

Complaint

IN THE MATTER OF

**MCWANE, INC.
AND
STAR PIPE PRODUCTS, LTD.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. 9351; File No. 101 0080
Complaint, January 4, 2012 – Decision, May 8, 2012*

This consent order addresses Star Pipe Products, Ltd.'s business methods, which made it easier to coordinate price levels through an entity known as the Ductile Iron Fittings Research Association. The complaint alleges that Star Pipe Products violated Section 5 of the Federal Trade Commission Act by colluding with McWane to increase DIPF prices. The consent order prohibits the respondent from entering into, adhering to, participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Competitors to raise, fix, maintain, or stabilize prices or price levels, or engage in any other pricing action; or to allocate or divide markets, customers, contracts, transactions, business opportunities, lines of commerce, or territories.

Participants

For the *Commission*: J. Alex Ansaldo, Jeanine K. Balbach, Michael J. Bloom, Thomas H. Brock, Monica Castillo, Edward D Hassi, Linda M. Holleran, and Andrew K. Mann.

For the *Respondents*: Gregory S.C. Huffman, William Katz, Brian Stoltz and Nicole Williams, Thompson & Knight LLP; William Lavery, Joseph Ostoyich, and Andreas Stagard, Baker Botts LLP; and Thomas W. Thagard III and J. Alan Truitt, Maynard Cooper and Gale P.C.

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 ("Commission"), having reason to believe that Respondents McWane, Inc. ("McWane") and Star Pipe Products, Ltd. ("Star") have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the

Complaint

Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges as follows:

NATURE OF THE CASE

1. This action concerns the collusive conduct of Respondents, and the exclusionary conduct of McWane, relating to the marketing and sale of ductile iron pipe fittings (“DIPF”).

2. Beginning in January 2008, McWane and Star, along with their competitor Sigma Corporation (“Sigma”), conspired to raise and stabilize the prices at which DIPF are sold in the United States. McWane, Sigma and Star (collectively, the “Sellers”) exchanged sales data in order to facilitate this price coordination.

3. The passage of the American Recovery and Reinvestment Act of 2009 (“ARRA”) in February 2009 significantly altered the competitive dynamics of the DIPF industry, and upset the terms of coordination among the Sellers. In the ARRA, the United States Congress allocated more than 6 billion dollars to water infrastructure projects, conditioned on the use of domestically produced materials, including DIPF, in those projects (the “Buy American” requirement).

4. At the time the ARRA was passed, McWane was the sole supplier of a full line of domestically produced DIPF in the most commonly used size ranges. Federal stimulus of the domestic DIPF market potentially left McWane in a position to reap a monopoly profit.

5. In response to the passage of the ARRA and its Buy American provision, Sigma, Star and others attempted to enter the domestic DIPF market in competition with McWane.

6. McWane maintained its monopoly in the domestic DIPF market through exclusionary conduct, including (i) entering into a distribution agreement with Sigma that eliminated Sigma as an actual potential entrant into the domestic DIPF market, and (ii) excluding actual and potential competitors, including Star, through the adoption and enforcement of exclusive dealing policies.

Complaint

7. Respondents' conduct has restrained competition and led to higher prices for both imported and domestically produced DIPF.

THE RESPONDENTS

8. Respondent McWane is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 2900 Highway 280, Suite 300, Birmingham, Alabama 35223. McWane manufactures, imports, markets and sells products for the waterworks industry, including DIPF.

9. At all times relevant herein, McWane has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

10. McWane's acts and practices, including the acts and practices alleged herein, are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

11. Respondent Star is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal place of business located at 4018 Westhollow Parkway, Houston, Texas 77082. Star imports, markets and sells products for the waterworks industry, including DIPF.

12. At all times relevant herein, Star has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

13. Star's acts and practices, including the acts and practices alleged herein, are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

THE DIPF INDUSTRY

14. DIPF are a component of pipeline systems transporting drinking and waste water under pressurized conditions in

Complaint

municipal distribution systems and treatment plants. DIPF are used to join pipes, valves and hydrants in straight lines, and to change, divide or direct the flow of water. The end users of DIPF are typically municipal and regional water authorities.

15. DIPF are produced in a broad product line of more than 2000 unique configurations of size, shape and coating. The industry differentiates between “A Items,” or commonly used fittings used routinely and on almost every job, and “oddball” fittings that are either of unusual configuration or size, or both. Although approximately 80 percent of market demand may be serviced with a product line of 100 fittings, DIPF suppliers must be able to supply more than 1900 additional fittings to serve the remaining 20 percent of demand.

16. Independent wholesale distributors, known as “waterworks distributors,” are the primary channel of distribution of DIPF to end users. Waterworks distributors specialize in distributing products for water infrastructure projects, and generally handle the full spectrum of waterworks products, including pipes, DIPF, valves and hydrants. Waterworks distributors employ sales personnel dedicated to servicing the needs of end users, and are generally able to satisfy the needs of end users for rapid service by stocking inventory in relatively close proximity to project sites.

17. Direct sales of DIPF to end users, or to the utility contractors that often serve as the agent of the end user in purchasing and installing DIPF, are uncommon. End users and DIPF suppliers alike prefer to work through waterworks distributors with locations near project sites. As a result, DIPF suppliers need to distribute DIPF through local waterworks distributors in each region of the country in order to compete effectively in that region.

18. Both imported and domestically produced DIPF are commercially available. All of the Sellers sell imported DIPF. Before Star’s entry into domestic production in 2009, McWane was the sole domestic producer of a full line of small and medium-sized DIPF.

Complaint

19. The end user of DIPF specifies whether, on a particular project, it will accept both imported and domestically produced DIPF, or only domestically produced DIPF. This specification is often mandated by municipal code, or by state or federal law.

20. Domestically produced DIPF sold for use in projects specified as domestic only are sold at higher prices than imported or domestically produced DIPF sold for use in projects not specified as domestic only.

THE RELEVANT MARKETS

21. The relevant product market in which to evaluate Respondents' conduct is the marketing and sale of DIPF, and narrower relevant markets as contained therein (collectively, the "relevant DIPF markets"), including:

- a. DIPF for projects not specified as domestic only;
- b. DIPF for projects specified as domestic only; and
- c. DIPF of certain size ranges (*e.g.*, 24" in diameter and smaller).

22. In particular, the marketing and sale of domestically produced small and medium-sized (3-24" in diameter) DIPF for use in projects specified as domestic only constitutes a separate relevant product market (the "relevant domestic DIPF market").

23. There are no widely used substitutes for DIPF, and no other product significantly constrains the prices of DIPF.

24. Before and after the passage of the ARRA, some end users purchasing DIPF for use in projects specified as domestic only were unable to substitute imported DIPF, or any other product, for domestically produced DIPF. The passage of the ARRA and its Buy American requirement temporarily expanded the relevant domestic DIPF market.

25. The relevant geographic market is no broader than the United States. To compete effectively within the United States, DIPF suppliers need distribution assets and relationships within the United States. DIPF suppliers located outside the United

Complaint

States that lack such assets and relationships are unable to constrain the prices of DIFP suppliers that have such assets and relationships.

26. Each and every state within the United States is also a relevant geographic market, and smaller markets within the boundaries of many states exist as well. DIFP suppliers can and do engage in price discrimination based on customers' location. DIFP end users require local and expeditious service and support, and typically do not purchase DIFP from waterworks distributors located more than 200 miles away. Waterworks distributors typically do not resell DIFP to other waterworks distributors or end users outside their service areas in any substantial quantity. As a result, DIFP suppliers charge different prices in different states, and within certain regions within many states.

THE RELEVANT DIFP MARKETS ARE CONDUCTIVE TO COLLUSION

27. The relevant DIFP markets have several features that facilitate collusion among the Sellers, including product homogeneity, market concentration of DIFP suppliers, barriers to timely entry of new DIFP suppliers, inelastic demand at competitive prices, and uniform published prices.

- a. DIFP are commodity products produced to industry-wide standards. Product homogeneity enhances the Sellers' ability to collude on prices and to detect deviations from those collusive prices.
- b. The relevant DIFP markets are highly concentrated. In 2008, the Sellers collectively made more than 90 percent of sales in the relevant DIFP markets. A highly concentrated market enhances the Sellers' ability and incentive to collude on prices.
- c. Effective *de novo* entry into the relevant DIFP markets takes several years. Barriers to entry include the need for a new entrant to develop a distribution network and a reputation for quality and service with waterworks distributors and end users. Convincing end users to

Complaint

allow the use of a new entrant's DIPF is often a time consuming process.

- d. Demand for DIPF is inelastic to changes in price at competitive levels. DIPF are a relatively small portion of the cost of materials of a typical waterworks project, and there are no widely used substitutes for the product.
- e. The Sellers publish nearly identical price books listing per-unit prices for each unique DIPF item carried by a given supplier, and periodically publish uniform multiplier discounts at which they offer to sell DIPF on a state-by-state basis. By simplifying and standardizing published prices, the DIPF price list/multiplier format enhances the Sellers' ability to collude on prices and to detect deviations from those collusive prices.

**THE SELLERS RESTRAINED PRICE COMPETITION IN
THE RELEVANT DIPF MARKETS**

28. Senior executives of the Sellers frequently and privately communicate with one another. These communications often relate to DIPF price and output.

29. Beginning in January 2008, the Sellers conspired to raise and stabilize the prices at which DIPF were sold in the United States.

30. Due to rising input costs, all of the Sellers desired price increases in 2008. However, McWane was concerned that Sigma and Star would not adhere to announced price increases, which would result in lost sales for McWane. The Sellers worked together though 2008 to alleviate McWane's concerns, with the common purpose of clearing the way for McWane to support common price increases.

31. On January 11, 2008, McWane publicly announced its first DIPF price increase of 2008. Sigma and Star followed this price increase.

Complaint

32. This January 2008 price increase was the result of a combination and conspiracy among the Sellers.

- a. Before announcing the January 2008 price increase, McWane planned to trade its support for higher prices in exchange for specific changes to the business methods of Sigma and Star that would reduce the risk that local sales personnel for these competitors would sell DIPF at prices lower than published levels.
- b. McWane communicated the terms of its plan to Sigma and Star. McWane acted with the intent of conspiring with Sigma and Star to restrain price competition.
- c. Sigma and Star manifested their understanding and acceptance of McWane's offer by publicly taking steps to limit their discounting from published price levels in order to induce McWane to support higher price levels.
- d. On or about March 10, 2008, McWane and Sigma executives discussed by telephone their efforts to implement the January 2008 price increase.

33. On June 17, 2008, McWane publicly announced its second DIPF price increase of 2008. Sigma and Star followed this price increase.

34. The June 2008 price increase was the result of a combination and conspiracy among the Sellers.

- a. Before announcing the June 2008 price increase, McWane planned to trade its support for higher prices in exchange for information from Sigma and Star documenting the volume of their monthly sales of DIPF. This exchange of information was to be achieved under the auspices of an entity styled as the Ductile Iron Fittings Research Association ("DIFRA").
- b. McWane communicated the terms of its plan to Sigma and Star, at least in part through a public letter sent by McWane to waterworks distributors, the common

Complaint

customers of the Sellers. A section of that letter was meaningless to distributors, but was intended to inform Sigma and Star of the terms of McWane's offer. McWane acted with the intent of conspiring with Sigma and Star to restrain price competition.

- c. Sigma and Star manifested their understanding and acceptance of McWane's offer by initiating their participation in the DIFRA information exchange in order to induce McWane to support higher price levels.
- d. McWane then led a price increase, and Sigma and Star followed.
- e. On or about August 22, 2008, executives of McWane and Sigma discussed by telephone their efforts to implement the June 2008 price increase.

**DIFRA FACILITATED PRICE COORDINATION AMONG
THE SELLERS**

35. The DIFRA information exchange operated as follows. The Sellers submitted a report of their previous month's sales to an accounting firm. Shipments were reported in tons shipped, subdivided by diameter size range (*e.g.*, 2-12") and by joint type. Data submissions were aggregated and distributed to the Sellers. Data submitted to the accounting firm was typically no older than 45 days, and the summary reports returned to the Sellers contained data typically no more than 2 months old.

36. During its operation between June 2008 and January 2009, the DIFRA information exchange enabled each of the Sellers to determine and to monitor its own market share and, indirectly, the output levels of its rivals. In this way, the DIFRA information exchange facilitated price coordination among the Sellers on the pricing of DIPF.

37. The acts and practices of Respondents, as alleged herein, have the purpose, capacity, tendency, and effect of (i) fixing, maintaining and raising prices of DIPF in the relevant DIPF

Complaint

markets, and (ii) facilitating collusion in the relevant DIPF markets.

38. There are no legitimate procompetitive efficiencies that justify the conduct of Respondents as alleged herein, or that outweigh its anticompetitive effects.

**MCWANE MONOPOLIZED THE RELEVANT DOMESTIC
DIPF MARKET**

39. At the time of the enactment of the ARRA in February 2009 and thereafter, McWane possessed monopoly power in the relevant domestic DIPF market.

40. At the time of the enactment of the ARRA, McWane was the only manufacturer of a full line of DIPF in the relevant domestic DIPF market and controlled nearly 100 percent of the relevant domestic DIPF market. Despite Star's entry into the relevant domestic DIPF market in late 2009, McWane continues to make more than 90 percent of sales in the relevant domestic DIPF market.

41. McWane's monopoly power in the relevant domestic DIPF market is protected by substantial barriers to effective entry and expansion, including the unfair methods of competition of McWane and Sigma, as alleged in Paragraphs 42 through 63, below.

42. For suppliers of the relevant DIPF that have existing relationships and goodwill with waterworks distributors and established reputations for quality and service in the provision of the relevant DIPF, McWane's unfair and exclusionary methods of competition are the primary barriers to effective entry and expansion in the relevant domestic DIPF market.

43. McWane's monopoly power in the relevant domestic DIPF market is further demonstrated directly by its ability to exclude competitors, to control prices, and to coercively impose unwanted distribution policies on its customers.

Complaint

44. Federal stimulus gave Sigma, Star and Serampore Industries Private, Ltd. (“SIP”), another imported DIPF supplier, an incentive to enter the domestic DIPF market.

45. Sigma, Star and SIP all attempted to enter the relevant domestic DIPF market in response to the ARRA.

46. McWane maintained its monopoly in the relevant domestic DIPF market by illegally inducing Sigma to abandon its effort to enter the domestic DIPF market, and by implementing an exclusive dealing policy to prevent other competitors from entering or expanding. Through this conduct, McWane eliminated or delayed competition from the only firms with the ability and incentive to enter the relevant domestic DIPF market in a timely fashion. McWane acted with the specific intent to monopolize the relevant domestic DIPF market.

McWane Eliminated Sigma as an Actual Potential Entrant

47. After the enactment of the ARRA, Sigma took steps to evaluate entry into domestic production of DIPF, including but not limited to (i) formulating a complete or nearly complete operational plan, (ii) arranging for an infusion of equity capital to fund domestic production, (iii) obtaining the approval of its Board of Directors for its entry plans, and (iv) casting prototype product.

48. McWane perceived that Sigma was preparing to enter the relevant domestic DIPF market. McWane sought to eliminate the risk of competition from Sigma by inducing Sigma to become a distributor of McWane’s domestic DIPF rather than a competitor in the relevant domestic DIPF market.

49. McWane and Sigma executed a Master Distribution Agreement dated September 17, 2009 (“MDA”). The principal terms of the MDA were as follows:

- a. McWane would sell domestic DIPF to Sigma at a 20 percent discount off of McWane’s published prices;
- b. McWane would be Sigma’s exclusive source for the relevant domestic DIPF;

Complaint

- c. Sigma would resell McWane's domestic DIPF at or very near McWane's published prices for domestic DIPF; and
- d. Sigma would resell McWane's domestic DIPF to waterworks distributors only on the condition that the distributor agreed to purchase domestic DIPF exclusively from McWane or Sigma.

50. An unwritten term of the MDA was that McWane would also sell its domestic DIPF at or very near its published prices.

51. In the absence of a sufficiently profitable arrangement with McWane, Sigma would likely have entered the relevant domestic DIPF market in competition with McWane.

52. Under the MDA, McWane controlled the price at which Sigma could sell domestic DIPF and the customers to whom Sigma could sell domestic DIPF. Sigma's participation in the relevant domestic DIPF market under the MDA was not equivalent to, and for consumers not a substitute for, Sigma's competitive entry into the relevant domestic DIPF market.

53. Sigma's independent, competitive entry into the relevant domestic DIPF market would likely have benefitted consumers by constraining McWane's prices for the relevant domestic DIPF and otherwise.

54. Through the MDA, McWane transferred a share of its sales and monopoly profits in the domestic DIPF market to Sigma in exchange for Sigma's commitment to abandon its plans to enter the relevant domestic DIPF market as an independent competitor.

55. Both McWane and Sigma entered into the MDA with the specific intent to maintain and share in McWane's monopoly profits in the relevant domestic DIPF market by eliminating competition among themselves and excluding their rivals.

McWane Excluded Star Through Exclusive Dealing

56. Star announced its entry into the relevant domestic DIPF market in June 2009. McWane knew that, initially, Star would

Complaint

have a shorter product line and a smaller inventory than McWane. Star would therefore have difficulty convincing a waterworks distributor to purchase all of its domestic DIPF from Star. McWane nevertheless projected that Star's entry into the domestic DIPF market, if unobstructed by McWane, would place downward pressure on McWane's prices for its domestic DIPF.

57. McWane responded to Star's entry into the relevant domestic DIPF market by adopting restrictive and exclusive distribution policies (collectively, "McWane's exclusive dealing policies"). McWane intended and expected that these policies would impede and delay the ability of Star to enter the domestic DIPF market.

- a. McWane threatened waterworks distributors with delayed or diminished access to McWane's domestic DIPF, and the loss of accrued rebates on the purchase of McWane's domestic DIPF, if those distributors purchased domestic DIPF from Star.
- b. As part of its MDA with McWane, Sigma agreed to implement a similar distribution policy, as alleged in Paragraph 49, above.
- c. McWane threatened some waterworks distributors with the loss of rebates in other product categories, such as ductile iron pipe, waterworks valves, and hydrants, if those distributors purchased domestic DIPF from Star.
- d. Beginning in 2011, McWane changed its rebate structure for domestic DIPF to require waterworks distributors to make certain minimum, and high, shares of their total domestic DIPF purchases from McWane in order to qualify for these rebates.

58. The purpose and effect of McWane's exclusive dealing policies has been and is to compel the majority of waterworks distributors to deal with McWane and Sigma on an exclusive or nearly exclusive basis for their domestic DIPF business.

Complaint

- a. Due to Star's perceived or actual status as an untested supplier of domestic DIPF with a shorter product line and smaller inventory than McWane, many distributors interested in purchasing domestic DIPF from Star were unwilling to switch all of their domestic DIPF business to Star.
- b. Instead, many distributors wished to purchase domestic DIPF from both McWane/Sigma and Star, and thereby to garner the benefits of price and service competition.
- c. McWane's exclusive dealing policies increased the risk of purchasing domestic DIPF from Star.
- d. Distributors otherwise interested in purchasing domestic DIPF from Star were and are unwilling to do so under the terms of McWane's exclusive dealing policies, and have remained exclusive or nearly exclusive with McWane and Sigma, contrary to their preference.

