

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

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
MAIN STREET FURNITURE, INC., ET AL.
CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING
ACTS.

Docket C-2772. Complaint, Dec. 23, 1975—Decision, Dec. 23, 1975

Consent order requiring a South Bend, Ind., furniture retailer, among other things to cease using bait and switch tactics; making price and/or savings misrepresentations; misrepresenting guarantees, furniture and service nature and quality, time limitations on offers to sell, and foreign origin; making false pictorial representations; failing to disclose additional charges and material facts and failing to make credit cost disclosures required by Regulation Z of the Truth in Lending Act.

Appearances

For the Commission: *Richard A. Palewicz.*

For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Acts, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Main Street Furniture, Inc., a corporation and Samuel Goldstein, Raymond Goldstein and Chester E. Brost, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Main Street Furniture, Inc. is a corporation organized, existing and doing business under and by virtue

of the laws of the State of Indiana, with its principal office and place of business located at 50510 U.S. 31 No., South Bend, Ind.

Respondents Samuel Goldstein, Raymond Goldstein, and Chester E. Brost are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of household furniture and appliances, and services in connection therewith to the general public.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegation in Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of their aforesaid business, respondents have disseminated and caused the dissemination of certain advertisements concerning said products and services by various means in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers of interstate circulation, and in radio and television broadcasts of interstate circulation, for the purpose of inducing, and which was likely to induce, directly or indirectly, the purchase of said products and services; additionally, respondents own, operate and control a total of three (3) retail furniture stores located in the States of Indiana and Ohio.

PAR. 4. In the course and conduct of respondents' business and for the purpose of inducing the sale of their household furniture, appliances and services in connection therewith, respondents have made numerous statements and representations in newspaper advertisements, radio and television commercials and oral statements by salesmen to prospective customers.

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

TRUCK LOAD SALE!

SAVINGS FANTASTIC * * *
SPECTACULAR VALUES

SPECIAL LIVING ROOM SALE * * * HUNDREDS TO CHOOSE FROM-
ALL PRICES REDUCED!

HUNDREDS OF BEDROOM SUITES ON SALE NOW! * * * \$96 to \$388

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SUPERB QUALITY

We guarantee everything and we SERVICE everything you buy from us

THESE FABULOUS OFFERS GOOD FOR ONE WEEK ONLY - - - -

SAVE UP TO \$100 AND MORE * * *

ITALIAN!

FRENCH!

SPANISH!

WE NEVER SAY "NO!" TO CREDIT

EASY TERMS * * *

Walnut finished

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, respondents have represented, and are now representing, directly or by implication that:

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

2. By and through the use of the words, "SALE," "SAVINGS FANTASTIC," "SPECTACULAR VALUES," and other words of similar import and meaning not set out specifically herein, respondents' merchandise may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondents' regular selling prices.

3. By and through the use of the words, "HUNDREDS TO CHOOSE FROM," and other words of similar import and meaning not set out specifically herein, the advertised merchandise is available in 100 different sets from which the prospective purchaser may choose.

4. There are no charges in addition to the advertised purchase price of respondents' merchandise.

5. By and through the use of the words, "Superb Quality," and other words of similar import and meaning not specifically set out herein, the durability of the advertised merchandise exceeds reasonable requirements for normal everyday use for a reasonable period of time.

6. The advertised merchandise was guaranteed in every respect without conditions or limitations and would be continually serviced

without charge for an unlimited period of time after the delivery of the advertised merchandise to the homes of purchasers.

7. The advertised offer was being made only for a limited period of time.

8. Purchasers of the advertised merchandise are afforded savings of \$100 and more off the prices at which such merchandise is usually and customarily sold at retail.

9. By and through the use of the words, "ITALIAN," "FRENCH," "SPANISH," and other words of similar import and meaning not set out specifically herein, furniture sold by respondents is of a foreign origin.

10. By and through the use of the words, "We Never Say 'No!' To Credit" and "Easy Terms," purchasers of respondents' merchandise are never refused credit and are granted easy credit terms without regard to their financial status or ability to pay.

11. By and through the use of the words, "Walnut finished," and other words of similar import and meaning not set out specifically herein, furniture sold by respondents is of solid wood construction.

PAR. 6. In truth and in fact:

1. The offers set out in respondents' advertisements are not bona fide offers to sell the advertised merchandise at the prices or on the terms or conditions stated but are made for the purpose of obtaining leads to prospective purchasers. Respondents' salesmen, thereafter, disparage respondents' advertised merchandise and otherwise discourage the purchase thereof and attempt to sell and frequently do sell different and more expensive merchandise.

2. Respondents' merchandise is not being offered for sale at special or reduced prices, and savings are not thereby afforded to their purchasers because of reductions from respondents' regular selling prices. In fact, respondents do not have regular selling prices, but the prices at which respondents' merchandise are sold vary from purchaser to purchaser.

3. The advertised merchandise is not available in 100 different sets from which the prospective purchaser may choose. To the contrary, respondents have available only a very limited number of selections of the advertised merchandise.

4. Respondents make extra charges as applicable, such as service, finance and life insurance charges over and above the regular advertised price of their merchandise.

5. The advertised merchandise is not of a high quality or durability that exceeds reasonable requirements for normal everyday use for a reasonable period of time. In many instances, respondents sell advertised merchandise only under the express condition that such merchandise is not warranted for any particular use.

6. The advertised merchandise is not guaranteed by respondents and is not continuously serviced without charge for an unlimited period of time.

7. Respondents' advertised offer is not made for a limited period of time. The advertised merchandise is regularly advertised for the represented price or at another so-called reduced price over a period of time greater than the represented limitations.

8. Purchasers of respondents' merchandise advertised in conjunction with the phrase "Save Up To \$100 And More," or terms of similar comparable import or meaning, did not realize savings of the stated percentage amount from the actual prices at which the merchandise so advertised was sold or offered for sale in good faith for a reasonably substantial period of time in the recent regular course of respondents' business.

9. Merchandise advertised in conjunction with the words, "Italian," "French," or "Spanish," or terms of comparable import or meaning, is not of a foreign origin. The advertised merchandise is produced by domestic manufacturers.

10. Purchasers of respondents' merchandise are not granted easy credit terms by respondents, without regard to their financial status or ability to pay.

11. Merchandise advertised in conjunction with the use of the phrase, "walnut finished," or terms of similar comparable import or meaning, was not of solid wood construction. To the contrary, said phrase merely described the color of a stain finish applied to the exposed surfaces of the merchandise.

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

PAR. 7. In the course and conduct of their business and for the purpose of inducing the sale of their household furniture, respondents through the use of pictorial representations in various publications and T.V. commercials, represented directly or by implication that:

1. All of the furniture illustrated in the pictorial representation is being offered for sale at the advertised price.

2. All of the furniture illustrated in the pictorial representation is available for sale in unlimited quantities as a group.

3. Furniture illustrated in the pictorial representation may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondents' regular selling prices.

PAR. 8. In truth and in fact:

1. Respondents offer only part of the furniture in the pictorial

representation at the advertised price and make extra charges as applicable for remaining furniture items in the pictorial representation.

2. All of the furniture in the pictorial representation is not available for sale in unlimited quantities as a group. To the contrary, respondents have available only a very limited number of the advertised groups of furniture.

3. Furniture illustrated in the pictorial representation is not being offered for sale at special or reduced prices, and savings are not afforded to purchasers because of reductions from respondents' regular selling prices. In fact, respondents do not have regular selling prices, but the prices at which respondents' merchandise are sold vary from purchaser to purchaser.

Therefore, the representations set forth in Paragraph Seven hereinbefore, were, and are, false, misleading and deceptive.

PAR. 9. In the course and conduct of their business and for the purpose of inducing the sale of their furniture, respondents have maintained, and are now maintaining, in their salesrooms, floor models and displays of furniture being offered for sale, on the basis of which their customers select and order the furniture they purchase from respondents.

In this connection, respondents and their sales representatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the quality and durability of the furniture being offered for sale, the terms and conditions under which merchandise will be sold and delivered, and the services that will be provided by respondents.

Moreover, subsequent to making sales and deliveries, respondents and their employees have made, and are now making, numerous oral statements, representations and promises to their customers regarding the time and manner in which respondents will perform various adjustments, replacements and/or repairs.

PAR. 10. By and through the use of the floor models and furniture displays, together with the aforesaid oral statements, representations and promises made by respondents, their sales representatives and other employees, respondents have represented, and are now representing, directly or by implication, that:

1. Furniture sold by respondents will be delivered to the customer free from damages and defects.

2. Furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced within a reasonable time.

3. Furniture which is delivered with damages and/or defects will be repaired or replaced to the satisfaction of the purchasers.

4. Furniture which is delivered to purchasers with damages and/or

defects will be repaired or replaced in accordance with promises made to the purchasers by respondents.

PAR. 11. In truth and in fact:

1. In many instances, furniture sold by respondents is delivered to purchasers with damages and/or defects.

2. In many instances, furniture which is delivered to purchasers with damages and/or defects is not repaired or replaced within a reasonable time.

3. In many instances, furniture which is delivered to purchasers with damages and/or defects is not repaired or replaced to the satisfaction of the purchasers.

