

IN THE MATTER OF
PERFORMANCE SAILCRAFT INC.

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

Docket C-2922. Complaint, May 2, 1978 —Decision, May 2, 1978

Consent order requiring a Pointe-Claire, Quebec, Canada, manufacturer and distributor of fiberglass sailboats and accessories, among other things, to cease entering into or enforcing any form of agreement with its dealers concerning the retail price of its products; restricting territories in which its dealers may advertise or sell its products; and terminating or threatening to terminate dealers who do not follow its pricing and territorial instructions. Further, any future price lists distributed by the firm must note that the prices are suggested or approximate.

Appearances

For the Commission: *Allen R. Caskie.*

For the respondent: *R. Warden McKimm, Ottawa, Canada.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Performance Sailcraft Inc., a corporation, more particularly described and referred to hereinafter as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended; 15 U.S.C. 45), 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 with respect thereto as follows:

PARAGRAPH 1. Respondent Performance Sailcraft Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the province of Quebec, Canada, with its principal office and place of business at 91 Hymus Boulevard, Pointe-Claire, Quebec, Canada.

PAR. 2. Respondent is a manufacturer and distributor of small recreational sailboats of fiberglass construction and accessories to be used therewith.

In 1975, respondent's gross income from sales of said products was \$3.6 million, over \$2 million of which was derived from sales in the United States.

PAR. 3. In the course of conduct of its business of manufacturing

and distributing sailboats and accessories, respondent is engaged in transacting business within the United States through the following activities, among others: the placement of advertising in United States magazines and newspapers of interstate circulation; the presence within the United States and participation of respondent's salesmen at numerous trade shows; and the C.O.D. shipment of respondent's products from its principal place of business to independent dealers located in various States throughout the United States who sell the products to consumers.

There is now and has been for several years past, a constant, substantial and increasing flow of such products in or affecting "commerce" as that term is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business in or affecting commerce, except to the extent that competition has been hampered or restrained by reason of the practices hereinafter alleged, respondent has been and is now in competition with other persons, firms and corporations engaged in the manufacture, sale and distribution of said products.

PAR. 5. Respondent, in combination, agreement, or understanding with certain of its authorized dealers, or with the cooperation or acquiescence of other of its dealers, has for the last several years been engaged in a planned course of action to fix, establish and maintain certain resale or retail prices at which said products are resold. In furtherance of said planned course of action, respondent has for the past several years engaged in the following acts or practices, among others:

(a) Regularly furnishing its dealers with price lists and necessary supplements thereto containing certain resale or retail prices;

(b) Establishing agreements, understandings, or arrangements with its dealers, as a condition precedent to the granting of a dealership, that such dealers will maintain certain resale or retail prices;

(c) Informing its dealers, by direct or indirect means, that respondents expect and require such dealers to maintain and enforce certain resale or retail prices or such dealerships will be terminated;

(d) Soliciting and obtaining from its dealers cooperation and assistance in identifying and reporting any dealer who advertises, or offers to sell, or sells said products at prices lower than certain resale or retail prices.

PAR. 6. Respondent, in combination, agreement, or understanding with certain of its authorized dealers, or with the cooperation or

engaged in a planned course of action whose effect has been to foster, promote, maintain and support its policies of restricting dealer competition in the United States in the marketing, sale, and distribution of fiberglass sailboats by directing, encouraging, threatening, warning, and/or otherwise prohibiting its dealers from selling or advertising the sale of said products outside of their allocated territories.

PAR. 7. These aforesaid acts and practices as alleged, are prejudicial and injurious to the public; have a tendency to hinder, restrict, restrain and prevent competition and have actually hindered, restricted, restrained and prevented competition; and constitute unfair acts or practices and unfair methods of competition in or affecting commerce within the meaning and intent of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Washington, D.C. Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; and

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

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

1. Respondent Performance Sailcraft Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the province of Quebec, Canada, with its principal office and

place of business at 91 Hymus Boulevard, Pointe-Clare, Quebec, Canada.

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

ORDER

I. *It is ordered*, That respondent Performance Sailcraft Inc., and its subsidiaries, divisions, licensees, successors, assigns, officers, directors, agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the distribution, advertising, offering for sale, or sale of fiberglass sailboats and accessories, or any other products (hereinafter referred to in this order as "said products"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from:

A. Establishing, maintaining or enforcing any contract, agreement, understanding or arrangement fixing, establishing, maintaining, controlling, influencing or enforcing in any way or to any extent, directly or indirectly, the price at which any of said products is advertised, sold or offered for sale at retail.

B. Requiring any dealer or prospective dealer to enter into any oral or written agreement or understanding that such dealer or prospective dealer will maintain any resale or retail price for any of said products as a condition of buying any of said products.

C. Requesting or requiring any dealer or prospective dealer, either directly or indirectly, to report any dealer, person or firm who does not adhere to any resale or retail price for any of said products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer, person or firm so reported.

D. Threatening to terminate or terminating, either directly or indirectly, any dealer for failure to observe, maintain or advertise respondent's suggested resale prices for said products.

E. Requiring, from any dealer charged with price cutting or failure to adhere to any resale or retail price, a promise or assurance to adhere to any resale or retail price for any of said products as a condition precedent to any future sales to said dealer.

F. Publishing, disseminating or circulating any price list, price book, price tag, advertising or promotional material, or other document indicating any resale or retail price without stating on each page (of such list, book, tag, advertising or promotional material or other document), on which a price appears, that the price is suggested or approximate.

G. Imposing or attempting to impose any limitations or restrictions respecting the territories in which said products may be advertised or sold by its dealers.

