibit respondents from the future use of such representations, for it "is now settled that deception may be accomplished by innuendo rather than outright false statements." *Regina Corp. v. Federal Trade Commission*, 322 F. 2d 765, 768 (3d Cir. 1963).²⁴

IV

In formulating our final order, we have modified the order entered by the examiner not only to render it fully consistent with our conclusions, but also, in light of the extent of respondents' present and past misrepresentations,²⁵ to frame it "broadly enough to prevent respondents from engaging in similarly illegal practices" in the future. See *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965).

Respondents have, through the device of Wolmart and the use of the holder in due course doctrine, attempted to shield the misrepresentations made to franchise dealers. Although Wolmart

²³ Presumably, the examiner's reference to "one of the companies" meant General Electric, which respondents have asserted developed the silicones used in their paint products, an assertion which has not been challenged by complaint counsel; respondents have not contended that they are "connected" with General Electric in any other fashion, nor have they contended that they have any connection of any nature with Union Carbide or Aluminum Company of America. The paint products sold by Thermochemical are manufactured by the Pur-All Paint Company of Carlstad, New Jersey (Tr. 2028).

²⁴ "Words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive." *Bockenstette v. Federal Trade Commission*, 134 F. 2d 369, 371 (10th Cir. 1943). Respondents' representations must, like advertisements, be considered in their entirety and as they would be interpreted by those to whom they appeal. See *Ford Motor Co. v. Federal Trade Commission*, 120 F. 2d 175, 182 (6th Cir. 1941), *cert. denied*, 314 U.S. 688.

²⁵ See note 5, *supra*.

was not entitled to the rights of a holder in due course, our order would not be fully effectual if it allowed respondents to utilize the holder in due course doctrine in a different fashion to achieve the same end. Consequently, the prohibitions of our order are not limited to misrepresentations of the rights of Wolmart or any similar entity created by respondents as to negotiable paper held by that party; respondents are also required to make full disclosure on any negotiable instrument executed in connection with the sale of their products that the instrument may be assigned to a third party against which the debtor may not have the defenses available against the seller. Respondents will thereby be precluded not only from misrepresenting the rights of any subsequent possessor of negotiable paper, but also from evading the order by transferring or assigning negotiable instruments to others whose connection with respondents may be sufficiently unclear to accord them, under the applicable law, the rights of a holder in due course, unless prior notice of this possibility has been given to potential debtors.²⁶ Such a practice clearly would be "reasonably related" to the unfair trade practices in which respondents have engaged in the past and thus can properly be prohibited under our order. *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 431 (1957); *Floersheim v. Federal Trade Commission*, 411 F. 2d 874, 878 (9th Cir. No. 22733, decided May 28, 1969); *Regina Corp. v. Federal Trade Commission*, *supra*, 322 F. 2d at 769-70.²⁷

²⁶ Our order is also fashioned to take into account the law of any jurisdiction which may impose more stringent requirements than would our order upon transactions involving negotiable instruments executed in connection with the sale of respondents' merchandise. (At least two States have abolished the holder in due course doctrine insofar as holders of consumer paper are concerned (Mass. Gen. Laws Ann. ch. 255, § 12c (1968); Vt. Stat. Ann. tit. 9, § 2455 (Supp. 1968)) and other States have restricted, in lesser fashion, the doctrine of negotiability as applied to consumer paper.) See generally Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 Yale L.J. 618, 632-37 (1969). Although these statutes apparently would not reach respondents' present practices, which normally do not involve sales at retail, we deem it appropriate to recognize the existence of such statutes in the order, since similar statutes may be interpreted as reaching transactions such as those involved here, and since there is always the possibility that respondents may change their methods of distribution and offer their products directly to the consuming public.

²⁷ The application of the prohibition in this case is no less appropriate than in a case involving ultimate consumers. The prospective dealers approached by respondents were small businessmen who presumed that they were dealing and would be dealing only with Thermochemical. These dealers may well have declined to execute the trade acceptances had they been given notice of the manner in which respondents handled these instruments. Under such circumstances, as we stated in *All-State Industries of North Carolina, Inc.*, Docket 8738, decided April 1, 1969, p. 15 [75 F.T.C. 493]:

In the words of the Supreme Court in another context, "It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not 'unfair'" *F.T.C. v. Keppel*, 291 U.S. 304, 313 (1934).

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Our order, like that entered by the examiner, prohibits respondents from engaging in the illegal conduct of the past not only in connection with paint and paint products, but also in connection with the sale of any other merchandise or franchise in commerce. In light of the present and past conduct of respondents, any order less broad would not adequately serve the public interest.²⁸ The limitations which the order places on respondents' freedom of action are not undue; respondents "must remember that those caught violating the Act must expect some fencing in."²⁹

FINAL ORDER

This matter has been submitted to the Commission on the cross-appeals of complaint counsel and respondents from the initial decision of the hearing examiner filed on December 11, 1968. The Commission has rendered its decision denying respondents' appeal and granting complaint counsel's, and adopting the findings of the hearing examiner to the extent they are consistent with the opinion accompanying this order. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be modified and, as modified, adopted and issued by the Commission as its final order. Accordingly,