4. In many instances, furniture which is delivered to purchasers with damages and/or defects is not repaired or replaced in accordance with promises made to the purchasers by respondents' employees.

Therefore, the aforesaid acts, practices, statements and representations regarding respondents' merchandise and services as set forth in Paragraphs Nine and Ten were, and are, false, misleading and deceptive.

PAR. 12. In the further course and conduct of their aforesaid business, and in connection with the representations set forth in Paragraphs, Four, Five, Seven, Nine and Ten above, respondents in offering their furniture for sale have failed to disclose material facts relating to the veneered construction or to the use of plastics with simulated wood appearance in the manufacture of their merchandise.

The aforesaid failure to disclose such material facts to purchasers has the tendency and capacity to mislead or deceive such persons with respect to the utility, construction, composition, durability, design and grade of household furniture sold by respondents.

Therefore, respondents' failure to disclose such material facts was, and is, unfair, false, misleading and deceptive.

PAR. 13. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their furniture and appliances, respondents' salesmen or representatives have in many instances engaged in the following additional unfair, false, misleading and deceptive acts and practices:

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

2. Through the use of false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Twelve above, respondents or their representatives have been able to

induce their customers into signing a contract upon initial contact without giving the customers sufficient time to carefully consider the purchase and consequence thereof.

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

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

PAR. 14. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents.

PAR. 15. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, and acts and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 16. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 17. In the course and conduct of their business, as aforesaid, respondents are engaging, and for some time last past have engaged, in the collection of debts allegedly due and owing to Main Street Furniture, Inc. pursuant to contracts or other agreements relating to the purchase of respondents' merchandise.

PAR. 18. In attempting to induce payments of purportedly due or delinquent accounts, respondents and their representatives or agents have sent through the United States mail dunning letters, notices and

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similar instruments which contain false and misleading statements and representations.

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

FINAL NOTICE TO RETAKE FURNITURE

You are hereby notified that unless you call Mr. ———— upon receipt of this notice, we will have no alternative but to start proceedings to RETAKE our furniture.

* * * * *

FINAL NOTICE OF COURT ACTION

48 HOUR NOTICE

Take notice that unless payment is made within 48 hours from the date hereof, our LEGAL DEPARTMENT will file proceedings against you without further notice, because you have failed or neglected to comply with the terms of your contract.

LEGAL DEPARTMENT

* * * * *

FINAL NOTICE BEFORE LEGAL ACTION YOU ARE HEREBY NOTIFIED THAT YOU HAVE 24 HOURS FROM THIS DATE TO CALL AT OUR STORE ANY PAY ON YOUR ACCOUNT. FAILURE TO DO SO WILL RESULT IN LEGAL ACTION AGAINST YOU.

LEGAL ACTION MEANS:

1. Court costs, attorney fees and other legal expenses will be charged to you, as provided by law, IN ADDITION to the complete amount of indebtedness to our store.

* * * * *

* * * This is definitely our FINAL NOTICE to you. Unless you pay your account WITHIN 24 HOURS YOU WILL HEAR FROM OUR ATTORNEY.

* * * * *

Notice of Impending Legal Proceedings

* * * A demand by proper authority is hereby made, and the debtor duly notified that he is about to be sued and his personal belongings attached by said Creditor in Court. And it is demanded that said debtor forthwith appear before the person of firm named below, and pay to said creditor either in money or duly accepted order, in such proportion of said earnings in accordance with the Statute in such made and provided.

Unless you comply with the above demand within 24 hours from date hereof, further proceedings will be had, and the above action prosecuted without further delay.

* * * * *

NOTICE OF INTENT TO FILE SUIT—OBTAIN JUDGMENT AND GARNISHEE WAGES

* * * You are hereby notified that unless you call at Main Street Furniture, 50510

U.S. 31N South Bend, Indiana, within 48 HOURS of this date and pay \$64.00 suit will be immediately filed, judgment obtained, property sold subject to execution, and wages garnisheed.

* * * * *

SUMMONS

PAR. 19. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not specifically set forth herein, respondents have represented, directly or by implication, that:

1. Respondents have referred, are referring, or will refer delinquent accounts to attorneys.

2. Failure to pay the amount claimed as owing within a stated period of time will result in immediate legal action.

3. Failure to pay the amount claimed as owing within a period of time will result in attachment and garnishment proceedings against the property and wages of the debtor.

4. Failure to pay the amount claimed as owing after notice of intent to repossess will result in the repossession of the merchandise.

5. Once judgment is entered against a debtor, it is impossible for the debtor to avoid payment thereof.

6. Respondents' organization has or maintains a separate legal department with qualified employees serving in this department.

7. Some forms used by respondents imply in form and content they are official documents duly issued or approved by a court of law or other government agency.

PAR. 20. In truth and in fact:

1. Failure of an alleged debtor to remit money to respondents within time period(s) indicated does not in most instances result in the immediate reference of such matters to attorneys.

2. Failure of an alleged debtor to remit money to respondents within time period(s) indicated does not in most instances result in the immediate institution of legal action to effect payment.

3. Failure of an alleged debtor to remit money to respondents within time period(s) indicated does not in most instances result in the immediate institution of attachment or garnishment proceedings to effect payment.

4. Failure to pay the amount claimed as owing after notice of intent to repossess, will not result in the repossession of the merchandise.

5. It is possible to avoid payment of a judgment, once such is entered, in a matter involving a debt. For instance, resort to bankruptcy proceedings will often avoid the payment of at least part of a judgment. Also, the restrictions and exemptions placed on the

collection of judgments make it possible in some instances to avoid the payment of at least part of a judgment.

6. Respondents do not have a separate legal department with qualified employees serving in this department.

7. Forms used by respondents are not official documents issued or approved by a court of law or other government agency, but on the contrary are wholly private in origin.

Therefore, the statements and representations set forth in Paragraphs Nineteen and Twenty hereof were and are false, misleading and deceptive.

PAR. 21. In the ordinary course of their business as aforesaid, and in connection with the collection of debts arising from retail installment sales, respondents through their employees engage in fraudulent and unconscionable conduct in the repossession of furniture and appliances from delinquent accounts and in so doing, have represented directly or by implication, that:

1. The person making the repossession was a court constable who was acting in his official capacity and pursuant to lawful authority.

2. The repossession was being accomplished pursuant to a court order that was lawfully obtained from the local court in the area.

3. The document shown to the delinquent account at the time of the repossession was an official court order.

PAR. 22. In truth and in fact:

1. The person making the repossession was not a court constable that was acting in his official capacity and pursuant to lawful authority. To the contrary, the person making the repossession was merely a collection employee of respondents.

2. The repossession was not being accomplished pursuant to a court order that was lawfully obtained from the local court in the area.

3. The document shown to the delinquent account at the time of the repossession was not an official court order but was a simulated legal document that was made up by respondents for collection purposes.

Therefore, the statements and representations set forth in Paragraphs Twenty-One and Twenty-Two hereof were and are false, misleading and deceptive.

PAR. 23. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the tendency and capacity to mislead and deceive members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and to induce recipients thereof into the payment of alleged delinquent accounts by reason of the said erroneous and mistaken belief.

PAR. 24. The aforesaid acts and practices of respondents as herein

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

COUNT III

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

PAR. 25. In the ordinary course and conduct of their business, as aforesaid, respondents regularly extend, and for some time last past have regularly extended consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 26. Subsequent to July 1, 1969, in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, respondents have caused and are causing customers to execute a binding "Retail Installment Contract" hereinafter referred to as the "Installment Contract." Respondents do not provide these customers with any other credit cost disclosures.

By and through the use of the installment contracts, respondents:

1. Induced certain customers to sign installment contracts in blank form. Respondents have subsequently filled in the blank spaces and frequently failed to give those customers a completed copy, thereby failing to furnish those customers any cost or credit disclosures prior to the consummation of the contract as required by Section 226.8(a) of Regulation Z in the manner and form prescribed by Section 226.8(b) and (c) of Regulation Z.

2. Failed to meet the requirements of Section 226.8(b)(7) of Regulation Z as the contract provides for the right of payment of the full amount due and "under certain conditions" to obtain a partial refund of the finance charge, without further disclosing the "certain conditions" under which prepayment could be made and a partial refund of the finance charge be obtained.

3. Failed to accurately disclose the date on which the finance charge begins to accrue as prescribed by Section 226.8(b)(1) of Regulation Z.

4. Failed to accurately state the "annual percentage rate," as prescribed by Section 226.8(b)(2) of Regulation Z.

5. Failed to disclose the total of payments as prescribed by Section 226.8(b)(3) of Regulation Z.

6. Failed to accurately disclose the number, amount and due dates, or periods of payments, scheduled to repay the indebtedness, as prescribed by Section 226.8(b)(3) of Regulation Z.

7. Failed to state the "unpaid balance of cash price," as prescribed by Section 226.8(c)(3) of Regulation Z.

8. Failed to disclose the amount financed, as required by Section 226.8(c)(7) of Regulation Z.

9. Failed to disclose the "deferred payment price," as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

10. Failed to include in the finance charge, charges or premiums for fire risk of loss insurance, written in connection with credit transactions when the customer was not given a clear, conspicuous, and specific written statement setting forth the cost of the insurance if obtained from or through respondents and stating that the customer may choose the person through which the insurance is to be obtained as prescribed by Section 226.4(a)(6) of Regulation Z.

