

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS AND ORDERS

IN THE MATTER OF

HALLMARK GROUP COMPANIES, INC., ET AL.

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

Docket C-2517. Complaint, July 1, 1974—Decision, July 1, 1974

Consent order requiring a Dallas, Tex., developer of mobile home parks and its wholly-owned subsidiary in Santa Clara, Calif., among other things to cease misrepresenting and failing to provide facilities and services they represented would be available at mobile home parks they have developed. Further, the order requires respondents to provide, within ninety (90) days of the effective date of this order, mobile home parks with all of the facilities and services which they represented would be available at said parks.

Appearances

For the Commission; *Ralph E. Stone.*

For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Hallmark Group Companies, Inc. and Pacific Western Mobile Estates, Inc., corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said 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 Hallmark Group Companies, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 208 Town North Plaza Building, 4230 LBJ Freeway, Dallas, Tex.

Respondent Pacific Western Mobile Estates, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business

located at 2075 De La Cruz Boulevard, Santa Clara, Calif. It is a wholly-owned subsidiary of respondent Hallmark Group Companies, Inc.

PAR. 2. Respondents are now, and for some time last past have been engaged in the development and operation of mobile home parks in the various States of the United States.

PAR. 3. In the course and conduct of respondents' aforesaid business, respondents have disseminated and have caused to be disseminated from their place of business located in Santa Clara, Calif. advertisements for said mobile home parks in newspapers and on radio broadcasts of interstate circulation for the purpose of inducing the lease of mobile home park spaces.

Through the aforementioned dissemination and transmission of said advertisements and the interstate nature of their business, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in mobile home park development and operation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Typical of such advertisements, disseminated as aforesaid, but not inclusive thereof, are the following: [see pp. 3-6 herein.]

PAR. 5. Through the use of said advertisements, and others similar thereto, not specifically set out herein, respondents have represented and are now representing, directly or by implication, that respondents' mobile home parks have available and fully operational certain facilities, *e.g.*, boat and camper storage, cable television, laundry facilities, car wash facilities, sauna, shuffleboard, multi-purpose court for basketball, tennis, volleyball and badminton.

PAR. 6. In truth and in fact each and every advertised facility is not available and fully operational at respondents' mobile home parks at the time such park is ready for occupancy.

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

PAR. 7. Furthermore, in the course and conduct of their business, as aforesaid, respondents failed and continue to fail to provide said mobile home parks with the fully operational facilities they represented were available.

The failure of respondents to provide fully operational facilities for the benefit of persons who leased spaces in respondents' parks in reliance upon said representations set forth in Paragraphs Four and Five hereof, was and is unfair and deceptive.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, and representations has the tendency and capacity to mislead and deceive members of the purchasing public into the

come live with us...

... We'd like to introduce you to the nicest part of mobile home living — Pacific Western Mobile Estates. Let's get together over a cup of coffee and sit around and relax. I know we can show you a whole new way of easy living — made up of people, recreation, and just plain fun.

... If you enjoy the sort of things we do... like swimming, sauna, billiards, tennis, shuffleboard, putting greens, indoor hydrotherapy pool, and lots of friendly clubhouse activities, you will like our park. It is real country club living at low prices.

... My name is Joe and this is my wife Mildred. They call us managers, but we feel more like neighbors. Come out today and join us.



**PACIFIC WESTERN
MOBILE ESTATES/GILROY**

500 W. Tenth Street
Gilroy, Calif. 95020
408/842-8296



All our parks have friendly managers who'd enjoy meeting you.

- Alice and "Skrif" at Modesto
- Walt and Vivian at Lathrop
- Hap and Maurita at San Jose
- Darrell and Jane at Pismo Beach

And open later this year: Vallejo Orange County Visalia Palm Springs Medford, Oregon Springfield, Oregon Lincoln, Nebraska Colorado Springs, Colorado



Write for free brochure to:
Pacific Western Mobile Estates, Inc.
2075 De La Cruz Blvd.
Santa Clara, California 95050

Name of park(s) _____
Name _____
Address _____
City _____ Zip _____ State _____

Complaint

84 F.T.C.

The Recreation Center



car wash / laundry / hobby room



9-hole putting green



sauna

Live up to your expectations at Pacific Western Mobile Estates/Gilroy ... a recreational wonderland!

Enjoy the pride of home ownership with a country club lifestyle, but without the starchy formality and land-office prices of conventional country clubs.

Amble up the path past the bubbling fountain to the clubhouse ... a center hum-m-m-ing with fun things to do ... a wonderfully inviting extension of your own home.

Enriched with the warmth of Spanish architecture ... bursting with hospitality, the expansive clubhouse provides recreation and socializing throughout the year.

Join the fun—dances, live entertainment, weekend brunches, parties and other social gatherings are easily accommodated in the spacious community hall. A full size stage, modern kitchen and banquet facilities ease the preparation and enhance the enjoyment of such events. What a lively center of exciting activity!

Get cozy ... the flow of conversation warms during friendly fireside chats in the library lounge

... ideally a restful setting to curl up and read a book ... a gracious hideaway for relaxation or television viewing.

The benefits of a spa-like atmosphere are apparent. Nothing could be more soothing than a sauna! Be gently massaged in the indoor hydrotherapeutic pool.

The relaxing resort atmosphere goes on ... enjoy a game of billiards ... or nourish an individual health program in the fully equipped men's and women's exercise room.

And there's more playing around! Splash in the pool ... gently heated throughout the year and lighted for evening dips.

Summertime arrives and the aromatic scent of smoking barbecues prevails at Pacific Western/Gilroy. Families gather on the barbecue patio to cook their favorite California cuisine over glowing charcoals.

Come by today and let us show you our beautiful park. We have some friendly managers and a lot of wonderful neighbors anxious to meet you.

Pacific Western Mobile Estates/Gilroy
500 West Tenth Street
Gilroy, California 95020
408-842-8296

GILROY PARK

The Community

Pacific Western/Gilroy is a well planned, self-contained community. Underground utilities; centrally located recreation and green areas; broad, well lit avenues with ideal circulation patterns; colorful, professionally maintained landscaping—all tastefully integrated into a beautiful, comprehensive design.

Always close at hand, the resident managers and their assistants are thoroughly trained and knowledgeable of mobile home park management. Their efficiency is matched only by their friendly, neighborly manner ... all to make your days carefree.

The security of the mobile home community is apparent ... from its walled perimeter to its street lights burning throughout the night. The management enjoys the confidence of residents and maintains a pleasant environment: no soliciting or door-to-door selling is permitted ... nor is the peaceful setting broken by noisy autos or motorcycles.

