

IN THE MATTER OF
RHINECHEM CORPORATION, ET AL.

Docket 9116. Interlocutory Order, Feb. 12, 1979

ORDER DENYING RESPONDENTS' MOTION FOR DISMISSAL OF
COMPLAINT

Administrative Law Judge Ernest G. Barnes has certified to the Commission, without recommendation, a motion by two respondents, Allegheny Ludlum Industries, Inc. ("ALI"), and Chemetron Corporation, to dismiss the complaint. We deny the motion, believing that the public interest would be better served by allowing this case to proceed.

Respondents' ground for dismissal is that the proposed acquisition by Rhinechem Corporation of the Pigments Division of Chemetron, a subsidiary of ALI, has been terminated. This acquisition, however, was not abandoned until after a United States District Court, upon motion of the Commission, issued an injunction against respondents barring the acquisition during the pendency of a Commission administrative proceeding and any subsequent judicial review. In granting the injunction, the court found that the Commission, which had contended that the acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, had demonstrated a sufficient likelihood of ultimate success on the merits.

It is conceded, and the Commission has so held, *see, e.g., British Oxygen Co., Ltd.*, 86 F.T.C. 1241, 1334-35 (1975), *rev'd on other grounds*, 557 F.2d 24 (2d Cir.1977), that the prohibitions of Section 7 of the Clayton Act are directed against the acquiring company, rather than the company to be acquired. Nevertheless, it is also clear that the moving respondents may be properly charged with a violation of Section 5 of the Federal Trade Commission Act for entering into a merger agreement which, complaint counsel contend, violates Section 7 of the Clayton Act. *Dean Foods Co.*, 70 F.T.C. 1146, 1288-92 (1966); *British Oxygen Co., Ltd.*, *supra* at 1334. *Cf. Grand Union v. FTC*, 300 F.2d 92 (2d Cir. 1962). Thus, even though the Commission has withdrawn this matter from adjudication with respect to Rhinechem Corporation in order to consider a proffered consent agreement, the complaint nonetheless states a cause of action under Section 5 of the Federal Trade Commission Act against the moving respondents. In Section 5 cases, it is well established that the discontinuance or abandonment of a practice, especially where not entirely voluntary, does not preclude the issuance of an

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appropriate cease and desist order. *E.g., Coro, Inc. v. FTC*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). Accordingly,

It is ordered, That respondents' motion for dismissal of the complaint, dated December 19, 1978, be, and it hereby is, denied.

IN THE MATTER OF
KAUFMAN AND BROAD, INC., ET AL.

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

Docket C-2954. Complaint, Feb. 12, 1979 — Decision, Feb. 12, 1979

This consent order, among other things, requires a Los Angeles, Calif. builder and seller of residential housing to cease misrepresentations of fact and using any other unfair or deceptive practices in the advertising, sale and construction of consumer housing. The firm is also required to furnish prospective customers with disclosures regarding construction materials and components; as well as information relating to the land, taxes and community facilities. Further, the company is required to provide home purchasers with warranties patterned on the housing industry's Home Owners Warranty program; and to employ the industry's standards in home construction and repair. Additionally, provisions in the order entitle original owners of company homes purchased from January 1, 1972, to have specified defects repaired, and requires the firm to repurchase the homes at the original price, should it fail to make proper repairs in a timely manner. The order also provides that disputes concerning repairs may be settled through third-party arbitration.

Appearances

For the Commission: *Blanche Stein, Richard A. Palewicz and Jerome S. Lamet.*

For the respondents: *Elroy Wolff, Sidley & Austin, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents Kaufman and Broad, Inc., a corporation, Kaufman and Broad Homes, Inc., a corporation, and Kaufman and Broad Home Sales, Inc., a corporation, have violated Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint as follows:

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For purposes of this complaint, "on-site residential housing" shall mean housing structures, including lots, consisting of single family dwelling units or housing structures consisting of multi-family dwelling units (including condominiums) represented and sold by respondents as completely constructed or partially constructed units.