

IN THE MATTER OF

DAVID PORTER

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

Docket 9172. Complaint, Dec. 16, 1983—Decision, Sept. 7, 1984*

This consent order requires a Springfield, Missouri operator of retail grocery stores, among other things, to cease engaging in any concerted action to impede the collection or dissemination of comparative price information. For a period of five years, Mr. Porter is prohibited from requiring price checkers to purchase items to be priced as a condition of allowing them to price check; denying price checkers the same access to his stores as is provided to customers; or coercing any price checker, publisher or broadcaster to refrain from collecting or reporting comparative price information. Mr. Porter is also required, upon the resumption of price reporting by TeleCable of Springfield, to reimburse the company \$250 per week for the cost of the program, up to \$1,000, or for a period of three years, whichever comes first; and to notify consumers of the broadcast through posted signs and newspaper ads.

Appearances

For the Commission: *Patricia Bremer.*

For the respondent: *Donald W. Jones, Springfield, Mo.*

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, his attorney, 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 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The Secretary of the Commission having thereafter withdrawn this

*Complaint previously published at 104 F.T.C. 526.

matter from adjudication as to this respondent in accordance with Section 3.25(c) of its 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 sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent David Porter is an individual trading and doing business as Porter's So-Lo Markets, with his principal business office at 1475 North National, Springfield, Missouri.

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

ORDER

I.

For the purpose of this Order, the following definitions shall apply:

A. *Porter* means David Porter, individually and through Porter's So-Lo Markets or any other entity or corporate device, and his representatives, agents, employees, successors and assigns.

B. *Price check* or *price checking* means the collecting, from information available to customers, of retail prices of items offered for sale by any retail grocery store (SIC 5411), which is done neither by nor on behalf of a person engaged in the sale of groceries, and which information is used in price reporting.

C. *Price checker* means any person engaged in price checking.

D. *Price reporting* or *price report* means the dissemination to the public of price checking information through any medium by any person not engaged in the sale of groceries.

E. *Springfield* means the counties of Christian and Greene, Missouri.

F. *Customer* means any individual who enters a retail grocery store for the purpose of grocery shopping, whether or not that individual actually makes a purchase.

G. *Person* means individuals, corporations, partnerships, unincorporated associations, and any other business entity.

H. *Geographic area* means: (1) a Standard Metropolitan Statistical Area as defined by the Bureau of the Census, U.S. Department of Commerce, as of October 1, 1982; or (2) a county.

I. *Supermarket* means any retail grocery store (SIC 5411) with annual sales of more than one million dollars (\$1,000,000.00).

II.

It is further ordered, That:

A. Porter shall forthwith cease and desist from taking any action in concert with any other person engaged in the sale of grocery products which has the purpose or effect of restricting, impeding, interfering with or preventing price checking or price reporting.

B. Except as provided in paragraph II.C., for five (5) years following the date on which this Order becomes final, Porter shall cease and desist from taking or threatening to take any unilateral action that would:

1. Require price checkers to purchase items to be price checked as a condition of allowing them to price check; or

2. Deny price checkers the same access to Porter's supermarkets as is provided to customers; or

3. Coerce, or attempt to coerce, any price checker, publisher or broadcaster into refraining from or discontinuing price checking or price reporting.

C. 1. Nothing in paragraph II.B. shall prevent Porter from adopting reasonable, non-discriminatory rules governing the number of price checkers in his supermarkets at any one time for the purpose of preventing disruption of Porter's normal business operations.

2. Nothing in subparagraph II.B.3. shall prevent Porter from publicly commenting upon or objecting to any price report in which his prices are compared to those of any other grocery retailer.