11. Failed to include in the finance charge, charges or premiums for credit life, accident, health or loss of income insurance, written in connection with credit transactions when the customer has not given a specific dated and separately signed affirmative written indication of his desire for such coverage as prescribed by Section 226.4(a)(5)(ii) of Regulation Z.

PAR. 27. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constituted violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for

settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

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

1. Respondent Main Street Furniture, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 50510 U.S. 31 No., South Bend, Ind.

Respondents Samuel Goldstein, Raymond Goldstein and Chester E. Brost are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above stated address.

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

ORDER I

It is ordered, That respondents Main Street Furniture, Inc., a corporation, its successors and assigns, and its officers, and Samuel Goldstein, Raymond Goldstein and Chester E. Brost, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division or any other device in connection with the purchasing, advertising, offering for sale, sale and distribution of furniture and appliances, or any other products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of merchandise.

2. Making representations, directly or indirectly, orally or in writing, purporting to offer merchandise or services for sale when the purpose of the representation is not to sell the offered merchandise or

services but to obtain leads or prospects for the sale of other merchandise or services at higher prices.

3. Discouraging in any manner the purchase of any merchandise or services which are advertised or offered for sale.

4. Failing to maintain and produce for inspection and copying for a period of three years adequate records to document for the entire period during which each advertisement was run and for a period of six weeks after the termination of its publication in press or broadcast media:

a. the cost of publishing each advertisement including the preparation and dissemination thereof;

b. the volume of sales made of the advertised product or service at the advertised price; and

c. a computation of the net profit from the sales of each advertised product or service at the advertised price.

5. Using the words "Sale," "Savings Fantastic," "Spectacular Values," or any other words of similar import or meaning not set forth specifically herein, unless the immediately preceding price at which bona fide sales have been made of the merchandise being offered for sale is disclosed or can be readily ascertained by disclosure of the stated dollar or percentage price and the price of said merchandise constitutes a recent reduction, in an amount not so insignificant as to be meaningless, from the immediately preceding price or unless a disclosure is made that such merchandise was offered for sale at the immediately preceding price in the recent regular course of respondents' business, and that no sales were made at that price or at any other price in the recent past.

6. (a) Representing, directly or indirectly, orally or in writing, that by purchasing any of respondents' merchandise, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price unless the former price is respondents' immediately preceding price for the advertised merchandise and bona fide sales have been made by respondents at that price in the recent past or unless a disclosure is made that said merchandise was offered for sale at the former price for a reasonably substantial period of time in the recent regular course of respondents' business and that no sales were made at that price or at any other price in the recent past.

(b) Representing, directly or indirectly, orally or in writing that by purchasing any of respondents' merchandise, customers are afforded savings between respondents' stated price and a compared price for said merchandise in respondents' trade area unless respondents' merchandise and the nature of the compared price are explicitly

identified in advertising and at the point of sale through the use of shelf tags or similar means and a substantial number of the principal retail outlets in the trade area regularly sell such merchandise at the compared price or some higher price in the regular course of their business.

(c) Representing, directly or indirectly, orally or in writing, that by purchasing any of respondents' merchandise, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable merchandise unless the compared value price is explicitly identified in advertising and at the point of sale through the use of shelf tags or similar means and respondents have in good faith conducted a market survey or obtained a similar representative sample of prices for comparable merchandise of like grade and quality in their trade area to establish that a substantial number of the principal retail outlets in the trade area regularly sell comparable merchandise of like grade and quality at the compared value price in the regular course of their business.

7. Failing to maintain and produce for inspection or copying, for a period of three years, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar representations as set forth in Paragraphs Five and Six of this order are based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

8. Representing, directly or indirectly, orally or in writing, that respondents have "HUNDREDS" or any other given number of furniture suites in stock unless respondents have the stated number of furniture suites available for immediate sale and delivery; or misrepresenting in any manner the colors, style, kind or quantity of furniture in stock and available for sale or delivery.

9. Failing to make full disclosure either in its advertising or at the time of sale and prior to consummation of the sale that in addition to the price quoted in respondents' advertising, certain other charges, as applicable, are made, such as, delivery, set up or assembly, service, and warranty charges.

10. Failing to disclose clearly and conspicuously within each advertisement for an advertised product each reservation, if any, as to suitability or durability of such advertised product for normal usage by the customers who may buy such product or service.

11. Representing, directly or indirectly, that any of respondents' products are guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; and unless respondents promptly and fully perform all of their obligations

and requirements, directly or impliedly represented, under the terms of each such guarantee.

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

13. Using the terms "Italian," "French" or "Spanish," or any other unqualified terms of similar import or meaning not set forth specifically herein, orally or in writing, to describe respondents' furniture when such furniture is of domestic origin, unless a clear and conspicuous disclosure is made in advertising and on the furniture that such furniture was manufactured in the United States by means of such statements as "Made in U.S.A." or "manufactured by" followed by the name and address of the domestic manufacturer.

14. Representing, directly or indirectly, orally or in writing, that purchasers of respondents' merchandise are granted easy or assured credit terms, by respondents; or misrepresenting in any manner, the amount, type, extent of any other facet of the credit terms respondents arrange or may arrange for their purchasers.

15. Representing, directly or indirectly, orally or in writing, that respondents' merchandise is "walnut finished," or using any other terms of comparable import or meaning not set forth specifically herein, to describe respondents' furniture, unless a clear and conspicuous disclosure is made in advertising and on the furniture that such terms are merely descriptive of the color and/or grain design or other simulated finish that is applied to the exposed surfaces of such furniture.

16. Using any wood names or any names that suggest wood, orally or in writing, to describe any materials simulating wood in respondents' furniture, unless a clear and conspicuous disclosure is made in advertising and on the furniture that such wood names are merely descriptive of the color and/or grain design or other simulated finish that is applied to the exposed surfaces of such furniture.

17. Using pictorial representations of two or more items of furniture in conjunction with a stated price when all of the furniture in the pictorial representations is not being offered at the stated price, unless a disclosure is made in immediate conjunction and with equal prominence that all of the illustrated furniture is not being offered at the stated price and that an additional charge is made for certain items that are clearly identified in the illustrations.

18. Offering merchandise for sale by means of any form of pictorial advertisement when such merchandise is not in stock and available in quantities sufficient to meet reasonably anticipated demands for sale to

the public at or below the advertised price for the period in which the prices are advertised to be effective.

19. Failing to inform, orally, all customers at the time of sale and provide in writing on the face of all order forms, sales contracts and invoices executed by customers, with such conspicuousness and clarity as is likely to be read and understood, that the customer has the right and option to cancel the contract and obtain a refund of all monies, by notifying respondents, in writing, within ten (10) days from the date of actual delivery of the merchandise, where furniture and/or appliances are delivered in a defective or damaged condition; *Provided, however,* That the provisions of Paragraphs 19 and 20 of the order shall not apply to merchandise sold "as is," conspicuously designated as such on order forms, sales contracts and invoices executed by the customers who have knowledge of damage to, or defects in, particular merchandise and have given written consent to purchasing same in its stated condition.

20. Failing to refund immediately all monies to customers who have requested contract cancellation in writing within ten (10) days from the date of actual delivery of defective or damaged merchandise; *Provided, however,* That, in lieu of making such a refund, respondents may, with the written consent of, and with no additional cost to the customer replace or repair defective or damaged merchandise, such replacement or repair to be fully, satisfactorily and promptly performed, in accordance with Paragraph 21 of this order I. In such a case, the customer who consents to accept replacement or repair in lieu of a refund, may cancel the contract with a refund of all monies by notification to respondents in writing within ten (10) days from the date of actual delivery or redelivery of any replacement or repaired merchandise that is itself defective or damaged.

21. Failing to make all refunds or to obtain the voluntary written consent of the customer for replacement or repair, as provided for in this order, within one (1) week of the receipt of the customer's request for cancellation; or to complete all repairs, pursuant to a written consent for repairs, within two (2) weeks from the date of such written consent, or to make full replacements, pursuant to a written consent for replacement, within thirty (30) days from the date of such written consent. In all other instances, where a customer has requested repairs or replacements, orally or in writing, within ten days following the delivery of defective, damaged or nonconforming merchandise, respondents shall investigate such complaints forthwith and complete repairs within three (3) weeks and replacements within forty (40) days of the receipt of such request.

22. Failing to notify the customer, orally and in writing, and at least five (5) business days prior to the scheduled completion date, that

respondents are unable to complete repairs or replacement within the time specified by this order and to cancel the contract with a full refund of all monies to the customer within one week, or in lieu thereof and at the option of the customer, to obtain the customer's voluntary written consent for an extension of the date set for completion, setting forth a date certain for completion, which shall be a date by which respondents actually expect to complete performance.

23. Failing to maintain and produce for inspection or copying, for a period of two (2) years, adequate records which disclose the facts pertaining to the receipt, handling and disposition of each and every communication from a customer, oral or written, requesting contract cancellation, refund, replacement or repair.