And there's more ... boat and camper storage, guest parking, underground utilities, cable television, accommodation for 12' 20' 24' 36' wide mobile homes, laundry facilities, car wash facilities, two-car parking per site.



social events



billiard room



barbecue patio



enclosed play area



boat and camper storage

community kitchen

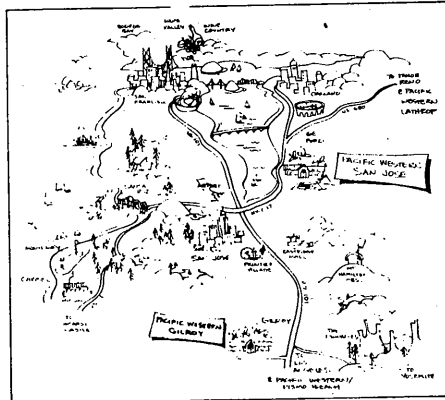


Outdoor living goes on. Play a round of golf on the 9-hole putting green. Sport activists will discover: shuffleboard, basketball, paddle-tennis, volleyball, badminton.

Especially for the children—busy bees, rabbits, porpoises, and hobby horses abound as part of a fascinating selection of play equipment safely enclosed in the separate tot play area.

Hobbies unlimited in the special hobby room! ... just another little but important spoiler at Pacific Western Gilroy.

Whether you are seeking an active, on-the-go life; pure relaxation; or a combination of both, you'll have your choice ... let us spoil you at Pacific Western Gilroy.



RENTAL INFORMATION

MONTHLY RENTAL

12' wide spaces	20' wide spaces	24'—36' wide spaces
\$65.00	\$70.00	\$75.00

Corner and Clubhouse lots \$5.00 extra per month

MITTERED CHARGES

Gas and Electricity
FREE SERVICES
 Water
 Garbage Collection
 Clubhouse Facilities

OPTIONAL MONTHLY CHARGES

Pets \$3.50
 Extra Person \$5.00
 Storage \$5.00
 Cable television available

OCCUPANCY REQUIREMENTS

All coaches less than 3 years old
 Awnings required—length and width of patio and carport
 Metal skirting to match
 Architectural approval on coaches
 25% landscaping in green starting in front of home

FOR DETAILS, SEE REGULATIONS AVAILABLE IN OFFICE

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Decision and Order

erroneous and mistaken belief that said statements and representations were and are true and into the leasing of substantial numbers of respondents' mobile home park spaces by reason of said erroneous and mistaken belief.

PAR. 9. The acts and practices of respondents, including their continuing failure to provide fully operational facilities, 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 or deceptive acts or practices in commerce in violation of Section 5 of 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 San Francisco 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 respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, and 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 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 procedures 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 Hallmark Group Companies, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 208 Town North Plaza Building, 4230 LBJ Freeway, Dallas, Tex.

Respondent Pacific Western Mobile Estates, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 2075 De La Cruz Boulevard, Santa Clara, Calif. It is a wholly-owned subsidiary of respondent Hallmark Group Companies, 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 respondents Hallmark Group Companies, Inc., Pacific Western Mobile Estates, Inc., corporations, their successors and assigns, and their officers, and respondents' agents, representatives, salesmen and employees, directly or through any corporation, subsidiary, division or other device, in connection with the development, operation and/or leasing of mobile home parks in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting, directly or by implication, orally or in writing, that any facility or service is available at any mobile home park.

2. Misrepresenting, directly or by implication, orally or in writing, that any facility or service will be available at any mobile home park.

Provided, however, That it shall not be deemed a violation of this paragraph if for reasons not within their control (*e.g.*, floods, other acts of God, strikes), such facility or service is not usable and available for its intended use at the time of said occupancy by the first lessee.

3. Failing to provide mobile home parks within ninety (90) days of the effective date of this order with all of the facilities and services which they represented would be available at said parks.

It is further ordered, That the respondents shall forthwith distribute a copy of this order to each of its operating divisions, and mobile home parks, and post in a prominent place for 30 days in each mobile home park presently owned and/or operated by respondents, their successors and assigns.

It is further ordered, That the respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment, incorporation, or sale resulting in the emergence of a successor firm, partnership, or

corporation, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That respondents 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 MATTERS OF

INTERNATIONAL PAPER COMPANY - Docket C-2518
VANCOUVER PLYWOOD CO., INC. - Docket C-2519

CONSENT ORDERS, ETC., IN REGARD TO ALLEGED VIOLATIONS OF THE
FEDERAL TRADE COMMISSION ACT

Complaint, July 1, 1974—Decisions, July 1, 1974

Consent orders requiring New York City and Florien, La. manufacturers of softwood plywood, among other things to cease using a basing point system of pricing; requiring the two firms to give customers the option of paying f.o.b. prices on picked-up purchases for a 10-year period and disclose the amount of actual freight on customers' invoices covering shipments sold on a delivered price basis; and requiring that in quoting prices the companies base estimated weights upon actual experience determined by representative sampling or by other reasonable methods. The agreement also provides that the orders shall not become effective until other cases involving the softwood plywood industry are resolved; the two companies shall have the option to accept the same order which may be entered against the other five non-consenting firms.

Appearances

For the Commission: *L. Barry Costilo* and *Ira S. Nordlicht*.

For the respondents: *H. F. Baker, Howrey, Simon, Baker & Murchison*, Wash., D.C. for International Paper Company. *J. Randolph Wilson, Covington & Burling*, Wash., D.C. for Vancouver Plywood Co., Inc.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating Section 5 of the Federal Trade Commission Act (U.S.C. Title 14, Section 45), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint charging as follows:

PARAGRAPH 1. Respondent International Paper Company is a corporation organized, existing and doing business under the laws of the

State of New York with its principal office and place of business at 220 E. 42nd Street, New York, N.Y. In 1971, International Paper Company had sales of \$1,969,550,000.

PAR. 2. Respondent Vancouver Plywood Co., Inc., is a corporation organized, existing and doing business under the laws of the State of Louisiana and is engaged in the sale of plywood in substantial amounts. In 1972, it had sales of \$40,000,000. It is managed and operated by Vanply, Inc., a wholly-owned subsidiary of Skelly Oil Company. Vancouver Plywood Co., Inc. has its principal office and place of business at Florien, La.

PAR. 3. Each of the respondents is substantially engaged in the manufacture, sale and distribution of softwood plywood. In the course and conduct of their business, each of the respondents is and has been for a substantial period of time engaged in selling such products to purchasers located in various States of the United States, and has caused such products to be transported from their facilities in various States of the United States to purchasers located in various other States of the United States. Each of the respondents is therefore engaged in "commerce," as "commerce" is defined in the Federal Trade Commission Act, and has been continuously so engaged for several years.

DEFINITIONS

PAR. 4. For the purpose of this complaint, the following definitions shall apply:

(a) "Softwood"—woods from coniferous trees such as pine, fir, spruce, and hemlock, which are generally light in texture, non-resistant and easily worked.

(b) "Softwood plywood" (sometimes referred to as "plywood" in this complaint)—material consisting of sheets of softwood glued or cemented together with the grains of adjacent layers arranged at right angles or at a wide angle usually being made of uniformly thin veneer sheets on either side of a thicker central layer.

(c) "Phantom freight"—the differential in amount between the actual freight costs incurred in shipping a product and higher freight charges used as the basis for billing the customer.