3. Whenever Porter believes that conditions exist that justify the exclusion of a price checker, he may submit to the Federal Trade Commission a sworn statement setting forth with particularity the facts that Porter believes meet such conditions. For purposes of this Order, the only conditions justifying the exclusion of a price checker are that another supermarket operator with whose prices Porter's prices are compared in a price report has knowingly tampered with or manipulated the results of such price report for its own competitive gain either (a) by the use of information wrongfully obtained and not available to all supermarket operators whose prices are being compared, or (b) by inducing any price reporter or price checker to cause false information to be published or broadcast. Following the Federal Trade Commission's actual receipt of such statement, Porter may exclude the price checkers from his supermarkets in the geographic area(s) covered by the affected price report for so long as the condi-

tions set forth in Porter's statement shall exist. In any civil penalty action against Porter for a violation of subparagraph II.B. 2. occurring after notice to the Federal Trade Commission was given by Porter as provided in this subparagraph, Porter shall have the burden of proving, by a preponderance of the evidence, that the conditions justifying the exclusion of a price checker as set forth in this subparagraph have been met. In meeting his burden, Porter may offer evidence only for the purpose of proving the facts set forth in his statement to the Federal Trade Commission. Nothing in this subparagraph shall be construed to be an exception to the prohibitions of paragraph II.A. of this Order.

III.

It is further ordered, That, upon the resumption of price reporting by TeleCable of Springfield that is similar in quality and coverage to that broadcast by it prior to October 14, 1981, and that includes any Porter supermarket, and upon receipt by Porter of written request for payment from TeleCable, Porter shall reimburse TeleCable for its actual cost of obtaining a price reporting program up to the amount of two hundred fifty dollars (\$250.00) per week. Porter's obligation under this Part (III) shall terminate either when he has reimbursed TeleCable in the total amount of one thousand dollars (\$1,000.00) or three (3) years following the date on which this Order becomes final, whichever occurs first. Porter shall not reimburse TeleCable for costs incurred by TeleCable during any week for which TeleCable's costs are reimbursed by any other person.

IV.

It is further ordered, That, within seven (7) days following the date on which this Order becomes final, Porter shall send a letter, a copy of which is attached here as Exhibit A, together with a copy of this Order, to TeleCable of Springfield, informing TeleCable of Porter's obligations under Parts II and V of this Order, TeleCable's rights under Part III, and the notices that Porter must receive from TeleCable before certain Order provisions become binding upon Porter.

V.

It is further ordered, That, if at any time during the two years following the date on which this Order becomes final, Porter is notified in writing by TeleCable of Springfield that price reporting that includes any of Porter's supermarkets has resumed in Springfield:

A. For a period of sixty (60) days following the receipt of such notice, Porter shall post signs no smaller than 30 inches by 40 inches in a front window in each of Porter's supermarkets in Springfield, stating:

GROCERY PRICE SURVEY

A price survey comparing prices of selected grocery items at Porter's So-Lo Markets and other Springfield grocery supermarkets is being broadcast over cable television. This comparative price survey can be seen on channel _____ and is broadcast from _____ to _____.

B. For a period of sixty (60) days following the receipt of such notice, whenever Porter places food advertisements of one-half page or larger in any printed advertising medium with circulation of 15,000 or more copies in Springfield, which advertisements cover only his own stores, Porter shall publish an announcement as a part thereof in the same language provided in paragraph V.A. This announcement shall be no smaller than 3 inches high by 3 inches wide and shall be printed in conspicuous type. In each week in which Porter does not place a one-half page or larger food advertisement in such printed advertising medium, Porter shall place this announcement as a display advertisement in any printed advertising medium with circulation of 15,000 or more copies in those areas of Springfield in which Porter's stores are located.

VI.

It is further ordered, That Porter shall, within seven (7) days after the date on which this Order becomes final, and once a year thereafter for three years, provide a copy of this Order to each of his supermarket managers, and secure from each such individual a signed statement acknowledging receipt of this Order.

VII.

It is further ordered, That Porter shall, within sixty (60) days after the date on which this Order becomes final, file with the Commission a verified written report, setting forth in detail the manner and form in which Porter has complied with this Order. Additional reports shall be filed at such other times as the Commission may by written notice require. Each compliance report shall include all information and documentation as may be required by the Commission to show compliance with this Order.

VIII.

It is further ordered, That Porter shall notify the Federal Trade Commission at least thirty (30) days prior to the discontinuance of his present business or employment as an individual proprietorship in the sale of groceries, or at least thirty (30) days prior to his affiliation with a new business or employment, or of any similar change which may affect compliance obligations arising out of this Order. The notice provision of this Part shall include any change in the organizational status of Porter's present business, such as incorporation, assignment or sale, resulting in the emergence of a successor entity, or any other change in Porter's business or his retail grocery operations.