59. McWane's exclusive dealing policies have foreclosed Star from a substantial volume of sales opportunities with waterworks distributors.

60. By foreclosing Star from a substantial volume of sales opportunities with waterworks distributors, McWane's exclusive dealing policies tend to minimize and delay Star's ability to compete in the domestic DIPF market and thereby to benefit consumers by constraining the prices of domestically produced DIPF charged by McWane and Sigma, and otherwise.

61. McWane's exclusive dealing policies have also raised barriers to entry into the relevant domestic DIPF market by other potential entrants, including SIP. This conduct has contributed to McWane's monopolization of the relevant domestic DIPF market.

62. The acts and practices of McWane, as alleged herein, have the purpose, capacity, tendency, and effect of (i) maintaining and stabilizing prices of DIPF in the relevant DIPF markets, (ii) eliminating potential competition from Sigma in the relevant domestic DIPF market, (iii) impairing the competitive effectiveness of Star in the relevant domestic DIPF market, and (iv) raising barriers to entry for potential rivals in the relevant

Complaint

domestic DIPF market. The conduct of McWane is reasonably capable of making a significant contribution to the enhancement or maintenance of McWane's monopoly power in the relevant domestic DIPF market.

63. There are no legitimate procompetitive efficiencies that justify the conduct of McWane as alleged herein, or that outweigh its anticompetitive effects.

FIRST VIOLATION ALLEGED**RESTRAINT OF TRADE**

64. As alleged herein, McWane and Star conspired, along with their competitor Sigma, to restrain price competition. These concerted actions unreasonably restrain trade and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

SECOND VIOLATION ALLEGED**RESTRAINT OF TRADE**

65. As alleged herein, McWane and Star conspired, along with their competitor Sigma, to exchange competitively sensitive sales information. These concerted actions unreasonably restrain trade in and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

THIRD VIOLATION ALLEGED**UNFAIR METHODS OF COMPETITION**

66. As alleged herein, McWane invited its competitors to collude with McWane to restrain price competition. These actions constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and

Complaint

practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

FOURTH VIOLATION ALLEGED**RESTRAINT OF TRADE**

67. As alleged herein, McWane and Sigma entered into the MDA. The agreement unreasonably restrains trade and constitutes an unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

FIFTH VIOLATION ALLEGED**CONSPIRACY TO MONOPOLIZE**

68. As alleged herein, McWane and Sigma entered into the MDA with the specific intent to monopolize the relevant domestic DIPF market, and took overt acts to exclude their rivals in furtherance of their conspiracy, constituting an unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

SIXTH VIOLATION ALLEGED**MONOPOLIZATION**

69. As alleged herein, McWane has willfully engaged in anticompetitive and exclusionary acts and practices to acquire, enhance or maintain its monopoly power in the relevant domestic DIPF market, constituting unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

Complaint

SEVENTH VIOLATION ALLEGED**ATTEMPTED MONOPOLIZATION**

70. As alleged herein, McWane has willfully engaged in anticompetitive and exclusionary acts and practices, with the specific intent to monopolize the relevant domestic DIPF market, resulting, at a minimum, in a dangerous probability of monopolizing the relevant domestic DIPF market, constituting unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

NOTICE

Notice is hereby given to Respondents that the fourth day of September, 2012, at 10:00 a.m., is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Washington D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record

Complaint

basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under _ 3.46 of said Rules.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint, and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after an answer is filed by the last answering Respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within five days of receiving the answer of the last answering Respondent, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that Respondents have violated or are violating Section 5 of the FTC Act, as amended, as alleged in the Complaint, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Ordering Respondents to cease and desist from the conduct alleged in the Complaint to violate Section 5 of the FTC Act, and to take all such measures as are appropriate to correct or remedy, or to prevent the recurrence of, the anticompetitive practices engaged in by Respondents.

Complaint

2. Prohibiting Respondents from agreeing with any competitor to fix prices or to allocate markets, or from soliciting any competitor to enter into such an agreement.
3. Prohibiting Respondents from agreeing with any competitor to exchange competitively sensitive information unless that information exchange meets sufficient criteria to assure that the information exchange will not facilitate collusion among Respondents and their competitors, such conditions to be determined by the Commission, or soliciting any competitor to enter into such an agreement.
4. Prohibiting Respondents from communicating competitively sensitive information to any competitor, except where such communications are the unavoidable result of announcing the terms on which Respondents propose to sell their products to their customers, or where the information communicated by Respondents relates solely to the terms on which Respondents propose to sell any product to, or purchase any product from, the person to whom the information is communicated by Respondents.
5. Requiring, for a period of time, that Respondents document all communications with any competitor, including by identifying the persons involved, the nature of the communication, and its duration, and that Respondents submit such documentation to the Commission.
6. Requiring that Respondents, upon request, provide the Commission with notification of any public price change relating to DIPF, including copies of pricing letters.
7. Prohibiting McWane from conditioning the sale, or any term of sale (including invoice price, delivery terms, credit allowances, rebates, or discounts), of any product on a customer's dealing, refusal to deal, or terms of dealing with any other supplier of domestically produced DIPF.

Decision and Order

8. Prohibiting McWane, for a period of time, from providing any discounts or other incentives that retroactively reduce the price of previously purchased units of McWane's domestically produced DIPF because of the purchase or sale of an additional unit of that product. Provided, however, that McWane shall be permitted to offer discounts or lower prices based solely on volume, provided that these discounts or lower prices are otherwise in accordance with the law.
9. Prohibiting McWane, for a period of time, from offering bundled rebates involving domestically produced DIPF.
10. Requiring that Respondents' compliance with the order shall be monitored at its expense by an independent monitor, for a term to be determined by the Commission.
11. Requiring that Respondents file periodic compliance reports with the Commission.
12. Any other relief appropriate to correct or remedy the anticompetitive effects in their incipency of any or all of the conduct alleged in the complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourth day of January, 2012, issues its complaint against Respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission") having heretofore issued its complaint charging, *inter alia*, the Respondent Star Pipe Products, Ltd. with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45 ("First and Second Violations"), and the Respondent having

Decision and Order

been served with a copy of that complaint, together with a notice of contemplated relief and having filed its answer denying such charges; and

The Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent Order, an admission by Respondent of all the jurisdictional facts, solely as those facts relate to the First and Second Violations set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts related to the First and Second Violations of the complaint, are true and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

1. Respondent Star is a limited partnership organized and existing under the laws of the State of Texas, with its principal address at 4018 Westhollow Parkway, Houston, Texas 77082.
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.

Decision and Order

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Commission” means the Federal Trade Commission.
- B. “Respondent” means Star Pipe Products, Ltd., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the U.S.-based subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- C. “Communicate” means to transfer or disseminate any information, regardless of the means by which it is accomplished, including without limitation orally, by letter, e-mail, notice, or memorandum. This definition applies to all tenses and forms of the word “communicate,” including, but not limited to, “communicating,” “communicated” and “communication.”
- D. “Competitively Sensitive Information” means any information regarding the cost, price, output, or customers of or for DIPF marketed by Respondent or any other Competitor, regardless of whether the information is prospective, current or historical, or aggregated or disaggregated.

Provided, however, that “Competitively Sensitive Information” shall not include:

1. information that is a list of prices or other pricing terms that has been widely Communicated by a Competitor to its customers through a letter, electronic mailing, sales catalog, Web site, or other widely accessible method of posting;

Decision and Order

2. information that relates to the terms on which a Competitor will buy DIPF from, or sell DIPF to, the Person to whom the Competitively Sensitive Information is Communicated;
 3. information that relates to transactions that occurred at least three (3) years prior to the date of the Communication of such information;
 4. information that must be disclosed pursuant to the Federal Securities Laws; or
 5. information obtained from or provided, in the ordinary course of Respondent's business, to: (a) a recognized credit rating Person that relates to the credit history or creditworthiness of a customer(s); or (b) another Competitor in relation to the verification of the salary currently being paid by that Competitor to an individual who is seeking or considering employment with Respondent.
- E. "Competitor" means Respondent and any Person that, for the purpose of sale or resale within the United States: (1) manufactures DIPF; (2) causes DIPF to be manufactured; or (3) imports DIPF.
- F. "Designated Manager" means a Regional Manager or the OEM Manager for sales of DIPF in and into the United States, and any employee performing any job function of a Regional Manager or the OEM Manager with responsibility for sales of DIPF in or into the United States.
- G. "Ductile Iron Pipe Fittings" or "DIPF" means any iron casting produced in conformity with the C153/A21 or C110/A21 standards promulgated by the American Water Works Association, including all revisions and amendments to those standards and any successor standards incorporating the C153/A21 or C110/A21 standards by reference.

Decision and Order

- H. “Federal Securities Laws” means the securities laws as that term is defined in § 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(47), and any regulation or order of the Securities and Exchange Commission issued under such laws.
- I. “Industry Statistics” means statistics derived from Input Data and Communicated by the Third Party Manager.
- J. “Input Data” means the Competitively Sensitive Information Communicated by Competitors to the Third Party Manager.
- K. “Information Exchange” means the entity Managed by A Third Party Manager that: (1) Communicates Industry Statistics and (2) includes Respondent and at least one other Competitor.
- L. “Insider” means a consultant, officer, director, employee, agent, or attorney of Respondent. *Provided, however*, that no other Competitor shall be considered to be an “Insider.”
- M. “Managed by A Third Party Manager” means that a Third Party Manager is solely and exclusively responsible for all activities relating to Communicating, organizing, compiling, aggregating, processing, and analyzing any Competitively Sensitive Information.
- N. “McWane, Inc.” means McWane, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- O. “Participate” in an entity or an arrangement means (1) to be a partner, joint venturer, shareholder, owner, member, or employee of such entity or arrangement, or

Decision and Order

(2) to provide services, agree to provide services, or offer to provide services through such entity or arrangement. This definition applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”

- P. “Person” means any natural person or artificial person, including, but not limited to, any corporation, unincorporated entity, or government. For the purpose of this Order, any corporation includes the subsidiaries, divisions, groups, and affiliates controlled by it.
- Q. “Third Party Manager” means a Person that (1) is not a Competitor, and (2) is responsible for all activities relating to Communicating, organizing, compiling, aggregating, processing, and analyzing any Competitively Sensitive Information Communicated or to be Communicated between or among Respondent and any other Competitor.

II.

IT IS FURTHER ORDERED that in connection with the business of manufacturing, marketing or selling DIPF in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, Respondent shall cease and desist from, either directly or indirectly, or through any corporate or other device:

- A. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Competitors:
1. To raise, fix, maintain, or stabilize prices or price levels, or engage in any other pricing action; or

Decision and Order

2. To allocate or divide markets, customers, contracts, transactions, business opportunities, lines of commerce, or territories.

Provided, however, that nothing in Paragraph II.A of this Order prohibits Respondent from entering into an agreement with another Competitor regarding the price of DIPF, if and only if that agreement relates exclusively to the terms under which Respondent will buy DIPF from, or sell DIPF to, that other Competitor.

- B. Communicating to any Person who is not an Insider, that Respondent is ready or willing:
 1. To raise, fix, maintain, or stabilize price or price levels conditional upon any other Competitor also raising, fixing, maintaining, or stabilizing price or price levels; or
 2. To forbear from competing for any customer, contract, transaction, or business opportunity conditional upon any other Competitor also forbearing from competing for any customer, contract, transaction, or business opportunity.
- C. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Competitors to Communicate or exchange Competitively Sensitive Information.
- D. Communicating Competitively Sensitive Information to any other Competitor.
- E. Attempting to engage in any of the activities prohibited by Paragraphs II.A, II.B, II.C, or II.D.

Provided, however, that it shall not of itself constitute a violation of Paragraph II.B, II.C, OR II.D of this Order for Respondent to Communicate:

Decision and Order

1. Competitively Sensitive Information to a Competitor where such Communication is reasonably related to a lawful joint venture, license, or potential acquisition, and is reasonably necessary to achieve the procompetitive benefits of such a relationship;
2. To any Person reasonably believed to be an actual or prospective purchaser of DIPF, the price and terms of a sale of DIPF; or
3. To any Person reasonably believed to be an actual or prospective purchaser of DIPF that Respondent is ready and willing to adjust the terms of a sale of DIPF in response to a Competitor's offer.

Provided further, that it shall not of itself constitute a violation of Paragraphs II.B, II.C, II.D or II.E of this Order for Respondent to Communicate with or Participate in an Information Exchange that is limited exclusively to the Communication of Input Data or Industry Statistics when:

1. Any Input Data relates solely to transactions that are at least six (6) months old;
2. Any Industry Statistic relates solely to transactions that are at least six (6) months old;
3. Industry Statistics are Communicated no more than one time during any six (6) month period;
4. Any Industry Statistic represents an aggregation or average of Input Data for transactions covering a period of at least six (6) months;
5. Any Industry Statistic represents an aggregation or average of Input Data received from no fewer than five (5) Competitors;
6. Relating to price, output, or total unit cost, no individual Competitor's Input Data to any Industry

Decision and Order

Statistic represents more than twenty-five (25) percent of the total reported sales (whether measured on a dollar or unit basis) of the DIPF product from which the Industry Statistic is derived;

7. Relating to price, output, or total unit cost, the sum of no three Competitors' Input Data to any Industry Statistic represents more than sixty (60) percent of the total reported sales (whether measured on a dollar or unit basis) of the DIPF product from which the Industry Statistic is derived;
8. Any Industry Statistic is sufficiently aggregated or anonymous such that no Competitor that receives that Industry Statistic can, directly or indirectly, identify the Input Data submitted by any other particular Competitor;
9. Respondent does not Communicate with any other Competitor relating to the Information Exchange, other than those Communications (i) occurring at official meetings of the Information Exchange; (ii) relating to topics identified on a written agenda prepared in advance of such meetings; and (iii) occurring in the presence of antitrust counsel;
10. Respondent retains, for submission to a duly authorized representative of the Commission upon reasonable notice, a copy of all Input Data Communicated to the Third Party Manager and all Industry Statistics Communicated by the Third Party Manager to Respondent; and
11. All Industry Statistics are, at the same time they are Communicated to any Competitor, made publicly available.

Decision and Order

III.

IT IS FURTHER ORDERED that until a final determination of the litigation with McWane, Inc., in this Docket 9351, including any appeals, and in any Commission action related to Docket 9351 that the Commission may take against McWane, Inc. Respondent shall cooperate with Commission staff, to the same extent to which it would have been required had it continued to be a respondent in the Commission action under Part 3 of the Commission's Rules of Practice, to (1) produce, at its own expense, information and documents in its possession, custody, or control; and (2) make its representatives available to provide deposition or hearing testimony, as such may be requested by any duly authorized representative of the Commission. Respondent shall also make its representatives available, upon reasonable notice, for interviews in person or by telephone with Commission staff. Nothing in this paragraph shall require the production of materials as to which Respondent may assert a valid claim of privilege on its own behalf or pursuant to the terms of any written joint defense agreement with any respondent in any Commission proceeding against McWane, Inc.

IV.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within sixty (60) days from the date this Order becomes final distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, to each of its officers, directors, and Designated Managers; and
- B. For five (5) years from the date this Order becomes final, distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, within sixty (60) days, to each Person who becomes its officer, director, or Designated Manager and who did not previously receive a copy of this Order and Complaint.

Decision and Order

- C. Require each Person to whom a copy of this Order is furnished pursuant to Paragraphs III.A and III.B of this Order to sign and submit to Respondent within sixty (60) days of the receipt thereof a statement that: (1) represents that the undersigned has read and understands the Order; and (2) acknowledges that the undersigned has been advised and understands that non-compliance with the Order may subject Respondent to penalties for violation of the Order.

V.

IT IS FURTHER ORDERED that Respondent shall file verified written reports within ninety (90) days from the date this Order becomes final, annually thereafter for five (5) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

- A. A description of any Information Exchange, including a description of (i) the identity of any Competitors participating in such exchange; (ii) the Competitively Sensitive Information being exchanged; (iii) the identity of the Third Party Manager and a description of how the Competitively Sensitive Information has been and is expected to be Managed by the Third Party Manager; and (iv) the identity of each employee of the Respondent who received information, directly or indirectly, from the Third Party Manager;
- B. Copies of the signed return receipts or electronic mail with return confirmations required by Paragraphs III.A, III.B, and III.C of this Order;
- C. One copy of each Communication during the relevant reporting period that relates to changes in Respondent's published list price or multiplier discounts for sales of DIPF made in or into the United States when that Communication is to two (2) or more customers and those changes are simultaneously applicable to two (2) or more customers; and

Decision and Order

- D. A detailed description of the manner and form in which Respondent has complied and is complying with this Order.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission:

- A. Of any change in its principal address within twenty (20) days of such change in address; and
- B. At least thirty (30) days prior to any proposed: (1) dissolution of Respondent; (2) acquisition, merger, or consolidation of Respondent; or (3) any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and
- B. Upon fifteen (15) days notice, and in the presence of counsel, and without restraint or interference from it, to interview officers, directors, or employees of Respondent.

Concurring and Dissenting Statement

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on May 8, 2032.

By the Commission, Commissioner Ohlhausen not participating.

**Statement of Commissioner J. Thomas Rosch,
Concurring in Part and Dissenting in Part In the Matter of
McWane, Inc. and Star Pipe Products, Ltd., and In the
Matter of Sigma Corporation**

The Commission has voted separately (1) to issue a Part 3 Administrative Complaint against Respondents McWane, Inc. (“McWane”) and Star Pipe Products, Ltd. (“Star”), and (2) to accept for public comment a Consent Agreement settling similar allegations in a draft Part 2 Complaint against Respondent Sigma Corporation (“Sigma”). While I have voted in favor of both actions, I respectfully object to the inclusion—in both the Part 3 Administrative Complaint and in the draft Part 2 Complaint—of claims against McWane and Sigma, to the extent that such claims are based on allegations of exclusive dealing, as explained in Part I below. I also respectfully object to naming Star, a competitor of McWane and Sigma, as a Respondent in the Part 3 Administrative Complaint, which alleges, *inter alia*, that Star engaged in a horizontal conspiracy to fix the prices of ductile iron pipe fittings (DIPFs) sold in the United States, and in a related, information exchange, as described in Part II below.

I.

For reasons similar to those that I articulated in a recent dissent in another matter, *Pool Corp.*, FTC File No. 101-0115, <http://www.ftc.gov/os/caselist/1010115/111121poolcorpstatementrosch.pdf>, I do not think that the Part 3 Administrative Complaint against McWane and the draft Part 2 Complaint against Sigma

Concurring and Dissenting Statement

adequately allege exclusive dealing as a matter of law. In particular, there is case law in both the Eighth and Ninth Circuits blessing the conduct that the complaints charge as exclusive dealing.

II.