NATURE OF TRADE AND COMMERCE

PAR. 5. The manufacture and sale of softwood plywood is a substantial and expanding industry in the United States. In 1971, domestic shipments were \$1,246,911,000. Softwood plywood is a material which

enters heavily into the cost of construction of residential and commercial buildings. There has been a trend toward factory-built housing in which 29 percent-39 percent more plywood is used than in conventional housing. Large markets for softwood plywood include the major urban areas and suburban centers in the northeast and northcentral regions of the nation and certain urban areas in the south and the west.

PAR. 6. Historically, plywood was made from Douglas-fir trees and manufactured almost entirely in the coastal areas of the Pacific Northwest. In more recent years, the industry expanded to inland areas as types of softwood other than Douglas-fir began to be used in the manufacture of plywood. As a result of the development of new laminating techniques permitting utilization of the woods of southern pine, Georgia-Pacific established the first plywood mill in the south in For- dyce, Arkansas in 1963. Most of the large western plywood manufacturers thereafter established plants in the south. All of the respondents now have softwood plywood plants in the south.

PAR. 7. By the end of 1971, there were 51 softwood plywood plants located in the south. Since 1963, there has been a significant increase in the production of softwood plywood nationally, with most of the increase occurring in the south. By the end of 1971, production of plywood in the south reached approximately one quarter of total U.S. output.

PAR. 8. In 1969, the top eight softwood plywood producers accounted for approximately 64 percent of domestic plant shipments and the top four producers accounted for approximately 48 percent of shipments. The concentration level has increased since that time. The 1969 concentration level increased from 1963 when the top four and top eight softwood plywood producers had approximately 36 percent and 50 percent of domestic plant shipments, respectively.

PAR. 9. In 1971, the top eight softwood plywood producers accounted for approximately 74 percent of southern production and the top four producers accounted for approximately 61 percent of that production. A number of plants have recently been built in the south by the leading producers and this has resulted in an increase in concentration in the south. The respondents are among the leading producers in either the nation or in the south.

PACIFIC NORTHWEST SINGLE BASING POINT

PAR. 10. Before Georgia-Pacific opened its first softwood plywood plant in the South, respondents were charging softwood plywood delivered prices based upon rail freight rates computed from Portland, Oreg. Georgia-Pacific and each of the respondents which subsequently opened plants in the South have continued to charge delivered prices for

softwood plywood computed on the basis of rail freight from the Pacific Northwest, despite substantial shipments of softwood plywood from respondent's plants located in the south and other places geographically distant from the Pacific Northwest. As part of this basing point system, respondents have refused to permit customers the option of purchasing softwood plywood at the plant at f.o.b. prices which did not include freight from the Pacific Northwest, or to allow their customers to arrange for the mode of transportation cheapest to the customer.

PAR. 11. The parallel conduct of respondents and others in adhering to delivered prices based upon rail rates from the Pacific Northwest for shipments from mills located in other areas of the country has resulted in substantial margins of phantom freight accruing to respondents, particularly for shipments from plants in the south made to customers located in the southern, eastern, and northcentral areas of the country. This conduct enables those respondents which have plants in the west to ship plywood from their western plants to customers in the east without being undercut in price by southern mills which have a substantial geographic cost advantage. An example of the extent of phantom freight involved in the basing point system is as follows:

In Sept. 1972, a retail dealer in New Orleans, La., purchased softwood plywood produced at a plant located 60 miles away in Holden, La. The dealer paid a delivered price of \$4,289, which was computed on the basis of rail freight from Portland, Ore. Portland is 2500 miles away and the freight was \$764. The supplying plant in fact shipped the plywood to the purchaser by truck at a freight charge of \$80. Approximately 16 percent or \$684 of the purchaser's total delivered price consisted of phantom freight.

PAR. 12. The American Plywood Association, 1119 A Street, Tacoma, Wash., to which most of the respondents belong, has disseminated to the industry freight books specifying appropriate rail rates from the Pacific Northwest. This has facilitated the workings of the above-described basing point system.

PAR. 13. The respondents and the rest of the industry use uniform estimated weights to quote delivered prices to customers. Inaccuracies in a number of these weights further inflate the amount of phantom freight.

NATURE OF THE OFFENSE

PAR. 14. In the conduct of the aforesaid business, the respondents individually, and in combination with other companies, are now using and for a number of years have used and pursued parallel courses of

business behavior constituting unfair methods of competition and unfair and deceptive acts in commerce. Among the unfair methods of competition and the unfair and deceptive acts and practices which respondents individually, and in combination, have been and are now engaged are the following:

(a) establishing and maintaining a system of delivered prices based on computation of rail freight from the Pacific Northwest for shipments made from mills located outside of that region;

(b) establishing and maintaining a system of delivered prices based on computation of rail freight and applying it to shipments made by other and cheaper modes of transportation;

(c) refusing to permit customers who purchase from southern plants the option of picking up purchases at the plant at true f.o.b. mill prices; and

(d) using identical and inaccurate estimated weights as basis for quoting delivered prices.

EFFECTS

PAR. 15. The capacity, tendency and effects of the conduct of respondents hereinbefore alleged are, among others, to:

(a) stabilize prices and provide certainty in the pricing of softwood plywood among competitors;

(b) reduce and hinder actual and potential competition among respondents in the sale and distribution of softwood plywood;

(c) create disincentives to the most efficient location of producing points;

(d) create disincentives to customers to locate close to producing points;

(e) discourage use of the cheapest and most efficient mode of transportation in given cases;

(f) discriminate in prices between customers; and

(g) mislead and deceive customers with respect to freight.

PAR. 16. The conduct of respondents hereinbefore alleged were and are unfair methods of competition, and unfair or deceptive acts in commerce in violation of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Section 45), as amended.

INTERNATIONAL PAPER COMPANY—Docket 2518

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of

the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent 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 to issue herein, 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 considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed 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 in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent International Paper Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 220 E. 42nd Street, New York, N.Y.

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.

3. The attached order shall not become effective until thirty (30) days after the Commission enters final orders to cease and desist, resulting from litigation or consent, against Boise Cascade Corporation, Champion International Corporation, Georgia-Pacific Corporation, Weyerhaeuser Company and Willamette Industries, Inc. An order shall be considered final either by operation of law or by failure of any of the above companies to seek court review, or if court review is had as to said companies, at such time as court review is final as to all said companies. In the event the Commission obtains a final order to cease and desist, or if the Commission or any court enters an order to dismiss the complaint against any of the companies named above, International Paper Company shall for a period of thirty (30) days thereafter have the option to accept such order or dismissal in lieu of the order contained in this consent agreement.

ORDER

I

Definitions

"Softwood plywood"—material consisting of sheets of softwood glued or cemented together with the grains of adjacent layers arranged at right angles or at a wide angle usually being made of uniformly thin veneer sheets on either side of a thicker central layer.

"Softwood lumber"—softwood cut at sawmills into various sizes and shapes from coniferous wood trees.

"Particleboard"—wood panel products made from wood particles mixed with a synthetic resin or other binder and formed by heat and pressure.