24. Failing to make a clear and conspicuous disclosure on furniture, or on a tag or label prominently attached thereto, that veneers, plastics or other materials having the appearance of wood, leather, slate or marble have been used in the manufacture of such merchandise; or failing to make a clear and conspicuous disclosure of any material facts relating to the true composition of furniture where materials or products that simulate other materials or products are used in the manufacture of such furniture.

25. Inducing or causing purchasers or prospective purchasers of respondents' products, installations or services to sign blank or partially filled in completion certificates or other legal instruments or documents; or misrepresenting, in any manner, the true nature or effect of such legal instruments or documents.

26. Contracting for any sale whether in the form of trade acceptance, conditional sales contract, promissory note, or otherwise which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of execution.

27. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in boldface type of a minimum size of ten (10) points, a statement in substantially the following form:

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

28. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form, in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point boldface type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION
(*Enter date of transaction*)

(Date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE: OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO _____ (NAME OF SELLER), AT _____ (ADDRESS OF SELLER'S PLACE OF BUSINESS),
NOT LATER THAN MIDNIGHT OF _____ (DATE).

I HEREBY CANCEL THIS TRANSACTION.

(DATE)

(BUYER'S SIGNATURE)

29. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction,

and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

30. Including in any sales contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this order including specifically his right to cancel the sale in accordance with the provisions of this order.

31. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

32. Failing or refusing to honor any valid notice of cancellation by a buyer and within ten (10) business days after the receipt of such notice, to (a) refund all payments made under the contract of sale; (b) return any goods or property traded in, in substantially as good condition as when received by the seller; (c) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

33. Negotiating, transferring, selling, or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

34. Failing, within ten (10) business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess or to abandon any shipped or delivered goods.

35. Assigning, selling or otherwise transferring respondents' notes, contracts or other documents evidencing a purchaser's indebtedness, unless any rights or defenses which the purchaser has and may assert against respondents are preserved and may be asserted against any assignee or subsequent holder of such note, contract or other document evidencing the indebtedness.

36. Failing to include the following statement clearly and conspicuously on the face of any note, contract or other instrument of indebtedness executed by or on behalf of respondents' customers:

NOTICE

Any holder takes this instrument subject to the terms and conditions of the contract which gave rise to the debt evidenced hereby, any contractual provision or other agreement to the contrary notwithstanding.

ORDER II

It is further ordered, That respondents Main Street Furniture, Inc., a corporation, its successors and assigns, and its officers, and Samuel Goldstein, Raymond Goldstein and Chester E. Brost, individually and as officers of said corporation, and respondents' agents, representatives

and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the collection of, or attempt to collect, accounts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing or causing to be represented by any means, directly or indirectly, that respondents have instructed, are instructing, or will instruct an attorney to file suit against an alleged debtor unless the alleged debt is immediately paid in full or a specified amount is paid thereon unless the respondents have already instituted the aforesaid suit.

2. Representing by any means, directly or indirectly, that:

- (a) legal action has been taken against the debtor; or

- (b) legal action is being taken against the debtor; or

- (c) legal action will be taken against the debtor unless the respondents have already instituted said legal action.

3. Representing by any means, directly or indirectly, that the post judgment rights of a creditor to attach property or garnish wages of a debtor are as specifically represented unless such is the fact in the jurisdiction in which collection is sought.

4. Informing a debtor of a creditor's right after judgment without disclosing at the same time that no judgment may be entered against the debtor unless the debtor has first been given notice and an opportunity to appear and defend himself in a court of law.

5. Representing, directly or indirectly, by any means to a debtor that it is impossible to escape a judgment.

6. Using fictitious job titles or organizational designations or descriptions by any means in connection with respondents' business or misrepresenting in any manner any departmentalization of respondents' business.

7. Using fictitious official titles or designations or descriptions by any means in connection with the repossession of furniture and/or appliances from delinquent accounts.

8. Representing by any means, directly or indirectly, that the repossession of furniture and/or appliances is being accomplished pursuant to a court order, unless a court order was lawfully obtained from the local court in the area and the delinquent account had first been given notice and an opportunity to appear and defend himself prior to the issuance of such court order; or misrepresenting, in any manner, respondents' repossession procedures.

9. Using any unofficial or unauthorized document which simulates or is represented by any means to be a document authorized, issued, or approved by a court of law or any other official or legally constituted or

authorized authority, or misrepresenting, in any manner, the source, authorization, or approval of any document.

10. Failing to give notification of the commencement of legal action by respondents against a customer by mailing a summons and complaint to such customer's last known address, and failing to obtain from the post office a certificate of such mailing. Such notice shall be in addition to any other notification or service required by law, practice or custom. Such summons and complaint to be sent by first class mail by respondents or their attorney with instructions on the face of the envelope "Do not forward. Address Correction Requested." In the event that such mail is returned as undeliverable by the post office or if the residence address of the defendant is unknown, the summons is to be mailed to the customer, care of the employer or place of employment of the customer if known, in a sealed envelope not indicating on the outside thereof, directly or indirectly by the return address or otherwise, that the communication is from an attorney or concerns an alleged debt.

ORDER III

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

1. Failing to furnish to the customer, before the transaction is consummated, a duplicate of the instrument or other statement containing the disclosures required by Section 226.8 of Regulation Z, as required by Section 226.8(a) of Regulation Z.

2. Failing to disclose the conditions entitling a customer to a partial refund of the finance charge as required by Section 226.8(b)(7) of Regulation Z.

3. Failing to accurately disclose the date on which the finance charge begins to accrue, as prescribed by Section 226.8(b)(1) of Regulation Z.

4. Failing to accurately state the "annual percentage rate," as prescribed by Section 226.8(b)(2) of Regulation Z.

5. Failing to disclose the "total of payments," as prescribed by Section 226.8(b)(3) of Regulation Z.

6. Failing to accurately disclose the number, amount, and due dates, or periods of payment, scheduled to repay the indebtedness, as prescribed by Section 226.8(b)(3) of Regulation Z.

7. Failing to state the "unpaid balance of cash price," as prescribed by Section 226.8(c)(3) of Regulation Z.

8. Failing to disclose the "amount financed," as prescribed by Section 226.8(c)(7) of Regulation Z.

9. Failing to disclose the "deferred payment price," as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

10. Failing to itemize and include in the finance charge, for purposes of disclosure of the finance charge and computation of the annual percentage rate, any and all charges for risk of loss insurance unless the customer was given a clear, conspicuous and specific written indication of the cost of such insurance coverage from respondents and stating that the customer may choose the source through which the insurance is to be obtained as prescribed by Section 226.4(a)(6) of Regulation Z.

11. Failing to itemize and include in the finance charge, for purposes of disclosure of the finance charge and computation of the annual percentage rate, any and all charges or premiums for credit life, accident, or health insurance unless respondents have obtained a specific dated and separately signed affirmative written indication of the customer's desire for such insurance coverage as prescribed by Section 226.4(a)(5)(ii) of Regulation Z.

12. Failing, in any consumer credit transaction or advertisement, to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That for a period of one year respondents post in a prominent place in each salesroom or other area wherein respondents sell furniture or other products and services a copy of this cease and desist order with a notice that any customer or prospective customer may receive a copy on demand.

It is further ordered, That respondents forthwith distribute a copy of this order to each of their operating divisions or departments.

It is further ordered, That respondents prominently display the following notice in two or more locations in that portion of respondents' business premises most frequented by prospective customers, and in each location where customers normally sign consumer credit documents or other binding instruments. Such notice shall be considered

prominently displayed only if so positioned as to be easily observed and read by the intended individuals:

NOTICE TO CREDIT CUSTOMERS

IF THE DEALER IS FINANCING OR ARRANGING THE FINANCING OF YOUR PURCHASE, YOU ARE ENTITLED TO CONSUMER CREDIT COST DISCLOSURES AS REQUIRED BY THE FEDERAL TRUTH IN LENDING ACT. THESE MUST BE PROVIDED TO YOU IN WRITING BEFORE YOU ARE ASKED TO SIGN ANY DOCUMENT OR OTHER PAPERS WHICH WOULD BIND YOU TO SUCH A PURCHASE.

This notice required by order of the Federal Trade Commission.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or State regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by, the Federal Trade Commission.

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

It is further ordered, That respondents, for a period of one year from the effective date of this order, shall furnish each newspaper or other advertising medium which is utilized by the respondents to obtain leads for the sale of merchandise, or to advertise, promote, or sell merchandise, with a copy of the Commission's news release setting forth the terms of this order.

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

It is further ordered, That in the event that the corporate respondent merges with another corporation or transfers all or a substantial part of its business or assets to any other corporation or to any other person, said respondents shall require such successor or transferee to file promptly with the Commission a written agreement to be bound by the

terms of this order; *Provided*, That if said respondents wish to present to the Commission any reasons why said order should not apply in its present form to said successor or transferee, they shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

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

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

ADVISORY OPINIONS WITH REQUESTS THEREFOR

**Interpretation of language contained in an order to file special
report regarding purchases of used bakery equipment.
(Docket 7880, released July 18, 1975)**

Opinion Letter

July 2, 1975

Gordon A. Thomas, Esquire,
Vice President and General Counsel,
ITT Continental Baking Company, Inc.,
P.O. Box 731,
Rye, New York. 10580

Re:ITT Continental Baking Company,
Docket No. 7880.

