

Complaint

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IN THE MATTER OF

WEST COAST CREDIT CORPORATION t/a FIDELITY
FINANCE CO., INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-2600. Complaint, Nov. 19, 1974 - Decision, Nov. 19, 1974*

Consent order requiring a Seattle, Wash., money lender, among other things to cease instituting collection lawsuits except in the county where the defendant either resides or where the contract was signed, and using promissory notes, etc., containing provisions governing the choice of forum county in the event of suit.

Appearances

For the Commission: *Randall H. Brook.*
For the respondent: *Betty B. Fletcher and Jonathan Blank, Preston, Thorgrimson, Ellis, Holman & Fletcher, Seattle, Wash.*

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent West Coast Credit Corporation, a corporation doing business as Fidelity Finance Co., Inc., has violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues this complaint.

PARAGRAPH 1. Respondent is a Washington corporation with its principal office located at 2005 Fifth Ave., Seattle, Wash.

PAR. 2. Respondent is engaged in the business of extending loans to consumers at various offices located throughout the State of Washington. Allegations below of respondent's present acts and practices include past acts and practices.

PAR. 3. In the course of its business, respondent extends loans to persons resident in Wash. and Idaho, and receives payments from, pursues collection activities against, and institutes legal actions against, debtors resident in Wash., Idaho, Oreg. and other states. Thus respondent maintains a course of business in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course of collecting allegedly defaulted obligations, respondent regularly resorts to use of judicial process in matters not resolved by private settlement. The defendant debtors in such cases are

predominantly low-income or middle-income persons not represented by counsel. Respondent usually obtains default judgments.

PAR. 5. Respondent commences collection lawsuits in the Superior Court of King County, Wash. In many such suits defendants reside, and have incurred the underlying obligations, outside of King County, in places up to 300 or more miles from the court. Courts located in the county where defendants reside or where they signed the contracts sued upon could be used for these suits. Through this use of distant or inconvenient forum, respondent effectively deprives defendants of a reasonable opportunity to appear, answer and defend the lawsuits. Therefore, such use of a distant or inconvenient forum is unfair.

PAR. 6. Almost all the defendants described in Paragraph Five would be entitled under state venue laws to be sued in the county of their residence and to move for a change of venue to that county, except for them having previously waived this right. Respondent elicits and causes such waiver by requiring borrowers to sign a form promissory note containing the following "venue waiver" provision:

The undersigned agree the venue of any action instituted hereon, at election of payee hereof, may be laid in King County.

PAR. 7. The venue waiver provision is not a bargained-for part of the promissory note and is not generally understandable to persons without legal background or experience. By requiring borrowers to waive statutory venue provisions, respondent effectively deprives them of rights otherwise available to move for a change of forum. Therefore, such use of venue waiver provisions is unfair.

PAR. 8. For its superior court lawsuits, respondent uses confusingly worded summonses which give defendants inadequate and misleading directions as to the proper procedure for responding. These summonses have the tendency to mislead defendants into defaulting. Thus respondent effectively deprives defendants of a reasonable opportunity to appear, answer and defend the lawsuits. Therefore, such use of confusingly worded summonses is unfair and deceptive.

PAR. 9. The acts and practices alleged above are all to the prejudice and injury of the public and constitute unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

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 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 West Coast Credit Corporation, a corporation doing business as Fidelity Finance Co., Inc., is a Washington corporation with its principal office located at 2005 Fifth Ave., Seattle, Wash.
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 respondent West Coast Credit Corporation, a corporation doing business as Fidelity Finance Co., Inc., and its successors, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the extension or collection of credit obligations of consumers, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Instituting suits except in the county where the defendant resides at the commencement of the action, or in the county where the defendant signed the contract sued upon. This provision shall not preempt any rule of law which further limits choice of forum or which requires, in actions involving real property or fixtures attached to real property, that suit be instituted in a particular county. The term "county" includes the equivalent political subdivision where no county exists.

2. Using promissory notes or other contracts containing any provision which governs or purports to govern choice of forum county in the event of suit.

It is further ordered, That, where respondent learns subsequent to institution of a suit that Paragraph 1 above has not been complied with, it shall forthwith terminate the suit and vacate any default judgment entered thereunder. In lieu of such termination, respondent may effect a change of forum to a county permitted by Paragraph 1; Provided, That respondent gives defendant notice of such action and opportunity to defend equivalent to that which defendant would receive if a new suit were being instituted. In all cases respondent shall provide defendants with a clear explanation of the action taken and of defendants' rights to appear, answer and defend in the new forum.

It is further ordered, That, where respondent terminates a suit or vacates a judgment pursuant to the preceding paragraph, it shall give notice to such termination or vacation to each "consumer reporting agency," as such term is defined in the Fair Credit Reporting Act (15 U.S.C. Section 603), which respondent has been informed or has reason to know has recorded the suit or judgment in its files. Additionally, respondent shall furnish such notice to any other person or organization upon request of the defendant.

It is further ordered, That when respondent institutes suit in any superior court in Washington State, it shall attach, to any summons served upon defendants, a notice or explanation to defendants which gives clear and adequate directions as to the proper procedure for responding to the summons without defaulting. The notice or explanation shall use clear and unconfusing language, and shall appear clearly, conspicuously, and in type at least as large as typewriter pica type. Should superior court rules or procedures change respondent shall forthwith modify the notice accordingly. The initial form of the notice, and any modifications thereof, shall be subject to approval by the Seattle Regional Office or other authorized representative of the Federal Trade Commission.

It is further ordered, That respondent prepare and maintain a summary of Washington superior court suits instituted, pending, terminated, or acted upon subsequent to judgment. This summary shall contain each defendant's 1) name, 2) address, and 3) county of residence; 4) county where the contract sued upon was signed by the defendant, if the suit was not instituted in the residence county; 5) date served; 6) date filed; 7) docket number; 8) name and location of court in which filed; 9) amount claimed; and 10) whether a default judgment has been entered. Where a suit has been instituted in a county other than where

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defendant resides or signed the contract, the reason for this choice of forum shall be explained. This summary shall cover a continuous two-year period commencing with service upon respondent of this order. A summary of suits instituted in King County Superior Court shall be prepared for the year immediately prior to this service, including only items 1-4 and 10, above. A copy of this summary shall be submitted to the Federal Trade Commission on a semiannual basis except that the summary of activity for the year preceding service of this order upon respondent shall be submitted within sixty days after service.