"Basing point system"—a method of pricing or price computation for products produced by respondent or on hand at respondent's mill or distribution point by which that respondent quotes a delivered price computed in whole or in part on a systematic basis upon freight charges from a location or locations which are geographically different from the actual point of shipment to the customer, or computed in whole or in part upon a mode of transportation which differs from the mode actually used.

"f.o.b. price"—a price set for purchases by the customer at the distribution point or originating mill which is not based in whole or in part on a basing point system of pricing, and which does not systematically vary according to the location of the customer. An f.o.b. price shall mean a price determined for, but not necessarily different for, each mill and distribution point operated by respondent. It shall not be set at an artificial level for the purpose of affecting purchases at the mill or distribution point at an f.o.b. price.

"Actual freight charge"—freight charges determined by distance, carrier rates, and respondent's estimated weights developed in accordance with the standards set forth in Paragraph III.

II.

It is ordered, That respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or indirectly, through any corporate or other device in connection with the sale and distribution of particleboard and softwood lumber and softwood plywood in "commerce," as "commerce" is defined in the Federal Trade Commission Act, shall within sixty (60) days from the date of entry hereof:

1. Cease and desist from engaging individually, or in combination with competitors, in establishing, maintaining or using a basing point system of pricing.

2. For a period of ten (10) years, give customers the option of receiving a quotation and purchasing at f.o.b. prices in quantities of at least a truckload (approximately 40,000 lbs.) of the products covered by this order produced by respondent or on hand at respondent's mill or distribution point when the customer furnishes its own or arranges transportation compatible with respondent's facilities and complies with reasonable loading schedules and procedures of respondent. Additional cost attributable to customer pickup may be passed on to customers making pickup in the form of a surcharge above the f.o.b. price.

3. For a period of ten (10) years, state on invoices to customers for truckload or carload shipments by common or contract carrier sold on a delivered price basis the amount of actual freight charge to customers, the common or contract carrier rates from the place of shipment, the specified estimated weights if and when used, and the f.o.b. price.

III.

It is further ordered, That respondent does within one hundred twenty (120) days cease and desist from adopting or maintaining estimated weights as a basis for calculating freight charges in quoting delivered prices on softwood plywood when such estimates are not based upon the experience of actual weights of softwood plywood produced by the respondent individually. Such experience shall be accumulated and updated by representative sampling or by other reasonable methods at least once a year for five (5) years.

IV.

It is further ordered, That respondent shall cease and desist from directly or indirectly communicating, relaying or reporting to any manufacturer of softwood plywood, softwood lumber, or particleboard, information relating to prices, terms or conditions of sale (including transportation rates, charges or routing information) at which these products are sold or may be sold, except in connection with a bona fide sale to, or purchase from, such manufacturer or in connection with negotiations related thereto.

V.

Nothing contained in this order shall be interpreted as prohibiting respondent, when acting individually, 1) from granting allowances to

meet lower prices of competitors, 2) from absorbing all or any part of actual freight charges on shipment to any geographic area, 3) from charging the same delivered price to all customers within the normal area for delivery by a distribution point or mill when delivered by respondent's vehicles, or 4) from making otherwise legal communications to governmental bodies and trade or news publications.

VI.

It is further ordered, That respondent shall notify all persons having sales and policy responsibilities in its organization of the terms of the order and publish same in at least two major trade journals or periodicals twice annually for each of two years from the date of this order.

VII.

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

VIII.

It is further ordered, That within sixty (60) days from the date of service of this order, and on a periodic basis thereafter, the respondent shall submit, in writing, to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent is meeting its compliance obligations.

VANCOUVER PLYWOOD CO., INC.—Docket 2519

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent 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 to issue herein, 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 considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed 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 in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Vancouver Plywood Co., Inc., is a corporation organized, existing and doing business under the laws of the State of Louisiana, with its office and principal place of business at Florien, La.

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.

3. The attached order shall not become effective until thirty (30) days after the Commission enters final orders to cease and desist, resulting from litigation or consent, against Boise Cascade Corporation, Champion International Corporation, Georgia-Pacific Corporation, Weyerhaeuser Company and Willamette Industries, Inc. An order shall be considered final either by operation of law or by failure of any of the above companies to seek court review, or if court review is had as to said companies, at such time as court review is final as to all said companies. In the event the Commission obtains a final order to cease and desist, or if the Commission or any court enters an order to dismiss the complaint against any of the companies named above, Vancouver Plywood Co., Inc. shall for a period of thirty (30) days thereafter have the option to accept such order or dismissal in lieu of the order contained in this consent agreement.

ORDER

I

Definitions

"Softwood plywood"—material consisting of sheets of softwood glued or cemented together with the grains of adjacent layers arranged at right angles or at a wide angle usually being made of uniformly thin veneer sheets on either side of a thicker central layer.

"Softwood lumber"—softwood cut at sawmills into various sizes and shapes from coniferous wood trees.

"Basing point system"—a method of pricing or price computation for products produced by respondent or on hand at respondent's mill or

distribution point by which that respondent quotes a delivered price computed in whole or in part on a systematic basis upon freight charges from a location or locations which are geographically different from the actual point of shipment to the customer, or computed in whole or in part upon a mode of transportation which differs from the mode actually used.

"f.o.b. price"—a price set for purchases by the customer at the distribution point or originating mill which is not based in whole or in part on a basing point system of pricing, and which does not systematically vary according to the location of the customer. An f.o.b. price shall mean a price determined for, but not necessarily different for, each mill and distribution point operated by respondent. It shall not be set at an artificial level for the purpose of affecting purchases at the mill or distribution point at an f.o.b. price.

"Actual freight charge"—freight charges determined by distance, carrier rates, and respondent's estimated weights developed in accordance with the standards set forth in Paragraph III.

II.

It is ordered That respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or indirectly, through any corporate or other device in connection with the sale and distribution of softwood lumber and softwood plywood in "commerce," as "commerce" is defined in the Federal Trade Commission Act, shall within sixty (60) days from the date of entry hereof:

1. Cease and desist from engaging individually, or in combination with competitors, in establishing, maintaining or using a basing point system of pricing.

2. For a period of ten (10) years, give customers the option of receiving a quotation and purchasing at f.o.b. prices in quantities of at least a truckload (approximately 40,000 lbs.) of the products covered by this order produced by respondent or on hand at respondent's mill or distribution point when the customer furnishes its own or arranges transportation compatible with respondent's facilities and complies with reasonable loading schedules and procedures of respondent. Additional cost attributable to customer pickup may be passed on to customers making pickup in the form of a surcharge above the f.o.b. price.

3. For a period of ten (10) years, state on invoices to customers for truckload or carload shipments by common or contract carrier sold on a delivered price basis the amount of actual freight charge to customers, the common or contract carrier rates from the place

of shipment, the specified estimated weights if and when used, and the f.o.b. price.

III.

It is further ordered, That respondent does within one hundred twenty (120) days cease and desist from adopting or maintaining estimated weights as a basis for calculating freight charges in quoting delivered prices on softwood plywood when such estimates are not based upon the experience of actual weights of softwood plywood produced by the respondent individually. Such experience shall be accumulated and up-dated by representative sampling or by other reasonable methods at least once a year for five (5) years.

