IN THE MATTER OF

CERTIFIED BUILDING PRODUCTS, INC., ET AL.

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

Docket 8875. Complaint, Feb. 14, 1972—Order and Opinion, Oct. 5, 1973.

Order requiring two Denver, Col., sellers, distributors and installers of residential siding materials, among other things to cease representing that offers of products are limited, prices are special or reduced, customers can receive percentage savings; misrepresenting the durability, performance or quality of its products; misrepresenting its guarantees; failing to make material disclosures to customers regarding the sale of instruments of indebtedness to third parties; and failing to disclose to consumers, in connection with the extension of consumer credit, information as required by Regulation Z of the Truth in Lending Act. Respondents are required to maintain adequate records to substantiate any representations or statements as to savings in price claims, claims regarding comparative values, etc. Further, the order closes the matter as to one of the individual respondents, Mr. Jack Bitman.

Appearances

For the Commission: *E. Eugene Harrison* and *Thomas H. Emmerson.*

For the respondents: *Holland and Hart,* Denver Col. and *Gelt and Grossman,* Denver, Col.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Certified Building Products, Inc., a corporation, and Certified Improvements Company, a corporation, and Michael P. Thiret and Jack Bitman, individually and as officers of said corporations, and Claude Thiret, individually and as general manager of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts, and of the implementing regulations promugated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof woud be in the public interest hereby issues its complaint stating in that respect as follows:

PARAGRAPH 1. Respondents Certified Building Products, Inc.,

and Certified Improvements Company, are corporations organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with their principal offices and places of business located at 3553 Brighton Boulevard in the city of Denver, State of Colorado.

Respondents Michael P. Thiret and Jack Bitman are individuals and officers of the corporate respondents. Respondent Claude Thiret is an individual and general manager of the corporate respondents. They formulate, direct, and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents. Respondents have cooperated and acted together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, distribution and installation of residential siding materials to the public.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of Colorado to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of the aforesaid business, and for the purpose of inducing the purchase of their products, respondents have made, and are now making, numerous statements and representations in advertising circulars and other promotional material and in oral statements made by their salesmen and representatives with respect to the nature of their offer, their prices, time limitations, guarantees and performance of their products.

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

NOW—You can have your home modernized * * * and also receive up to $300 in CASH.

* * * * * * *

Let us explain how YOU can receive this advertising money we would normally spend in other advertising media to introduce this beautiful new product.

* * * * * * *

Guaranteed in writing for thirty beautiful years. Save Money * * * by eliminating the painting forever.

* * * * * * *

This card must be mailed within five days to qualify.

* * * * * * *

Savings * * * in painting cost * * * will more than pay for your new * * * siding installation.

* * * * * * *

Take the work, worry and expense out of maintaining your home.

* * * * * * *

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning, but not expressly set out herein, separately and in connection with the oral statements and representations of their salesmen and representatives, the respondents have represented, and are now representing, directly or by implication that:

1. The offer to sell proposed respondents' materials is for a limited time only.

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

3. All purchasers of respondents' siding materials will realize a 50 percent savings in their air-conditioning and heating bills.

4. Siding materials sold by respondents will never require repairing.

5. Respondents' siding materials and installations are unconditionally guaranteed in every respect, without condition or limitation, for a period of thirty (30) years or more.

6. The offer of respondents' siding, set forth in its advertising, was being made under a revolutionary new plan that would modernize a prospective customer's home and at the same time allow that prospective customer to receive up to $300 in cash.

7. Homes of prospective purchasers have been specially selected as model homes for the installation of respondents' products; after installation, such homes would be used for demonstration and advertising purposes by respondents; and, that as a result of

allowing their homes to be used as models, purchasers would receive allowances, discounts, or commissions.

8. Purchasers of respondents' siding installations will receive enough commissions, from referrals of other prospective purchasers, to obtain their installation at little or no cost.

9. Prospective purchasers of respondents' siding will receive a free gift if they allow one of respondents' representatives to call on them in their home.

10. Respondents will perform all of the services and provide all of the materials as agreed to, both orally and in writing, by the parties.

