

Complaint

93 F.T.C.

IN THE MATTER OF
HARPER SALES, INC., ET AL.

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

Docket 9070. Complaint, Dec. 19, 1975 — Decision, Feb. 1, 1979

This consent order, among other things, requires a Rush, N.Y. mobile home dealer and its affiliates to cease conditioning the leasing or renting of space in their trailer parks to the purchase of mobile homes and accessories from Harper Sales, Inc. or other designated sources.

Appearances

For the Commission: *Henry R. Whitlock* and *Herbert S. Forsmith*.
For the respondents: *John Stuart Smith, Nixon, Hargrave, Devans & Doyle*, Rochester, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties identified in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act, as amended, and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

I. DEFINITIONS

PARAGRAPH 1. For the purposes of this complaint, the following definitions shall apply:

(a) "Mobile home" means a transportable unit or units designed to be placed without a permanent foundation, connected to utilities, and used or capable of being used for year-round living.

(b) "Mobile home park" means a tract of land utilized specifically for the purpose of renting sites for the placement of mobile homes for residential purposes and in which utility connections and various communal services are commonly provided.

II. RESPONDENTS

PAR. 2. Respondent Harper Sales, Inc. is a corporation organized under the laws of the State of New York with its principal office located at 7500 West Henrietta Road, Rush, New York.

PAR. 3. Respondent Edgewood Park Estates, Inc. is a corporation

organized under the laws of the State of New York with its principal place of business located at 4000 Brick Schoolhouse Road, Hamlin, New York.

PAR. 4. Respondent Harper Park-Avon is a partnership organized under the laws of the State of New York with its principal office located at 6150 East Avon-Lima Road, Avon, New York.

PAR. 5. Respondents Ralph R. Harper and John R. Harper are officers of corporate respondent Harper Sales, Inc. They formulate, direct, approve, authorize and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Said individual respondents also are partners in the partnership respondent, Harper Park-Avon. They formulate, direct, approve, authorize and control the acts and practices of the partnership respondent including the acts and practices hereinafter set forth. Their business address is the same as that of corporate respondent Harper Sales, Inc.

PAR. 6. Respondent Harper Sales, Inc. has been, and is now, engaged in the advertising, offering for sale, sale and distribution of mobile homes and mobile home accessories.

In fiscal year 1972, sales of mobile homes by respondent Harper Sales, Inc. were approximately \$1,600,000.

PAR. 7. Respondent Edgewood Park Estates, Inc. has been, and is now, engaged in the development and operation of a mobile home park known as Harper Park-Hamlin located at the same address as that of said corporate respondent.

PAR. 8. Respondent Harper Park-Avon has been and is now, engaged in the development and operation of a mobile home park located at 6150 East Avon-Lima Road, Avon, New York.

III. JURISDICTION

PAR. 9. (a) In the course and conduct of its business as aforesaid, respondent Harper Sales, Inc. now causes, and for some time last past has caused, mobile homes and other products to be shipped to purchasers located in states other than New York.

(b) In the course and conduct of its business as aforesaid, respondent Harper Sales, Inc. has purchased and continues to regularly purchase mobile homes and other products from suppliers in states other than New York for the purpose of offering said products for sale, to maintain an available inventory for sale and to fill special purchase orders received from their customers.

(c) In the course and conduct of their business, respondents Edgewood Park Estates, Inc. and Harper Park-Avon have entered into agreements with respondent Harper Sales, Inc. which are

essential to make effective the restraints on interstate commerce alleged in Paragraph Eleven hereof.

(d) Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 10. Except to the extent that competition has been hindered, frustrated, lessened and eliminated by the acts and practices alleged in this complaint, respondents have been and are in substantial competition in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, with persons or firms engaged in the sale of mobile homes and mobile home accessories and with persons or firms engaged in the operation and maintenance of mobile home parks.

IV. VIOLATIONS

PAR. 11. In the course and conduct of their business as aforesaid, respondents have refused to rent sites under the control of Edgewood Park Estates, Inc. and Harper Park-Avon for the accommodation of mobile homes which have not been purchased from Harper Sales, Inc. thereby making the rental of said sites conditional and dependent upon the purchase of mobile homes from Harper Sales, Inc.

V. EFFECTS

PAR. 12. The acts, practices and methods of competition engaged in, followed, pursued or adopted by respondents, as hereinabove alleged, have or tend to have the effect of:

- (a) reducing competition in the sale of mobile homes;
- (b) foreclosing potential competitors in the sale of mobile homes by raising entry barriers;
- (c) foreclosing substantial sales by dealers of mobile homes to actual or prospective tenants of sites in respondents' mobile home parks;
- (d) inflating the prices of mobile homes purchased from respondents;
- (e) depriving consumers of the benefits of competition.

PAR. 13. The aforesaid acts, practices and methods of competition, constitute unreasonable restraints of trade and unfair methods of competition in or affecting commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended, and constitute unfair acts and practices in or affecting commerce in

violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Commission having issued its complaint on December 19, 1975, charging that the respondents named in the caption hereof have violated the provisions of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45); and

Respondents and complaint counsel, by joint motion filed December 16, 1976, having moved to have this matter withdrawn from adjudication for the purpose of submitting an executed consent agreement; and

The Commission, by order issued January 11, 1977, having withdrawn this matter from adjudication pursuant to Section 3.25(c) of its Rules; and

Each of the respondents and counsel supporting the complaint having executed an agreement containing a consent order, which includes an admission by the respondents of all the jurisdictional facts set forth in the 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 the complaint, and waivers as required by the Commission's Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of one hundred and eighty (180) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Harper Sales, Inc. is a corporation organized under the laws of the State of New York, with its principal office located at 7500 West Henrietta Road, Rush, New York.