It is further ordered, That respondent shall forthwith deliver a copy of this order to each of its branches, subsidiaries, and operating divisions.

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

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

IN THE MATTER OF

DILLINGHAM DEVELOPMENT COMPANY

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

Docket C-2601. Complaint, Nov. 19, 1974 - Decision, Nov. 19, 1974

Consent order requiring a Los Angeles, Calif., developer and seller of recreational land in Calif. and Nev., among other things to cease 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: *Jon R. Calhoun.*

For the respondent: *Pro se.*

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act, and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Dillingham Development Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending 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 Dillingham Development Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada with its principal office and place of business located at 10850 Wilshire Boulevard, Suite 800, Los Angeles, Calif.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the development and sale of recreational land in California and Nevada.

PAR. 3. In the regular course and conduct of its business as aforesaid respondent regularly arranges for the extension of consumer credit or offers to extend or arrange for the extension of such 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. 4. Subsequent to July 1, 1969, in extending or arranging for such consumer credit, respondent made certain cost of credit disclosures, including the actual interest rate to be charged, but failed to comply with the disclosure requirements of the Truth in Lending Act as defined and set forth in Regulation Z, in that respondent:

a) Failed to make the required disclosures clearly, conspicuously, and in meaningful sequence, as prescribed by Section 226.6(a) of Regulation Z.

b) Failed, in the course of disclosing the cost of credit expressed as a percentage rate, to use the term "annual percentage rate," as prescribed by Section 226.8(b)(2) of Regulation Z.

c) Failed to set forth the number, amount, due dates or periods of payments scheduled to repay the indebtedness and the sum of such payments using the term, "total of payments," and to identify the amount of any "balloon payment" and state the conditions, if any, under

which a "balloon payment" may be refinanced if not paid when due, as prescribed by Section 226.8(b)(3) of Regulation Z.

d) Failed to describe the method of computing unearned portions of finance charges and amounts deducted from any rebate or credit to the customer of such charges in the event of prepayment of the obligation, as prescribed in Section 226.8(b)(7) of Regulation Z.

e) Failed, in the course of disclosing the sales price to use the term "cash price," as prescribed by Section 226.8(c)(1) of Regulation Z.

f) Failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total down payment, as prescribed by Section 226.8(c)(3) of Regulation Z.

g) Failed to disclose and itemize on a timely basis all other charges included in the amount financed, but which are not part of the finance charge, as prescribed by Section 226.8(c)(4) of Regulation Z.

h) Failed to use the term "unpaid balance" to describe the sum of the unpaid balance of cash price and all other charges which are included in the amount financed but which are not part of the finance charge, as prescribed by Section 226.8(c)(5) of Regulation Z.

i) Failed to use the term "amount financed" to describe the difference between the unpaid balance and any amounts required to be deducted under Paragraph (e) of Section 226.8 of Regulation Z, as prescribed by Section 226.8(c)(7) of Regulation Z.

j) Failed to disclose and itemize the total amount of the finance charge using the term "finance charge," as prescribed by Section 226.8(c)(8)(i) of Regulation Z.

k) Failed to use the term "deferred payment price" to describe the sum of the cash price, all other charges which are included in the amount financed but which are not part of the finance charge, and the finance charge as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

l) Failed, in any consumer credit transaction to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9, and 226.10 of Regulation Z.

PAR. 5. By the aforesaid failure to make disclosures, respondent has failed to comply with the requirements of Regulation Z, the implementing Regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of the Truth in Lending Act, respondent's aforesaid failure to comply with Regulation Z constitutes violations of that Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and of the Truth in Lending Act; 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 aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure 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 Dillingham Development Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 10850 Wilshire Boulevard, Suite 800, Los Angeles, Calif.

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

It is ordered, That respondent, Dillingham Development Company, a corporation, its successors and assigns, and respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension or arrangement for the extension of consumer credit, or any advertisement to aid, promote or assist, directly or indirectly, any

extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. Failing to make the required disclosures clearly, conspicuously, and in meaningful sequence, as prescribed by Section 226.6(a) of Regulation Z.

2. Failing to set forth the finance charge expressed as an annual percentage rate, using the term "annual percentage rate," as prescribed by Section 226.8(b)(2) of Regulation Z.

3. Failing to set forth the number, amount, due dates or periods of payments scheduled to repay the indebtedness and the sum of such payments using the term, "total of payments," and to identify the amount of any "balloon payment" and state the conditions, if any, under which a "balloon payment" may be refinanced if not paid when due, as prescribed by Section 226.8(b)(3) of Regulation Z.

4. Failing to describe the method of computing unearned portions of finance charges and amounts deducted from any rebate or credit to the customer of such charges in the event of prepayment of the obligation, as prescribed in Section 226.8(b)(7) of Regulation Z.

5. Failing to use the term "cash price" to describe the cash price of the property purchased, as prescribed by Section 226.8(c)(1) of Regulation Z.

6. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as prescribed by Section 226.8(c)(3) of Regulation Z.

7. Failing to disclose and itemize on a timely basis all other charges included in the amount financed, but which are not part of the finance charge, as prescribed by Section 226.8(c)(4) of Regulation Z.

8. Failing to use the term "unpaid balance" to describe the sum of the unpaid balance of cash price and all other charges which are included in the amount financed but which are not part of the finance charge, as prescribed by Section 226.8(c)(5) of Regulation Z.

9. Failing to use the term "amount financed" to describe the difference between the unpaid balance and any amounts required to be deducted under Paragraph (e) of Section 226.8 of Regulation Z, as prescribed by Section 226.8(c)(7) of Regulation Z.