H. Attempting to enter into, entering into, continuing, maintaining, or enforcing any contract, combination, understanding or agreement to limit, allocate, or restrict the territory in which said products may be advertised or sold by its dealers.

I. Requesting or requiring any dealer or prospective dealer, either directly or indirectly, to report any dealer, person or firm who does not adhere to any territorial restriction in the advertising and sale of any of said products, or acting on reports so obtained by refusing or threatening to refuse sales to any dealer, person or firm so reported.

J. Threatening to terminate or terminating, either directly or indirectly, any dealer for failure to limit or restrict the advertising and sale of said products to a specified territory.

Provided, that none of the provisions herein shall prohibit respondent from designating geographical areas within which a dealer may agree to devote his best efforts to the sale of said products (hereinafter "area of primary responsibility") as a condition of becoming a dealer or maintaining a dealership, provided that such dealers are told that said area is not exclusive and does not place a territorial restriction upon the sale of said products.

Provided further, that none of the provisions herein shall prohibit respondent from terminating dealers for lawful business reasons.

II. *It is further ordered*, That the respondent shall within sixty (60) days after the service upon it of this order, mail a copy of this order to each of its dealers of said products in the United States and, during the five (5) year period of time following the date of service of this order, to all of its future dealers in the United States at the time said dealers are opened as accounts, under cover of the letter annexed hereto as Exhibit A, and furnish the Commission proof of the mailing thereof in the file required to be maintained under Paragraph V herein.

III. *It is further ordered*, That respondent shall forthwith distribute a copy of this order to each of its operating divisions engaged in the manufacture, sale, marketing and distribution of said products and to all of its sales personnel connected with the sale, marketing, and distribution of said products and shall instruct each sales person employed by it now or in the future to read this order and to be familiar with its provisions.

IV. *It is further ordered*, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the

corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of the order.

V. *It is further ordered*, That the respondent herein, for a period of five (5) years from the date of this signing, establish and maintain a file of all records referring or relating to respondent's refusal to sell said products to any of respondent's dealers, which file shall contain the names and addresses of all dealers with whom respondent has refused to deal since the effective date of the order, a description of the reason for the refusal, the date of the refusal, and a record of a communication to each such dealer explaining respondent's refusal to sell said products, and which file will be made available on reasonable notice for inspection at the Commission's offices in Washington, D.C.

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

EXHIBIT A

(Letterhead of Performance Sailcraft Inc.)

Dear Dealer:

PSI has entered into an agreement with the Federal Trade Commission relating to our territorial allocation and pricing policies. A copy of the consent order entered into pursuant to that agreement is enclosed herewith.

We have entered into this agreement solely for the purpose of settling a dispute with the Commission, and the agreement and consent order are not to be construed as an admission that we have violated any of the laws administered by the Commission, or that any of the allegations in the complaint are true and correct. Instead, the order merely relates to our activities in the future.

In order that you may readily understand the terms of the consent order, we have set forth the essentials of the agreement with the Commission, although you must realize that the consent order itself is controlling rather than the following explanation of its provisions:

- (1) Our dealers are free to set their own retail or resale prices for the products covered by the consent order.
- (2) We will not solicit, invite or encourage any dealer or any other person to report any dealer not following any retail or resale price for any of said products, and, furthermore, will not act on any such report sent to us.
- (3) We will not require or induce our dealers to refrain from advertising said

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(4) As you know, it is a condition of becoming a dealer or maintaining a dealership that you agree to devote your best sales efforts in your designated geographical territory. However, you are free to advertise and sell any of the products covered by the consent order outside of these designated territories.

Sincerely,
(Officer)

Interlocutory Order

91 F.T.C.

IN THE MATTER OF

CHRYSLER CORPORATION, ET AL.

Docket 9072. Interlocutory Order, May 8, 1978

Denial of complaint counsel's motion to enforce subpoena *duces tecum* against present owner of records sought, a purchaser of the assets of the corporation named in the subpoena.

ORDER DENYING MOTION TO ENFORCE SUBPOENA DUCES
TECUM

On February 13, 1978, Administrative Law Judge Lewis F. Parker certified to the Commission the motion of complaint counsel herein for enforcement of a subpoena *duces tecum* issued in November, 1976,¹ directing Northline Dodge, Inc., a California corporation, to produce certain documents relating, *inter alia*, to motor vehicle repossessions in which it had been involved during a specified time period. A partial return was made, and complaint counsel were pursuing further compliance when, on July 29, 1977, complaint counsel were advised that the assets of the California corporation had been sold to a Texas corporation having different principals but the same name, and the California corporation dissolved. The assets transferred evidently include the records sought, to the extent they exist, but complaint counsel assert that the Texas corporation has declined to take the effort necessary to make any further return on the subpoena. Matters were in this posture when complaint counsel moved for enforcement of the subpoena.

Complaint counsel's motion does not attempt to propound a theory for enforcing a subpoena *duces tecum* against a corporation which simply purchased assets from the corporation against which it was issued. It is patent, however, that mere identity of name between the two corporations has no bearing on the matter. The subpoena was issued against and served upon a particular legal entity. While that legal entity retains the capacity to be sued for some period of time after formal dissolution, it evidently no longer possesses the documents sought. The legal entity which does possess the documents, on the other hand, has never been subpoenaed to produce them. Moreover, there is nothing in the record to indicate that the new entity stands in the position of a legal successor to the dissolved corporation so as to enable the outstanding subpoena to be enforced

¹ The exact date does not appear from the materials before us. Indeed, as complaint counsel note, the copy of the subpoena attached to the motion herein does not show on its face that it was authorized by the ALJ. Because of