EXHIBIT A

TeleCable of Springfield
1533 South Enterprise
Springfield, Missouri 65801

Dear Sir or Madam:

This is to notify you that I, David Porter, the owner of Porter's So-Lo Markets in Springfield, Missouri, have entered into a consent order with the Federal Trade Commission in which I have agreed that I will not interfere with efforts by independent parties such as TeleCable of Springfield to engage in price reporting or price checking in my grocery stores in Springfield. I have agreed that I will not require price checkers to purchase the items being price checked, will not deny price checkers the same access to my supermarkets as is provided to customers, and will not attempt to coerce any price checker, publisher or broadcaster into refraining from or discontinuing price checking or price reporting. The terms of and limitations of the agreement are set forth in a consent order issued by the Federal Trade Commission, a copy of which is enclosed herewith.

If TeleCable of Springfield institutes a price reporting program similar or superior in quality and coverage to the one broadcast by TeleCable in 1981, and if the program includes any of my grocery stores in Springfield, Missouri, I will reimburse TeleCable for its actual costs of obtaining price reports, up to the amount of \$250 per week, and up to \$1,000 in total. I will also place notices in my Springfield grocery stores and in weekly advertisements, informing consumers of TeleCable's price surveys. The precise terms of my obligations to place such notices, and to reimburse TeleCable for certain of its costs, are set forth in the enclosed consent order.

In order to receive any funds to which you may be entitled and to effect the placement of the notices described above, please notify me in writing, c/o Porter's So-Lo Markets, 1475 North National, Springfield, Missouri 65802, stating when the program began or is scheduled to begin, the time and channel on which the survey will be broadcast, and TeleCable's costs, if any, of obtaining the survey information.

Very truly yours,

David Porter

IN THE MATTER OF

ARMSTRONG CORK COMPANY

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AND SEC. 2(a) OF THE CLAYTON ACT*Docket C-1010. Consent Order, Nov. 3, 1965—Modifying Order, Sept. 10, 1984*

This Order reopens the proceeding and modifies an FTC Consent Order issued on November 3, 1965, 68 F.T.C. 849, which alleged that a manufacturer and distributor of floor-covering products had conspired with its wholesalers to reduce competition by fixing resale prices and conditions of product sale to retailers and flooring contractors, and by discriminating in price between competing buyers. After considering company petitions, supporting materials and other relevant information, the Commission concluded that hardships to the company and the public outweighed any benefit derived from the prohibition against imposing "terms or conditions" on resale of products, and deleted the language "terms or conditions" from paragraphs 1, 2, and 4 of Part I of the Order. The Commission also deleted the word "rebates" from paragraph 2 after finding that such modification would also be in the public interest since it would permit the company to funnel "direct-to-consumer" rebates through its wholesalers and retailers. However, the Commission declined to set or modify other parts of the Order, holding that the firm had failed to demonstrate any change of law, fact, or public interest consideration that would justify further modification.

ORDER REOPENING AND MODIFYING FINAL ORDER

By petition of October 21, 1983, as supplemented and refiled on February 28, 1984, Armstrong World Industries, Inc. (formerly Armstrong Cork Company and hereinafter "Armstrong") asked the Commission to reopen and modify the Commission order issued against Armstrong on November 3, 1965. Armstrong requested that the Commission (1) modify Part I of the order by (a) deleting provisions prohibiting certain non-price vertical restraints; and (b) limiting the geographic scope of the resale price maintenance prohibitions; (2) set aside Parts II and III of the order; (3) set aside or modify Part IV of the order; and (4) substitute "Armstrong World Industries, Inc." for "Armstrong Cork Company" as the respondent to the order. Armstrong's October 21, 1983 and February 28, 1984 submissions were placed on the public record and no comments were received.

Upon consideration of Armstrong's petition and supporting materials, and other relevant information, the Commission finds that a modification of the order to delete the words "terms or conditions" from paragraphs 1, 2, and 4 of Part I is in the public interest. Armstrong has sufficiently demonstrated that the prohibition against Armstrong's imposing any terms or conditions on the resale of its