10. Failing to disclose and itemize the total amount of the finance charge using the term "finance charge," as prescribed by Section 226.8(c)(8)(i) of Regulation Z.

11. Failing to use the term "deferred payment price" to describe the sum of the cash price, all other charges which are included in the amount financed but which are not part of the finance charge, and the finance charge as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

12. Failing, in any consumer credit transaction to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9, and 226.10 of Regulation Z.

It is further ordered, That the respondent corporation shall establish and maintain at its offices copies of relevant executed documents for all future and post-January 1, 1973, sales of real property for inspection and review upon request by the Federal Trade Commission. Such documents shall include, where appropriate, copies of the initial Purchase Agreement, Note Secured by Deed of Trust, Deed of Trust and Truth in Lending Disclosure Form.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

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

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

IN THE MATTER OF

MONTGOMERY WARD & CO., INCORPORATED

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

Docket C-2602. Complaint, Nov. 19, 1974 - Decision, Nov. 19, 1974

Consent order requiring a Chicago, Ill., general merchandise and catalog retailer, among other things to cease instituting collection lawsuits in distant or inconvenient courts. The suit must be filed in the county where the defendant either lives or the contract was signed.

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Appearances

For the Commission: *Randall H. Brook.*
For the respondent: *Edward S. Berger*, Chicago, Ill.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Montgomery Ward & Co., Incorporated, has violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues this complaint:

PARAGRAPH 1. Montgomery Ward & Co., Incorporated, is an Illinois corporation with its principal office located at 619 West Chicago Ave., Chicago, Ill.

PAR. 2. Respondent is a general merchandise and catalog retailer, engaged in the advertising, offering for sale, sale and distribution of clothing, household goods, appliances, tools, tires and various other articles of merchandise. Allegations below of respondent's present acts or practices include past acts or practices.

PAR. 3. Respondent sells, ships and distributes its products throughout the United States, and is thus in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course of its business, respondent regularly extends credit (hereinafter referred to as retail credit accounts) for the purpose of facilitating consumers' purchases of respondent's products.

PAR. 5. In the course of its collection of retail credit accounts, respondent regularly sues, directly or through collection agencies, allegedly defaulting purchasers in courts located far from where the purchaser defendants reside or from where they signed the contracts sued upon. Courts located closer to where defendants reside or where they signed the contracts sued upon could be used for these suits. In Alaska, for example, many defendants are low income Alaskan natives who reside in small villages five hundred or more miles from the forum court. The distance, cost and inconvenience of defending such suits place a virtually insurmountable burden on defendants. Respondent thus effectively deprives many defendants of a reasonable opportunity to appear, answer and defend. Therefore, such use of distant or inconvenient forum is unfair.

PAR. 6. In its pursuit of post-judgment remedies in Alaska, respondent regularly causes orders for judgment debtor examinations to be issued. Through these orders, respondent requires defendants to appear in person in Anchorage, at their own expense, to testify as to their

assets. Such orders have been issued in midwinter against defendants residing in northern Alaska, five hundred or more miles from Anchorage. Such defendants could readily be examined by local magistrates or through sworn written interrogatories. Thus, the use of such burdensome orders against distantly-residing defendants is unfair.

PAR. 7. The aforesaid acts and practices of respondent are all to the prejudice and injury of the public and constitute unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

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 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 Montgomery Ward & Co., Incorporated, is an Illinois corporation with its principal office located at 619 West Chicago Ave., Chicago, Ill.
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 respondent Montgomery Ward & Co., Incorporated, a corporation, and its successors, assigns, officers, agents, repre-

sentatives and employees, directly or through any corporation, subsidiary, division or other device, including any collection agency, in connection with the collection of retail credit accounts in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Instituting suits except in the county (or, in Alaska, in the court closest to) where defendant resides at the commencement of the action, or in the county (or, in Alaska, in the court closest to) where the defendant signed the contract sued upon. If defendant cannot be located by diligent efforts, suit may be instituted in the county of defendant's last known residence. These provisions shall not preempt any rule of law which further limits choice of forum or which requires, in actions quasi in rem or involving real property or fixtures attached to real property, that suit be instituted in a particular county.

Provided, That, with respect to collection suits filed on behalf of respondent by any third party relating to accounts assigned for collection to that third party prior to the date of service of this order, failure of such third party to bring such suits in the appropriate location as set forth above shall not constitute noncompliance with this paragraph.

For purposes of this order, in open end credit transactions (for example, "revolving charge accounts"), the "contract sued upon" is the document (commonly called "sales slip" or "purchase order") evidencing the actual credit sale.

2. Causing the issuance of any order for judgment debtor examination which requires the personal appearance of a defendant, unless the appearance may be made in the county of the defendant's residence or, in Alaska, in a location no more distant from the defendant's residence than the nearest court.

It is further ordered, That, where respondent learns subsequent to institution of a suit that Paragraph 1 above has not been complied with, it shall forthwith terminate the suit and vacate any default judgment entered thereunder. In lieu of terminating a suit, respondent may effect a change of forum to a county or court permitted by the preceding Paragraph 1, provided that respondent gives defendant notice of such action and opportunity to defend equivalent to that which defendant would receive if a new suit were being instituted. *Further*, Where respondent learns that Paragraph 2 above has not been complied with, it shall forthwith vacate the judgment-debtor examination order. In all cases respondent shall provide defendants with a clear explanation of the action taken and of defendants' rights to appear, answer and defend in the new forum. Compliance with this paragraph, where suit has been

instituted in the county appearing from respondent's business records to be where defendant resides, shall be considered compliance with the preceding Paragraph 1.

It is further ordered, That, where respondent terminates a suit or vacates a judgment pursuant to the preceding Paragraph, it shall give notice of such termination or vacation to each "consumer reporting agency," as such term is defined in the Fair Credit Reporting Act (15 U.S.C. Section 603), which respondent has been informed or has reason to know has recorded the suit or judgment in its files. Additionally, respondent shall furnish such notice to any other person or organization upon request of the defendant.