It is ordered, That the respondents Thermochemical Products, Inc., a corporation, and its officers, and respondents Jeannette Vine and Beatrice Freeman, also known as Beatrice Jacobs, individually and as officers of said corporation, and Charles A. Jacobs and David Jacobs, individually and as managers of said corporation, and Walmart Discount Corporation, a corporation, and its officers, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of any paint or paint products or coatings or franchises in connection

²⁸ Should respondents at some future time embark upon a course of conduct so wholly different from their past and present modes of operation that the Commission's order may prove inappropriate or unduly burdensome, they may utilize the procedure provided by Section 3.72(b)(2) of the Commission's Rules for moving to reopen and modify the order in light of such changed conditions. See *Consumer Sales Corp. v. Federal Trade Commission*, 198 F. 2d 404, 408-409 (2d Cir. 1952), *cert. denied*, 344 U.S. 912 (1953); *P. Lorillard Co. v. Federal Trade Commission*, 186 F. 2d 52, 59 (4th Cir. 1950); *General Transmissions Corp. of Washington*, Docket 8713 (issued February 23, 1968), p. 11 [73 F.T.C. 427].

²⁹ *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 431 (1957), citing *United States v. Crescent Amusement Co.*, 323 U.S. 173, 187 (1944).

therewith, or any other articles of merchandise or franchises, 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:

(a) Respondents are a subsidiary of, a division of, or are affiliated with Union Carbide Company, General Electric Company or Aluminum Company of America or any other corporate entity; or misrepresenting, in any manner, respondents' trade or business connections or affiliations;

(b) Any of respondents' products were manufactured or developed, in whole or in part, by any of the aforementioned companies or misrepresenting, in any manner, the company or organization which developed or manufactured, in whole or in part, any of the products manufactured or sold by the respondents.

2. Representing, directly or by implication, that respondents' products are guaranteed, unless the nature, conditions 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 and further, unless all such guarantees are in fact fully honored and all the terms thereof fulfilled.

3. Representing, directly or by implication, that:

(a) Dealers selling respondents' products will earn any stated gross or net amount; or representing, in any manner, the past earnings of dealers, unless in fact the past earnings reported are those of a substantial number of dealers and accurately reflect the average earnings of these dealers under circumstances similar to those of the dealer to whom the representation is made;

(b) Respondents' dealers may return any unsold merchandise or that respondents will transfer unsold merchandise to other dealers;

(c) A survey has been made of the territory in which a prospective dealer is located for the purpose of ascertaining the sales potential of said territory;

(d) Respondents will send a representative to contact prospective customers of their dealers, or erect billboards and other displays, or furnish newspaper

mats free of charge, or prepare suitable mailings on the dealer's letterhead; or misrepresenting, in any manner, the assistance which will be given the dealer in making sales of the product purchased.

4. Representing, directly or by implication, that:

(a) Respondents' products are waterproof or will cause any surface to which they are applied to become waterproof or misrepresenting, in any manner, the characteristics and capabilities of respondents' products and the manner in which respondents' products will perform;

(b) Respondents' products are suitable for use on the interior of a structure; or misrepresenting, in any manner, the uses for which respondents' products are suitable;

(c) One or more coats or applications of respondents' products is sufficient to achieve or to produce any result other than that which normally is attained by such action.

5. Representing, directly or by implication, that:

(a) Any respondent is a holder in due course, or is entitled to the rights of a holder in due course, of any negotiable instrument executed in payment for a sale of respondents' products;

(b) Any person, firm, or corporation controlled by, or affiliated with, Thermochemical Products, Inc., or any other person, firm, or corporation controlled by, or affiliated with, the individual respondents, jointly or severally, is a holder in due course, or is entitled to the rights of a holder in due course, of negotiable paper executed in payment of products purchased from respondents.

6. Using the trade name Wolmart Discount Corporation, or any other name or names other than the names of payees or actual creditors, in seeking to collect any notes, trade acceptances or other instruments of indebtedness or other accounts receivable.

7. Failing to reveal, clearly and conspicuously, to the debtor, respondents' identity, when any other names are used by respondents or their agents in the sale of merchandise and collection of any notes, trade acceptances or other instruments of indebtedness or accounts receivable in connection therewith.

8. Participating in any plan or arrangement whereby others may falsely allege to be holders in due course, or entitled to the rights of a holder in due course, of negotiable instruments arising out of the sale of merchandise by respondents or services performed for respondents.

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

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

(b) Where negotiation of the instrument to a third party is prohibited or otherwise limited under the law of the state in which the instrument is executed, that the negotiation or assignment of the trade acceptance, promissory note or other instrument of indebtedness to a finance company or other third party will not cut off any rights or defenses that the purchaser may have under the contract;

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

(d) Where the law of the state in which the instrument is executed does not preserve as against any holder of the instrument all of the legal and equitable defences the purchaser may assert against the seller, that in the event the instrument is negotiated or assigned to a finance company or other third party, the purchaser may have to pay to such finance company or other third party the full amount due under his contract whether or not he has claims against the seller for defects in merchandise, nondelivery or the like.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions and to all present and future salesmen or other per-

sons engaged in the sale of respondents' products or services, and shall secure from each such salesman or other person a signed statement acknowledging receipt of said order.