PAR. 6. In truth and in fact:

1. The offer to sell respondents' materials is not for a limited time only, but is an offer regularly available to the public.

2. Respondent's siding materials are not being offered for sale at special or reduced prices, and savings are not thereby afforded respondents' customers because of a reduction from respondents' regular selling price, but the price at which respondents' products are sold varies from customer to customer depending on the resistance of the prospective purchaser.

3. All purchasers of respondents' residential siding materials will not realize a fifty (50%) percent savings in their air-conditioning and heating bills. Few, if any, will achieve such savings.

4. Residential siding materials sold by respondents will require repair.

5. Respondents' residential siding materials and installations are not unconditionally guaranteed in every respect without conditions or limitations for a period of thirty (30) years. Such guarantee as may be provided is subject to numerous terms, conditions and limitations.

6. The offer set forth by respondents is not a revolutionary new plan, nor would a prospective customer, who purchased respondents' siding, necessarily receive up to $300 in cash.

7. Homes of prospective purchasers are not specifically selected as model homes for the installations of respondents' products; after installations, such homes are not used for demonstration or advertising purposes by respondents; and purchasers, as a result of allowing their homes to be used as models, are not granted reduced prices nor do they receive allowances, discounts, or commissions.

8. Few, if any, purchasers of respondents' residential siding installation receive enough referral commissions to obtain their installation at little or no cost and respondents seldom, if ever, pay allowances or commissions on referral sales.

9. Prospective purchasers of respondents' siding have not received a free gift in all of the instances that it has been promised to them.

10. Respondents have, in several instances, failed to provide the materials and perform the services as agreed to, both orally and in writing, by the parties.

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

PAR. 7. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their siding materials, respondents and their salesmen or representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

1. In a substantial number of instances and in the usual course of their business, respondents sell and transfer their customers' obligations, procured through the use of the unfair, false, misleading and deceptive statements and representations set out in Paragraphs Four and Five above, to various financial institutions. In any subsequent legal action to collect on such obligations, these financial institutions or other third parties, as a general rule, may cut off various personal defenses, otherwise available to the obligor, arising out of respondents' failure to perform or out of other unfair, false, misleading or deceptive acts and practices on the part of respondents.

2. In a substantial number of instances, through the use of the unfair, false, misleading and deceptive statements and representations set out in Paragraphs Four and Five above, respondents have been able to induce customers into signing a contract with the respondents on the respondents' initial contact with the customer. In such a situation, it is highly improbable that the customer was able to seek out advice or make an independent decision on whether or not he should enter into the contract and therefore, had to rely heavily on the advice and information given to him by respondents.

Therefore, the acts and practices as set forth in Paragraph

Seven hereof were and are unfair and false, misleading and deceptive acts and practices.

PAR. 8. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been and now are in substantial competition, in commerce, with corporations, firms, and individuals in the sale of residential siding materials and other products of the same general kind and nature as that sold by respondents.

PAR. 9. The use by the respondents of the aforesaid false, misleading, and deceptive statements, representations, and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violations of the Truth in Lending Act and the implementing regulations promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 11. In the course and conduct of their business as aforesaid, respondents regularly extend, and for some time last past have regularly extended, consumer credit as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 12. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business and in connection with credit sales as "credit sale" is defined in Section 226.2(n) of Regulation Z, have caused and are causing their customers to execute retail installment contracts, hereinafter referred to as contracts Form A and Form B.

PAR. 13. By and through the use of both contracts, Form A and Form B, respondents in a number of instances:

1. Have failed to disclose the date on which the finance charge begins to accrue if different from the date of the transaction, as required by Section 226.8 (b) (1) of Regulation Z.

2. Have failed to state the due dates or period of payments scheduled to repay the indebtedness, and the sum of such payments, using the term, "total of payments," as required by Section 226.8 (b) (3) of Regulation Z.

3. Have failed to give a clear identification of the property to which any security interest relates or if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify, as required by Section 226.8 (b) (5) of Regulation Z.

4. Have failed to use the terms "cash downpayment" and "total downpayment" and have failed to give the corresponding disclosures with those terms, as required by Section 226.8 (c) (2) of Regulation Z.