It is further ordered, That respondent prepare and maintain a summary of suits instituted, pending, terminated, or acted upon subsequent to judgment. This summary shall contain each defendant's (1) name, (2) address, and (3) county of residence; (4) county where the contract sued upon was signed by the defendant, if the suit was not instituted in the residence county; (5) county where served; (6) date served; (7) date filed; (8) docket number; (9) name and (10) location of court in which filed; (11) name of plaintiff (if a collection agency suing in its own name); (12) amount claimed; and (13) disposition (including garnishment or execution, if any). Where a suit has been instituted in a county other than where defendant resides or signed the contract sued upon, the reason for this choice of forum shall be explained. This summary shall cover a continuous two-year period commencing with service upon respondent of this order. A summary of suits instituted by respondent's principal collection counsel for its Central Credit Units in Oakland, Los Angeles, Kansas City, Chicago, Albany, and Baltimore shall also be prepared for a year period immediately prior to such service, with information limited to items 1, 3, 4 and 10 above, and a notation of whether a default judgment has been entered. A copy of this summary shall be submitted to the Federal Trade Commission on a semiannual basis except that the summary of activity for the year preceding service of this order upon respondent shall be submitted within sixty days after service.

It is further ordered, That respondent shall forthwith deliver a copy of this order to each of its subsidiaries and operating divisions, to each collection agency currently collecting any of respondent's retail credit accounts, and to any other collection agency prior to referral to it of any of respondent's retail credit accounts. Respondent shall obtain and preserve signed and dated statements from each collection agency, acknowledging receipt of the order and willingness to comply with it.

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

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

IN THE MATTER OF

TRU-VIEW PLASTICS, INC., ET AL.

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

Docket C-2603. Complaint, Nov. 19, 1974 -- Decision, Nov. 19, 1974

Consent order requiring a Brooklyn, N. Y., retailer and distributor of plastic slip covers, among other things to cease using misleading sales plans; misrepresenting guarantees; disparaging advertised merchandise and using bait and switch tactics.

Appearances

For the Commission: *Carol H. Katz.*

For the Respondents: *Arthur Teichberg, New York, N. Y.*

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 Tru-View Plastics, Inc., a corporation, and Martin Simon and Dennis Simon, individually and as officers of said corporation, hereinafter 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 Tru-View Plastics, 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 5606 Church Avenue, Brooklyn, N. Y.

Respondents Martin Simon and Dennis Simon are individuals and are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of plastic slip covers to members of the purchasing public at retail.

PAR. 3. Respondents, in the course and conduct of their business, as aforesaid, have caused and now cause the dissemination of certain advertisements concerning their products and services in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements inserted in newspapers of interstate circulation for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of their merchandise by residents of New Jersey and other surrounding states.

PAR. 4. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of plastic slip covers to members of the purchasing public at retail in the metropolitan New York-New Jersey area.

PAR. 5. In the course and conduct of their business, as aforesaid, respondents' sales representatives call upon prospective customers at their places of residence in the States of New York and New Jersey and thereat have engaged in the offering for sale and sale of respondents' merchandise.

PAR. 6. In the further course and conduct of their business, respondents have caused their merchandise when sold to be delivered to residents in the States of New York and New Jersey.

PAR. 7. By virtue of the aforesaid acts and practices, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 8. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their merchandise, respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation and by oral statements and representations of their sales representatives and agents with respect to said merchandise and services.

Typical and illustrative of said statements and representations, but not all inclusive thereof, is the following:

SPECIAL OFFER!-3 PIECE SECTIONAL OR SOFA & 2 CHAIRS-29.95
10 YEAR WEAR GUARANTEE
10 YEAR GUARANTEE-SEAMS AND WORKMANSHIP WARRANTEED
10 YR WRITTEN GUARANTEE
10 YEAR WRITTEN GUARANTEE ON WORKMANSHIP

PAR. 9. By and through the use of said above quoted statements and representations, and others of similar import and meaning but not expressly set out herein, respondents have represented and are now representing directly or by implication that:

1. Respondents are making a bona fide offer to sell the advertised merchandise at the price and on the terms and conditions stated in the advertisements.

2. Respondents' merchandise is unconditionally guaranteed for various periods of time, such as ten (10) years.

PAR. 10. In truth and in fact:

1. Respondents' offers are not bona fide offers to sell said merchandise at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are made for the purpose of obtaining leads to persons interested in the purchase of plastic slip covers. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents or their salesmen who make little or no effort to sell to the prospective customer the advertised merchandise. Instead, they exhibit what they represent to be the advertised merchandise which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced merchandise of superior quality is thereupon exhibited, which by comparison disparages and demeans the advertised merchandise. By these and other tactics, purchase of the advertised merchandise is discouraged, and respondents, through their salesmen, attempt to sell and frequently do sell the higher priced merchandise.

2. Respondents' plastic slip covers are not unconditionally guaranteed for the period of time represented in respondents advertisements or as orally represented by the respondents' salesmen. To the contrary, such written guarantees, as they have provided to their customers, are subject to conditions and limitations not disclosed in respondents' advertisements or in respondents' representatives' oral representations.

Therefore, the statements and representations as set forth in Paragraphs Eight and Nine, hereof, were and are false, misleading and deceptive.

PAR. 11. In the course and conduct of their business as aforesaid, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, as "commerce" is defined in the

Federal Trade Commission Act, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as the aforesaid merchandise sold by respondents.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts 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 such advertisements and representations were and are true, and into the purchase of substantial quantities of respondents' said merchandise by reason of said erroneous and mistaken beliefs.

PAR. 13. 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 and unfair and deceptive acts and 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 New York 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, an 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 procedure 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 Tru-View Plastics, 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 5606 Church Avenue, Brooklyn, N. Y.

Respondents Martin Simon and Dennis Simon are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above stated address.

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 Tru-View Plastics, Inc., a corporation, its successors and assigns, and its officers, and Martin Simon and Dennis Simon, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale and distribution of plastic slip covers or other merchandise to the public at retail, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of plastic slip covers or other merchandise or services.