I also object to the allegations in the Part 3 Administrative Complaint and in the draft Part 2 Complaint that name Star as a co-conspirator in the alleged horizontal price-fixing of DIPF sold in the United States and the related, alleged DIFRA information exchange.¹ I do not consider naming Star, along with McWane and Sigma, as a co-conspirator to be in the public interest. There are at least three reasons why this is so. First, although there may be reason to believe Star conspired with McWane and Sigma in this oligopolistic industry, Star seems much less culpable than the others. More specifically, I believe that we must be mindful of the consequences of public law enforcement in assessing whether the public interest favors joining Star as a co-conspirator.² Second, I am concerned that a trier of fact may find it hard to believe that Star could be both a victim of McWane's alleged "threats" to deal exclusively with distributors, and at more or less the same time (the "exclusive dealing" program began in September 2009), a co-conspirator with McWane in a price-fixing conspiracy (June 2008 to February 2009). (This concern further explains why I do not have reason to believe that the exclusive dealing theory is a viable one.) Third, I am concerned that Star's alleged participation in the price-fixing conspiracy and information exchange relies, in part, on treating communications to distributors as actionable signaling on prices or price levels.³ *See,*

1 *See* McWane/Star Part 3 Administrative Compl. ¶¶ 29–38, 64–65; Sigma draft Part 2 Compl. ¶¶ 23–33.

2 *See* Credit Suisse Secs. (USA) LLC v. Billing, 551 U.S. 264, 281–84 (2007) (questioning the social benefits of private antitrust lawsuits filed in numerous courts when the enforcement-related need is relatively small); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–60 (2007) (expressing concern with the burdens and costs of antitrust discovery, and the attendant *in terrorem* effect, associated with private antitrust lawsuits).

3 McWane/Star Part 3 Administrative Compl. ¶ 34b; Sigma draft Part 2 Compl. ¶ 29.

Analysis to Aid Public Comment

e.g., Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1305–07 (11th Cir. 2003).

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission (“Commission” or “FTC”) has accepted, subject to final approval, an agreement containing a proposed consent order (“Agreement”) from Star Pipe Products, Ltd. (“Star”). The Agreement seeks to resolve in part an administrative complaint issued by the Commission on January 4, 2012. The complaint charges that Star and certain of its competitors violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by engaging in collusive acts and practices in the market for ductile iron pipe fittings (“DIPF”).

The Commission anticipates that, with regard to Star, the competitive issues described in the complaint will be resolved by accepting the proposed order, subject to final approval, contained in the Agreement. The Agreement has been placed on the public record for 30 days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the Agreement and any comments received, and will decide whether it should withdraw from the Agreement or make final the proposed order contained in the Agreement.

The purpose of this Analysis to Aid Public Comment is to invite and facilitate public comment concerning the proposed order. It is not intended to constitute an official interpretation of the Agreement and proposed order or in any way to modify its terms.

The proposed order is for settlement purposes only and does not constitute an admission by Star that it violated the law, or that the facts alleged in the complaint, other than jurisdictional facts, are true.

Analysis to Aid Public Comment

I. The Complaint

The following allegations are taken from the complaint and publicly available information.

A. Background

The largest sellers of DIPF in the United States are Star, McWane, Inc. (“McWane”), and Sigma Corporation (“Sigma”). DIPF are used in municipal water distribution systems to change pipe diameter or pipeline direction. There are no widely available substitutes for DIPF. Both imported and domestically produced DIPF are commercially available.

DIPF suppliers distribute these products through wholesale distributors, known as waterworks distributors, which specialize in distributing products for water infrastructure projects. The end users of DIPF are typically municipal and regional water authorities.

DIPF prices are based off of published list prices and discounts, with customers negotiating additional discounts off of those list prices and discounts on a transaction-by- transaction basis. DIPF suppliers also offer volume rebates.

B. Challenged Conduct

Between January 2008 and January 2009, Star allegedly conspired with McWane and Sigma to increase the prices at which DIPF were sold in the United States. In furtherance of the conspiracy, and at the request of McWane, Star changed its business methods to make it easier to coordinate price levels, first by limiting the discretion of regional sales personnel to offer price discounts, and later by exchanging information documenting the volume of its monthly sales, along with sales by McWane and Sigma, through an entity known as the Ductile Iron Fittings Research Association (“DIFRA”).

Analysis to Aid Public Comment

II. Legal Analysis

The January and June 2008 price restraints among Star, McWane, and Sigma alleged in the complaint are naked restraints on competition that are *per se* unlawful.¹

The June 2008 agreement, which was allegedly reached after a public invitation to collude by McWane, illustrates how price fixing agreements may be reached in public. Here, McWane's invitation to collude was conveyed in a letter sent to waterworks distributors, the common customers of Star, McWane, and Sigma. McWane's letter contained a section that was meaningless to waterworks distributors, but was intended to inform Star and Sigma of the terms on which McWane desired to fix prices.²

The DIFRA information exchange was a component of the illegal price fixing agreement. Specifically, the complaint alleges that the DIFRA information exchange played a critical role in the 2008 price fixing conspiracy, first as the *quid pro quo* for a price increase by McWane in June 2008, and then by enabling Star, McWane, and Sigma to monitor each others' adherence to the collusive arrangement through the second half of 2008.

Evaluated apart from the price fixing conspiracy, Star's participation in the information exchange is an independent

1 FEDERAL TRADE COMMISSION & UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATION AMONG COMPETITORS ("Competitor Collaboration Guidelines")§ 1.2 (2000); *In re North Texas Specialty Physicians*, 140 F.T.C. 715, 729 (2005) ("We do not believe that the *per se* condemnation of naked restraints has been affected by anything said either in *California Dental* or *Polygram*").

2 Because McWane's communication informed its rivals of the terms of price coordination desired by McWane without containing any information for customers, this communication had no legitimate business justification. *See In re Petroleum Products Antitrust Litig.*, 906 F.2d 432,448 (9th Cir. 1990) (public communications may form the basis of an agreement on price levels when "the public dissemination of such information served little purpose other than to facilitate interdependent or collusive price coordination").

Analysis to Aid Public Comment

violation of the antitrust laws because this concerted action facilitated price coordination among the three competitors.³

III. The Proposed Order

The proposed order is designed to remedy the unlawful conduct charged against Star in the complaint and to prevent the recurrence of such conduct.

Paragraph II.A of the proposed order prohibits Star from participating in or maintaining any combination or conspiracy between any competitors to fix, raise or stabilize the prices at which DIPF are sold in the United States, or to allocate or divide markets, customers, or business opportunities.

Paragraph II.B of the proposed order prohibits Star from soliciting or inviting any competitor to participate in any of the actions prohibited in Paragraphs II.A.

Paragraph II.C of the proposed order prohibits Star from participating in or facilitating any agreement between competitors to exchange “Competitively Sensitive Information” (“CSI”), defined as certain types of information related to the cost, price, output or customers of or for DIPF. Paragraph II.D of the proposed order prohibits Star from unilaterally disclosing CSI to a competitor, except as part of the negotiation of a joint venture, license or acquisition, or in certain other specified circumstances. Paragraph II.E of the proposed order prohibits Star from

³ The Commission articulated a safe harbor for exchanges of price and cost information in Statement 6 of the 1996 Health Care Guidelines. *See* DEPT OF JUSTICE & FEDERAL TRADE COMM'N, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE, STATEMENT 6: ENFORCEMENT POLICY ON PROVIDER PARTICIPATION IN EXCHANGES OF PRICE AND COST INFORMATION (1996). The DIFRA information exchange failed to qualify for the safety zone of the Health Care Guidelines for several reasons. Although the DIFRA information exchange was managed by a third party, the information exchanged was insufficiently historical, the participants in the exchange too few, and their individual market shares too large to qualify for the permissive treatment contemplated by the Health Care Guidelines. While failing to qualify for the safety zone of the Health Care Guidelines is not in itself a violation of Section 5, firms that wish to minimize the risk of antitrust scrutiny should consider structuring their collaborations in accordance with the criteria of the safety zone.

Analysis to Aid Public Comment

attempting to engage in any of the activities prohibited by Paragraphs II.A, II.B, II.C, or II.D.

The prohibitions on Star's communication of CSI with competitors contained in Paragraphs II.C and II.D of the proposed order are subject to a proviso that permits Star to communicate CSI to its competitors under certain circumstances. Under the proposed order, Star may participate in an information exchange with its competitors in the DIPF market provided that the information exchange is structured in such a way as to minimize the risk that it will facilitate collusion among Star and its competitors. Specifically, the proposed order requires any exchange of CSI to occur no more than twice yearly, and to involve the exchange of aggregated information more than six months old. In addition, the aggregated information that is exchanged must be made publicly available, which increases the likelihood that an information exchange involving Star will simultaneously benefit consumers. The proposed order also prohibits Star's participation in an exchange of CSI involving price, cost or total unit cost of or for DIPF when the individual or collective market shares of the competitors seeking to participate in an information exchange exceed specified thresholds. The rationale for this provision is that in a highly concentrated market the risk that the information exchange may facilitate collusion is high. Due to the highly concentrated state of the DIPF market as currently structured, an information exchange involving Star and relating to price, output or total unit cost of or for DIPF is unlikely to reoccur in the foreseeable future.

Paragraph III of the proposed order requires Star to cooperate with Commission staff in the still-pending administrative litigation against McWane.

The proposed order has a term of 20 years.

Complaint

IN THE MATTER OF

WINCHESTER INDUSTRIESCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4362; File No. 102 3171
Complaint, May 16, 2012 – Decision, May 16, 2012

This consent order addresses Winchester Industries' marketing and sale of replacement windows for use in residences. The complaint alleges that respondent did not possess and rely upon a reasonable basis substantiating representations that consumers who replace their windows with Bristol and Winter Lock Super Triple-E A-Plus with Alpha-10 windows are likely to achieve residential energy savings of 47% or to save 47% on their heating and cooling costs when it made them. The consent order prohibits respondent from making any representation that: (A) consumers who replace their windows with respondent's windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; or (B) respondent guarantees or pledges that consumers who replace their windows with respondent's windows will achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to receive the maximum represented savings or reduction.

Participants

For the *Commission: Robert Frisby, Zachary Hunter, Joshua Millard, and Sarah Waldrop.*

For the *Respondent: Eric Horne, Eckert Seamans Cherin & Mellott, LLC.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Winchester Industries ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Winchester Industries is a Pennsylvania partnership with its principal office or place of business at 500 Leech Avenue, Saltsburg, Pennsylvania 15681. The partnership

Complaint

was formed in 1983 by Steel Bridge, LTD, LLC, a Canadian corporation, and Winchester Industries, Inc., a Pennsylvania corporation.

2. Respondent manufactures, advertises, offers for sale, sells, and/or distributes windows, including its “Bristol” and “WinterLock Super Triple-E A-Plus with Alpha-10” windows. Respondent distributes these windows to independent dealers and installers who in turn sell them to consumers for residential use.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused the dissemination of advertising and promotional materials, such as advertising on its website as well as brochures and other promotional materials it provided to window dealers and installers, including but not necessarily limited to the attached Exhibits A through H. Respondent’s dealers and installers disseminated or caused the dissemination of these advertising and promotional materials to consumers. The advertising and promotional materials contain the following statements or depictions:

a. Bristol Windows Internet Promotional Material

Manufacturer 47% Energy Savings Pledge

Replace your old drafty, Energy Wasting windows and doors NOW and SAVE, SAVE, SAVE

Exhibit A (www.bristolwindows.com).

[T]he triple-paned design of some replacement windows, such as Bristol windows, can also produce energy savings up to 50% per year.

Exhibit B (www.bristolwindows.com).

Since replacing the double-paned windows, according to Simon, the triple-paned windows have cut his family’s heating and cooling bills in half. ‘With the

Complaint

Bristol windows, we save over \$2,500 a year in heating and cooling costs . . .

Exhibit C (www.bristolwindows.com).

b. Bristol Windows Energy Saving Pledge

47% Energy Savings Pledge

This pledges a savings of at least 47% of energy consumption for heating and cooling the residence at the address shown hereon during the 12 month period beginning with the first full month after completed installation of Bristol units . . . it is hereby agreed and understood that this Pledge only [sic] be effective if the homeowner, located at the address shown hereon, has purchased a complete installation of Bristol Triple-E, A-Plus with ALPHA-10 insulated replacement windows, and is effective for a one year period after installation.

Exhibit D.

c. WinterLock windows Promotional Materials

“Reduce energy costs by up to 47%”

Exhibit E.

“Energy savings up to 47%”

Exhibit F.

d. Bristol Windows Promotional Materials

“Stop Wasting Money On Your Energy Bills!”

“47% Energy Savings Pledge!”

Exhibit G.

However, after reviewing my consumption of gas and electric one year after the installation, I have to admit

Complaint

that investing in three panes of glass worked for us. We consumed 53.2% less energy after getting the windows.

Exhibit H.

5. Many factors determine the savings homeowners can realize by replacing their windows, including the home's geographic location, size, insulation package, and existing windows. Consumers who replace single or double-paned wood or vinyl-framed windows – common residential window types in the United States – with Winchester replacement windows are not likely to achieve a 47% reduction in residential energy consumption or heating and cooling costs.

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

- a. Consumers who replace windows with Bristol or WinterLock Super Triple-E A-Plus with Alpha-10 windows are likely to achieve residential energy savings of 47%; or
- b. Consumers who replace windows with Bristol or WinterLock Super Triple-E A-Plus with Alpha-10 windows are likely to save 47% on residential heating and cooling costs.

7. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation(s) set forth in Paragraph 6 at the time the representation(s) were made.

8. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation(s) set forth in Paragraph 6 at the time the representation(s) were made. Therefore, the representation set forth in Paragraph 7 was false or misleading.

9. Respondent provided to its independent dealers and installers promotional materials referred to in Paragraph 4. By

Complaint

doing so, respondent provided them with the means and instrumentalities for the commission of deceptive acts or practices. Therefore, respondent's provision of such materials to its dealers and installers, as described in Paragraph 4 above, constitutes a deceptive act or practice.

10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this sixteenth day of May, 2012, has issued this complaint against respondent.

By the Commission, Commissioner Rosch and Commissioner Ohlhausen not participating.

Complaint

Exhibit A

Products Research Center Company In The News Sweepstakes Contact Us Home

| About Us | Links | Dealer Lookup | Customer Service |

Enter your zip code to find a dealer in your area.

Manufacturer
47%

Energy Savings Pledge
and
Tax Credit Qualified*

Replace your old drafty, Energy Wasting windows and doors
NOW and...

up to **\$1,500.⁰⁰**

SAVE, SAVE, SAVE

• Environmentally Triple Glass with Superior Heat, Cold & UV Reflective Properties
• Dual frame reinforced construction
• Deadbolt style locking system

• Year Round Savings
• Structural Integrity
• Comfort & Security

Sold and Installed by **EXCLUSIVE** Dealers throughout the USA!

*Bristol's super glass windows and doors exceed the 2010 AIAA requirements! Thermal and structural performance is guaranteed by 25 years of manufacturing Triple glass units... our legacy of perfection and performance can now be yours. We've been saving the earth's energy for 25 years. Now it's your turn.

WINCHESTER INDUSTRIES • 724-639-3551

Super
TRIPLE
E
ALPHA 10

ONLY THE VIEW
IS THE PROBLEM
BRISTOL'S WINDOWS!

Complaint

Exhibit B

...able on my body."

Although maintenance-free is a important goal for many homeowners, the triple-paneled design of some replacement windows, such as Bristol Windows, can also produce energy savings up to 50% per year. When compared to double-paneled windows, typically put a costlier inert gas known as argon between the panes, Bristol's triple-paneled replacement windows have two air spaces filled with their own proprietary mix of thick inert gases that act as a dual thermal insulator. Bristol adds high-tech heat reflective layers and a warm-edge spacer system that creates a ultimate thermal shield that does a much better job of slowing the transfer of cold in or heat out — thus halting the flow of heating and cooling dollars out the window.

A complete selection of aesthetic, virtually maintenance-free, triple-paneled, replacement windows by Winchester Industries are sold under the names of Bristol, Deford, and Baricade. For best results, energy savings and comfort, these windows must be professionally installed. The company is looking for new dealers in certain U.S. regions to round out their national presence.

For more info, visit the website www.winchesterwindows.net; call 800-885-5432; email inquiry@winchesterwindows.net; or write to Winchester Industries at PO Box 148, 950 Leech Ave, Salisbury, PA 17083.

#A#
By Del Williams, a technical writer based in Torrance, California.

[Back to News]

Installed in 60,000+ Homes! Call Now! Exclusive Territories Available **NOT JUST A WINDOW - A COMPLETE WINDOW SYSTEM**
 R-9 Certified • U-Value .17 (Rate of Heat Transfer - The lower the better)

Complaint

Exhibit C



How Much Can New Windows Really Save You?

Can you and your best homeowners find a way to save nearly half their home energy bill by turning to green technology.

Homeowners are dreading another season of sky-high winter heating or blistering summer air conditioning bills. Even if further price hikes don't occur, fairly a hefty scenario, homeowners are realizing that typical weather stripping and insulation may not be enough to curb soaring energy costs -- not when the windows themselves are bleeding precious winter heat, summer cooling, and hard-earned dollars.

The government Energy Star website, which promotes energy efficiency among U.S. consumers and businesses, acknowledges the need for better alternatives. "All energy-efficient windows have at least two panes, but not all double-paned windows are energy efficient," states the website. "Twenty years ago, double-paned meant energy efficient; today, advanced technologies have enabled the development of windows that are much more efficient than traditional clear-glass double-paned windows."

While it's no-brainer to upgrade windows if you're replacing them for resistance or aesthetic reasons anyway, more homeowners are switching from traditional single and double-paned windows to state-of-the-art, triple-paned units for comfort, cost and energy savings up to 50% per year.

We Juggle the Living on the Inside

Against windows as cold as -13° F, John and Kelly Simon's whole-house, gas heater and fireplace could make little headway. The family learned themselves as swimmers and bankers indoors, bracing themselves against the bone-chilling cold they felt coming through the double-paned windows in their 2,300-sq.-foot Grandpeter Park, Michigan home.

"The cold permeated even when we had our thermal drapes drawn, with the heater and fireplace going full blast," says John Simon. "We have to always be cold during winter, even though the heating bill was going through the roof." The first straw was when ice crystals formed on the windows -- inside the house. "It was like being on the tundra at home," says Simon. "We realized the cold transferred right through the double-paned windows, and we had to do something about it."

Simon went on a mission to bring comfort and manageable fuel bills to his family. He checked all the window companies in his area. He visited showrooms and other people's homes. He tested the thermal protection of energy-efficient, double-paned windows, but none fully satisfied him.

"Most windows can keep out drafts, but that doesn't mean they're efficient in keeping out winter cold or locking in heat," says Simon, who checked out as many actual install sites as he could, feeling the panes for heat or cold transfer first-hand. "Even the most energy-efficient, double-paned windows let cold penetrate or heat escape."

One window technology called triple-paned windows jumped to the front. The triple-paned design with high-tech thermal spacers between each pane of glass helped prevent both cold and heat from radiating either inside or outside.

Where competitors, double-paned window systems put a common inert gas, argon, between the panes, the triple-paned replacement windows, offered by Saltzman, Pennsylvania-based Winchester Industries, provided two air spaces filled with their own proprietary mix of gases as a dual thermal insulator. Like a thermal shield, the double layer of thick gases does a much better job of slowing the transfer of cold in or heat out -- that's halting the flow of heating and cooling dollars out the windows.