IV.

It is further ordered, That respondent shall cease and desist from directly or indirectly communicating, relaying or reporting to any manufacturer of softwood plywood or softwood lumber, information relating to prices, terms or conditions of sale (including transportation rates, charges or routing information) at which these products are sold or may be sold, except in connection with a bona fide sale to, or purchase from, such manufacturer or in connection with negotiations related thereto.

V.

Nothing contained in this order shall be interpreted as prohibiting respondent, when acting individually, 1) from granting allowances to meet lower prices of competitors, 2) from absorbing all or any part of actual freight charges on shipment to any geographic area, 3) from charging the same delivered price to all customers within the normal area for delivery by a distribution point or mill when delivered by respondent's vehicles, or 4) from making otherwise legal communications to governmental bodies and trade or news publications.

VI.

It is further ordered, That respondent shall notify all persons having sales and policy responsibilities in its organization of the terms of the order and publish same in at least two major trade journals or periodicals twice annually for each of two years from the date of this order.

VII.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent which may affect compliance obligations arising out of the order,

such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries.

VIII.

It is further ordered, That within sixty (60) days from the date of service of this order, and on a periodic basis thereafter, the respondent shall submit, in writing, to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent is meeting its compliance obligations.

IN THE MATTER OF

AMERICAN ALUMINUM CORPORATION, ET AL.

ORDER, OPINION, ETC. IN REGARD TO ALLEGED VIOLATIONS OF THE
TRUTH IN LENDING AND FEDERAL TRADE COMMISSION ACTS

*Docket 8865. Complaint, Oct. 4, 1971—Order & Opinion, July 2, 1974**

Order requiring a Birmingham, Ala., seller and distributor of residential aluminum siding, storm windows, storm doors and various other home improvement products, among other things to cease using any sales plan employing false, misleading or deceptive statements or representations to obtain leads to potential customers; disparaging advertised products; misrepresenting the savings available to purchasers; misrepresenting the duration, nature or extent of any guarantee; misrepresenting the durability or efficacy of its products; failing to maintain adequate records to substantiate any advertising claims made; and violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *John H. Bedford*, and *W. Roland Campbell*.
For the respondents: *Joseph J. Lyman*, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Truth in Lending Act and the regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that American Aluminum Corporation, a corporation, and Norman J. Foucha and Bobby G. Smith,

* On September 16, 1974, respondents filed a petition for review in the Court of Appeals for the Fifth Circuit.

6. Certain of respondents' home improvement products are unconditionally guaranteed or guaranteed for life.

7. Respondents' siding materials will never require painting.

PAR. 6. In truth and in fact:

1. Respondents' said advertised offers are not genuine or bona fide offers but are made for the purpose of obtaining leads as to persons interested in the purchase of respondents' products. After obtaining such leads, respondents' salesmen or representatives call upon such persons at their homes and, according to their established mode of operation, respondents' salesmen or representatives disparage the advertised product and otherwise discourage the purchase thereof and attempt to sell and frequently do sell a different and more expensive product instead of the advertised product for which the customer was originally solicited.

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

3. Respondents' advertised offer is not made for a limited time only. Said merchandise is advertised regularly at the represented prices and on the terms and conditions therein stated.

4. Purchasers of respondents' products do not receive a free bonus or gift in the form of free storm windows.

5. After installation of respondents' aluminum siding is completed, homes of purchasers are not used for demonstration or advertising purposes; and purchasers, as a result of allowing their homes to be used as models, are not granted reduced prices, nor do they receive allowances, discounts or commissions.

6. Respondents' home improvement products are not unconditionally guaranteed or guaranteed for life. Such guarantee as may be provided is subject to numerous terms, conditions and limitations respecting the duration of the guarantee and the extent and manner of performance thereunder. Furthermore, in a substantial number of cases, respondents or their salesmen or representatives fail to furnish any written guarantee to the customer and fail to disclose the life during which said guarantee applies.

7. Respondents' siding materials will require painting.

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

PAR. 7. In a substantial number of instances and in the usual course of their business, respondents sell and transfer their customers' obligations, procured by the aforesaid unfair, false, misleading and deceptive means, to various financial institutions. In any subsequent legal action to collect on such obligations, these financial institutions or other third parties, as a general rule, have available and can interpose various defenses which may cut off certain valid claims customers may have against respondents for their failure to perform or for certain other unfair, false, misleading or deceptive acts and practices.

PAR. 8. In the conduct of their aforesaid business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of aluminum siding and other home improvement products of the same general kind and nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations 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 into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. 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 commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation 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 II as if fully set forth verbatim.

PAR. 11. 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. 12. In the ordinary course of their business as aforesaid, respondents cause to be published advertisements of their goods and services,

as "advertisement" is defined in Regulation Z. These advertisements aid, promote, or assist directly or indirectly extensions of consumer credit in connection with the sale of these goods and services. By and through the use of the advertisements, respondents:

1. State that no downpayment is required in connection with a consumer credit transaction, without also stating all of the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10 (d) (2) thereof:

- (i) The cash price;
- (ii) The number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
- (iii) The amount of the finance charge expressed as an annual percentage rate; and
- (iv) The deferred payment price.

PAR. 13. By and through the use of respondents' contract to perform various home improvements, a security interest, as "security interest" is defined in Section 226.2 (z) of Regulation Z, is or will be retained or acquired in real property which is used or expected to be used as the principal residence of the respondents' customers. Respondents' retention or acquisition of such security interest in said real property thereby entitles their credit customers to be given the right to rescind that transaction until midnight of the third business day following the consummation of the transaction or the date of delivery of all the disclosures required by Regulation Z, whichever is later.

Respondents have caused the following additional information and clause to appear in its contract with credit customers:

The undersigned agree(s) that due to the custom nature of the work called for herein (he) (they) will pay as liquidated and agreed damages the sum of 25% of the agreed price upon (his) (their) cancellation of this agreement.

By and through the use of the above-quoted additional information and clause, respondents have and are representing to their customers that they are liable for damages in the event that these customers exercise their right to rescind, thereby violating Section 226.9 (d) of Regulation Z. And, said additional information is stated and utilized so as to mislead or confuse the customer and contradicts, obscures and detracts attention from the information required by Regulation Z to be disclosed, thereby violating Section 226.6 (c) of Regulation Z.

PAR. 14. Pursuant to Section 103 (q) of the Truth in Lending Act, respondents' aforesaid failure to comply with the provisions of Regulation Z constitute violations of that Act, and, pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY DAVID H. ALLARD,
ADMINISTRATIVE LAW JUDGE

OCTOBER 9, 1973

PRELIMINARY STATEMENT

This proceeding was commenced with the issuance of a complaint on Oct 4, 1971,¹ charging the corporate respondent and Norman J. Foucha and Bobby G. Smith, individually and as officers of the corporate respondent, with violations of Section 5 of the Federal Trade Commission Act by committing unfair methods of competition and unfair and deceptive acts and practices in commerce and violating the Truth in Lending Act and the implementing regulations promulgated thereunder.