2. Making representations, directly or indirectly, orally, visually, or in writing, purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.

3. Disparaging in any manner, or discouraging the purchase of any merchandise or services which are advertised or offered for sale.

4. Representing, directly or indirectly, orally or in writing, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

5. Failing to maintain and produce for inspection and copying for a period of three years adequate records to document for the entire period during which each advertisement was run and for a period of six weeks after the termination of its publication in press or broadcast media:

- a. The cost of publishing each advertisement including the preparation and dissemination thereof;
- b. The volume of sales made of the advertised product or service at the advertised price; and
- c. A computation of the net profit from the sales of each advertised product or service at the advertised price.

6. Representing, orally or in writing, directly or by implication, that any product or service is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; and respondents deliver to each purchaser, prior to the signing of the sales contract a written guarantee clearly setting forth all of the terms, conditions and limitations of the guarantee fully equal to the representations, orally or in writing, directly or by implication, made to each such purchaser, and unless respondents promptly and fully perform all of their obligations and requirements under the terms of each such guarantee.

It is further ordered, That respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of plastic slip covers and other merchandise, or utilized in the advertising, promotion or sale of plastic slip covers and other merchandise.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of plastic slip covers and other merchandise, with a copy of the Commission's News Release setting forth the terms of this order.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents who are engaged in the offering for sale and sale of respondents' products, or in any aspect of preparation, creation, or placing of advertising and that respondents secure a signed statement acknowledging receipt of said order from each such person and that respondents distribute a copy of this order to each of their operating divisions.

It is further ordered, That respondents maintain full and complete records of all complaints and correspondence received from customers,

or any memoranda in connection therewith, for a period of two years after receipt.

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

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business addresses and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That no provision of the order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

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

1349 Certification of Record and Recommendations on Order

IN THE MATTER OF

ITT CONTINENTAL BAKING COMPANY

ORDER AND OPINION IN REGARD TO SHOW CAUSE PROCEEDING TO
EXTEND FOR A FIVE-YEAR PERIOD THE CEASE AND DESIST ORDER
ISSUED UNDER THE FEDERAL TRADE COMMISSION ACT AND SEC. 7
OF THE CLAYTON ACT

Docket 7880.

Order to Show Cause, Dec. 12, 1973-Order & Opinion, Nov. 26, 1974

Order dismissing an Order to Show Cause why the proceeding should not be reopened and the cease-and-desist order issued against Continental Baking Company May 11, 1962, 60 F.T.C. 1183, be extended for an additional five years to prohibit respondent from acquiring any firm engaged in the production and sale of bread and bread-type rolls without prior permission of the Commission. The order to show cause was found not to be in the public interest.

Appearances

For the Commission: *Rafe H. Cloe, James E. Corkey, Stephen Miller, Edward W. Abramowitz and Robert W. Rosen.*

For the respondent: *Roy M. Anderson, Rye, N. Y. for ITT Continental Baking Company. John H. Schafer and David J. Cynamon, Covington & Burling, Wash., D.C.*

CERTIFICATION OF RECORD AND RECOMMENDATIONS ON ORDER TO
SHOW CAUSE BY ALVIN L. BERMAN, ADMINISTRATIVE LAW JUDGE

DECEMBER 12, 1973

PRELIMINARY STATEMENT

On May 11, 1962, the Commission issued a consent order against Continental Baking Company ("Continental") requiring, *inter alia*, that for a period of ten years, it not acquire any interest in, or the assets of, any concern engaged in the production and sale of bread and bread-type rolls. ¹ On Sept. 13, 1968, Continental was merged into a successor corporation, ITT Continental Baking Company ("ITT Continental"), a newly incorporated, wholly-owned subsidiary of International Tele-

¹ The pertinent portion of the order (Section III) reads as follows: *It is further ordered*, That for a period of ten (10) years from the date of issuance of this order by the Federal Trade Commission respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or non-corporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order, permits such an acquisition by respondent, said modification to be within the sole and final discretion of the Federal Trade Commission.

phone and Telegraph Corporation ("ITT"). On Apr. 27, 1972, the Commission issued its Show Cause Order requiring respondent ITT Continental to show cause why the public interest or changed conditions of fact, or both, did not require that the Commission reopen the proceeding and modify the moratorium-on-acquisitions provision recounted above by extending the proscription on such acquisitions until Apr. 13, 1977.

The Commission, on Aug. 1, 1972, denied a motion of respondent to set aside the Show Cause Order and directed that the matter be assigned to a hearing examiner "for the purpose of receiving evidence in support of and in opposition to the question of whether the public interest requires that the proceeding be reopened and the Commission's order of May 11, 1962, be altered, modified, or set aside in accordance with" its Show Cause Order. Accordingly, the matter was assigned to Hearing Examiner Eldon P. Schrup on Aug. 11, 1972. Subsequently, on Aug. 29, 1972, prior to any action having been taken, the matter was reassigned to Administrative Law Judge David H. Allard. Various preliminary matters were resolved by Judge Allard, including discovery and clarification of the issues, and he presided over a number of prehearing conferences extending from Sept. 28, 1972 through Mar. 8, 1973. On Apr. 10, 1973, the matter was reassigned to the undersigned as Judge Allard was leaving the Commission's staff of administrative law judges.

Upon assignment of this case, the undersigned familiarized himself with the entire record up to that point. Additional prehearing conferences were held on Apr. 23 and June 7, 1973. The latter conference was held primarily to dispose of requests for admissions made by respondent of Commission counsel. Hearings commenced on June 12, 1973, and the last evidence was received on Oct. 25, 1973, upon which date the record was closed.

The matter thus is before the undersigned for the purpose of making recommended findings, conclusions and disposition. In making such recommendations, the entire record has been carefully considered, including proposed findings of fact and conclusions and briefs filed by counsel. Those findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

The recommendations that follow, including recommended findings,² conclusions and disposition, are made after hearing and observing the witnesses and reviewing the entire record,³ including the proposed findings, conclusions and briefs submitted by the parties as well as their responses.

² Recommended findings of fact are made in the numbered paragraphs that follow.