The Simons had the windows professionally installed in their home, and there's been no need for layered clothing layers since. "Because the triple-paned windows are so thermally efficient, there's no need to fiddle with the thermostat in winter or summer," says Simon. "Once I set the thermostat at a comfortable temperature, I don't have to touch it all year long. You can't say that about other windows."

Since replacing the double-paned windows, according to Simon, the triple-paned windows have cut his family's heating and cooling bills in half. "With the Bristol Windows, we save over \$2,500 a year in heating and cooling costs and are protected from spikes in energy cost. Best of all, we're comfortable and can finally enjoy our home year-round."

Not wanting summer heat anymore

During Sandra King's first summer in her Mesa, Arizona home it got up to 120° F outside. She found no refuge from the heat inside her two-story, 2,000-sq.-foot home on cooling a soft couch. Inside she had the air conditioning cranked all the way up, so calling fan going full blast, and two quiet floor fans placed on either side of a fabric sofa in her home office. "The fans were so noisy I couldn't hear the phone," says King. "Sitting in front of a mirror, I'd break out in a sweat or burn my feet on the hardwood floor."

A thermal reading of the single-paned, aluminum windows in her home read 135° F, while the home's interior topped 96° F. At a contractor's recommendation, she installed energy-efficient, double-paned windows in a new addition to her home, but was sorely disappointed at the amount of heat they still let through.

King took action, asking eight window companies to visit her home. She carefully compared their offerings and paid particular attention to the heat loss demonstrations, which were designed to show how their windows would repel heat. While the energy-efficient, double-paned windows retained heat transmission better than single-paned windows, each allowed a significant amount of heat to pass. None, she felt, would cut heat from the summer sun to a comfortable level. When King investigated the triple-paned windows, however, she immediately noticed a difference. "Under a heat lamp so hot it felt like lava, the Bristol Windows passed absolutely no heat," she says.

Besides the triple-paned windows' high-tech spacer system and insulating inert gases between each pane, King credits the windows' multiple low-E layers on two panes; these reflect more heat than the single low-E layer on energy-efficient, double-paned windows. The triple-paned windows' multiple, soft-coat low-E layers not only provide better heat reflective performance than the single hard-coat, low-E layer of typical double-paned windows, but also greatly reduce harmful ultraviolet rays.

King decided to replace her single-paned windows with triple-paned ones, and within the moment her hot house became a home for her. "The day they came to install my new windows, I was working in my home office as usual," says King. "When they removed the picture window, the heat was so intense I thought I'd die. But the instant they fitted these windows into place, the heat disappeared. I nearly got myself tangled up ahead around, trying to figure out what happened to the heat."

King estimates saving at least \$3,000 a year in cooling and heating costs since installing the Bristol Windows. She's so happy with the triple-paned windows that she's planning to replace her year-old, double-paned windows with them. "The first day the triple-paned windows blocked the heat and made me comfortable, that was it -- I got my life," says King. "I'm more productive and I like being home now."

Beating extremes and alternatives on foreign soil

Debra Duggert's family had battled weather extremes in their 2,000-sq.-foot, Lakewood, Colorado home for too long. With winter

Houseful of FREE Windows Sweepstakes



Contact us for additional details

Complaint

Exhibit D

Winchester Industries

Manufacturer of the Ultimate Bristol Replacement Windows and Doors

47% Energy Savings Pledge

This pledges a savings of at least 47% of energy consumption for heating and cooling the residence at the address shown hereon during the 12 month period beginning with the the first full month after completed installation of Bristol units. In the event energy savings are less than 47% of the previous 12 months' energy consumption, the homeowner should notify Winchester Industries who will provide the homeowner with the necessary forms to file for benefits under this Pledge. If energy savings are less than 47% of the previous 12 months' energy consumption, the homeowner will be reimbursed the difference between actual savings and 47% of energy cost for the previous 12 months.

Notwithstanding anything herein to the contrary, it is hereby agreed and understood that this Pledge only be effective if the homeowner, located at the address shown hereon, has purchased a complete installation of Bristol Triple-E, A-Plus with ALPHA-10 insulated replacement windows, and is effective for a one year period after installation.

THIS PLEDGE IS BASED ON ENERGY(FUEL) CONSUMPTION, NOT COST. IT IS SUBJECT TO THE FOLLOWING PROVISIONS:

- 1) This factory pledge covers only Bristol SUPER Triple-E, A-Plus with Alpha-10 insulating glass replacement windows.
- 2) A complete, full-house, installation of Bristol's SUPER Triple-E with Alpha-10 is defined as all windows, not less than eight, on this residence excluding basement, attic and porch.
- 3) This pledge covers only single and two family dwellings.
- 4) Maximum payment under this Pledge shall be \$500.00 and is strictly for the time period indicated on the reverse side. Reimbursements, if any, can only be issued to a homeowner that has resided at the specified address for a full 12 month period before and after the completed installation date.
- 5) Homeowners must properly maintain heating and cooling system.
- 6) Appropriate allowances for abnormal weather conditions may be made in adjusting a claim.
- 7) Claims under this Pledge must be submitted in writing with supporting evidence to Winchester Industries within 30 days after expiration of this Pledge. Also forward a copy to the Bristol Distributor where purchased.
- 8) Proper allowance shall be made for cost of operation, taxes and service fees, of any utilities included in the fuel bill in adjusting a claim.
- 9) Claim adjustments, if any, will be issued from Winchester Industries within 90 days after all information has been verified and found to be accurate.
- 10) The homeowner referred to on the reverse side as the purchaser of Bristol units must have resided at the specified residence address for a full one year period preceding the installation.
- 11) Apparent changes such as room additions, i.e., sunrooms, heated garages, etc., to the said residence during the 12 month period of the claim shall make such claims invalid.
- 12) Homes moved from one utility service to another shall make this claim null and void.
- 13) Reimbursement at rates prevailing at time of window purchase. Comparison will be based on units of energy used rather than actual dollars to compensate for inflationary increases from one year to the next.
- 14) Complete utility bills for the 24 months in question or a summary form from the authorized utility must be submitted to claim a refund.



Claims must be submitted in writing along with proof of purchase and utility bills and addressed to:

Energy Savings Dept. • Winchester Industries • P.O. Box 160, Saltsburg, PA 15681

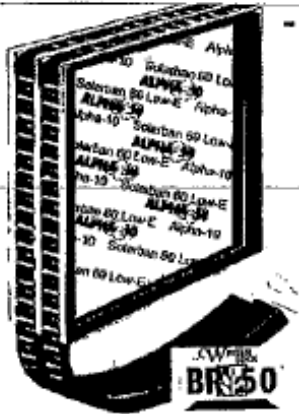
Complaint

Exhibit E



A beautiful, durable, low
maintenance and environmentally
responsible choice

- Renew and Improve your home's appearance
- The last window you will ever need
- A Green Choice:



- Reduce energy costs by up to 47%

WINTER LOCK
LIFETIME WINDOW SYSTEMS

Complaint

Exhibit F

Energy Savings up to 47%



Super Triple E A+ High Performance Low-E & Special Gas Mixture Saves You Money and Energy!

Average Monthly Energy Cost	10 Years with no Increase in Energy Costs	Annually			Reflected Savings Using 10% Energy Cost Increase			
		10 Years with 5% Increase per year	10 Years with 10% Increase per year	10 Years with 15% Increase per year	15% Savings	25% Savings	40% Savings	47% Savings
\$100	\$12,000	\$15,090	\$18,125	\$24,364	\$2,869	\$4,761	\$7,850	\$8,388
\$125	\$15,000	\$18,867	\$23,908	\$30,456	\$3,596	\$5,877	\$9,562	\$11,284
\$150	\$18,000	\$22,640	\$29,687	\$36,547	\$4,303	\$7,172	\$11,476	\$13,483
\$175	\$21,000	\$26,414	\$33,969	\$42,638	\$5,029	\$8,367	\$13,387	\$15,730
\$200	\$24,000	\$30,187	\$38,250	\$48,729	\$5,737	\$9,562	\$15,300	\$17,977
\$225	\$27,000	\$33,960	\$43,031	\$54,820	\$6,455	\$10,758	\$17,212	\$20,225
\$250	\$30,000	\$37,734	\$47,812	\$60,911	\$7,172	\$11,953	\$19,125	\$22,472
\$275	\$33,000	\$41,507	\$52,594	\$67,002	\$7,889	\$13,148	\$21,037	\$24,719
\$300	\$36,000	\$45,280	\$57,375	\$73,093	\$8,606	\$14,344	\$22,950	\$26,966
\$325	\$39,000	\$49,054	\$62,156	\$79,185	\$9,323	\$15,539	\$24,862	\$29,213
\$350	\$42,000	\$52,827	\$66,937	\$85,276	\$10,041	\$16,734	\$26,775	\$31,460
\$375	\$45,000	\$56,601	\$71,718	\$91,367	\$10,758	\$17,930	\$28,687	\$33,708
\$400	\$48,000	\$60,374	\$76,500	\$97,458	\$11,475	\$19,125	\$30,600	\$35,955



Complaint

Exhibit G

**STOP WASTING MONEY
ON YOUR
ENERGY BILLS!**

**47%
Energy Savings
Predicted!**

Bristol

THE ULTIMATE REPLACEMENT WINDOWS & DOORS!
Eliminates Maintenance - Improves Security - Provides Energy Efficiency

www.bristolwindows.com

88-101 **EPG** Glass Technology SINCE 1988

Complaint

Exhibit H

"I must tell you I am so elated over the change in my home. I used to think my air conditioning wasn't working properly and I would ask the technician if I needed Freon when he did the regular check ups. He always said it was fine. I sit in front of my windows and do a lot of crafts and saw a change immediately the next day. I have the sun come in from the west and afternoons are the hottest part of the day. I realized my air conditioning was blowing hot air around before that was coming in through the windows. Now my air conditioning is blowing cool air and it reaches across the whole room. I sit in my chair now and can't get over the change. I am so comfortable and this week has been a good test. I even raised my temp to 82° and the whole place is comfortable. I do have a fan on in the living room. Sorry to write such a long letter but I must tell you I also get the full hot sun from west. I used to close my bathroom door in the summer it was like an oven and in the winter it was so cold. I hated to go in to shower. Now I have the door open during the day and night and the temperature is the same as rest of the house. I wish I had done the windows sooner. I have lived here ten years. It is well worth the investment. I am enjoying my small place so much more. The heat outside is not coming in and I know I will be more comfortable this winter. I'm sure I will get more benefit from the heating system. A job well done and your men were fine gentlemen and I will be telling my friends what a difference the windows make."

Evelyn Rokart, AZ

"This is a testimonial to the changes in my energy bills since I began replacing my old windows with Bristol windows. Prior to the initial installation in 2001, my energy bills (gas and electricity) were running \$108 per month using the budget system. Since that time, I have been replacing windows at the rate of 2-3 per year. As of November 2003, I was spending \$82 per month for energy. As of this December, I was spending \$71 per month on energy after replacing 8 windows. It definitely has made a difference and I expect the savings to continue as I work toward replacing all my windows."

Mary Ann Nelson, NE

"I just wanted to send a note of appreciation to your organization. Everyone involved with the manufacturing process should know that they are doing a great job and that the windows your organization manufactures really do work! I was skeptical about the three-pane system and the projected energy savings that the sales person made. However, after reviewing my consumption of gas and electric one year after the installation, I have to admit that investing in three panes of glass worked for us. We consumed 53.2% less energy after getting the windows."

I like the lower energy bills...my wife likes the change in comfort level. Prior to investing in the windows, my wife would complain about how cold it was during the winter months and how hot it was upstairs (mainly in the bedrooms) during the summer months. We have not had that conversation since having your windows installed."

What a great investment! Throughout the year I'm saving on average \$180.00 per month. The monthly payment for the windows is less than \$150.00 (I think that's awesome)! I read in an article that new home construction will have to install a three-pane system if the builder wants to promote the home as a "green home." Excellent! Please give this letter to potential clients; the average consumer, unfortunately, doesn't know what I know. Energy bills go down...comfort levels change...it's such a great investment. Everyone should have your windows! More than Satisfied."

K. Niss, Hosan, VA



"We had Bristol Windows replace 12 of our existing windows in our home 2 years ago. It was a big decision for us because they are not the cheap variety, but we were convinced it was a good investment. We would get what we paid for, and we should do it. We only had 12 done instead of the 17 windows we have, and they said we could do the rest later if we were satisfied, and have time to pay it off. The time is now! We absolutely LOVE these windows. When everyone else was screaming about the heating cost when prices went up, ours stayed the same. This year our heating bill has actually gone down instead of up. They are SOOOO easy to clean, all from the inside, no ladders, we never have to struggle to get old windows open, some didn't open at all before. No more frosted over windows in winter either. Fresh air in the fall and spring is so easy to have. And they worked with us to make it affordable for us. It is definitely one of our best investments, and now we are getting the other 6 windows replaced."

Jim & Annette Hattan - Fremont, NE

Decision and Order

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 a Complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the respondent with violation of the Federal Trade Commission 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 complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 Federal Trade Commission Act, and that a 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 thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Winchester Industries is a Pennsylvania partnership with its principal office or place of business at 500 Leech Avenue, Saltsburg, Pennsylvania 15681. The partnership was formed in 1983 by Steel Bridge, LTD, LLC, a Canadian

Decision and Order

corporation, and Winchester Industries, Inc., a Pennsylvania corporation.

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

DEFINITIONS

For purposes of this order, the following definitions shall apply:

- A. “Clearly and prominently” means
 1. In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it;
 2. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the disclosure shall be made through the same means through which the communication is presented. In any communication disseminated by means of an interactive electronic medium such as software, the Internet, or online services, the disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade,

Decision and Order

contrast to the background against which it appears, the length of time it appears on the screen, and its location, for an ordinary consumer to notice, read and comprehend it; and

3. Regardless of the medium used to disseminate it, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.
- B. “Close proximity” means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.
 - C. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
 - D. “Competent and reliable scientific evidence” shall mean tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true.
 - E. “Covered product or service” means any fenestration product, any component thereof, and any product or any service for which respondent makes any claim about energy savings, energy costs, energy consumption, U-factor, SHGC, R-value, K-value, insulating properties, thermal performance, or energy-related efficacy.
 - F. “Fenestration product” means any window, sliding glass door, or skylight.

Decision and Order

- G. “K-value” is a measure of a material’s thermal conductivity.
- H. Unless otherwise specified, “respondent” shall mean Winchester Industries, a partnership, its successors and assigns, and its officers, agents, representatives, and employees.
- I. “R-value” is a measure of a material’s resistance to heat flow.
- J. “SHGC” means solar heat gain coefficient, which is the fraction of incident solar radiation admitted through a window, both directly transmitted and absorbed and subsequently released inward.
- K. “U-factor” is a measure of the rate of heat loss.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service in or affecting commerce, shall not make any representation, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names that:

- A. Consumers who replace their windows with respondent’s windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; or
- B. Respondent guarantees or pledges that consumers who replace their windows with respondent’s windows will achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs;

unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that all

Decision and Order

or almost all consumers are likely to receive the maximum represented savings or reduction.

Provided, however, that if respondent represents that consumers who replace their windows with respondent's windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs under specified circumstances, or if respondent guarantees or pledges up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs under specified circumstances, it must disclose those circumstances clearly and prominently in close proximity to such representation, guarantee, or pledge and it must substantiate that all or almost all consumers are likely to receive the maximum represented, guaranteed, or pledged savings or reduction under those circumstances (*e.g.*, when replacing a window of a specific composition in a building having a specific level of insulation in a specific region).

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service in or affecting commerce, shall not make any representation, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names:

- A. That any specific number or percentage of consumers who replace their windows with respondent's windows achieve energy savings or reduction in heating and cooling costs; or
- B. About energy consumption, energy savings, energy costs, heating and cooling costs, U-factor, SHGC, R-value, K-value, insulating properties, thermal performance, or energy-related efficacy of any covered product or service;

unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon

Decision and Order

competent and reliable scientific evidence to substantiate that such representation is true.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service in or affecting commerce, shall not provide to others the means and instrumentalities with which to make, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names, any false, unsubstantiated, or otherwise misleading representation of material fact. For the purposes of this Part, “means and instrumentalities” shall mean any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any covered product or service, in or affecting commerce.

IV.

IT IS FURTHER ORDERED that respondent Winchester Industries, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

Decision and Order

V.

IT IS FURTHER ORDERED that respondent Winchester Industries, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying all acknowledgments of receipt of this order obtained pursuant to this Part.

VI.

IT IS FURTHER ORDERED that respondent Winchester Industries, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the partnership that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the partnership name or address. *Provided, however,* that, with respect to any proposed change in the partnership about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: "Winchester Industries, File No. 102 3171, Docket No. C-4362."

Decision and Order

VII.

IT IS FURTHER ORDERED that respondent Winchester Industries, and its successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports.

VIII.

This order will terminate twenty on May 16, 2032, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Rosch and Commissioner Ohlhausen not participating.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Winchester Industries, a partnership (“respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter involves respondent’s marketing and sale of replacement windows for use in residences. According to the FTC complaint, respondent represented that consumers who replace their windows with Bristol and Winter Lock Super Triple-E A-Plus with Alpha-10 windows are likely to achieve residential energy savings of 47% or to save 47% on their heating and cooling costs. The complaint alleges that respondent did not possess and rely upon a reasonable basis substantiating these representations when it made them. Many factors determine the savings homeowners can realize by replacing their windows, including the home’s geographic location, size, insulation package, and existing windows. Consumers who replace single or double-paned wood or vinyl-framed windows – common residential window types in the United States – with Winchester replacement windows are not likely to achieve a 47% reduction in residential energy consumption or heating and cooling costs. The complaint also alleges that, by providing its independent dealers and installers with advertising and other promotional materials making the above unsubstantiated representations, respondent provided the means and instrumentalities to engage in deceptive practices. Thus, the complaint alleges that respondent engaged in unfair or deceptive practices in violation of Section 5(a) of the FTC Act.

Some promotional materials challenged in the FTC’s complaint include the words “up to” in an apparent attempt to

Analysis to Aid Public Comment

qualify representations that consumers who replace windows with respondent's windows are likely to achieve specified amounts of residential energy savings or reduction in residential heating and cooling costs. In the context of specific ads in this case, the words "up to" do not effectively qualify such representations for replacement windows. The FTC's complaint and the proposed consent order should not be interpreted as a general statement of how the Commission may interpret or take other action concerning representations including the words "up to" for other products or services in the future.

The proposed consent order contains three provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I addresses the marketing of windows. It prohibits respondent from making any representation that: (A) consumers who replace their windows with respondent's windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; or (B) respondent guarantees or pledges that consumers who replace their windows with respondent's windows will achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to receive the maximum represented savings or reduction. Further, if respondent represents, guarantees, or pledges that consumers achieve such energy savings or heating and cooling cost reductions under specified circumstances, it must: disclose those circumstances clearly and prominently in close proximity to such representation, guarantee, or pledge; and substantiate that all or almost all consumers are likely to receive the maximum represented, guaranteed, or pledged savings or reduction under those circumstances (*e.g.*, when replacing a window of a specific composition in a building having a specific level of insulation in a specific region). The performance standard imposed under this Part constitutes fencing-in relief reasonably necessary to ensure that any future energy savings or reduction claims are not deceptive.