A pretrial conference was held on Dec. 21, 1971; a request for admissions was filed by complaint counsel on Jan. 18, 1972, to which respondents timely failed to answer. On Mar. 9, 1972, the matter was assigned to the undersigned. Hearings were held in Birmingham, Ala., on Apr. 4, 1972, in Chattanooga, Tenn., on Apr. 5, 6, and 7, 1972, and in Birmingham, Ala., on May 30, 1972. Thereafter, hearings were held in abeyance to allow complaint counsel to proceed with remedies, the net result of which was to enforce the subpoenas issued by the Commission against the named individual respondents as well as several other individuals. When this matter was resolved, the hearings were promptly set and concluded in Birmingham, Ala., on July 10 and 11, 1973. Briefs were filed on Sept. 10, 1973.

At those hearings, testimony and documents were incorporated in the record in support of the complaint as well as in opposition thereto. This proceeding, thus, is before the administrative law judge upon the complaint, answer, admissions, testimony and other evidence, proposed findings of fact and conclusions, and briefs filed in support thereof submitted by the parties have been carefully considered and those findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matter.

Having heard and observed the witnesses and having carefully reviewed the entire record² in this proceeding, together with the proposed

¹ On brief, complaint counsel erroneously maintain the date to be Apr. 3, 1971.

² References to the record are made in parentheses, and certain abbreviations are used as follows:

Comp.—Complaint

Ans.—Answer

Tr.—Transcript page

CX—Commission exhibit

RX—Respondents' exhibit

findings, conclusions, and briefs submitted by the parties as well as replies, the administrative law judge makes the following findings as to facts, conclusions, and order.

FINDINGS OF FACT

1. Respondent American Aluminum Corporation is a corporation organized in 1965, under the laws of the State of Alabama, with its principal office located at 1624 6th Avenue North, Birmingham, Ala.³ (Comp., par. 1; Ans. par. 1).

2. Respondent American Aluminum Corporation also does business under the trade name National Aluminum Corporation. (Ans. par. 1).

3. Respondents Norman J. Foucha and Bobby G. Smith served as the principal officers of the corporate respondent. However, respondent Foucha sold his interest in the corporation to Bobby G. Smith in Jan. 1971, and thereafter severed all relationships with the corporate respondent.⁴ (Comp. par. 1; Ans. par. 1; Tr. 606, 607).

4. Respondent Bobby G. Smith now formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. (Comp. par. 1; Tr. 751-52, 754, 762, 608, 611-12, 621-22, 700).

5. Smith hires and fires salesmen (Tr. 699), furnishes leads to them (Tr. 706-07), approves and pays for the mailers and advertisements (Tr. 707-08), determines to whom mailers will be sent (Tr. 716), presides at sales meetings (Tr. 711-12); resolves disputes with customers (Tr. 705-06), assumes responsibility for installation (Tr. 699), and determines to which finance company to transfer the customers' retail installment contract (Tr. 704).

6. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, and distribution of residential aluminum siding, storm windows, storm doors and various other home improvement products to the public and in the installation thereof. (Comp. par. 2; Ans. par. 2).

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act,
7. Respondents, in the course and conduct of their business, now

³ At some period of time, the principal office appears to have been moved to 228 First Avenue North, Birmingham, Ala. (Tr. 697-98).

⁴ In their proposed findings, respondents admit that the corporate respondents' internal office affairs and fiscal policies were conducted primarily by respondent Foucha as a corporate officer until he sold his interest to Bobby G. Smith (Tr. 609, 690, 707). Respondents also admit that during that time frame, respondent Bobby G. Smith in his capacity as a corporate officer hired the salesmen and generally was in charge of selling the corporate respondents' products. (Tr. 619, 690-91, 699, 707, 714).

cause, and for some time last past have caused, their said products, advertising and promotional material, contracts, and other business papers and documents to be shipped and transmitted from and to their place of business, located as aforesaid in the State of Alabama and from the suppliers of said products, located in various States of the United States, to their prospective purchasers and purchasers thereof, located in various other States of the United States, other than the State of Alabama and the states in which said suppliers are located, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act. (Comp. par. 3; Admitted at prehearing conference, Tr. 5).⁵

8. Respondents' gross sales during 1968, were \$1,477,977 and in 1969, \$1,664,867 (CX 10b). Since Smith became president in Jan. 1971, sales have not diminished appreciably and during 1972, were about \$1,000,000 (Tr. 712-13).

Respondents' Advertisements and Representations Therein

9. Respondents' principal method of advertising its products is through mailouts to people in selected areas where it plans to solicit business (Tr. 611, 616). Approximately 50,000 mailers were sent out each week (Tr. 714) to different states (Tr. 616). CX 1a-8b are typical mailouts. They represent formats of advertisements used by respondents during the period of 1961-1971 (Admission #2).

10. The mailouts most often sent out by American offered aluminum siding installed for \$189.50, \$199.50 or \$219.50 with free storm windows (CX 1a-7b).

a. A salesman testified that leads given him were always from the mailers, with a price of \$189.50, \$199.50 or \$219.50.

b. All of the 20 public witnesses whose testimony was adduced at the hearings had received mailers similar to CX 1a-7b. The mailers featured the cheaper grade siding at less than \$219.50.

c. There was no evidence that the mailer featuring the more expensive siding (CX 8a-8b) had ever been used, except for the testimony of respondent Foucha, who claimed some had been sent out (Tr. 616).

⁵ In their proposed finding No. 8, respondents also admit that their business "was transacted under circumstances disclosing, they were engaged 'in commerce' as that term is defined in the Federal Trade Commission Act."

Initial Decision

84 F.T.C.

11. Typical and illustrative of the contents of respondents' mailouts, but not all-inclusive thereof, are the following:

ALL-ALUMINUM SIDING SALE
 MANY MONTHS TO PAY-LOW MONTHLY PAYMENTS
 PAY NOTHING FOR MONTHS AFTER INSTALLATION
 \$199.50
 (CX 1a, CX 2a, CX 4a)

ENJOY EVERLASTING HOME BEAUTY FREE BONUS

Special Offer To You-If you act promptly we will include Storm Windows for every window in your home as a FREE Bonus with the purchase of our All Aluminum or Siding Special.

- 100% Guaranteed Genuine Aluminum Siding
- Completely installed by our our expert home finishers.
- Absolutely NO EXTRAS to pay.
- YOUR CHOICE of beautiful decorator colors.
- One lifetime installation protects forever!

(CX 1a, 2a, 3b, 4a, 5b, 6a, 33a, 35a).

THIS CARD IS WORTH \$431.00 TO YOU AND YOU GET A BONUS GIFT FREE WITH PURCHASE

THIS IS A LIMITED OFFER!!

MAIL THIS CARD TODAY AND GET YOUR FREE GIFT

Mail this card within 7 days to become eligible for this savings, plus FREE Storm Windows for every window in your home with the purchase of this Aluminum Siding for your home.