Dear Mr. Thomas:

In your letter of May 15, 1975, you requested the Commission's opinion as to whether the order entered on November 26, 1974 [84 F.T.C. 1349], requires ITT Continental Baking Company to file a special report informing the Commission of any purchase of used bakery equipment from any concern currently engaged in the production and sale of bread and bread type rolls.

After careful consideration of your request and the purpose of the order, the Commission is of the opinion that acquisition of used bakery equipment of whatever kind from another bakery is the acquisition of an "interest in any concern" engaged in the production and sale of bread and bread type rolls requiring ITT Continental Baking Company to file a special report.

By direction of the Commission.

Letter of Request

May 15, 1975

Mr. Charles A. Tobin
Secretary
Federal Trade Commission
Washington, D.C.

* For case before the Commission, see 60 F.T.C. 1183, 84 F.T.C. 1349.

Re: Docket No. 7880

Dear Mr. Tobin:

On November 26, 1974 the Federal Trade Commission issued an order in connection with the above docket number which required this company to file with the Commission a special report in the event it intends to make "any acquisitions of any interest in any concern engaged in the production and sale of bread and bread-type rolls." The words of special import in this order are "interest in any concern." It is our interpretation of that language that it is not intended to cover the purchase by Continental of items of used bakery equipment from another baking company currently engaged in the production and sale of bread.

Inasmuch as this company from time to time will be interested in making used bakery equipment purchases, we would appreciate an acknowledgment from you that our interpretation of the order is correct and that the filing of a special report is not required in that type of a transaction.

We will look forward to hearing from your office in the near future.

Very truly yours,

Gordon A. Thomas
Vice President and
General Counsel

No. 147. Granting of "back-haul" allowances to customers picking up their own orders. (72 F.T.C. 1050)

No. 483. "Backhaul" allowances advisory opinion affirmed. (File No. 683 7026, released December 26, 1973, 83 F.T.C. 1843) Statement of Clarification. (85 F.T.C. 1174)

Letter of Reply

October 8, 1975

Honorable Albert Rees
Director
Council on Wage and Price Stability
Executive Office of the President
Washington, D.C. 20506

Dear Director Rees:

This is in reply to your letter of April 1, 1975 relating to the Commission's recent clarification, in a letter to Consumers Union of March 19, 1975, of the legality under Section 2(a) of the Robinson-Patman Act of backhaul allowances.

Your letter suggests that the Commission's clarification will discourage backhaul practices. It was the Commission's intention in the March 19 statement to eliminate confusion over the options available to the delivered price seller. It emphasized that the seller who uses a uniform delivered price can, in addition to the delivered price, offer his customers the option of purchasing f.o.b. his shipping point as long as the optional f.o.b. price is uniform and available to all customers on a nondiscriminatory basis. The Commission sees no reason why this clarification of the available options should discourage backhaul practices.

You further recommend that the Commission should adopt a policy of allowing backhaul allowances equal to the actual cost of transportation to each customer. Such a policy, your letter urges, can be based on the premise that the Robinson-Patman Act does not mandate uniformity as to f.o.b. prices, because that Act permits a seller to offer different prices where justified by different costs.

However, those differences in cost under the Robinson-Patman Act that justify price differentials are limited "* * * strictly to those actual differences traceable to the particular buyer for and against whom the discrimination is granted, to the different methods of serving them, and to the different quantities in which they buy." *House Committee Report No. 2287*, March 31, 1936. The cost justification provision, accordingly, was designed "* * * to leave the test of a permissible differential upon the question: If the more favored customer were sold in the same quantities and by the same methods of sale and delivery as the customer not so favored, how much more per unit would it actually cost the seller to do so, his other business remaining the same?" *Senate Committee Report No. 1502*, February 3, 1936. "There can be no doubt," the Supreme Court has stated, "that the § 2(a) proviso as amended by the Robinson-Patman Act contemplates, both in express wording and legislative history, a showing of actual cost differences resulting from the differing methods or quantities in which the commodities in question are sold or delivered." *United States v. Borden Co.*, 370 U.S. 460, 467 (1962).

It follows, therefore, as the Commission understands these require-

ments, that the Robinson-Patman Act's Section 2(a) cost proviso cannot be interpreted so as to cost justify price differentials between backhaul customers purchasing f.o.b. at the seller's shipping point, if those price differentials represent only the *absence* of delivery cost differentials that *would have been incurred* had the commodities in question in fact been transported to different delivery destinations and, in that contingency, would have occasioned differing cost obligations upon the seller.

To state the matter in another way, if different backhaul customers purchase identical goods in identical quantities and according to exactly the same method of sale and delivery (*i.e.* by pick-up in their own trucks at the seller's shipping point) then, as the Commission see it, no cost differences to the seller, as contemplated under the cost justification provision of Section 2(a) of the Robinson-Patman Act, obtain. In particular, in such transactions, because no transportation of goods by the seller to affect delivery occurs, no delivery cost differentials arise such as would justify differences with respect to the f.o.b. price. Accordingly, f.o.b. price differences, in these circumstances, would not be cost justified under Section 2(a) of the Robinson-Patman Act in the Commission's view.

As the Commission heretofore has indicated, questions would not arise under the laws it administers if sellers using valid uniform zone delivered pricing systems offer to all customers, in lieu of a uniform delivered price, the option of purchasing f.o.b. the seller's shipping point, if that optional f.o.b. price is uniform and available to all customers on a nondiscriminatory basis.

The Commission does not understand that economies would not consistently be realized, through backhauling, by customers with empty trucks returning via their suppliers' factory and/or warehouse shipping points, if those suppliers make uniformly available a nondiscriminatory shipping-point price option. You suggest, in this regard, that geographically distant customers would not be able to afford to make use of such an option if the f.o.b. price is no lower than the seller's uniform zone-delivered price minus his average transportation cost for that zone. However, it appears to us that the only significant costs to the customers of backhauling in this situation are the additional wages, if any, required to be paid to the driver of the backhauling truck for the added time required to accomplish the pickup and the additional fuel cost incurred in traveling full rather than empty. Insofar as these costs were less than the difference between the supplier's delivered price and his f.o.b. price, the customer would be realizing a saving. This would

be apart from any general or public economies such as a reduction in overall fuel requirements.

The Commission has carefully considered the views that you have expressed and sincerely appreciates your concern in this matter. As indicated, however, the Commission is unable to construe the cost justification proviso of Section 2(a) of the Robinson-Patman Act as justifying differing backhaul allowances on the basis of hypothetical, and not actual, delivery cost differences. While the Commission would be happy to take action which would result in the additional reduction of fuel and other costs, it is not empowered to do so except as such may be incident to the proper exercise of its statutory responsibilities and consequently it can encourage backhauling only so far as it is consistent with the Commission's interpretation of the Robinson-Patman Act.

By direction of the Commission.

Correspondence from Council on Wage and Price Stability

April 2, 1975

Charles A. Tobin
Secretary
Room 172
Federal Trade Commission
Washington, D.C. 20580

Dear Mr. Tobin:

I have enclosed copies of letters sent today to the members of the Commission by the Director of the Council on Wage and Price Stability. These letters are in response to the Commission's March 19, 1975 letter, about "backhaul" allowances, to the Consumers Union.

Please include these letters in the appropriate public docket at the Commission.

Sincerely,

/S/ Vaughn C. Williams
General Counsel

April 1, 1975

Dear Commissioner ————:

I am writing to express my concern about the Federal Trade Commission's clarification, in a letter to the Consumers' Union issued

on March 19, 1975, and publicly released on March 28, of the legality under Section 2(a) of the Robinson-Patman Act of backhaul allowances offered by a seller, who otherwise offers a uniform zone-delivered price, to customers who provide their own transportation for goods purchased at the seller's warehouse. In my view, it is important that the Commission develop a clear policy to encourage backhaul practices, in order to alleviate the fuel waste and other costs that result from unused backhaul capacity. However, the Commission's March 19 clarification is not such a policy, and may indeed further discourage backhaul.

The March 19 letter requires that the f.o.b. price offered to all backhauling customers be "uniform"—that is, be the same dollar amount in each case. It does not permit a seller to offer backhaul allowances that vary in accordance with the cost of transportation to each customer. This requirement of uniformity places a substantial restraint upon the development of backhauling—a restraint not mandated by the Robinson-Patman Act, which permits a seller to offer different prices where justified by different costs.

Under the Commission's March 19 letter, the uniform f.o.b. price offered to customers who backhaul is not likely to be lower than the seller's uniform zone-delivered price minus his average transportation cost for that zone. Sellers, at least those with substantial dominance in their product markets, cannot be expected to offer a uniform allowance in excess of their average costs. This allowance, however, will only permit backhauling by customers who can provide their own transportation at less than or equal to the seller's average cost. Customers far away enough to incur greater transportation costs will not be able to afford to make use of their empty backhaul capacity. In my view, this status will persist over time.