Analysis to Aid Public Comment

Parts II and III address any product or service for which respondent makes any energy-related efficacy representation. Part II prohibits respondent from making any representation: (A) that any specific number or percentage of consumers who replace their windows with respondent's windows achieve energy savings or reduction in heating and cooling costs; or (B) about energy consumption, energy savings, energy costs, heating and cooling costs, U-factor, solar heat gain coefficient, R-value, K-value, insulating properties, thermal performance, or energy-related efficacy; unless the representation is non-misleading and substantiated by competent and reliable scientific evidence. Part III prohibits respondent from providing to others the means and instrumentalities with which to make any false, unsubstantiated, or otherwise misleading representation of material fact. It defines "means and instrumentalities" to mean any information, including any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any such product or service.

Parts IV through VII require respondent to: keep copies of advertisements and materials relied upon in disseminating any representation covered by the order; provide copies of the order to certain personnel, agents, and representatives having responsibilities with respect to the subject matter of the order; notify the Commission of changes in its structure that might affect compliance obligations under the order; and file a compliance report with the Commission and respond to other requests from FTC staff. Part VIII provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or the proposed order, or to modify the proposed order's terms in any way.

Complaint

IN THE MATTER OF

SERIOUS ENERGY, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4359; File No. 112 3001
Complaint, May 16, 2012 – Decision, May 16, 2012

This consent order addresses Serious Energy, Inc.'s marketing and sale of replacement windows for use in residences. The complaint alleges that respondent did not possess and rely upon a reasonable basis substantiating representations that consumers who replace their windows with SeriousWindows 501 Series windows are likely to achieve residential energy savings of 40% or save 40% on residential heating and cooling costs or that consumers who replace their windows with SeriousWindows 600 Quantum 2 Series windows are likely to achieve residential energy savings of 49% or save 49% on residential heating and cooling costs when it made them. The consent order prohibits respondent from making any representation that: (A) consumers who replace their windows with respondent's windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; or (B) respondent guarantees or pledges that consumers who replace their windows with respondent's windows will achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to receive the maximum represented savings or reduction.

Participants

For the *Commission: Robert Frisby, Zachary Hunter, Joshua Millard, and Sarah Waldrop.*

For the *Respondent: Lydia Parnes, Wilson Sonsini Goodrich & Rosati, PC.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Serious Energy, Inc. ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

Complaint

1. Respondent Serious is a Delaware corporation with its principal office or place of business at 1250 Elko Drive, Sunnyvale, CA 94089. Respondent does business under its own name and formerly did business under the name “Serious Materials, Inc.”

2. Respondent manufactures, advertises, offers for sale, sells, and/or distributes windows, including “SeriousWindows” replacement window lines. Respondent distributes these windows to independent dealers and installers who in turn sell them to consumers for residential use.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused the dissemination of advertising and promotional materials, including printed advertisements, website advertising, and other promotional materials provided to window dealers and installers, including but not necessarily limited to the attached Exhibits A through D. Respondent’s dealers and installers disseminated or caused the dissemination of these advertisements and promotional materials to consumers. The advertisements and promotional materials contain the following statements or depictions:

a. SeriousWindows Printed Promotional Material:

Guaranteed to reduce your heating and cooling use by up to 49%*. When you replace all of your old windows with SeriousWindows 600 Series, you’ll not only improve your living comfort and your home’s value, but you can significantly lower your heating and cooling consumption. If you spend \$300 a month in heating and cooling, with Quantum2 windows you can potentially save up to 49%, that’s a savings of over \$14,400 in a decade. That’s why we say SeriousWindows 600 products are an annuity, because they will pay for themselves over time.

* Energy savings may vary and depends on numerous factors and variables pertaining to your windows and

Complaint

dwelling. Cost savings in this example does not include any energy cost increases.

Exhibit A (SeriousWindows 600 Quantum 2 Series Brochure).

b. SeriousWindows Printed Promotional Material:

SeriousWindows

SAVES MORE ENERGY THAN ANY OTHER WINDOW. PERIOD.

....

· Reduces heating & cooling

costs by up to 50%.*

....

*According to internal modeling with ResFen software & modeling parameters established by the Efficient Windows Collaborative.

Exhibit B (Print Brochure).

c. SeriousWindows Energy Savings Pledge:

49%

FUEL SAVINGS PLEDGE

....

ENERGY SAVINGS PLEDGE

This Pledges a savings of at least 49% of "Energy Consumption" for heating and cooling this residence at the address shown below during the 12 month period beginning with the date of this Pledge. If energy savings are less than 49% of the previous 12 months' energy consumption, the

Complaint

homeowner will be reimbursed the difference between actual savings and 49% of energy cost for the previous 12 months. In the event energy savings are less than 49% of the previous 12 months' energy consumption, the homeowner should notify the SeriousWindows™ Quantum2 Dealer who will provide the homeowner with the necessary forms to file for benefits under this Pledge.

....

Exhibit C.

d. SeriousWindows Printed Promotional Material:

Cut Your Energy Bills By Up to 40%
SeriousWindows 501 Series offers some of the most energy efficient residential windows on the market today. You'll save money on heating and cooling costs, as well as energy. If you spend \$200 a month on heating and cooling that's \$2,400 a year. SeriousWindows 501 products cut 40% off that figure and would save you \$960 in just the first year and over \$9,600 over the next decade.

Exhibit D (SeriousWindows 501 Series Brochure).

5. Many factors determine the savings homeowners can realize by replacing their windows, including the home's geographic location, size, insulation package, and existing windows. Consumers who replace single or double-paned wood or vinyl-framed windows – common residential window types in the United States – with SeriousWindows replacement windows are not likely to achieve a 40% or 49% reduction in residential energy consumption or heating and cooling costs.

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

- a. Consumers who replace windows with SeriousWindows 600 Quantum 2 Series windows are likely to achieve residential energy savings of 49%;

Complaint

- b. Consumers who replace windows with SeriousWindows 600 Quantum 2 Series windows are likely to save 49% on residential heating and cooling costs;
- c. Consumers who replace windows with SeriousWindows 501 Series windows are likely to achieve residential energy savings of 40%; or
- d. Consumers who replace windows with SeriousWindows 501 Series windows are likely to save 40% on residential heating and cooling costs.

7. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation(s) set forth in Paragraph 6 at the time that the representation(s) were made.

8. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation(s) set forth in Paragraph 6 at the time that the representation(s) were made. Therefore, the representation set forth in Paragraph 7 was false or misleading.

9. Respondent provided to its independent dealers and installers promotional materials referred to in Paragraph 4. By doing so, respondent provided them with the means and instrumentalities for the commission of deceptive acts or practices. Therefore, respondent's provision of such materials to its dealers and installers, as described in Paragraph 4 above, constitutes a deceptive act or practice.

10. Respondent's practices, as alleged in this complaint, constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission, this sixteenth day of May, 2012, has issued this complaint against respondent.

Complaint

By the Commission, Commissioner Rosch and Commissioner Ohlhausen not participating.

Exhibit A

Guaranteed to reduce your heating and cooling use by up to 49%*. When you replace all of your old windows with SeriousWindows 600 Series, you'll not only improve your living comfort and your home's value, but you can significantly lower your heating and cooling consumption. If you spend \$300 a month in heating and cooling, with Quantum2 windows you can potentially save up to 49%, that's a savings of over \$14,400 in a decade. That's why we say SeriousWindows 600 products are an annuity, because they will pay for themselves over time.

Energy savings may vary and depends on numerous factors and variables pertaining to your windows and dwelling. Cost savings in this example does not include any energy cost increases.

Complaint

Exhibit B

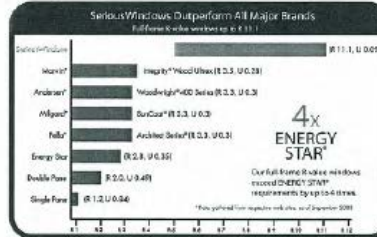
SeriousWindows

SAVES MORE ENERGY THAN ANY OTHER WINDOW. PERIOD.



Our windows save more energy than any other window while improving comfort and providing the design & style you expect from premium windows.

- Reduces heating & cooling costs by up to 50%.*
- 18% warmer glass than standard dual-pane low-E windows.
- Highest insulating full-frame R-value windows.
- Blocks 99.5% UV rays vs. 84% standard dual-pane low-E windows.

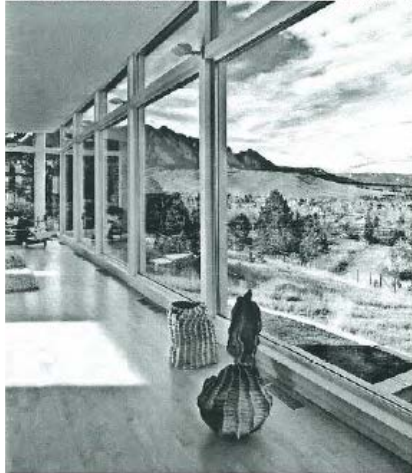


SERIOUS MATERIALS (800)797-8159
www.seriouswindows.com
www.seriousmaterials.com

* According to internal modeling with Radiance software & modeling parameters established by the Efficient Windows Collaborative.

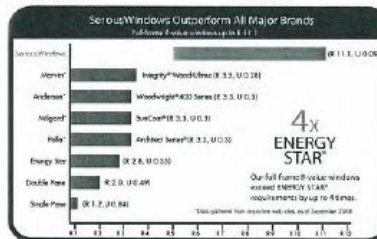
SeriousWindows

SAVES MORE ENERGY THAN ANY OTHER WINDOW. PERIOD.



Our windows save more energy than any other window while improving comfort and providing the design & style you expect from premium windows.

- Reduces heating & cooling costs by up to 50%.*
- 18% warmer glass than standard dual-pane low-E windows.
- Highest insulating full-frame R-value windows.
- Blocks 99.5% UV rays vs. 84% standard dual-pane low-E windows.



SERIOUS MATERIALS (800)797-8159
www.seriouswindows.com
www.seriousmaterials.com

* According to internal modeling with Radiance software & modeling parameters established by the Efficient Windows Collaborative.

SM 001747

COMPLAINT EXHIBIT B

Complaint

Exhibit C

ENERGY SAVINGS PLEDGE

This Pledge a savings of at least 49% of "Energy Consumption" for heating and cooling this residence at the address shown below during the 12 month period beginning with the date of this Pledge. If energy savings are less than 49% of the previous 12 months' energy consumption, the homeowner will be reimbursed the difference between actual savings and 49% of energy cost for the previous 12 months. In the event energy savings are less than 49% of the previous 12 months' energy consumption, the homeowner should notify the *SeriousWindows™ Quantum2 Dealer* who will provide the homeowner with the necessary forms to file for benefits under this Pledge.

**THIS PLEDGE IS BASED ON ENERGY CONSUMPTION, NOT COST.
IT IS SUBJECT TO THE FOLLOWING PROVISIONS:**

1. This Pledge covers only the *SeriousWindows Quantum2* window with high performance glass.*
2. This Pledge covers only single and two family dwellings.
3. Complete installation of these windows is defined as all the windows and glass patio doors on this residence except in the unheated or cooled areas such as attics, basements and outside porches.
4. Maximum payment under this Pledge is \$500.00.
5. Claims under this Pledge must be filed in writing with support evidence within 30 days after expiration of this Pledge to the *SeriousWindows Quantum2 Dealer*.
6. Homeowners must properly maintain heating and cooling systems.
7. All other doors must be energy efficient and weather tight.
8. Proper allowance for abnormal weather conditions shall be made in adjusting a claim.
9. Reimbursement at rates prevailing at the time of window purchase.
10. All claims are subject to an inspection by a *SeriousWindows Quantum2 Dealer* system engineer.

Name _____

Address _____

City _____ State _____ Zip _____

Date of Issue _____

How/where/when anything herein to the contrary, it is hereby agreed and understood that this Pledge only be effective if the homeowner located at the address shown above has purchased a "Complete" installation of residential replacement windows with "high performance glass" and is effective on the date shown.
* High performance glass is the *SeriousGlass™ 10-PowerQ* system.

PN #114-002B-021629

SM 001778

COMPLAINT EXHIBIT C

Complaint

SM 001779



FUEL SAVINGS PLEDGE

Installation Date* _____
Issued to (Name) _____
Address _____
City _____ State _____ Zip _____
Authorized _____ Officer



*Expires 12 months from installation date.

Complaint

Exhibit D

Cut Your Energy Bills By Up to 40% SeriousWindows 501 Series offers some of the most energy efficient residential windows on the market today. You'll save money on heating and cooling costs, as well as energy. If you spend \$200 a month on heating and cooling that's \$2,400 a year. SeriousWindows 501 products cut 40% off that figure and would save you \$960 in just the first year and over \$9,600 over the next decade.



Decision and Order

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 a Complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the respondent with violation of the Federal Trade Commission 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 complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 Federal Trade Commission Act, and that a 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 thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Serious Energy, Inc. ("Serious") is a Delaware corporation with its principal office or place of business at 1250 Elko Drive, Sunnyvale, CA 94089.

Decision and Order

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**DEFINITIONS**

For purposes of this order, the following definitions shall apply:

- A. “Clearly and prominently” means
 1. In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it;
 2. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the disclosure shall be made through the same means through which the communication is presented. In any communication disseminated by means of an interactive electronic medium such as software, the Internet, or online services, the disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen,

Decision and Order

and its location, for an ordinary consumer to notice, read and comprehend it; and

3. Regardless of the medium used to disseminate it, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.
- B. “Close proximity” means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.
- C. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- D. “Competent and reliable scientific evidence” shall mean tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true.
- E. “Covered product or service” means any fenestration product, any component thereof, and any product or any service for which respondent makes any claim about energy savings, energy costs, energy consumption, U-factor, SHGC, R-value, K-value, insulating properties, thermal performance, or energy-related efficacy.
- F. “Fenestration product” means any window, sliding glass door, or skylight.
- G. “K-value” is a measure of a material’s thermal conductivity.

Decision and Order

- H. Unless otherwise specified, “respondent” shall mean Serious Energy, Inc., its successors and assigns, and its officers, agents, representatives, and employees.
- I. “R-value” is a measure of a material’s resistance to heat flow.
- J. “SHGC” means solar heat gain coefficient, which is the fraction of incident solar radiation admitted through a window, both directly transmitted and absorbed and subsequently released inward.
- K. “U-factor” is a measure of the rate of heat loss.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service in or affecting commerce, shall not make any representation, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names that:

- A. Consumers who replace their windows with respondent’s windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; or
- B. Respondent guarantees or pledges that consumers who replace their windows with respondent’s windows will achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs;

unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to receive the maximum represented savings or reduction.

Decision and Order

Provided, however, that if respondent represents that consumers who replace their windows with respondent's windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs under specified circumstances, or if respondent guarantees or pledges up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs under specified circumstances, it must disclose those circumstances clearly and prominently in close proximity to such representation, guarantee, or pledge and it must substantiate that all or almost all consumers are likely to receive the maximum represented, guaranteed, or pledged savings or reduction under those circumstances (*e.g.*, when replacing a window of a specific composition in a building having a specific level of insulation in a specific region).

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service in or affecting commerce, shall not make any representation, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names:

- A. That any specific number or percentage of consumers who replace their windows with respondent's windows achieve energy savings or reduction in heating and cooling costs; or
- B. About energy consumption, energy savings, energy costs, heating and cooling costs, U-factor, SHGC, R-value, K-value, insulating properties, thermal performance, or energy-related efficacy of any covered product or service;

unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that such representation is true.

Decision and Order

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service in or affecting commerce, shall not provide to others the means and instrumentalities with which to make, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names, any false, unsubstantiated, or otherwise misleading representation of material fact. For the purposes of this Part, “means and instrumentalities” shall mean any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any covered product or service, in or affecting commerce.

IV.

IT IS FURTHER ORDERED that respondent Serious, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials in its possession or control containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

Decision and Order

V.

IT IS FURTHER ORDERED that respondent Serious, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying all acknowledgments of receipt of this order obtained pursuant to this Part.

VI.

IT IS FURTHER ORDERED that respondent Serious, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: "Serious Energy, Inc., File No. 112 3001, Docket No. C-4359."

Decision and Order

VII.

IT IS FURTHER ORDERED that respondent Serious, and its successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports.

VIII.

This order will terminate on May 16, 2032, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Rosch and Commissioner Ohlhausen not participating.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Serious Energy, Inc., a corporation (“respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter involves respondent’s marketing and sale of replacement windows for use in residences. According to the FTC complaint, respondent represented that consumers who replace their windows with SeriousWindows 600 Quantum 2 Series windows are likely to achieve residential energy savings of 49% or save 49% on residential heating and cooling costs. Additionally, according to the FTC complaint, respondent represented that consumers who replace their windows with SeriousWindows 501 Series windows are likely to achieve residential energy savings of 40% or save 40% on residential heating and cooling costs.

The complaint alleges that respondent did not possess and rely upon a reasonable basis substantiating these representations when it made them. Many factors determine the savings homeowners can realize by replacing their windows, including the home’s geographic location, size, insulation package, and existing windows. Consumers who replace single or double-paned wood or vinyl-framed windows – common residential window types in the United States – with SeriousWindows replacement windows are not likely to achieve a 40% or 49% reduction in residential energy consumption or heating and cooling costs. The complaint also alleges that, by providing its independent dealers and installers with advertising and other promotional materials making the above unsubstantiated representations, respondent provided the means and instrumentalities to engage in deceptive

Analysis to Aid Public Comment

practices. Thus, the complaint alleges that respondent engaged in unfair or deceptive practices in violation of Section 5(a) of the FTC Act.

Some promotional materials challenged in the FTC's complaint include the words "up to" in an apparent attempt to qualify representations that consumers who replace windows with respondent's windows are likely to achieve specified amounts of residential energy savings or reduction in residential heating and cooling costs. In the context of specific ads in this case, the words "up to" do not effectively qualify such representations for replacement windows. The FTC's complaint and the proposed consent order should not be interpreted as a general statement of how the Commission may interpret or take other action concerning representations including the words "up to" for other products or services in the future.

The proposed consent order contains three provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I addresses the marketing of windows. It prohibits respondent from making any representation that: (A) consumers who replace their windows with respondent's windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; or (B) respondent guarantees or pledges that consumers who replace their windows with respondent's windows will achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to receive the maximum represented savings or reduction. Further, if respondent represents, guarantees, or pledges that consumers achieve such energy savings or heating and cooling cost reductions under specified circumstances, it must: disclose those circumstances clearly and prominently in close proximity to such representation, guarantee, or pledge; and substantiate that all or almost all consumers are likely to receive the maximum represented, guaranteed, or pledged savings or reduction under those circumstances (*e.g.*, when replacing a window of a specific composition in a building having a specific level of insulation in a specific region). The

Analysis to Aid Public Comment

performance standard imposed under this Part constitutes fencing-in relief reasonably necessary to ensure that any future energy savings or reduction claims are not deceptive.