³ References to the record are made in parentheses. Certain abbreviations are used as follows: Tr. - Transcript page; CX - Commission exhibit; and RX - Respondent exhibit.

I. Authority of Commission to Modify Consent Order

Respondent, from the outset, has challenged the Commission's authority to modify a consent order without the permission of the other party and has argued further that, since the ten-year moratorium on acquisitions expired on May 11, 1972, there is no longer an order in effect which can be extended. These issues, however, were considered by the Commission and ruled upon adversely to respondent in the Commission's Aug. 1, 1972, Order Directing Hearings For Receipt of Evidence. The undersigned, therefore, does not address himself further to these contentions of respondent.

II. Recommended Findings and Conclusions Relative to Liability of ITT Continental to Consent Order

1. On June 12, 1968, after protracted arms-length negotiations, a merger plan or agreement was entered into between Continental, a publicly held Delaware corporation, ITT, a publicly held Delaware corporation, and ITT Continental, a Delaware corporation. ITT Continental was and is a wholly-owned subsidiary of ITT (CX 26E).

2. Pursuant to the agreement, on Sept. 13, 1968, Continental ceased to exist as a corporation. Since that date, the business previously carried on by Continental, including the production and distribution of bread and bread-type rolls, has been carried on by ITT Continental (CX 26E).

3. Prior to the merger, ITT Continental had no assets or employees. Continental's officers continued to hold their respective positions with ITT Continental immediately after the merger, although there have been changes in management personnel since that time. Immediately after the merger, the assets of ITT Continental were the same as the assets of Continental prior to the merger (CX 26F).

4. After the merger, ITT Continental continued to operate the same plants and facilities and with the same organization previously used by Continental. ITT Continental continued to sell and distribute the same products, in the same manner and to the same customers as Continental had previously (CX 26F).

5. Since the merger, and as a result thereof, 100 percent of ITT Continental's common stock has been owned by ITT (CX 26F).

6. The merger was not entered into or consummated for the purpose of evading the consent order in any way. However, at the time of the merger, ITT knew of the existence of the outstanding consent order against Continental and in Continental's "Notice of Special Meeting of Stockholders", dated Aug. 6, 1968, it was stated that "[t]he business conducted by Continental prior to consummation of the transaction [the

merger] will be continued thereafter by New Continental, a new wholly-owned subsidiary of ITT which will be named ITT Continental Baking Company" and that "New Continental will assume all the liabilities of Continental." (CX 26G). So far as is known, ITT Continental at no time identified Continental's liability under the consent order as one of the liabilities being assumed (Tr. 461-63).

*Discussion of, and Recommended Conclusion as to, ITT
Continental's Liability under the Consent Order*

From the foregoing, it is clear that, except for the change of name and ownership of stock, the business entity after the merger was in all respects identical to that which existed prior to the merger. The assets were the same; the management, employees and organization were the same; the plants and facilities operated were the same; and the same products were produced and distributed in precisely the same manner to the same customers as before.

The consent order does not in so many words bind successors and assigns to its provisions. However, it has long been established that successors and assigns may be subject to an administrative order, when appropriate, irrespective of whether the order specifically uses the words "successors and assigns." *Regal Knitwear v. NLRB*, 324 U.S. 9 (1945). Respondent, relying upon *United States v. Armour & Co.*, 402 U.S. 673 (1971), asserts that the absence of words purporting to hold "successors and assigns" in a *consent order* conclusively precludes liability of a successor corporation to such an order.

Armour is inapposite. It involved a consent decree which prohibited Armour from dealing directly or indirectly in certain specified commodities. The action was one to enjoin another corporation, which did deal in the specified commodities, from acquiring the stock of Armour. The case, therefore, simply construed a consent decree as to whether it went so far as to prohibit a particular type of company, unnamed and not a party, from acquiring the stock of a corporation that was party to the consent decree. Unlike the instant case, *Armour* did not pertain to the liability of a successor corporation. Further, as pointed out by the Court, 402 U.S. at 674-75, this was not an action seeking modification of the decree, as is the instant case. In short, *Armour* involved an interpretation of what the consent decree prohibited--not whether its proscriptions would apply to a successor corporation.

The Court, in *Armour*, further considered whether a particular Paragraph Five of the consent decree, which ran against named stockholders, would apply to future owners of the stock of the corporation. The

Court relied upon the provisions of that particular paragraph as reinforcing its overall interpretation of the intent of the consent decree. In this regard, it pointed out that Paragraph Five ran only against named stockholders and did not specify their successors and assigns. In view of the fact that other provisions of the consent decree expressly ran against the corporations and their "successors and assigns," the Court held that the absence of the phrase "successors and assigns" from Paragraph Five was intentional. It is clear, therefore, that *Armour* has no application here.

In *Regal Knitwear*, 324 U.S. at 14-15, the Court recognized that a successor or assign could be held bound by a Labor Board order depending upon an appraisal of its relations and behavior with the prior corporation and quoted with approval from *Walling v. Reuter*, 321 U.S. 671, 674 (1944), as follows:

We have also said of an injunction to restrain violation of the Fair Labor Standards Act, which is somewhat analogous to Labor Board orders, that "Not only is such an injunction enforceable by contempt proceedings against the corporation, its agents and officers and those individuals associated with it in the conduct of its business, but it may also, in appropriate circumstances, be enforced against those to whom the business may have been transferred, *whether as a means of evading the judgment or for other reasons.*" (Emphasis supplied)

And in *Walling v. Reuter*, the Court continued (at pp. 674-75), "The vitality of the judgment in such a case survives the dissolution of the corporate defendant. * * * *And these principles may be applied in fuller measure in futherance of the public interest, which here the petitioner represents, than if only private interests were involved.*" (Emphasis supplied)

In applying the foregoing principles, the Court in *NLRB v. Tempest Shirt Mfg. Co.*, 285 F.2d 1, 4 (5th Cir. 1960), stated:

* * * [T]he crucial question for determining successorship is one of continuity: whether the industry remains essentially the same after the transfer of ownership. * * * It is quite obvious in this case that there has not been any substantial business change: the same products are made; the same machinery and equipment are used; the same supervisors and employees are retained; by purchase, Pascal has the same accounts receivable; and ownership and control of policy remain in the same individuals. * * *

* * * * * * * * *

Here, as in [*NLRB v. Auto Ventshade, Inc.*, 276 F.2d 303 (5th Cir. 1960)] it is immaterial that the transfer of Tempest's manufacturing business to the Pascal Corporation was a bona fide business transaction carried out at "arm's length."⁴

⁴ See also *P. F. Collier & Son, Corp. v. FTC*, 427 F.2d 261, 272 (6th Cir. 1970), cert. denied, 400 U.S. 926 (1970); *United States v. Van Rualte Co.*, 328 F. Supp. 827 (S.D.N.Y. 1971).