Respondent Edgewood Park Estates, Inc. is a corporation organized under the laws of the State of New York, with its principal place of business located at 4000 Brick Schoolhouse Road, Hamlin, New York.

Respondent Harper Park-Avon is a partnership organized under the laws of the State of New York with its principal office located at 6150 East Avon-Lima Road, Avon, New York.

Respondents Ralph R. Harper and John R. Harper are officers of corporate respondents Harper Sales, Inc. and Edgewood Park

Estates, Inc. They formulate, direct, approve, authorize and control the acts and practices of Harper Sales, Inc. Said individual respondents are also partners in the partnership respondent, Harper Park-Avon. They formulate, direct, approve, authorize and control the acts and practices of the partnership respondent. Their business address is the same as that of corporate respondent Harper Sales, Inc.

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

It is ordered, That Harper Sales, Inc. and Edgewood Park Estates, Inc., corporations, and Harper Park-Avon, a partnership, their successors and assigns, and their officers and partners and Ralph R. Harper and John R. Harper, individually and as officers of said corporations and as partners in said partnership, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, partnership, division or other device, in connection with the sale of mobile homes or the rental or lease of mobile home sites, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

The offering, execution, maintenance or enforcement of any lease, agreement, understanding or other arrangement which, directly or indirectly, conditions the lease or rental of a mobile home site upon the purchase of a mobile home from a respondent, or a source designated by a respondent. For the purposes of the foregoing sentence a transfer or conveyance of a mobile home site by any respondent to anyone not a respondent which grants any respondent the option or right to purchase such site, shall be deemed to be a lease; and the lease or rental of a mobile home under which the lessor has the option or right to require the lessee to purchase such mobile home as a condition for the continued use of such mobile home, shall be deemed to be a purchase.

Provided, however, that respondents may freely exercise their rights as businessmen, including the right to set reasonable rules, regulations and standards concerning the appearance of mobile homes and acceptance of tenants in respondents' mobile home parks and the operation, maintenance and appearance of mobile homes, mobile home parks and mobile home sites, except insofar as limited by the provisions of this order; and

Provided further, that nothing in this order shall exempt any

person or firm from the duty to comply with all applicable laws or regulations which are consistent with the provisions of this order.

It is further ordered, That respondents shall, within thirty (30) days of service of this order, distribute, and obtain a signed receipt therefor, a copy of this order to each of their operating divisions and respondents' employees engaged in the sale or rental of mobile homes or mobile home sites.

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment, and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, each individual respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the sale of mobile homes or the rental or lease of mobile home sites or of his affiliation with a new business or employment in which his own duties and responsibilities involve the sale of mobile homes or the rental or lease of mobile home sites. Such notice shall include this respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment.

The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

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

It is further ordered, That respondents maintain complete business records relative to the manner and form of their continuing compliance with the terms and provisions of this order. Each record shall be retained by respondents for at least three years after it is made.

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.

Interlocutory Order

93 F.T.C.

IN THE MATTER OF

THE KROGER COMPANY

Docket 9102. Interlocutory Order, Feb. 1, 1979

ORDER AFFIRMING ORDER RULING ON RESPONDENT'S MOTION
FOR PRODUCTION OF DOCUMENTS PURSUANT TO § 3.36

Administrative Law Judge Montgomery K. Hyun (the "ALJ") has *sua sponte* certified to the Commission for discretionary review certain of his rulings in connection with respondent's motion for *in camera* production of documents in the files of the Commission. We decline to disturb the ALJ's discovery rulings and, accordingly, we affirm. Our disposition of this matter also moots respondent's application for a stay of further proceedings before the ALJ and for oral argument before the Commission.

The ALJ certified his rulings only because of suggestions by respondent that his continued participation in this matter might be inappropriate in light of the Commission's refusal to grant clearance to one of respondent's attorneys, Mr. Mark Tuller, notwithstanding that both previously served at different times as attorney-advisors to former Chairman Engman.

The standards governing the appearance of former agency employees in Commission proceedings address issues different from those concerning the propriety of participation by administrative law judges. The clearance rules concern impropriety resulting from access to inside information whereas the principal question involving an ALJ's participation is one of bias or prejudgment. Thus, application of these standards may lead to differing results concerning the continued participation of Mr. Tuller and Judge Hyun in this proceeding, notwithstanding that each avers that during his tenure with Chairman Engman he did not participate in any matter pertaining to the respondent.

Here, no question of possible bias or prejudgment by the ALJ has been raised by the respondent and we can perceive none. Certainly mere access to information in the possession of the Commission casts no shadow on Judge Hyun's ability to render an impartial decision in this matter. Indeed, to suggest otherwise would call into question a judge's ability to review assertedly privileged information *in camera* for the purpose of determining whether the attorney requesting the information is entitled to see it. For these reasons, we find nothing inconsistent about the fact that Mr. Tuller