Parts II and III address any product or service for which respondent makes any energy-related efficacy representation. Part II prohibits respondent from making any representation: (A) that any specific number or percentage of consumers who replace their windows with respondent's windows achieve energy savings or reduction in heating and cooling costs; or (B) about energy consumption, energy savings, energy costs, heating and cooling costs, U-factor, solar heat gain coefficient, R-value, K-value, insulating properties, thermal performance, or energy-related efficacy; unless the representation is non-misleading and substantiated by competent and reliable scientific evidence. Part III prohibits respondent from providing to others the means and instrumentalities with which to make any false, unsubstantiated, or otherwise misleading representation of material fact. It defines "means and instrumentalities" to mean any information, including any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any such product or service.

Parts IV through VII require respondent to: keep copies of advertisements and materials relied upon in disseminating any representation covered by the order; provide copies of the order to certain personnel, agents, and representatives having responsibilities with respect to the subject matter of the order; notify the Commission of changes in its structure that might affect compliance obligations under the order; and file a compliance report with the Commission and respond to other requests from FTC staff. Part VIII provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or the proposed order, or to modify the proposed order's terms in any way.

Complaint

IN THE MATTER OF

GORELL ENTERPRISES, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4360; File No. 112 3053
Complaint, May 16, 2012 – Decision, May 16, 2012

This consent order addresses Gorell Enterprises, Inc.'s marketing and sale of replacement windows for use in residences. The complaint alleges that respondent did not possess and rely upon a reasonable basis substantiating representations that consumers who replace their windows with respondent's Thermal Master III[®] glass system windows are likely to achieve residential energy savings of 40% or save 40% on residential heating and cooling costs when it made them.. The consent order prohibits respondent from making any representation that: (A) consumers who replace their windows with respondent's windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; or (B) respondent guarantees or pledges that consumers who replace their windows with respondent's windows will achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to receive the maximum represented savings or reduction.

Participants

For the *Commission: Robert Frisby, Zachary Hunter, Joshua Millard, and Sarah Waldrop.*

For the *Respondent: Steve Stallings, Burns White LLC.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Gorell Enterprises, Inc. ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Gorell is a Pennsylvania corporation with its principal office or place of business at 1380 Wayne Avenue, Indiana, Pennsylvania 15701. Respondent has done business as

Complaint

“Gorell Window & Doors, LLC” and “American Conservatory Systems.”

2. Respondent manufactures, advertises, offers for sale, sells, and/or distributes windows, including “Gorell” replacement window lines. Respondent distributes these windows to independent dealers and installers who in turn sell them to consumers for residential use.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused the dissemination of advertising and promotional materials, including content for presentation books and other promotional materials provided to window dealers and installers, including but not necessarily limited to the attached Exhibit A. Respondent’s dealers and installers disseminated or caused the dissemination of these advertisements and promotional materials to consumers. The advertisements and promotional materials contain the following statements or depictions:

- a. Gorell Energy Savings Pledge:

40%

ENERGY SAVINGS PLEDGE!!!

....

40% Energy Savings Pledge

Gorell Windows & Doors pledges that you will save at least 40% on home fuel consumption for both heating and cooling at your residence . . . during the 12-month period beginning with the date of this pledge (after installation and final payment).

If your energy savings during the first year after the installation of your new windows are less than 40% of your previous 12-month energy consumption – with all

Complaint

things being equal except for your new Gorell windows – you will be reimbursed the difference between the actual savings and 40% of your energy costs for the previous 12 months, up to \$500.

If the sum of heating and cooling degree days after installation is within 5% of the same data from the 12 months prior to installation, Gorell will honor the full request, up to \$500. However, if the sum of heating and cooling degree days after the installation of Gorell products is between 5% and 20% more, Gorell will honor 75% of the pledge claim, up to \$375. If the heating and cooling degree days are more than 20% greater after the installation, Gorell will honor 50% of the pledge claim, up to \$250.

....

Exhibit A.

5. Many factors determine the savings homeowners can realize by replacing their windows, including the home's geographic location, size, insulation package, and existing windows. Consumers who replace single or double-paned wood or vinyl-framed windows – common residential window types in the United States – with Gorell replacement windows are not likely to achieve a 40% reduction in residential energy consumption or heating and cooling costs.

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

- a. Consumers who replace windows with respondent's Thermal Master III® glass system windows are likely to achieve residential energy savings of 40%; or
- b. Consumers who replace windows with respondent's Thermal Master III® glass system windows are likely to save 40% on residential heating and cooling costs.

7. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and

Complaint

relied upon a reasonable basis that substantiated the representation(s) set forth in Paragraph 6 at the time that the representation(s) were made.

8. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation(s) set forth in Paragraph 6 at the time that the representation(s) were made. Therefore, the representation set forth in Paragraph 7 was false or misleading.

9. Respondent provided to its independent dealers and installers promotional materials referred to in Paragraph 4. By doing so, respondent provided them with the means and instrumentalities for the commission of deceptive acts or practices. Therefore, respondent's provision of such materials to its dealers and installers, as described in Paragraph 4 above, constitutes a deceptive act or practice.

10. Respondent's practices, as alleged in this complaint, constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission, this sixteenth day of May, 2012, has issued this complaint against respondent.

By the Commission, Commissioner Rosch and Commissioner Ohlhausen not participating.

Complaint

Exhibit A

40%
ENERGY SAVINGS PLEDGE !!!

Effective From (Date): _____ to (Date) _____

Issued to (Name): _____

Address: _____

City: _____ State: _____ Zip: _____

Gorell
WINDOWS & DOORS

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Gorell-FTC-11-000010

EXHIBIT A

Complaint

09/05

40% Energy Savings Pledge

Gorell Windows & Doors pledges that you will save at least 40% on home fuel consumption for both heating and cooling at your residence (address shown below) during the 12-month period beginning with the date of this pledge (after installation and final payment).

If your energy savings during the first year after the installation of your new windows are less than 40% of your previous 12-month energy consumption — with all things being equal except for your new Gorell windows — you will be reimbursed the difference between the actual savings and 40% of your energy costs for the previous 12 months, up to \$500.

If the sum of heating and cooling degree days after installation is within 5% of the same data from the 12 months prior to installation, Gorell will honor the full request, up to \$500. However, if the sum of heating and cooling degree days after the installation of Gorell products is between 5% and 20% more, Gorell will honor 75% of the pledge claim, up to \$375. If the heating and cooling degree days are more than 20% greater after the installation, Gorell will honor 50% of the pledge claim, up to \$250.

To make a claim under this pledge, please contact your Gorell dealer for the necessary forms to file for your benefits.

This pledge is based on energy consumption, not cost, and is subject to the following provisions:

1. This program applies only to "complete installations" in which all windows (minimum 12) and patio doors in a single-family home have been replaced with Gorell replacement window and door products that incorporate the Thermal Master III® glass system. All Gorell products must have been replaced at the same time, prior to the effective date of the pledge.
2. Heating and cooling systems of the residence must be properly maintained, per manufacturers' instructions.
3. Attic and wall insulation must meet current building code requirements, and all doors must be energy efficient and weather-tight.
4. There can be no change in the number of residents or in the use of the residence over 24 months.
5. Only central air conditioning energy usage for cooling is included in the calculations. Energy consumption from window air conditioners cannot be included.
6. All claims are subject to an inspection by and approval of a Gorell system engineer or representative.

Thank you for selecting Gorell windows and doors. We are confident that you will experience decades of improved comfort in your home.

Name _____


Address _____

City _____ State _____ Zip _____

Date of installation _____

Gorell Dealer Name _____

Gorell Dealer Signature _____



WINDOWS & DOORS

Gorell-FTC-11-000011

Decision and Order

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 a Complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the respondent with violation of the Federal Trade Commission 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 complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 Federal Trade Commission Act, and that a 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 thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Gorell Enterprises, Inc. ("Gorell") is a Pennsylvania corporation with its principal office or place of business at 1380 Wayne Avenue, Indiana, Pennsylvania 15701.

Decision and Order

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**DEFINITIONS**

For purposes of this order, the following definitions shall apply:

- A. “Clearly and prominently” means
 1. In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it;
 2. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the disclosure shall be made through the same means through which the communication is presented. In any communication disseminated by means of an interactive electronic medium such as software, the Internet, or online services, the disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen,

Decision and Order

and its location, for an ordinary consumer to notice, read and comprehend it; and

3. Regardless of the medium used to disseminate it, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.
- B. “Close proximity” means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.
- C. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- D. “Competent and reliable scientific evidence” shall mean tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true.
- E. “Covered product or service” means any fenestration product, any component thereof, and any product or any service for which respondent makes any claim about energy savings, energy costs, energy consumption, U-factor, SHGC, R-value, K-value, insulating properties, thermal performance, or energy-related efficacy.
- F. “Fenestration product” means any window, sliding glass door, or skylight.
- G. “K-value” is a measure of a material’s thermal conductivity.

Decision and Order

- H. Unless otherwise specified, “respondent” shall mean Gorell Enterprises, Inc., its successors and assigns, and its officers, agents, representatives, and employees.
- I. “R-value” is a measure of a material’s resistance to heat flow.
- J. “SHGC” means solar heat gain coefficient, which is the fraction of incident solar radiation admitted through a window, both directly transmitted and absorbed and subsequently released inward.
- K. “U-factor” is a measure of the rate of heat loss.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service in or affecting commerce, shall not make any representation, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names that:

- A. Consumers who replace their windows with respondent’s windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; or
- B. Respondent guarantees or pledges that consumers who replace their windows with respondent’s windows will achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs;

unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to receive the maximum represented savings or reduction.

Decision and Order

Provided, however, that if respondent represents that consumers who replace their windows with respondent's windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs under specified circumstances, or if respondent guarantees or pledges up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs under specified circumstances, it must disclose those circumstances clearly and prominently in close proximity to such representation, guarantee, or pledge and it must substantiate that all or almost all consumers are likely to receive the maximum represented, guaranteed, or pledged savings or reduction under those circumstances (*e.g.*, when replacing a window of a specific composition in a building having a specific level of insulation in a specific region).

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service in or affecting commerce, shall not make any representation, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names:

- A. That any specific number or percentage of consumers who replace their windows with respondent's windows achieve energy savings or reduction in heating and cooling costs; or
- B. About energy consumption, energy savings, energy costs, heating and cooling costs, U-factor, SHGC, R-value, K-value, insulating properties, thermal performance, or energy-related efficacy of any covered product or service;

unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that such representation is true.

Decision and Order

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service in or affecting commerce, shall not provide to others the means and instrumentalities with which to make, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names, any false, unsubstantiated, or otherwise misleading representation of material fact. For the purposes of this Part, “means and instrumentalities” shall mean any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any covered product or service, in or affecting commerce.

IV.

IT IS FURTHER ORDERED that respondent Gorell, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

Decision and Order

V.

IT IS FURTHER ORDERED that respondent Gorell, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying all acknowledgments of receipt of this order obtained pursuant to this Part.

VI.

IT IS FURTHER ORDERED that respondent Gorell, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: "Gorell Enterprises, Inc., File No. 112 3053, Docket No. C-4360."

Decision and Order

VII.

IT IS FURTHER ORDERED that respondent Gorell, and its successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports.

VIII.

This order will terminate on May 16, 2032, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Rosch and Commissioner Ohlhausen not participating.

Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Gorell Enterprises, Inc., a corporation (“respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter involves respondent’s marketing and sale of replacement windows for use in residences. According to the FTC complaint, respondent represented that consumers who replace their windows with respondent’s Thermal Master III® glass system windows are likely to achieve residential energy savings of 40% or save 40% on residential heating and cooling costs. The complaint alleges that respondent did not possess and rely upon a reasonable basis substantiating these representations when it made them. Many factors determine the savings homeowners can realize by replacing their windows, including the home’s geographic location, size, insulation package, and existing windows. Consumers who replace single or double-paned wood or vinyl-framed windows – common residential window types in the United States – with Gorell replacement windows are not likely to achieve a 40% reduction in residential energy consumption or heating and cooling costs. The complaint also alleges that, by providing its independent dealers and installers with advertising and other promotional materials making the above unsubstantiated representations, respondent provided the means and instrumentalities to engage in deceptive practices. Thus, the complaint alleges that respondent engaged in unfair or deceptive practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains three provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I addresses the marketing of

Analysis to Aid Public Comment

windows. It prohibits respondent from making any representation that: (A) consumers who replace their windows with respondent's windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; or (B) respondent guarantees or pledges that consumers who replace their windows with respondent's windows will achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to receive the maximum represented savings or reduction. Further, if respondent represents, guarantees, or pledges that consumers achieve such energy savings or heating and cooling cost reductions under specified circumstances, it must: disclose those circumstances clearly and prominently in close proximity to such representation, guarantee, or pledge; and substantiate that all or almost all consumers are likely to receive the maximum represented, guaranteed, or pledged savings or reduction under those circumstances (*e.g.*, when replacing a window of a specific composition in a building having a specific level of insulation in a specific region). The performance standard imposed under this Part constitutes fencing-in relief reasonably necessary to ensure that any future energy savings or reduction claims are not deceptive.

Part I of the order requires substantiation for representations including the words "up to" because the respondent may elect to make such representations in the future. The words "up to" do not effectively qualify representations regarding the energy savings or cost reductions likely to be achieved through replacement windows. Therefore, Part I requires the same level of substantiation regardless of whether the covered representation includes the words "up to." The FTC's proposed consent order should not be interpreted as a general statement of how the Commission may interpret or take other action concerning representations including the words "up to" for other products or services in the future.

Parts II and III address any product or service for which respondent makes any energy-related efficacy representation.

Analysis to Aid Public Comment

Part II prohibits respondent from making any representation: (A) that any specific number or percentage of consumers who replace their windows with respondent's windows achieve energy savings or reduction in heating and cooling costs; or (B) about energy consumption, energy savings, energy costs, heating and cooling costs, U-factor, solar heat gain coefficient, R-value, K-value, insulating properties, thermal performance, or energy-related efficacy; unless the representation is non-misleading and substantiated by competent and reliable scientific evidence. Part III prohibits respondent from providing to others the means and instrumentalities with which to make any false, unsubstantiated, or otherwise misleading representation of material fact. It defines "means and instrumentalities" to mean any information, including any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any such product or service.

Parts IV through VII require respondent to: keep copies of advertisements and materials relied upon in disseminating any representation covered by the order; provide copies of the order to certain personnel, agents, and representatives having responsibilities with respect to the subject matter of the order; notify the Commission of changes in its structure that might affect compliance obligations under the order; and file a compliance report with the Commission and respond to other requests from FTC staff. Part VIII provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or the proposed order, or to modify the proposed order's terms in any way.

Complaint

IN THE MATTER OF

THV HOLDINGS LLCCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4361; File No. 112 3057
Complaint, May 16, 2012 – Decision, May 16, 2012

This consent order addresses THV Holdings LLC's marketing and sale of replacement windows for use in residences. The complaint alleges that respondent did not possess and rely upon a reasonable basis substantiating representations that its windows likely pay for themselves in energy savings alone within eight years, when consumers replace their windows with THV Compozit windows with Alter-Lite® triple pane glass; that consumers who replace their windows with these THV windows are likely to achieve residential energy savings of 40%, save 40% on residential heating and cooling costs, or reduce their energy bills by half; and that homeowners have saved 35%-55% off their energy bills by replacing their windows with THV windows when it made them. The consent order prohibits respondent from making any representation that: (A) consumers who replace their windows with respondent's windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; or (B) respondent guarantees or pledges that consumers who replace their windows with respondent's windows will achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to receive the maximum represented savings or reduction.

Participants

For the *Commission: Robert Frisby, Zachary Hunter, Joshua Millard, and Sarah Waldrop.*

For the *Respondent: Eric Berman, Baker Botts, LLP; and Cory Skolnick, Frost Brown Todd LLC.*

COMPLAINT

The Federal Trade Commission, having reason to believe that THV Holdings LLC ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

Complaint

1. Respondent THV Holdings LLC is a Delaware limited liability company with its principal office or place of business at 5611 Fern Valley Road, Louisville, Kentucky 40228. It does business as THV Compozit Windows & Doors, Leingang Home Center, Primax Home Center, True Home Value, Rolox Home Center, and Thomas Construction.

2. Respondent manufactures, advertises, offers for sale, sells, installs, and/or distributes windows, including its THV Compozit Window line with Alter-Lite® triple pane glass. Respondent sells these windows directly to consumers for residential use, and distributes the windows to numerous independent distributors who in turn sell them to consumers for residential use.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused the dissemination of advertising and promotional materials, such as web page, newspaper and magazine advertising, brochures, telemarketing scripts, and sales training materials, including but not necessarily limited to the attached Exhibits A through I. Respondent and its independent distributors disseminated or caused the dissemination of these advertising and promotional materials and representations to consumers. The advertising and promotional materials contain the following statements or depictions:

a. THV Window Systems Premium Warranty

THV Window Systems will pay for themselves in energy savings within eight years or we pay the difference! . . .

This warranty guarantees a total energy savings equal to or greater than the total purchase price of a full house installation of THV Window Systems at the address shown hereon for a period of eight (8) years. The eight year total energy savings begin the first day of the month subsequent to the completed installation of THV Window Systems. In the event total energy

Complaint

savings over the eight-year period are less than the complete installation purchase price, the Purchaser shall notify THV using the provided claim forms to file for benefits under this warranty. If energy savings over the eight-year period are less than the completed installation, THV will reimburse the difference between actual savings and the purchase price.

Exhibit A.

- b. Thermal Line Windows - THV Composit Window Systems

Sales Training Manual

■ *What would happen to your fuel bills if I were able to build a window that acted more like a thermos bottle than a jelly jar? Do you think they would go up or down?*

Get Answer: They'd go down!

State answer pointing to the fuel savings warranty saying:

They would pay for themselves in energy savings alone within 8 years!

....

Now ask the question that clears the deck for the Closing Sequence. The goal of this question is to make sure the only thing holding them back is the money.

Great window isn't it? Other than the cost, is there any reason you wouldn't want to own these windows and cut that energy bill in half?

Exhibit B.

Complaint

c. THV Sales Training Materials

Why are our windows better than everyone else's?

It is the only product that is FREE! That's right, FREE! Homeowners will typically experience a 35% to 55% reduction in monthly energy bills. Our windows will pay for themselves in energy savings alone within eight years or we will pay the difference. **And that's the Thomas promise!**

Exhibit C.

d. THV Telemarketing Sales Script

THOMAS CONSTRUCTION MANUFACTURES OUR OWN COMPOSIT WINDOW. OUR HOME OWNERS HAVE NOTICED THAT OUR WINDOWS HAVE SAVED THEM 35-55% OFF THEIR ENERGY BILLS AND OUR WINDOWS SYSTEM WILL PAY FOR THEMSELVES IN ENERGY SAVINGS ALONE WITHIN 8 YEARS OR WE WILL PAY THE DIFFERENCE!!

WHAT THIS MEANS TO OUR HOME OWNERS!!

OUR WINDOWS ARE FREE!!! THAT'S THE THOMAS PROMISE!!!

Exhibit D.

e. THV Telemarketing Sales Script

CASH BACK DIRECT MAIL PITCH

STEP I Hello is Mr. _____ in?