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All of the elements enumerated in the cases cited above are present here except that the stock of ITT Continental is owned by ITT and ITT previously had owned no stock in Continental. This, however, is only one of the elements to be considered in holding a successor corporation and is not deemed essential when all of the other elements are met. A continuity of ownership could be relied upon, *inter alia*, to show subterfuge or some other basis for piercing the corporate veil. *Walling v. Reuter*, 321 U.S. at 674, and *NLRB v. Tempest Shirt Mfg. Co.*, 285 F.2d at 4, are authority for holding a successor corporation even though the transfer of the business was at arms length and for legitimate purposes. *Walling* speaks of enforcing an injunction against "those to whom the business may have been transferred" (emphasis supplied), and *Tempest* contemplated the ownership of the successor corporation by other individuals when it was stated that "[t]he crucial question for determining successorship is one of continuity: whether the industry remains the same after the transfer of ownership."

In *Lucy v. Adams*, 224 F. Supp. 79 (N.D. Ala. 1963), in holding that an injunction against an individual who was Dean of Admissions at the University of Alabama ran against his successor to that office, the Court stated, at p. 81:

It is the general rule "that one who succeeds to the interest of a party to whom the injunction is directed and who has notice of the injunction, is bound by the judgment and punishable for contempt for disobedience." 43 C.J.S. Injunctions §263d, page 1013.

The public interest requires that this general rule be equally applicable here where, despite the change in stock ownership, there was substantial identity of the parties, with the entire business of Continental continued using the same assets and personnel, in the same manner and with the same customers.

Further, ITT Continental's contemplation of continuing the business that was conducted by Continental prior to the merger, and assumption by ITT Continental of all of the liabilities of Continental, must be interpreted to include the outstanding order to which Continental was subject. It is of no moment that liability to the provisions of the consent decree may not have been specifically assumed. An obligation imposed by an order issued by a regulatory agency in the public interest should not be deemed less binding a liability under the circumstances than, for example, an obligation to meet a private debt or to comply with a contractual obligation.⁵

⁵ "In case of merger of one corporation into another, where one of the corporations ceases to exist and the other corporation continues in existence, the latter corporation is liable for the debts, contracts, and torts of the former * * *". 15 *Fletcher Cyc. Corps.* (1961 Ed.) §7121.

Another basis for holding ITT Continental subject to the Commission's consent order is the principle that parties, though not named in an order or injunction, may not violate *in rem* injunctions. See *United States v. Hall*, 472 F.2d 261, 265-66 (5th Cir. 1972), *rehearing denied*, Jan. 30, 1973, and cases cited therein. As explained in *Hall*, at p. 266, "A court entering a decree binding on a particular piece of property is necessarily faced with the danger that its judgment may be disrupted in the future by members of an undefinable class--those who may come into contact with the property. The *in rem* injunction protects the court's judgment."

Hall applied the *in rem* principle to an injunction of disruptive action against a school desegregation plan, even though the party held in contempt was not a party to the original litigation and was acting independently of the parties thereto.

The Commission's consent order against Continental is in the nature of an *in rem* ruling. Application of the *in rem* principle is even more appropriate here than in *United States v. Hall*. An order prohibiting a particular business entity from acquiring other businesses or portions of businesses in a particular industry is a judgment which goes directly to the business enjoined and the industry involved. It is a judgment that the business enjoined and the industry involved are such that it would be contrary to the public interest for the business entity enjoined to grow in that industry by acquisition. It is an *in rem* judgment that does not depend upon the particular ownership of the business entity but rather upon an analysis of the business entity in relationship to the relevant market.

The order is no less *in rem* in character because it was entered by consent. It would be an incongruous act of futility if the Commission's order proscribing the growth of a particular business entity by merger should become a nullity simply by virtue of the fact that the business entity has been acquired by an even larger entity, one which has a policy of growth, including growth by acquisition.⁶ But that is essentially ITT Continental's position here, and so must be rejected.

This is unlike the situation where a party is ordered to stop a particular type of false advertising or unlawful practice and, subsequent to the order, is acquired by another party or corporation and there is no reason to believe that the new company would engage in the acts or practices proscribed by the order.⁷ Here, there was an *in rem* judgment acting in futuro to the effect that the merger of a particular business entity with any other in the industry would be contrary to the public interest. ITT

⁶ ITT has a policy to engage in growth (see, *infra*, pp. 37, 49 [pp. 1377, 1385 herein]).

⁷ See, e.g., *A&M Karagheusian, Inc.*, 68 F.T.C. 452 (1965).

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Continental may not deal with the *rem* covered by the order in a manner violative of the order. ITT Continental must be deemed to have acquired the business, the *rem*, subject to the Commission's order.⁸

Upon consideration of the foregoing, it is recommended that ITT Continental be held to be a successor corporation to Continental and subject to the provisions of the Commission's consent order dated May 11, 1962.