(CX 1b, 2b, 7b, 33a, 35a)

12. Each of the mailouts sent out included a business reply card and when prospective customers fill in the reply cards and return them to respondents, the cards then become leads and are turned over to salesmen (Tr. 400-01, 619, 707). Thereafter, the salesmen make appointments with the prospective customers and attempt to sell them aluminum siding installed on their homes (Tr. 619). The respondents generally have two grades of aluminum siding that they offer to sell. The first is what respondents call Imperial siding and the second is referred to as cheaper siding (Tr. 704). The cheaper siding was offered for sale in respondents' mailers at \$199.50, \$189.50, \$219.50 and \$199 completely installed (CX 1a-7b). The Imperial siding is advertised in a mailer at a price of \$199.50 (CX 8a-8b).

13. Respondent American furnished salesmen with its contract forms, mortgage forms, and rescission notices, and other forms necessary to make sales of aluminum siding (Tr. 465, 468). The salesmen would then, upon making a sale, obtain the customer's signature on a

blank retail installment contract which was later completed by American (Tr. 474).

14. Respondent American furnished salesmen unpainted samples of the cheaper grade aluminum siding and storm windows (CX 59) to show to customers (Tr. 434). These samples were used by salesmen to show the siding advertised at less than \$219.50, with a free storm window (Tr. 434).

15. Through oral statements of its salesmen who called on prospective customers in response to receiving a reply from the mailouts, respondents made the following representations with regard to the transactions:

a. The offer set forth in said advertisements is a bona fide offer to sell the advertised products at the prices and on the terms and conditions stated.

b. Respondents' products are being offered for sale at special or reduced prices, and that savings are thereby afforded to purchasers from respondents' regular selling price.

c. Respondents' advertised offer is made for a limited time only.

d. That purchasers of respondents' products would receive a Free Bonus or gift in the form of free storm windows.

e. After the installation of respondents' aluminum siding is completed, the homes of purchasers will be used for demonstration and advertising purposes by the respondents; and, as a result of allowing their homes to be used as models, purchasers will be granted reduced prices or will receive allowances, discounts or commissions.

f. Certain of respondents' home improvement products are unconditionally guaranteed for life.

g. Respondents' siding materials will never require painting.⁶

Bait and Switch Sales Tactics

16. Respondents' sales methods were described by one respondent as "step up selling" which means "When you go into a customer's house and sell a product and after you sell the product you show them something besides what you've advertised." (Foucha, Tr. 610-11). To accomplish this, the salesman sells the cheaper grade siding and obtains a signed contract for it. After obtaining the signed contract, the salesman persuades the customer to purchase the Imperial grade siding at a much higher price (Smith, Tr. 733-34). Salesmen were told by respondents to

⁶A, b, c and d above were admitted by respondents at the pretrial conference (Prehearing Tr. 21-22). The representations e, f and g, which were not admitted, will be discussed fully hereinafter under the headings "Representations Regarding Use of Home in Advertising," "Guarantee," and "Never Requires Painting."

sell the better grade material to earn a commission (Cameron, Tr. 410).

17. During the time period of Mar. 12, 1969 through Dec. 31, 1969, respondents neither sold nor installed any residential siding at the advertised prices of \$189.50, \$199, \$199.50 or \$219.50 (Admission #3). No documentary evidence was presented to show that American had ever sold residential siding at the above-mentioned prices.

18. According to respondent Foucha, American kept something like 100 squares of the cheaper grade siding on hand in its warehouse (Tr. 625). The installation manager testified that he had enough of the cheaper grade siding in stock to do only five or six jobs (Tr. 762). Even though it maintained this limited amount in stock, American purchased none of the residential siding advertised in the mailouts for cheaper grade siding (CX la-7b) during the years 1968 and 1969 (Admission #7). Although the records of sales for the nine-month period show no sales at \$219.50 or less, there were sales at much higher prices where it appears that the cheaper grade siding was used (Tr. 643-46; CX 11Z228, 11Z268, 11Z269). In these instances, the price per square far exceeded the price per square advertised in CX la-7b, which would be \$19.95 to \$21.95.

19. American could not have operated profitably if it had sold its aluminum siding at prices of \$199.50 with free storm windows.

a. According to respondent Foucha, the cost of the siding, exclusive of any accessories needed to install it, was \$10-12 per square and the installer was paid \$6 per square (Tr. 620). A square is 100 square feet. Overhead expenses, including advertising, were for the year 1969, 34.7 percent (CX 10b) and on a \$199.50 sale would amount to \$69.23. On a \$199.50 job, the siding would cost a minimum of \$100, the installation cost would be \$60 and overhead expense would be \$69.23. This would total \$229.23.

b. This figure, however, does not take into consideration any commission to the salesman or the cost of storm windows which were supposed to be given free with the job. Thus American, taking into consideration all costs and expenses of doing business, would lose money on any job done at less than \$219.50.

20. Respondents discouraged their salesmen from selling the siding advertised for \$219.50 or less by paying salesmen a very small commission on it, and a much better commission on the Imperial grade siding.

a. The commission on the Imperial grade siding was 50 percent of all money charged over \$65 per square and thus depended on the price charged the customer (Foucha, Tr. 621).

b. The commission on the siding advertised at less than \$219.50 was a couple of dollars (Cameron, Tr. 412). This, according to a salesman of

American, being practically nothing, induced you to sell a better grade material (Tr. 412).

21. Respondents discouraged the purchase of aluminum siding advertised at a price of \$219.50 or less by salesmen showing customers unpainted samples which were unattractive.

a. Fifteen public witnesses who had been switched to the Imperial grade siding were shown unpainted samples after they had first signed a contract for siding at \$199.50 (Parkerson, Tr. 141; Ellis, Tr. 171; Smith, Tr. 247; Bryant Tr. 264, the testimony of 11 of these witnesses was stipulated as being the same as that of Woods Bryant, CX 60; hereinafter when reference is made to Bryant's testimony, it includes the 11 witnesses whose testimony was stipulated).

b. These witnesses described the sample as looking like tin (Tr. 141, 247, 264) or what you would put on a barn (Tr. 140). One witness was told he would have to paint it right after it was put on to keep it from tarnishing (Ellis, Tr. 172). After Bryant saw the unpainted sample, he told the salesman he wouldn't have it (Tr. 265).

22. Respondents, after binding the prospective customer to a contract for the siding of \$219.50 or less, immediately proceeded to disparage it, claiming that it would require special maintenance and would not prove satisfactory.

a. Witnesses who had been switched were told that the \$199.50 siding would require regular maintenance such as painting or treatment (Tr. 172, 247, 264).

b. Some were told it would rattle because of not being interlocked (Tr. 173, 174, 268) and that anything would dent it (Tr. 269).

c. Four witnesses who contracted for siding advertised in the CX la-7b mailers were told the siding which they purchased would require some maintenance. They were told such things as it would have to be treated twice a year (Creel Tr. 66), would have to be painted every 2 or 3 years (Winsett, Tr. 98), would have to be waxed each year (Hatcher, Tr. 274), would have to be painted (Whaley, Tr. 317). Two of these witnesses were told the siding would not interlock (Winsett, Tr. 97; Whaley, Tr. 317).