Backhauling by a seller's more distant customers can most simply be encouraged by a seller's offer of an allowance that is equal to his actual cost of transportation to any particular customer. With such an allowance, any customer who can ship as efficiently as the seller would be encouraged to use his empty truck capacity to do so. While different customers would be paying different prices for the same goods, the difference would only reflect differences in the seller's actual transportation costs to those customers.

While Section 2(a) of the Robinson-Patman Act generally prohibits price differentials for a single product, it expressly permits "differentials which make only due allowance for differences in the cost

of manufacture, sale, or *delivery* * * *." This language can certainly be interpreted to refer to such price differentials as would result from a backhaul allowance measured by actual transportation costs. Additional discriminations may be inherent in the uniform zone-delivered price from which such a backhaul allowance would be deducted. However, that fact makes it no less true that the price differentials resulting from an actual cost allowance would be justified by the differences in the seller's transportation costs to different customers.

Uncertainty about the legality of actual-cost backhaul allowances has significantly impeded the negotiation of backhaul agreements. The Commission's disapproval of actual cost allowances in its March 19 letter will of course further discourage backhaul practices by customers far enough away from a supplier to exceed his average transportation costs. The encouragement of backhaul, on the other hand, would not only save fuel and other costs as noted above, but would also increase competition among suppliers and customers with respect to the transportation of purchased goods. I therefore recommend that the Commission issue a statement that Section 2(a) of the Robinson-Patman Act permits actual cost backhaul allowances.

Sincerely,

/S/ Albert Rees
/S/ Director

Joint venture for the production and marketing of cresols, cresol derivatives and certain other related products. (File No. 753 7007, released November 3, 1975)

Opinion Letter

October 9, 1975

John Bodner, Jr., Esquire
Howrey, Simon, Baker & Murchison
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: Advisory Opinion Request of Hercules Incorporated and
Koppers Company, Incorporated, File No. 753 7007

Dear Mr. Bodner:

This is in response to your letter of February 11, 1975 requesting an

advisory opinion concerning a proposed joint venture between Hercules, Incorporated and Koppers Company, Inc. for the production and marketing of cresols, cresol derivatives and certain other related products. You have requested that the Commission approve the venture as consonant with the laws it administers.

The Commission has given careful consideration to your request and the supplemental data provided. On the basis of the information presently available to it, the Commission has concluded that it is unable to approve the joint venture.

Based upon information presently available, the Commission is seriously concerned that a consequence of the joint venture, if consummated, may be substantially to lessen competition in particular, already concentrated, product markets. In the Commission's opinion, substantial anticompetitive effects in such markets may result because the venture, on the one hand, would appear to position an existing major factor in such markets, Koppers, to gain significant further market shares, entrench and solidify its market position and to obtain monopolistic market control, while on the other, the venture would appear to operate substantially to lessen potential competition by eliminating an apparent strong potential competitor, Hercules, from independent entry, or from entry in conjunction with a partner not already significantly present in any of the affected markets.

Acquisitions are proscribed where their effect may be substantially to lessen competition in any line of commerce in any section of the country, 15 U.S.C. §18; *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964). The elimination of a potential entrant may substantially lessen competition in violation of the Act. *United States v. Penn-Olin Chemical Co.*, *Supra*.

A number of facts lead us tentatively to conclude, based on the information presently available to us, that Hercules is a potential entrant into cresol production generally, and BHT and meta-para cresol production in particular, two markets in which Koppers already has substantial market shares. Not only was Hercules present in the BHT and paracresol markets during the period 1958 to 1972, but the firm appears to possess the technical expertise required for cresol production. Its technical know-how has, from time to time, been offered under license to others. Furthermore, it is clear from your submission that Hercules possesses a new and apparently commercially valuable production process for cresols. The firm has a continuing internal need for one of the venture products, BHT, and has available an idle plant

which can be readily converted to cresol production. The firm's financial resources; interest in investment; investment history; and the market opportunity in cresols, apparent from supply and anticipated demand profiles, are also factors indicating that Hercules stands as a viable independent potential entrant. Hercules, additionally, does not appear to us to be foreclosed from entry because of a lack of any necessary capabilities or skills.

At the same time, Hercules' venture partner, Koppers, is a substantial producer of meta-para cresol in a domestic market of only five producers and the leading domestic producer of BHT with approximately a 33 percent market share in a four producer market. In both of these markets, Hercules appears as a likely potential entrant. The venture accordingly presents serious issues under Section 7 of the Clayton Act.

You have stated that initially the venture will not market any meta-para cresol other than that presently produced by Koppers. However, regardless of whether the venture chooses initially to market such meta-para cresol, the venture would appear to have the effect of increasing Kopper's market power as to meta-para cresol, and would appear to provide Koppers, already a substantial producer, with an opportunity substantially to increase its share of that market any time the venture chooses to do so.

Koppers is the sole domestic producer of MBMC. Joining with Hercules in continued MBMC production and in the production of raw materials for MBMC will be likely to solidify Koppers' position in this market. Because Koppers has a monopoly in MBMC, the proposed venture would appear to raise questions under Section 5 of the Federal Trade Commission Act and Section 2 of the Sherman Act.

A joint venture or merger may substantially lessen competition both in eliminating a potential entrant and by entrenching the position of a firm in an oligopolistic market. *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568 (1967); *General Foods Corp. v. Federal Trade Commission*, 386 F.2d 936 (3rd Cir. 1967), cert. denied, 391 U.S. 919 (1968). The substitution of a larger more powerful competitor for a smaller already dominant firm may reduce a competitive structure by raising entry barriers and by dissuading smaller firms from aggressively competing. *Federal Trade Commission v. Procter & Gamble Co.*, *supra*.

The presence of Hercules-Koppers in the relevant markets, substituted for Koppers alone, may entrench the position of Koppers, rigidifying

present oligopolistic structures and raising barriers, both actual and psychological, to entry by others. Koppers' position in the already concentrated BHT and MBMC markets would solidified by vertical integration into raw materials. Firms considering entry would face the combined strength and resources of two major firms instead of Koppers alone. Accordingly, competition could be substantially lessened within the meaning of Section 7 of the Clayton Act not only by the elimination of Hercules as a potential entrant, but also by the entrenchment of Koppers in the BHT, meta-para cresol and MBMC markets.

The competitive consequences outlined in this letter are not conclusive. Nonetheless, based upon the information presently available to the Commission, we are unable to approve the proposed joint venture; accordingly the Commission advises that it will undertake a formal investigation if Hercules, Incorporated and Koppers Company, Inc. enter into said joint venture.

By the direction of the Commission.

*Letter of Request**

February 11, 1975

Dear Mr. Tobin:

Re: Hercules Incorporated-Koppers Company, Inc.'s Proposed
Jointly-Owned Company To Produce Cresols and Cresol
Derivatives

This is a request by Hercules Incorporated and Koppers Company, Inc. to the Commission for an Advisory Opinion under Section 1.1 *et seq.* of the Commission's Rules that the creation and operation of a proposed jointly-owned company by the requesting parties to produce and market cresols and cresol derivatives is permissible under the antitrust laws of the United States.

In support of this request, Hercules and Koppers submit the enclosed memorandum showing that the proposed joint venture for the specialty chemicals involved will benefit both competition and the public interest. The memorandum describes the parties and the chemical products involved, sets forth the nature and basic terms of the joint venture, and then discusses the probable effects on competition of the joint venture.

As further pointed out in the memorandum, Hercules and Koppers

* For reasons of economy, the large volume of supporting materials is not reproduced in this volume. It is available for public inspection in the Division of Legal and Public Records, Room 130, Federal Trade Commission Building, Washington, D.C. 20580.

must decide very soon whether they will consummate the proposed joint venture, and for commercial reasons they wish to make that decision without giving advance notice. Accordingly, we ask that this request be handled with all possible dispatch and that all the information submitted to the Commission by the parties be accorded confidential treatment. If the Commission decides to release any of the submitted information, we request that we receive reasonable notice before the release date.

In order to expedite this matter, Hercules and Koppers on their part stand ready to discuss the memorandum with the staff of the Commission and, if necessary, to provide supplemental information.

We further wish to advise the Commission that the proposed course of action is not currently being followed by the requesting parties and is not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency.

Sincerely yours,

/S/ John Bodner, Jr.

Warranties—Interpretation of obligation under a full warranty to provide installment or replacement materials in event of a defect in an “installed product.” (File No. 763 7001, released December 1, 1975)

Opinion Letter

November 7, 1975

L. A. Pulkrabek, Esquire
Legal Department
Armstrong Cork Company
Lancaster, Pennsylvania 17604
Dear Sir:

This is in response to your letters to the commissioners dated May 29, 1975 concerning the Magnuson-Moss Warranty Act, Public Law 93-637. You request the Commission's opinion whether a “full (statement of duration) warranty” for what you term an “installed product” must include an obligation to provide installation of replacement materials in the event of a defect.