III. The Consent Order

The initial decision of the hearing examiner, which included the consent order and which was adopted by the Commission on May 11, 1962, recited and adopted various provisions of the parties' Agreement Containing Consent Order to Divest and to Cease and Desist, including those to the following effect: (1) the agreement disposes of the entire proceeding and the consent order is in the public interest for the reasons set forth in Appendix A of the agreement which is a part thereof; (2) the record on which the initial decision and the Commission's decision shall be based consists solely of the complaint and the agreement; (3) the agreement is for settlement purposes only and does not constitute an admission by Continental that it has violated the law as alleged in the complaint; and (4) the complaint may be used in construing the terms of the order (Initial Decision, pars. 4, 6, 8 and 10 (60 F.T.C. 1191-92).

Consideration of the terms of the complaint and the agreement of the parties (including Appendix A thereto), therefore, is essential to understand the theories of alleged violation under which the consent order was issued and the agreed-to positions of the parties in order to appraise whether the facts developed in the hearings held under the Show Cause Order have demonstrated that the public interest or changed conditions of fact require a reopening of the proceeding and an extension of the moratorium provision on acquisition. In other words, any modification of the moratorium provision consented to should be based upon a consideration of public interest or a showing of facts consistent with the theory under which the consent order was agreed to and issued. And that theory is to be found in the complaint and the agreement of the parties, including Appendix A thereto.

The following facts are derived from the agreement:

* * * * *

⁸ If ITT Continental had acquired Continental during pendency of the action, the acquisition would have been subject to whatever final order the Commission might have issued. See, e.g., *United States v. Bates Valve Bag Corp.*, 39 F.2d 162 (3rd Cir. 1930); *G&C Merriam Co. v. Saalfeld*, 190 Fed. 927, 932 (6th Cir. 1911); *United States v. American Optical Co.*, 97 F. Supp. 71 (N.D.Ill. 1951). Under the circumstances here, there is no less reason to hold ITT Continental liable to the provisions of the order, which were operative against Continental at the time of its acquisition, than under a *lis pendens* situation.

7. Continental was a corporation doing business under and by virtue of the laws of the State of Delaware, with its principal business located in Rye, N. Y.

8. As described at the outset of Appendix A to the agreement, the Commission's complaint against Continental charged a violation of Section 7 of the amended Clayton Act in connection with its 1958 acquisition of several named baking companies, including one Omar, Inc., and with violating Section 5 of the Federal Trade Commission Act by reason of its continuous practice of acquiring various baking concerns throughout the United States.

9. At the time of the challenged acquisitions, Continental produced, sold and distributed bakery products at wholesale primarily under the trade name "Wonder" for bread and "Hostess" for cake. Continental's products were baked in some 85 plants located in some 64 cities in 29 states and the District of Columbia, and were distributed throughout 44 states. Continental's sales for 1958 were \$328 million and had increased to over \$410 million in 1960.

10. For purposes of the agreement, the definition of bread and bread-type rolls used by the Bureau of the Census, as set forth in Census of Manufacturers category SIC 20511, applied. This is a separate and distinct category from all other bakery products in recognition of the fact that bread and bread-type rolls are a separate and distinct line of commerce since they contain different ingredients and require different type machinery and personnel for makeup and bakery than do cake and sweet goods.

11. Because of the nature of the goods produced, the operations of a baking plant are regional in nature. Distribution of bread and related products is limited by the distance they can be economically shipped from the plant and still retain their most important characteristic, freshness. The geographical markets in which bakery products may be examined include a metropolitan area and larger geographical markets such as the total area of distribution in which an acquired company sold bakery products.

12. Appendix A to the agreement recited that the second count of the complaint charged Continental with violating Section 5 of the Federal Trade Commission Act by its alleged "continuous practice of acquiring various bakeries throughout the United States;" that the theory of the count was that, through these acquisitions, respondent gained power to engage in certain unfair competitive acts and practices, *i.e.*, the making of payments for shelf space and entry into retail outlets, and the granting of discriminatory rebates, discounts, and allowances. It was stated that the legality of these pricing practices in themselves was not

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intended to be challenged but that the practices were asserted as manifestations of the economic power obtained through the continuous practice of acquisition.

13. Appendix A then summarized the provisions of the consent order, its purpose, and why it was in the public interest, in the following language:

The proposed Order, which is part of the Agreement to which this Appendix is attached, calls for complete divestiture of all the assets of the former Omar, Inc., which was probably the eighth largest baker in the country at the time of acquisition. *One of the principal problems in the baking industry is the tendency towards concentration and the continuous growth of major baking companies through acquisition. Such acquisitional growth and tendency towards concentration places in the hands of a few large companies the means to set the pattern of competition, not only among themselves, but also for all local baking companies serving any given area.* The Omar, Inc. acquisition constituted the principal allegation of the complaint. *Coupled with the divestiture is the order that the respondent shall cease and desist from acquiring for ten years any concern engaged in the production and sale of bread and bread-type rolls.* If this order is adopted by the Commission, the respondent's alleged continuous practice of acquiring companies baking and selling bread and bread-type rolls will be brought to a halt and the major acquisition forming the gravamen of the complaint will be undone. Competition may be restored essentially as it existed before the acquisition of Omar, Inc., and the public interest will be well served. (Emphasis supplied)

IV. Public Interest and Changed Conditions of Fact Bearing Upon Reopening of Proceeding and Modification of Moratorium Provision of Consent Order

The Commission's Show Cause Order, *inter alia*, recited that industry wide concentration in the production and sale of bread and bread-type rolls has increased since issuance of the cease and desist order against Continental on May 11, 1962; that respondent has contributed to this increased concentration by reason of various asset acquisitions including some that were made without Commission permission, some of which were found in *United States v. ITT Continental Baking Company*, CA No. C-1220, D.C.Col. Aug. 2, 1971, to be in violation of the consent order; that respondent is and has been the leading and dominant supplier of bread and bread-type rolls in the United States; that respondent was the first baking company placed under a moratorium provision; that moratorium provisions against American Bakeries Company and Campbell-Taggart Baking Company, leading companies in the production and sale of bread and bread-type rolls, terminate on Sept. 19, 1976, and Apr. 13, 1977, respectively.

The Commission stated its opinion that the public interest and changed conditions of fact required it to reopen its consent order in part so as to extend the terms of Section III until Apr. 13, 1977, in order to