23. When a customer who had contracted for the siding offered at \$219.50 or less would not be switched to the Imperial grade siding, respondents failed to perform under its contract to install the aluminum siding. Various reasons were given, such as the siding was not in stock.

a. Five witnesses, who contracted for cheaper grade siding between the years 1966-1971, were unable to get performance by American (Creel, Tr. 57-91; Winsett, Tr. 93-119; Cannon, Tr. 223-39; Hatcher, Tr. 82-93; Whaley, Tr. 24-37). Joseph W. Cannon spent \$25 in telephone

charges calling American about installation of the cheaper siding job at \$259, to no avail (Tr. 230-32). He made at least 15 calls to the company (Tr. 236) and was told such things as the siding was not in stock (Tr. 231). He paid \$25 down on the contract (CX 228) by check to American (CX 50a and b). In spite of his many efforts in prodding American, he never received performance or his deposit back (Tr. 232). Even the Chattanooga Better Business Bureau and the Birmingham Better Business Bureau, whom he contacted, did not get him his money back (Tr. 231-32).

b. Martha Winsett, who had contracted with American for a siding job at \$259 in Sept. of 1971 (Tr. 98), was promised installation within two weeks (Tr. 100). When no one came to install the siding, she wrote the company but received no answer (Tr. 100-02). Believing she was bound to the contract and wanting siding put on her house, she contacted the Birmingham Better Business Bureau and finally, through their efforts, received a letter from American canceling the contract (Tr. 102-03; CX 46).

c. Mattie Creel signed a contract for the cheaper grade siding at \$297, paying \$50 down (Tr. 65; CX 45). Installation, which had been promised in two weeks, was never done (Tr. 69-70). She called American several times and was given various excuses why the job had not been done, such as the company was out of siding (Tr. 69-70). She was finally told her money for downpayment was being mailed (Tr. 69-70). When it was not received, she called again and was told she could get "two lawyers" to collect her downpayment and it would not do any good (Tr. 70). Finally, after four months of trying to get the job done or her money back, she contacted the Better Business Bureau and finally received a refund (Tr. 71).

c. Ben Whaley contracted with American for the cheaper grade siding and paid \$39.50 down in 1966 (Tr. 318). He was promised that the siding would be installed by Dec. 15, 1966. As a result of not hearing from them, he wrote letter but received no reply (Tr. 321). His down payment was not refunded until he went to the Better Business Bureau (Tr. 320-21).

d. James Hatcher, who contracted with American for the cheaper grade siding at \$335 (CX 39c), also failed subsequently to hear from that company (Tr. 276). He had been promised installation within sixty days (Tr. 274). He called at least three times and on one occasion was told it was not in stock (Tr. 276). Subsequently, he answered a similar mailer and contracted with Southern Aluminum Enterprise for a similar job at \$398 (Tr. 277, 279, CX 40). He never again heard from this company (Tr. 280), which actually is a trade name used by respondent American (Foucha, Tr. 612).

Price Savings Representation

24. The representation in respondents' mailers that a customer saves \$431 on the advertised special (CX 1b, 2b, 4b, 7b) clearly implies that the regular price would be \$630.50. Also, the representation that \$189.50 is a "50% discount special" represents a regular price of \$379 for the cheaper grade siding. Respondents do not have a regular price of \$630.50, \$379 or any other regular price for the cheaper grade siding. Respondents admitted there is no regular price for its products and the prices at which they are sold vary from customer to customer, depending on the resistance of the prospective customer (Prehearing Conference, Tr. 27).

25. In its mailer for the Imperial grade siding (CX 8a-b), respondents claim "if you act now save 20% NOW ONLY \$1999.00." This clearly infers a regular selling price for the Imperial grade siding of \$2493.00 for ten squares, which would amount to \$249.30 per square. The amount is much in excess of the usual and the highest price at which the Imperial grade siding is actually sold.

a. According to respondent Foucha, the maximum price which salesmen would be allowed to charge a customer for Imperial siding is \$100 to \$150 per square (Tr. 618).

b. According to respondent Smith, the average price of the Imperial siding is only \$90 per square (Smith, Tr. 739).

c. Cameron, a salesman, testified the list price for Imperial siding installed with ten squares would be \$1595 (Tr. 502). The normal price would be based on \$100 per square or \$1000 for the job advertised on the mailer CX 8a-b (Tr. 502, 503).

d. Thus, the highest price which a salesman would be authorized to charge for the Imperial grade siding on the mailer would be \$1500 and the average price on a job as advertised would be \$900-\$1000.

e. The claimed regular price is more than two times this average price of a job and 60 percent in excess of the highest possible price charged customers.

Limited Time Offer

26. The offer made in the mailers for siding at \$219.50 or less was not for a limited time only as represented. The mailers with the offer proclaiming "All American Siding Sale" were sent out to prospective customers each and every week (Smith, Tr. 707-08). In fact, about 50,000 mailers were sent each week (Smith, Tr. 714).

a. The so-called special offer was a continuing offer even though it had the appearance of bait designed to make sales at higher prices. The

only sense in which the offer was limited was that American might not send a salesman to the area for an isolated lead (Cameron, Tr. 530-31).

b. The mailer, however, clearly gives the impression that the sale advertised was a limited offer and not being continually made (CX la-7b).

c. The prospective customer considered the price at which the siding was advertised to be an exceptional bargain (Winsett, Tr. 94; Parkerson, Tr. 139; Ellis, Tr. 159; Bryant, Tr. 263).

d. Because it had the appearance of a bargain, the prospective customer mailed it back right away (Bryant, Tr. 263). Some customers sent the card back shortly after receiving the mailer to qualify for the free storm windows, which offer they assumed to be limited (Creel, Tr. 63; Parkerson, Tr. 137).

27. Respondents' salesmen tell customers the reduced price on the Imperial grade siding is a limited offer (American, Tr. 458). As an example, one customer was told the offer of Imperial siding at \$995 was limited (Smith, Tr. 251). The Imperial siding is offered continuously at similar prices (See Finding 25).

Free Gift Representation

28. The mailers state "mail this card today and get your free gift" (CX la-7b). Prospective customers do not receive any gift for sending the mailer. In fact, customers do not receive the free gift of storm windows mentioned in its mailers for making a purchase.

a. None of the 20 customer witnesses received any free gift or storm windows.

b. Mrs. Parkerson, who was promised storm windows and doors by the salesman, did not receive them (Tr. 141). The salesman entered "no plastic windows" on her contract (CX 57) to make her believe she would receive aluminum storm windows.

c. The free storm windows are not given to customers who purchase the Imperial grade siding and they are only free with the cheaper material (Campbell, Tr. 767).

d. Salesmen were told to tell customers "that they're plastic, and cost about a dollar each to manufacture" (Cameron, Tr. 433).

e. Mrs. Creel sent the reply card back in immediately in order to receive the free storm windows offered (Tr. 63). She contracted to purchase the advertised special in the mailer and did not receive either it or the storm windows (Tr. 68-69).