Hi this is _____ with Rolox Industries. I'm calling to see if you looked over the material we mailed to you?

STEP II What it tells about is a special neighborhood savings program, offering you up to a thousand dollars off on your next home improvement.

Complaint

So you can remodel your home with triple glass, energy efficient windows and reduce your heating and cooling bills by at least 40%.

Exhibit E.

f. THV Newspaper Advertising

LOWER ENERGY BILLS & INCREASE YOUR COMFORT WITH THV REPLACEMENT WINDOWS

....

■ 40% Fuel Savings

...

THV GUARANTEES IN WRITING . . .

Our windows will pay for themselves in utility bills alone or we will pay you the difference.

Exhibit F.

Up to 40% FUEL SAVINGS

Composit frame for superior energy performance and savings. . . . Our fuel pledge is that THV windows will pay for themselves or we will pay you the difference.

GUARANTEED!

Exhibit G.

g. THV Magazine Advertisement

WINNING THE WAR ON HIGH ENERGY BILLS

40% FUEL SAVINGS *Guaranteed*

Our windows pay for themselves or we pay you the difference! GUARANTEED!

Complaint

Exhibit H.

h. THV 40% Fuel Pledge

Our pledge: Your new THV Compozit windows will give you an energy savings of 40% on your fuel consumption during the first 12 months after installation or we will pay you the difference!

....

This pledges a savings of 40% on your heating and cooling consumption for this residence at the address shown hereon during the 12 month period beginning with the date of this Pledge.

....

Exhibit I.

5. Many factors determine the savings homeowners can realize by replacing their windows, including the home's geographic location, size, insulation package, and existing windows. Consumers who replace single or double-paned wood or vinyl-framed windows – common residential window types in the United States – with THV replacement windows are not likely to achieve a 40%, 50%, or 35%-55% reduction in residential energy consumption or heating and cooling costs.

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

- a. Its windows likely pay for themselves in energy savings alone within eight years, when consumers replace their windows with THV composit windows with Alter-Lite® triple pane glass;
- b. Consumers who replace windows with THV composit windows with Alter-Lite® triple pane glass are likely to achieve residential energy savings of 40%;

Complaint

- c. Consumers who replace windows with THV composited windows with Alter-Lite® triple pane glass are likely to save 40% on residential heating and cooling costs;
- d. Consumers who replace windows with THV composited windows with Alter-Lite® triple pane glass are likely to reduce their energy bills by half; or
- e. Home owners have saved 35-55% off their energy bills by replacing their windows with THV composited windows.

7. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation(s) set forth in Paragraph 6 at the time the representation(s) were made.

8. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation(s) set forth in Paragraph 6 at the time the representation(s) were made. Therefore, the representation set forth in Paragraph 7 was false or misleading.

9. Respondent provided to its independent distributors promotional materials referred to in Paragraph 4. By doing so, respondent provided them with the means and instrumentalities for the commission of deceptive acts or practices. Therefore, respondent's provision of such materials to its distributors, as described in Paragraph 4 above, constitutes a deceptive act or practice.

10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this sixteenth day of May, 2012, has issued this complaint against respondent.

By the Commission, Commissioner Rosch and Commissioner Ohlhausen not participating.

Complaint

Exhibit A



The Industry's FIRST Energy Savings GUARANTEE
 THV Window Systems will pay for themselves in energy savings
 within eight years or we pay the difference!

Issued to: _____ Phone# (____) _____
Purchaser (Homeowner)

Residence Street Address _____ City _____ State _____ Zip Code _____

of Units Installed _____ Warranty/Contract No. _____

Effective _____ to _____
Date Installed (Eight Years Later)

Validated by: _____
THV Window Systems Certified Home Remodeler

See reverse side for complete instructions

The THV Window Systems are distributed by THV Certified Home Remodelers
 PO Box 34749, Louisville, Kentucky 40232
 Copyright © 2004, ThermoView Industries, Inc.



CUSTOMER ACTIVATION RECEIPT -
 Fill out and return to THV within 30 days of your completed installation or
 Warranty is Null and Void. Mail with previous 12 months of utility bills/summary to:
 THV, PO Box 34749, Louisville, KY 40232

Issued To _____	Phone # _____	Number of Units Installed _____	Warranty/Contract No. _____
Residence Street Address _____		Contract # _____	Date _____
City _____ State _____ Zip _____		Effective _____ to _____	Date Installed _____ Eight years later _____
Purchaser's Signature _____	Date _____	Certified Home Remodeler (Installer) _____	Date _____



SUBSIDIARY ACTIVATION RECEIPT -
 Fill out and return to THV upon completion of approved contract. Once received
 and processed at THV, a deduction will be made from your Subsidiary Account.
 THV, PO Box 34749, Louisville, KY 40232

Issued To _____	Phone # _____	Number of Units Installed _____	Warranty/Contract No. _____
Residence Street Address _____		Contract # _____	Date _____
City _____ State _____ Zip _____		Effective _____ to _____	Date Installed _____ Eight years later _____
Measurer's Signature _____	Date _____	Finance/Ordering Dept. Signature _____	Date _____

THV 0326

Complaint

THV LIMITED PREMIUM WARRANTY

This warranty guarantees a total energy savings equal to or greater than the total purchase price of a full house installation of THV Window Systems at the address shown hereon for a period of eight (8) years. The eight year total energy savings begin the first day of the month subsequent to the completed installation of THV Window Systems. In the event total energy savings over the eight-year period are less than the complete installation purchase price, the Purchaser shall notify THV using the provided claim forms to file for benefits under this warranty. If energy savings over the eight-year period are less than the completed installation, THV will reimburse the difference between actual savings and the purchase price.

Notwithstanding anything herein to the contrary, it is hereby agreed and understood that this warranty shall only be effective if the Purchaser, located at the address indicated above, has purchased a complete installation of THV Window Systems units, remains the owner at such residence for an eight-year period after installation and is in compliance with the terms and conditions stated below. This warranty is based on energy (fuel) consumption, not cost. It is subject to the following provisions:

TERMS AND CONDITIONS OF THV LIMITED PREMIUM WARRANTY

1. The Premium Warranty covers only Total Energy Savings resulting from a complete installation of THV Window Systems units.
2. A "complete installation" is defined as all windows at the residence except basement, attic and porch. The Premium Warranty covers only energy savings of installations at single and two family dwellings.
3. To activate Premium Warranty the Customer Activation Receipt must be submitted to THV, PO Box 34749, Louisville, KY 40232 within 30 days of completed installation, and include 12 months of utility bills evidencing energy usage.
4. Premium Warranty claims, if any, can only be issued by a purchasing homeowner that resides at the specified address for a full eight-year period after completed installation date.
5. Heating/cooling system at the residence must be properly maintained.
6. Appropriate allowances for abnormal weather conditions may be made in adjusting a claim.
7. Purchaser must submit claims under this Premium Warranty, in writing within 90 days after the complete installation eight-year anniversary.
8. Total energy savings includes eligible tax credits available to the Purchaser as a result of the purchase of THV Window Systems units.
9. Claim determinations or adjustments, if any, will be made within 90 days after all claim information has been received, authenticated and verified.
10. Modifications that could increase energy consumption, such as room additions, i.e., sun-rooms, heated garages, etc., to the said residence during the eight-year time period of the claim shall make such claims invalid unless submitted to THV for prior approval.
11. A change of energy related utility service (e.g., change from electric to gas) at the residence shall make the Premium Warranty null and void.
12. Reimbursement, if any, is determined using average energy rates during the Premium Warranty period. Reimbursement calculations are based on reduced units of energy (e.g. MCF dollars per thousand cubic feet) not reduction in actual dollars. Reimbursement, if any, is calculated using the change in energy usage, excluding the impact of changes in weather (measured by non-heating and cooling days derived from statistics gathered from the National Oceanic and Atmospheric Administration) multiplied by average energy rate over the warranty period. Cost of operation, taxes and service fees of any utilities are excluded from reimbursement calculation.
13. Purchaser must submit complete utility bills for the 96 month Premium Warranty period, or a summary form, from the authorized utility to claim a refund. The claim must be forwarded to THV, PO Box 34749, Louisville, KY 40232 within 90 days of the eight-year anniversary date.
14. Implied warranties shall be limited to the duration of this limited Warranty. Some States do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.
15. This Warranty excludes incidental and consequential damages. Some states do not allow the exclusion or limitation of incidental or consequential damages so the above limitation or exclusion may not apply to you.
16. This Warranty gives you specific legal rights, and you may have other rights which vary from State to State.

Warranty Activation:

Following completion of a "complete installation" of THV Window System units, the eligible homeowner must take the following action to initiate the THV Limited Premium Warranty:

1. Complete the Customer Activation Receipt provided by THV at the completion of installation.
2. Obtain 12 months prior energy usage from utility company.
3. Within 30 days after completed installation mail Customer Activation Receipt and a copy of the 12 months prior energy usage to THV
PO Box 34749
Louisville, KY 40232
4. Within 90 days Purchaser will receive "Your Personal Warranty Packet" and THV confirmation letter.

Subsidiary Warranty Activation:

1. Salesperson must validate offer and acceptance of Premium Warranty in writing on contract and include signature and date of Seller and Purchaser.
2. Contract number shall serve as Premium Warranty number.
3. Contract number/Premium Warranty number must be applied to Customer Premium Warranty, Customer Activation Receipt and Subsidiary Activation Receipt and checked for accuracy against original contract.
4. Upon approval of contract, fill out front of Subsidiary Activation Receipt and mail to:
THV
PO Box 34749
Louisville, KY 40232
5. Once received and processed at THV, a deduction will be made from your Subsidiary Account.
6. Installer must return Customer Premium Warranty and Customer Activation Receipt to Purchaser at the time of completed installation.
7. Installer must verbally communicate instructions for Activation Receipt to Purchaser.

THV 0327

Complaint

Exhibit B**THE THERMOS®
COMPARISON****Your response:**

No, you heat with money...

Point to the estimated fuel usage on the fuel savings warranty sheet you talked about during the company story.

Major statement – memorize:

Your present windows can keep your home no warmer than this jelly jar can keep your coffee hot! And in the summer you have the same situation keeping the heat out.

Pull out your thermos and separate the liner from the case:

- *You would use a thermos if you wanted to keep your coffee hot for longer than 10 minutes, wouldn't you?*

Get answer: Yes

- *If I were to put hot coffee in this thermos and put it outside in the winter's night, how long before it would get cold?*

Get answer: 10 hours! — Sixty times more effective!

- *What would happen to your fuel bills if I were able to build a window that acted more like a thermos bottle than a jelly jar? Do you think they would go up or down?*

Get Answer: They'd go down!

State answer pointing to the fuel savings warranty saying:

They would pay for themselves in energy savings alone within 8 years!

- *That's what we set out to do, build a window that thinks it's a Thermos bottle!*

Why? To offer homeowners a window that is an investment, not an expense.

- *We need the two elements of a Thermos bottle:*

1. *Dead air space.*
2. *Reflective surface*

Hold up your THV Composit Corner Section.

- *We thought if one air space was good, two had to be better! Makes sense, doesn't it?*

Get Answer: Yes

- *The silver lining was a bit more difficult. We use a "soft coat" Low-E rather than the less expensive hard coat. You may get a flyer in the mail from my competition giving away free Low-E... they use hard coat; it's not nearly as effective as soft coat!*

THV 0550

Complaint

GET AN ANSWER

You may have to help get a conclusion.

We are very flexible on monthly payments and terms. Again, the many people I deal with feel differently about the monthly payments. Our goal is to keep it comfortable, so you enjoy the windows without payment pressure.

What type of payment would fit you best?

Write both figures down. Make them important.

Now ask the question that clears the deck for the Closing Sequence. The goal of this question is to make sure the only thing holding them back is the money.

Great window isn't it? Other than the cost, is there any reason you wouldn't want to own these windows and cut that energy bill in half?

THV 0568

Complaint

Exhibit C

Product Knowledge

Show & sell training
Bill D.
NOT APPROVED 6 months

Division #1: Windows and Siding

The window and siding division is the largest division and the bread and butter of the company. This means that these should be the first products you promote! Why? Windows and siding projects are likelier to issue, demo and approve than many other products. The more you promote windows and siding, the more money you'll make. **Don't forget, your income is under your control!**

Windows

- We manufacture our very own Thomas Construction Window at a manufacturing plant in Mandan, North Dakota! The window is made out of an aerated polymer, which is 214% more efficient than vinyl.
- We are the exclusive carriers of this window.
- Products in this division come with a 50 year warranty and 3 year glass breakage warranty.
- The window in triple paned with a krypton/argon gas mix and tilts in for easy cleaning.
- Many types are available, including bay, bow, garden, casement, slider and double hung windows. There are also many colors available including a wood grain finish.
- This division also includes entry, French and patio doors by precision.

Why are our windows better than everyone else's?

It is the only product that is FREE! That's right, FREE! Homeowners will typically experience a 35% to 55% reduction in monthly energy bills. Our windows will pay for themselves in energy savings alone within eight years or we will pay the difference. **And that's the Thomas promise!**

Siding

- _____ is the manufacturer of our siding and Thomas is the exclusive carrier of the product.
- Our siding is solid vinyl, not recycled.
- The siding is maintenance free, which means the homeowner will NEVER have to paint the house again.
- We can cover the whole home, including soffit and fascia.
- Several colors and styles are available, including vertical siding.
- Siding comes with a lifetime warranty.
- We use styrene wrap on the back of the siding for flat surface and air flow.

Division #2: Roofing

- Our roofing manufacturer is _____.
- This is the last roof a homeowner will ever need to replace on their home.
- Our 50 year warranty is transferable, which is attractive to homeowners who are thinking about selling and hoping to add more value.
- The roof is hail resistant.
- We can also put in aluminum gutters with roof installation.

Complaint

Exhibit D

Tel2 market script

WINDOWS:

THOMAS CONSTRUCTION MANUFACTURES OUR OWN
COMPOSIT WINDOW. OUR HOME OWNERS HAVE NOTICED
THAT OUR WINDOWS HAVE SAVED THEM 35-55% OFF THEIR
ENERGY BILLS AND OUR WINDOWS SYSTEM WILL PAY FOR
THEMSELVES IN ENERGY SAVINGS ALONE WITHIN 8 YEARS
OR WE WILL PAY THE DIFFERENCE!!

WHAT THIS MEANS TO OUR HOME OWNERS!!

**OUR WINDOWS ARE FREE!!! THAT'S THE
THOMAS PROMISE!!!**

DO YOU WORK DURING THE DAY OR EVENINGS? THE
REASON I ASK IS BECAUSE WHAT WE WOULD LIKE TO DO IS
SHOW YOU WHAT WE HAVE TO OFFER AND ANSWER ANY
QUESTIONS YOU MAY HAVE AND LEAVE YOU WITH A COST
FREE NO OBLIGATION ESTIMATE.

I HAVE AN APPOINTMENT AVAILABLE TOMORROW
@_____ WHICH WOULD BE BETTER FOR YOU?

**(ABC) ALWAYS BE CLOSING!!
(GO TO BUTTON UP)**

Complaint

Exhibit E

CASH BACK DIRECT MAIL PITCH

- STEP I Hello is Mr. _____ in?
- Hi this is _____ with Rolox Industries. I'm calling to see if you looked over the material we mailed to you?
- STEP II What it tells about is a special neighborhood savings program, offering you up to a thousand dollars off on your next home improvement. So you can remodel your home with triple glass, energy efficient windows and reduce your heating and cooling bills by at least 40%.
- STEP III But first, let me ask:
1. How old is your home? How long have you owned it?
 2. Is that a frame or brick house?
 3. When you folks eventually change to a window that cuts your utility bills, how many will you need?
- (SECONDARY WINDOW QUESTION)
- I guess what I'm asking is, if Rolox could show you a window that you liked, and a way to get up to 100% of your investment back, how many of your windows would you change?
- STEP IV Right now our factory reps are going directly to homeowners to demonstrate the advantages of our windows and for a limited time we have a cash back offer which will enable you to put Rolox windows in your home and in 3 years, you can claim and receive up to 100% of your investment back. While we are doing this, I'll have him stop by!
- STEP V
1. But how did I catch you at home, do you work days?
 2. Does Mrs/Mr work days or nights?
 3. What time are you both home from work?
- STEP VI Ok, I'll put you on our factory reps schedule for (time). Now tomorrow being (day), that isn't club, church, bowling or anything like that is it? In case he's a little late, you folks will be home all evening anyway, won't you?
- STEP VII By the way, what is your wife/husband name? Do me a favor Mr/Mrs _____ tell _____ that this is our factory rep coming out, not some door-to-door salesman. What he will do is show you a working model of our window. If you see something you like he can measure your opening and let you know exactly what our cost would be. If it's something we can help you with, great! If not, we'll shake hands and part friends.
- Now our factory rep only leaves the office on the appointments I set for him, so I can count on you and Mrs/Mr both being there, can't I? Ok great, what is your correct address? And that's in _____. Ok, what's your zip code? Well thanks a lot for the appointment and we'll look forward to seeing you both (day & time).

THV 1241

Complaint

Exhibit F

LOWER ENERGY BILLS & INCREASE YOUR COMFORT WITH THV REPLACEMENT WINDOWS

- 50 Year Warranty
- 40% Fuel Savings
- Easy to clean tilt-in feature
- Maintenance free inside and out

THV GUARANTEES IN WRITING...
Our windows will pay for themselves in utility bills alone or we will pay you the difference.

ALTER-LITE®
TRIPLE PANE GLASS

THV
composit
WINDOW SYSTEMS

7
Estimate Colors

ACT NOW!

FREE INSTALL
WITH PURCHASE OF 5 OR MORE WINDOWS
Offer Ends in 30 Days. One offer per household. Not valid with any other offer or sale.

WE SELL ENERGY STAR

CREATE IMPACT WITH DOORS

THV
composit
DOOR SYSTEMS
PATIO DOORS

STEEL DESIGNER ENTRY DOORS

\$150 OFF

\$250 OFF

THV
True Home Value, Inc.
www.thvstores.com

CALL FOR YOUR FREE ESTIMATE
(800) 460-3129
LOCALLY OPERATED

Complaint

Relax with the safety and convenience of **MAINTENANCE-FREE GUTTERS**

- Diverts leaves and debris
- Prevents mold growth
- Prevents mosquito breeding
- Resistant to fading from the sun and cleaning solvents
- Prevents termite damage
- Protects your home against foundation and landscape damage
- Keeps you safe from climbing to clean gutters



**25%
OFF
GUTTER
PROTECTION**

Offer Ends In 30 Days. One offer per household. Not valid with any other offer or sales.

THV is the exclusive supplier of:

CLEAR WATER
Gutter Protection System

ADD VALUE AND CURB APPEAL WITH SIDING



VISIT OUR SHOWROOM
5140 Frederica St Ste C
Between Applebee's & Olive Garden
9-6 M-F, 9-1 Sat., Sun. by appt.

CALL FOR YOUR FREE ESTIMATE
(800) 460-3129



**\$99 OFF
Per Square**

Offer Ends In 30 Days. One offer per household. Not valid with any other offer or sales.