The Commission has carefully considered the matters set forth in your

86 F.T.C.

letter pertaining to the obligations required under a full warranty. The Commission has treated your letter as a request for an advisory opinion under §§ 1.1-1.4 of the Commission's rules, 16 C.F.R. §§ 1.1-1.4. Section 104 of the Act, 15 U.S.C. 2304, provides that a full warranty must, at a minimum, affirm or promise to "remedy" such product "without charge". Section 101(10), 15 U.S.C. 2301(10) defines the term remedy to include, at the warrantor's option, repair or replacement. Replacement is defined in § 101(11), 15 U.S.C. 2301(11), as "furnishing a new consumer product which is identical or reasonably equivalent to the warranted consumer product." Applying this definition to the case of flooring or other products having utility only when installed, the Commission is of the opinion that installation of substitute materials is within the Act's definition of replacement. Uninstalled materials cannot be deemed "identical or reasonably equivalent" to the installed product. Therefore, the consumer could not be charged for such installation.

It should be noted that a full warrantor could impose on the consumer a duty to remove, return, and reinstall a consumer product, if such duty met the test of reasonableness under § 104(b)(1), 15 U.S.C. 2304(b)(1). The duty would be on the warrantor to show that the cost and inconvenience to consumers of such a duty were outweighed by corresponding benefits to individuals or to the public. See "Implementation and Enforcement Policy" for the Magnuson-Moss Warranty Act, 40 Fed. Reg. 25721, 25722 (June 18, 1975).

By direction of the Commission.

Letter of Request

May 29, 1975

Dear ————:

Re: Title I-P. L. 93-637 Consumer Product Warranties

Representatives of Armstrong Cork Company met with Christian S. White of the Commission's staff in mid-April for the purpose of discussing interpretative views of the warranty provisions of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. For the most part, Armstrong agrees with Mr. White's interpretation of those provisions of the Act which were discussed. However, there was disagreement in interpretation in an area we consider significant in view of the nature of our business. Mr. White suggested our addressing that issue direct to the Commissioners through appropriate expression of our views. That issue is, whether the new

legislation *requires* warrantors of consumer products which are intended to be installed in the home by an independent third party installer, to provide for removal of defective goods and the installation of replacement goods in order to extend a full warranty on the product.

Armstrong Cork Company, a Pennsylvania corporation, is engaged primarily in the manufacture of resilient flooring, carpeting, and residential and architectural ceilings. Most of the products Armstrong manufactures are intended to be installed in the home, and in public and commercial buildings. The installation of these products is performed by independent flooring, carpeting, and ceiling retailers, contractors, and in some instances, on a do-it-yourself basis. These "installers" are generally several steps removed from the manufacturing process. Most of the products sold by Armstrong, with the notable exception of ceiling systems, are complete in themselves, that is, they have no component parts. Before the consumer has what might be called an "installed product," ready for use, there are two undertakings: one for the product, the other for the installation of that product. In addition to labor, the installation of the product may include use of sundries, underlayment, etc. which may or may not be of Armstrong manufacture.

There are essentially four different situations involving defects in products installed in the home:

(1) A product has been improperly installed; for example, flooring material is ripped or gouged during installation—clearly, in this instance, the dealer whose mechanic was performing the installation must provide the necessary remedy.

(2) The dealer installs defective goods and the defect was apparent at the time of installation; for example, there is an apparent bubble or discoloration, and instead of properly procuring replacement material prior to installation, the mechanic installs the defective material. In those situations, clearly the dealer should provide the remedy to the consumer.

(3) A product defect may not be readily perceived, or is not discovered until after installation. When such a defect becomes apparent, it is Armstrong's policy to undertake either repair of those areas found defective or provide replacement goods. This undertaking is performed without any charge being assessed by Armstrong to the consumer. Currently, in the case of carpet and ceiling materials, and after a specified period in the instance of flooring materials, we do not provide compensation for the labor charges incidental to the removal of the

defective goods or installation of the replacement goods. In regard to our carpet and ceiling materials, we follow general industry practice. In the case of our flooring materials, we currently provide a consumer warranty which we believe does more for the consumer than industry practice. Neither our carpet nor our ceiling materials currently carry a written consumer warranty.

(4) The consumer undertakes to perform the installation of a do-it-yourself product and save the costs incident to a professional installation. Product defect claims may arise from the consumer's failure to follow installation instructions, from non-recommended use, or from defective goods. If the manufacturer who fully warrants his product is required to professionally install replacement goods for the do-it-yourselfer, the consumer receives a better bargain than he initially paid for.

The underlying thread of the Act, as well as the legislative history, is to advise consumers, clearly and conspicuously, of written warranty terms, so that educated decisions can be made in the marketplace. The legislative intent is borne out by the statutory language in Section 102: "* * * to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." House Report No. 93-1107 clearly indicates that "The purpose of the legislation is (1) to make warranties on consumer products more readily understood * * *." The legislators were attempting to avoid a situation where "the bold print giveth and the fine print taketh away." We do not read the Act as requiring the manufacturer to assume the costs of installation of replacement goods if he fully warrants only his product and makes it clear that the remedy is to provide replacement goods. The opposite reading would, we believe, result in an unintended substantive change in warranty law and practice for it would preclude a manufacturer from fully warranting its product with the remedy being product replacement and requires the manufacturer either to offer its product with a limited warranty or not provide any written warranty. Considering that installation and installation costs are not within the manufacturer's control and that such costs may approach or even exceed the product costs, it is likely that few manufacturers of installed products will, as a practical matter, be able to offer full warranties after July 3, 1975, at least to the degree theretofore.

Should the Commission not ultimately concur with our interpretation of the Act as expressed above, we believe that the Commission should consider establishing under Section 103(c) or perhaps Section 104(b)(3)

a special category of warranty entitled "FULL (Statement of Duration) WARRANTY - INSTALLATION NOT INCLUDED." Such a category would permit exclusion by the manufacturer of the responsibility for removing the defective product and installing replacement material. Appropriately the consumer would then look to the local dealer—his seller and installer—for a warranty of installation attendant to a product defect. This is clearly the most efficient and least expensive way of handling the problem and properly places upon the installer not only the responsibility to carefully select from whom he purchases, but also avoids the too recurrent theme of the installer avoiding responsibilities by simply passing them along to a remote manufacturer.

The clear legislative purpose and intent under the Act's warranty provisions is to clearly and conspicuously advise the consumer of the terms of written warranties. If the consumer is so advised that purpose is fulfilled.

We would welcome the opportunity to further address ourselves to this matter should you or any of your associates so desire.

Very truly yours,

/S/ L. A. Pulkrabek
Assistant Secretary and
General Manager
Legal Department
Secretary's Office

Compliance advisory opinion as to whether a proposed quantity discount, if implemented, would constitute compliance with the amended Clayton Act Subsection 2(a) Order (72 F.T.C. 412). (Docket No. 8599, released December 5, 1975)

Opinion Letter

November 19, 1975

Thomas E. Quay, Esquire
Secretary and Counsel
William H. Rorer, Inc.
Fort Washington, Pennsylvania 19034
Re: William H. Rorer, Inc., Docket No. 8599

Dear Mr. Quay:

This is in response to your request on behalf of William H. Rorer, Inc.,

for an advisory opinion concerning whether a proposed quantity discount, if implemented, would constitute compliance with the amended Clayton Act Subsection 2(a) Order in the above-captioned matter. According to your letter of March 13, 1975, and attachments thereto, Rorer proposes granting to all direct-buying retail customers a 3.5 percent discount from the list price of Maalox products with any purchase of \$250 or more of Maalox products at net prices. Rorer bases the proposed discount on a showing of savings in its costs of delivery and sale.

According to your letter, Rorer currently employs a nationally uniform delivered pricing system in the sales of its products. The net price to direct-buying retail customers, according to the letter, is the suggested price from wholesaler to retailer less 15 percent. To maintain the direct account status, however, the retail customer must purchase in terms of net prices at least \$125 of any Rorer products in each order and a total of \$500 for an entire year. The letter adds that Rorer products are delivered to direct-buying retail customers by common carrier from warehouses in Fort Washington, Pennsylvania; Tucker, Georgia; Hammond, Indiana; and San Leandro, California.

The Commission understands that the proposed discount would amount to a 4.12 percent reduction in the net price of Maalox products to participating direct-buying retail customers. According to your letter, the discount would not be applicable to non-Maalox products. Finally, it is understood that the discount would be offered to all direct-buying retail customers.

To determine the savings in the cost of delivery, Rorer focuses on savings in the cost of shipping its products to customers located closest to its points of distribution. Sufficient savings to justify the discount to these customers would arise, according to Rorer, by shipping a typical order containing \$250 worth of Maalox products instead of shipping two or more typical minimum \$125 orders. Rorer reasons, relying on facts previously submitted, that if the discount is qualified to the near-by customers then it would be uniformly cost justified to all customers.

To determine the savings in the cost of sale, Rorer divides its total 1974 operating cost for processing orders by the total number of invoices written to find the average cost of processing an individual order. Rorer contends that by processing an order containing \$250 worth of Maalox products rather than two more minimum \$125 orders it would save the cost of processing at least one invoice.

The Commission after reviewing the materials submitted in support of

the proposed discount hereby advises that, based on the cost justification submitted, the discount would not be uniformly cost justified and would therefore be violative of the above-captioned order. Several erroneous assumptions made in the cost study concerning the costs of delivery and sale require that the justification be rejected.