FINANCING AVAILABLE
SENIOR DISCOUNTS for 55 and OLDER
www.thvstores.com

Complaint

Exhibit G

IT'S A GREAT TIME TO REPLACE WINDOWS!



Up to 40% FUEL SAVINGS

Composite frame for superior energy performance and savings. Fifty-year warranty. Our fuel pledge is that THV windows will pay for themselves or we will pay you the difference. **GUARANTEED!**

ALTER-LITE™
Triple-pane glass

- Low-E coating
- Tilt-in easy to clean feature
- 50 Year Warranty
- Maintenance-free

TAX CREDIT UP TO \$1750

FIND OUT IF YOU QUALIFY FOR THE TAX CREDIT. CALL TODAY.

TRUCCATING
UP TO 50% OFF



25% OFF

FIRST 25 CALLERS GET FREE INSTALLATION

Offer expires 2/28/10. Not valid with any other discounts or offers.

INEXPENSIVE ONE DAY BATH REMODEL



9am



5pm



NU-BATH™
Tub/Showers

Various styles and options for you to choose from. Easy to clean. Installed over your old tub in one day. Professional and affordable.

\$250 OFF

ANY BATH/SHOWER PKG

Offer expires 2/28/10. Not valid with any other discounts or offers.



SIDING

Many colors and styles to choose from. Gives you great curb appeal and added insulation. Maintenance-free.



ENTRY/PATIO DOORS

Composite core for energy efficiency. Security features. Various colors, styles and hardware to choose from.



GUTTER PROTECTION

Protect your home's foundation. Stop breeding of mosquitoes. No more ladders.

33% OFF

ALL OTHER PRODUCTS

Offer expires 2/28/10. Not valid with any other discounts or offers.

CALL TO JOIN A GREAT TEAM

NOW HIRING SALES REPS

\$25,000 Home Improvement

ONE LUCKY HOMEOWNER WILL

THV Sweepstakes

\$15,000 & \$10,000

in FREE THV HOME IMPROVEMENTS CASH TO SPEND HOW YOU LIKE

CALL to ENTER TODAY!



True Home Value, Inc.

CALL: FOR YOUR FREE ESTIMATE

800-460-3135

CLICK: www.thvstores.com

COME BY:
SHOWROOM
130 Walton Ave
Bowling Green

BUY FEB 2010 PAY JULY 2010

NO PURCHASE NECESSARY. PURCHASE WILL NOT INCREASE ODDS OF WINNING. Open to homeowners who 21, and legal residents within True Home Value, Inc.'s (THV) service area. Ends 12/31/10. See store for official rules. Prize: \$15,000. Limit one entry per person/family. For Official Rules, go to: www.thvstores.com or write to: Sweepstakes Rules, P.O. Box 28079, Louisville, KY 40228. Sponsor: THV, Inc. 18078, Louisville, KY 40227.

Complaint

Exhibit H

**WINNING THE WAR
ON HIGH ENERGY BILLS**

**40% FUEL SAVINGS
Guaranteed**

Our windows pay for themselves or we pay you the difference!
GUARANTEED!

LIFETIME WARRANTY
TRU COATING
Fourteen Exterior Colors

**WINDOWS • SIDING • DOORS • TUBS
GUTTER PROTECTION**

ROLOX
HOME CENTER
A Division of
THV
True Home Value, Inc.

FREE ESTIMATE
800-950-3060
www.rolox.com

25% OFF
ALL PRODUCTS
All offers good for 30 days.
One offer per household.
Not valid with any other offer or sales.

Complaint

Exhibit I



Our pledge: Your new THV Composit windows will give you an energy savings of 40% on your fuel consumption during the first 12 months after installation or we will pay you the difference!

Issued to: _____ Phone # _____

Residence Street Address City State Zip Code

of Units: _____ Pledge/Contract No. _____

Effective _____ to _____

Validated by: _____

THV Certified Home Remodeler

See reverse side for complete instructions

The THV Pledge is backed by THV Certified Home Remodelers
P.O. Box 34740 • Louisville, KY 40232
Copyright 2010 THV

THV 0342



CUSTOMER ACTIVATION RECEIPT
Fill out and return to THV Composit Windows & Doors within 30 days of your completed installation to: THV PO Box 34740, Louisville, KY 40232

Issued To _____	Phone # _____	Number of Units Installed _____	Pledge/Contract No. _____
Residence Street Address _____		Contract # _____	Date _____
City _____	State _____	Zip _____	Effective _____
			Date Installed _____
Purchaser's Signature _____	Date _____	Certified Home Remodeler (Installer) _____	Date _____



DEALER ACTIVATION RECEIPT
Fill out and return to THV Composit Windows & Doors with copy of approved contract to: THV PO Box 34740, Louisville, KY 40232

Issued To _____	Phone # _____	Number of Units Installed _____	Pledge/Contract No. _____
Residence Street Address _____		Contract # _____	Date _____
City _____	State _____	Zip _____	Effective _____
			Date Installed _____
Signature _____	Date _____		

Complaint


 TERMS AND CONDITIONS OF THE Complaint Ext
 40% FUEL PLEDGE

This pledges a savings of 40% on your heating and cooling consumption for this residence at the address shown hereon during the 12 month period beginning with the date of this Pledge. In the event fuel savings are less than 40% of the previous 12 months fuel consumption, the homeowner should notify THV Composit Windows & Doors, who will provide the homeowner with the necessary forms to fill out for benefits under this Pledge. If fuel savings are less than 40% of the previous 12 months fuel consumption, the homeowner will be reimbursed the difference between actual savings and 40% of fuel cost for the previous 12 months.

Notwithstanding anything herein to the contrary, it is hereby agreed and understood that this Pledge only be effective if the homeowner, located at the address shown hereon, has purchased a complete installation of THV Composit Triple Alter-Lite® Glass replacement windows, effective on the dates shown.

This Pledge is based on fuel consumption, not cost. It is subject to the following provisions.

1. This Pledge covers only THV Composit Triple Alter-Lite® Glass replacement windows.
2. Complete installation of THV Composit Triple Alter-Lite® Glass replacement windows is defined as all windows on this residence except basement, attic and porch.
3. THV Composit one inch Double Glass insulated replacement windows may be substituted when window sizes exceed Triple Alter-Lite® Glass.
4. This Pledge covers only single and two family dwellings.
5. Maximum payment under this Pledge is \$1,200.
6. Customer must fill-out and send in the Customer Activation Receipt within 30 days of the completed installation of THV Composit Triple Alter-Lite® Glass replacement windows for Pledge to be activated.
7. Claims under this Pledge must be filled out in writing, with supporting evidence, within 60 days of the 12 month anniversary of this Pledge to THV Composit Windows & Doors. **Failure to make a claim within 60 days of the 12 month anniversary will void the Pledge and any reimbursement due to customer.**
8. Homeowners must properly maintain heating and air conditioning system.
9. An allowance shall be made for any non- heating and cooling utilities included in the utility bill such as, dish washers, refrigerators, lighting, computers, etc. when calculating a claim.
10. Proper allowance for abnormal weather conditions shall be made in adjusting a claim.
11. Reimbursement at rates prevailing at time of window purchase.
12. THV calculations are final and are based on information provided at the activation of this Pledge form.



THV 0343

Complaint

Dear THV Premium Warranty Customer:

Due to the fluctuating rates for utilities, our energy savings pledge is based on the amount of fuel used, not the cost.

Additionally, our savings pledge states that the fuel use will be adjusted for the weather. To make the adjustment, we rely on statistics published by the National Oceanic and Atmospheric Administration. This agency of the United States Government records the temperature each hour, 24 hours per day and averages these readings to arrive at the average hourly temperature for each day. If the average temperature is 65 degrees F., cooling is required. If the average temperature is below 65 degrees F., heating is required.

Each degree below 65 degrees F., is considered a "heating degree day" meaning one degree is required for one day. Thus, 10 heating degrees could mean one degree of heating for each of ten days, or two degrees of heating for each of five days, etc.

Conversely, cooling degree days apply in the same manner when the average daily temperature is above 65 degrees F.

We use these heating degree days and cooling degree days to compare the relative severity of the weather before and after installation of the windows. Our fuel savings pledge is that you will use less fuel after adjustments are made, up or down, for the change in the weather.

Since both gas and electricity are used for purposes other than heating and cooling your home, we attempt to compute the amount of fuel actually used for the heating and cooling. To do this, we examine your utility statements to determine the consumption during those months when there are no heating or cooling days, then pro-rate that non-heating or non-cooling consumption over the entire year.

The enclosed analysis is based on the above and shows how much more or less was saved on both your gas and electric bills. The cost for this energy is based on the rate charged on the statement nearest the date of installation of your windows.

If you have any additional questions, please give us a call.

Complaint

Consumption during months with essentially no cooling or heating degree days \pm 1,206 Kwh per month before, and 1973 Mcf after installing the windows.
Using these averages for 12 months gives the estimated "Non-cooling or non-heating" uses.

Consumption before installation windows:	<u>8,338</u> Kwh
Change in degree day: <u>195</u> to <u>174</u>	<u>-10.77%</u>
Assumed consumption due to weather	<u>7,440</u> Kwh
Assumed consumption less 40%	<u>4,464</u> Kwh
Actual consumption after installing windows	<u>6,971</u> Kwh
Difference	<u>2,507</u> Kwh
Cost at *\$ <u>0.064</u> per Kwh	<u>\$ 160.46</u> \$

* Rate charged on gas statement nearest date of installation

Decision and Order

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 a Complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the respondent with violation of the Federal Trade Commission 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 complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, 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 Federal Trade Commission Act, and that a 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 thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent THV Holdings LLC ("THV Holdings") is a Delaware limited liability company with its principal office or place of business at 5611 Fern Valley Road, Louisville, Kentucky 40228.

Decision and Order

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**DEFINITIONS**

For purposes of this order, the following definitions shall apply:

- A. “Clearly and prominently” means
 1. In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it;
 2. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the disclosure shall be made through the same means through which the communication is presented. In any communication disseminated by means of an interactive electronic medium such as software, the Internet, or online services, the disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen,

Decision and Order

and its location, for an ordinary consumer to notice, read and comprehend it; and

3. Regardless of the medium used to disseminate it, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.
- B. “Close proximity” means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.
 - C. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
 - D. “Competent and reliable scientific evidence” shall mean tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true.
 - E. “Covered product or service” means any fenestration product, any component thereof, and any product or any service for which respondent makes any claim about energy savings, energy costs, energy consumption, U-factor, SHGC, R-value, K-value, insulating properties, thermal performance, or energy-related efficacy.
 - F. “Fenestration product” means any window, sliding glass door, or skylight.
 - G. “K-value” is a measure of a material’s thermal conductivity.

Decision and Order

- H. Unless otherwise specified, “respondent” shall mean THV Holdings LLC, its successors and assigns, and its officers, agents, representatives, and employees.
- I. “R-value” is a measure of a material’s resistance to heat flow.
- J. “SHGC” means solar heat gain coefficient, which is the fraction of incident solar radiation admitted through a window, both directly transmitted and absorbed and subsequently released inward.
- K. “U-factor” is a measure of the rate of heat loss.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service in or affecting commerce, shall not make any representation, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names that:

- A. Consumers who replace their windows with respondent’s windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; or
- B. Respondent guarantees or pledges that consumers who replace their windows with respondent’s windows will achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs;

unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to receive the maximum represented savings or reduction.

Decision and Order

Provided, however, that if respondent represents that consumers who replace their windows with respondent's windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs under specified circumstances, or if respondent guarantees or pledges up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs under specified circumstances, it must disclose those circumstances clearly and prominently in close proximity to such representation, guarantee, or pledge and it must substantiate that all or almost all consumers are likely to receive the maximum represented, guaranteed, or pledged savings or reduction under those circumstances (*e.g.*, when replacing a window of a specific composition in a building having a specific level of insulation in a specific region).

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service in or affecting commerce, shall not make any representation, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names:

- A. About the ability of respondent's windows to pay for themselves in energy savings alone within any specific number of years or other time period, when consumers replace their windows with respondent's windows;
- B. That any specific number or percentage of consumers who replace their windows with respondent's windows achieve energy savings or reduction in heating and cooling costs; or
- C. About energy consumption, energy savings, energy costs, heating and cooling costs, U-factor, SHGC, R-value, K-value, insulating properties, thermal performance, or energy-related efficacy of any covered product or service;

Decision and Order

unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that such representation is true.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service in or affecting commerce, shall not provide to others the means and instrumentalities with which to make, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names, any false, unsubstantiated, or otherwise misleading representation of material fact. For the purposes of this Part, “means and instrumentalities” shall mean any information, including, but not necessarily limited to, any advertising, labeling, telemarketing scripts, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any covered product or service, in or affecting commerce.

IV.

IT IS FURTHER ORDERED that respondent THV Holdings, and its successors and assigns, within thirty (30) days of the issuance of this order, must:

- A. Establish and implement a training program for all principals, officers, directors, managers, employees, agents, and representatives who direct or engage in the promotion or sale of any covered product or service;
- B. Designate a manager to coordinate and oversee the implementation of this training program;
- C. Require all current principals, officers, directors, managers, employees, agents, and representatives who direct or engage in the promotion or sale of any covered product or service to complete the training program within sixty (60) days of the order’s issuance,

Decision and Order

and require all future principals, officers, directors, managers, employees, agents, and representatives to complete the training program before directing or engaging in the promotion or sale of any covered product or service;

- D. Ensure that the training program addresses:
1. the trainee's duty not to use or make any representation prohibited under this order;
 2. all representations specifically approved by the respondent concerning energy savings, reduction in heating and cooling costs, and any other energy-related attribute of any covered product or service; and
 3. the trainee's duty not to use or make any representation concerning energy savings, reduction in heating and cooling costs, or any other energy-related attribute of any covered product or service unless the respondent has authorized the representation after the order's issuance;
- E. Secure from each participant in this training program, at the conclusion of training, a signed statement acknowledging that he or she has completed the program;
- F. Maintain and upon request make available to the Federal Trade Commission for inspection and copying all acknowledgments obtained pursuant to this Part, as well as a copy of all materials used in training pursuant to this Part; and
- G. Regularly evaluate and adjust its training program in light of any material changes to respondent's promotional materials, operations, or any other circumstances that respondent knows or has reason to know may have a material impact on the effectiveness of the training program required pursuant to this Part.

Decision and Order

V.

IT IS FURTHER ORDERED that respondent THV Holdings, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

IT IS FURTHER ORDERED that respondent THV Holdings, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having supervisory responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying all acknowledgments of receipt of this order obtained pursuant to this Part.

Decision and Order

VII.

IT IS FURTHER ORDERED that respondent THV Holdings, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: “THV Holdings LLC, File No. 112 3057, Docket No. C-4361.”

VIII.

IT IS FURTHER ORDERED that respondent THV Holdings, and its successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports.

IX.

This order will terminate on May 16, 2032, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any

Analysis to Aid Public Comment

violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission, Commissioner Rosch and Commissioner Ohlhausen not participating.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from THV Holdings LLC, a limited liability company (“respondent”).

The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will

Analysis to Aid Public Comment

decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves respondent's marketing and sale of replacement windows for use in residences. According to the FTC complaint, respondent represented that its windows likely pay for themselves in energy savings alone within eight years, when consumers replace their windows with THV Compozit windows with Alter-Lite® triple pane glass. The respondent also allegedly represented that consumers who replace their windows with these THV windows are likely to achieve residential energy savings of 40%, save 40% on residential heating and cooling costs, or reduce their energy bills by half. In addition, the respondent allegedly represented that homeowners have saved 35%-55% off their energy bills by replacing their windows with THV windows. According to the complaint, respondent did not possess and rely upon a reasonable basis substantiating these representations when it made them. Many factors determine the savings homeowners can realize by replacing their windows, including the home's geographic location, size, insulation package, and existing windows. Consumers who replace single or double-paned wood or vinyl-framed windows – common residential window types in the United States – with THV replacement windows are not likely to achieve a 40%, 50%, or 35%-55% reduction in residential energy consumption or heating and cooling costs. The complaint also alleges that, by providing its independent dealers and installers with advertising and other promotional materials making the above unsubstantiated representations, respondent provided the means and instrumentalities to engage in deceptive practices. Thus, the complaint alleges that respondent engaged in unfair or deceptive practices in violation of Section 5(a) of the FTC Act.

Some promotional materials challenged in the FTC's complaint include the words "up to" in an apparent attempt to qualify representations that consumers who replace windows with respondent's windows are likely to achieve specified amounts of residential energy savings or reduction in residential heating and cooling costs. In the context of specific ads in this case, the words "up to" do not effectively qualify such representations for replacement windows. The FTC's complaint and the proposed

Analysis to Aid Public Comment

consent order should not be interpreted as a general statement of how the Commission may interpret or take other action concerning representations including the words “up to” for other products or services in the future.

The proposed consent order contains three provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I addresses the marketing of windows. It prohibits respondent from making any representation that: (A) consumers who replace their windows with respondent’s windows achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; or (B) respondent guarantees or pledges that consumers who replace their windows with respondent’s windows will achieve up to or a specified amount or percentage of energy savings or reduction in heating and cooling costs; unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence to substantiate that all or almost all consumers are likely to receive the maximum represented savings or reduction. Further, if respondent represents, guarantees, or pledges that consumers achieve such energy savings or heating and cooling cost reductions under specified circumstances, it must: disclose those circumstances clearly and prominently in close proximity to such representation, guarantee, or pledge; and substantiate that all or almost all consumers are likely to receive the maximum represented, guaranteed, or pledged savings or reduction under those circumstances (*e.g.*, when replacing a window of a specific composition in a building having a specific level of insulation in a specific region). The performance standard imposed under this Part constitutes fencing-in relief reasonably necessary to ensure that any future energy savings or reduction claims are not deceptive.

Parts II and III address any product or service for which respondent makes any energy-related efficacy representation. Part II prohibits respondent from making any representation: (A) about the ability of respondent’s windows to pay for themselves in energy savings alone within any specific number of years or other time period, when consumers replace their windows with respondent’s windows; (B) that any specific number or percentage of consumers who replace their windows with respondent’s

Analysis to Aid Public Comment

windows achieve energy savings or reduction in heating and cooling costs; or (C) about energy consumption, energy savings, energy costs, heating and cooling costs, U-factor, solar heat gain coefficient, R-value, K-value, insulating properties, thermal performance, or energy-related efficacy; unless the representation is non-misleading and substantiated by competent and reliable scientific evidence. Part III prohibits respondent from providing to others the means and instrumentalities with which to make any false, unsubstantiated, or otherwise misleading representation of material fact. It defines “means and instrumentalities” to mean any information, including any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any such product or service.

Parts IV through VIII require respondent to: train personnel who direct or engage in the promotion or sale of any product or service covered by the order not to make representations prohibited by the order; keep copies of advertisements and materials relied upon in disseminating any representation covered by the order; provide copies of the order to certain personnel, agents, and representatives having supervisory responsibilities with respect to the subject matter of the order; notify the Commission of changes in its structure that might affect compliance obligations under the order; and file a compliance report with the Commission and respond to other requests from FTC staff. Part IX provides that the order will terminate after twenty (20) years under certain circumstances.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or the proposed order, or to modify the proposed order’s terms in any way.