The cost justification is improperly based on a cost comparison which relies on the cost of handling a minimum \$125 purchase without having established that this size order would be substantially representative of the class of all purchases not earning the discount. A cost justification must reflect the true cost of transacting business and the actual pattern of sales experienced.

The cost justification is in further error because it attempts to qualify the discount in part by savings in the cost of handling the order's undiscounted non-MaaloX products. Since these non-MaaloX products would not benefit from the proposed discount it is unacceptable to justify the discount with savings attributable to their cost of delivery or processing in the order. The only savings which can be properly considered in supporting a discount on MaaloX products are those which would reflect due allowances for differences in the costs of shipping and processing orders for MaaloX products in differing quantities.

Additionally, the cost justification erroneously assumes that the entire cost incurred in order processing can be the basis for establishing cost savings. Only that portion of the operating cost which varies with the size of orders processed is suitable for consideration in the cost justification. That portion of the cost which depends on the total volume of business transacted without regard to the size of orders on which that business is divided would not be relevant to a cost justification * * *.

By direction of the Commission.

Letter of Request

March 13, 1975

Re: New Request for Advisory Opinion Pursuant to FTC Rule
3.61(d); Ref. Docket No. 8599

Dear Sir:

1. As general counsel, I hereby request, on behalf of William H. Rorer, Inc., an advisory opinion pursuant to FTC rule 3.61(d) as to whether the proposed quantity discount, if implemented, would be in compliance with the Commission's Order, as modified, August 21, 1967,

32 *Federal Register* 12844, Docket No. 8599. As modified, the Order's application was limited to competing retail customers.

2. We also understand that the Order, as modified, does not *require* us to seek this advisory opinion from the Commission prior to instituting a quantity discount compatible with the terms of the Order. Nevertheless, Rorer voluntarily elects to seek the Commission's opinion in advance.

3. Rorer proposes to offer only to its retail customers a quantity discount of three and one-half percent (3-1/2%) from the list price on each single order of \$250 (net) or more of its leading antacid product, Maalox (suspension or tablets). There is adequate transportation cost justification for this discount as set forth in the attached schedules (see Index of Schedules). Rorer makes prepaid shipments from four locations: Fort Washington, Pennsylvania; Tucker, Georgia; Hammond, Indiana; and San Leandro, California.

4. Rorer's "list price" is our suggested price from wholesaler to retailer. (see General Price List, Schedule F.) Our price to wholesalers reflects a 20% discount from that "list price;" to retailers who buy on a direct basis, our price reflects a 15% discount. Our proposed 3-1/2% quantity discount to retailers only, on Maalox products only, would provide a direct retail discount of 18-1/2% from the list price. The non-Maalox portion of the order will continue to bear a 15% discount. Rorer additionally offers retailers a 2% discount for prompt payment.

5. Effective January 1, 1975, a retailer, in order to maintain his direct account status, must purchase \$500 (net) worth of Rorer products annually. Each order must be for \$125 (net) or more of our products.

6. Previous studies of transportation savings made and discussed with a representative of the Bureau of Competition of the FTC have revealed that there are three examples that show a *minimum* savings: from our Tucker, Georgia, branch warehouse to Atlanta, Georgia; from our San Leandro branch warehouse to Oakland, California; and from the San Leandro location to Los Angeles, California. Therefore, we have computed transportation savings on the basis of typical orders shipped from our Tucker and San Leandro branches to those locations.

7. Although transportation savings more than justify the proposed 3-1/2% quantity discount, we also assert a cost justification based upon administrative savings to be gained (Schedule E(a) and (b)). It is our contention that the proposed 3-1/2% discount is also justified entirely by this analysis alone.

8. Based upon experience during the last six months of 1974, we know that more than 50% of orders shipped to direct buying retailers contained \$200 (net) or more worth of Maalox products. It is our firm conviction that under our new terms and prices in effect since January 1, 1975, the 50% figure will be valid for orders containing \$250 (net) or more worth of Maalox products.

9. Enclosed in Schedule G are copies of four sets of published tariff schedules applicable to all four of our shipping points, although the examples cited refer only to our Tucker, Georgia and San Leandro, California branches. The tariff schedules are provided in order to facilitate the evaluation of our submission.

10. Schedules A through E, inclusive, contain calculations and data based on a "typical" order which is a competitive trade secret within the meaning of FTC Rule §4.10(a)(2). Therefore, Rorer expressly asserts a claim of confidentiality to Schedules A through E, inclusive. If the Commission renders a favorable advisory opinion, Rorer's implementation of the proposal would, of course, be in strict compliance with all the terms of the Order including prompt notification to the Commission and adequate and regular notice to all retail customers together with reasons and details of the discount.

Very truly yours,

/S/ Thomas E. Quay

Advertising and selling as "new," cars used for emission control tests (85 F.T.C. 1171). (File No. 753 7005, released January 7, 1976)

Opinion Letter

December 4, 1975

Mr. Richard H. Johnson
Acting Assistant Administrator for Enforcement
United States Environmental Protection Agency
Washington, D.C. 20460

Re: Sale of Vehicles Used to Perform Emission Control Tests
Required by the State of California

Dear Mr. Johnson:

This is in reply to your letter of May 12, 1975 requesting the Commission's opinion regarding the status "of those vehicles sold in the

State of California which have been tested in accordance with the provisions of the California Air Resources Board (CARB) Assembly Line testing requirements." Your letter indicates that for the 1974 model year, CARB required automobile manufacturers to subject about 20,000 vehicles to an emission control test identical to the "standard Federal testing procedure." It is the Commission's understanding that this standard procedure is the same as that described in your prior letter of September 16, 1974. Your May 12th request further indicates that auto manufacturers also have the option under California law to accumulate any desired mileage on test vehicles prior to testing in order to stabilize emission performance. The question posed is whether vehicles used to accomplish the CARB tests may be advertised and sold as "new."

On March 7, 1975, the Commission responded to your prior request for advice dated September 16, 1974 by advising you that each manufacturer's emission testing could raise unique questions and that the Commission would therefore prefer to respond to individual requests from manufacturers on a case-by-case basis. Your letter of May 12th, including its references to CARB test vehicles, fails to include individualized testing data, and in any event is not from an individual manufacturer. The Commission requires an affected party to make its own advisory opinion request, 16 C.F.R. §1.1, and without the benefit of comprehensive submissions by the real parties in interest the Commission is unable to issue a definitive opinion in elaboration of the March 7th reply.

It has come to the Commission's attention, however, that the March 7th letter has been interpreted in some quarters to constitute a Commission determination that emission test vehicles cannot legally be sold as "new" under any circumstances. Such an interpretation is incorrect, and the Commission wishes to emphasize that its previous reply did not involve any determination that emission test vehicles may or must be sold as either "new" or "used".

By direction of the Commission. Commissioner Hanford dissented, believing that the issuance of an advisory opinion was appropriate under the circumstances.

Letter of Request

May 12, 1975

Dear Mr. Tobin:

On March 7, 1975, the Commission provided an opinion, in response to our request of September 16, 1974, on the right of automobile manufacturers to advertise and sell as "new" those test automobiles used to demonstrate compliance with air pollution control standards.

The opinion responded to the issue as to "whether manufacturers would have the right to advertise and sell any of these test vehicles as 'new' " by stating that the "Commission * * * cannot conclude, as a matter of law, that automobile manufacturers have the right to sell such test vehicles as 'new.' Each manufacturer's testing may raise unique questions. Therefore, the Commission would prefer to defer a more definitive opinion until it receives a request from an auto manufacturer."

In order for us to relate the general opinion to our pending rulemaking, we request your definitive opinion regarding the status of those vehicles sold in the State of California which have been tested in accordance with the provisions of the California Air Resources Board (CARB) Assembly Line testing requirements. In model year 1974, the CARB required that a statistical sample of approximately 20,000 production vehicles (2% of one million vehicles sold in California) be selected and tested by American and foreign manufacturers using the standard Federal testing procedure. The test itself results in the accumulation of approximately 15 miles per vehicle. The CARB procedures permit manufacturers, at their option, to accumulate any desired mileage on vehicles prior to testing to accommodate those particular manufacturers who claim that a new vehicle exhibits erratic emission performance during the first few miles of use until the engine and emission control system settle into more predictable modes. Manufacturers claim that new vehicles of some model lines require mileage accumulation prior to testing. Accordingly, based on CARB information, 20-40 miles are accumulated prior to testing which could result in a total accumulation of 55 miles or 70 miles in the event of a retest. The totals would be 58.2 and 76.4 for 1975 and later models because the FTP is extended for 3.2 miles. One foreign manufacturer accumulates 200 miles on a selected vehicle prior to testing for a total accumulation of 218.2 miles. We are requesting that you provide the Commission's opinion on the status as "new" or "used" of these test automobiles used to demonstrate compliance with air pollution control standards in California.

We would appreciate your response as soon as possible.

Sincerely yours,

86 F.T.C.

/S/ Richard H. Johnson
Acting Assistant Administrator
for Enforcement (EG-329)