5. Have failed to use the term, "amount financed," and to give the corresponding disclosure with that term, as required by Section 226.8 (c) (7) of Regulation Z.

6. Have failed to use the term, "deferred payment price," and to give the corresponding disclosure with that term, as required by Section 226.8 (c) (8) (ii) of Regulation Z.

PAR. 14. By and through the use of contract Form A, respondents have given notice to their customers that a security interest, as "security interest" is defined in Section 226.2 (z) of Regulation Z, has been or will be retained or acquired by the respondents in the real property which is expected to be used as the principal residence of the customer. Respondents' retention or acquisition of a security interest in said real property gives their customers, who are extended consumer credit, as "consumer credit" is defined in Section 226.2 (k) of Regulation Z, the right to rescind the transaction until midnight of the third business day following the date of consummation of the transaction or the date of delivery of all the disclosures required by Regulation Z, whichever is later.

By and through the use of the aforementioned contract Form A, respondents, in a number of instances:

1. Have failed to provide the "Notice of Opportunity to Rescind" to the customer on one side of a separate statement which identifies the transaction to which it relates, as required by Section 226.9 (b) of Regulation Z.

2. Have failed to set out the "Effect of Rescission," Section 226.9 (d) of Regulation Z in the manner and form required by Section 226.9 (b) of Regulation Z.

3. Have failed to furnish two (2) copies of the above referred-to notice to the customers, as required by Section 226.9 (b) of Regulation Z.

PAR. 15. By and through the use of contract Form B, respondents have agreed to deliver to the owner of the property receiving the home improvements, the requisite lien waivers, to the end that no lien may attach to the owner's property by virtue of the work and materials to be furnished under the contract Form B.

Respondents have not delivered the above referred-to lien waivers to their customers in a number of instances where delivery of such waivers was contracted for by the parties. In these instances, the security interests which have been or will be retained or acquired, have, therefore, not been effectively waived.

Respondents therefore remain obligated to make the proper disclosures and otherwise act in accordance with Section 226.9 of Regulation Z.

In the instances referred to above, where the respondents have failed to deliver the necessary lien waivers, they have also failed to make the proper disclosures and to otherwise act in accordance with Section 226.9 of Regulation Z.

PAR. 16. Respondents have caused the following additional information and clause to appear in their contract Form B under "customer acknowledgement:"

That agreement is non-cancellable, and that in case of cancellation, the contractor shall be entitled to 30% of the total amount of this agreement to recover delivery and credit expenses, or the total amount of this agreement if he has commenced work.

By and through the use of the above-quoted additional information and clause, respondents have and are representing to their customers that they are liable for damages in the event that these customers exercise their right to rescind, thereby violating Section 226.9 (d) of Regulation Z. And, said additional information has been stated, utilized, or placed by the respondents so as to mis-

lead, or confuse the customer and contradicts, obscures, and detracts attention from the information required by Regulation Z to be disclosed, thereby violating Section 226.6(c) of Regulation Z.

PAR. 17. Respondents have caused the following additional information and clauses to appear in their contracts Form A and Form B under "customer acknowledgement:"

That this agreement contains all agreements between the owner and contractor and no other agreements oral or written will be binding on contractor.

That this agreement becomes binding on purchaser immediately, but does not become binding upon contractor until same is countersigned by credit manager.

Said additional information has been stated, utilized, or placed by the respondents so as to mislead or confuse the customer and contradicts, obscures, and detracts attention from the information required by Regulation Z to be disclosed, thereby violating Section 226.6(c) of Regulation Z.

PAR. 18. Pursuant to Section 105 of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act, and, pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY DAVID H. ALLARD, ADMINISTRATIVE LAW JUDGE

FEBRUARY 13, 1973

PRELIMINARY STATEMENT

This proceeding was commenced with the issuance of a complaint on February 14, 1972, charging the corporate respondents, Certified Building Products, Inc., Certified Improvements Company, and Michael P. Thiret and Jack Bitman, individually and as officers of said corporations, and Claude Thiret, individually and as general manager of said corporations, with violations of Section 5 of the Federal Trade Commission Act by committing unfair methods of competition and unfair and deceptive acts and practices in commerce and violating the Truth in Lending Act and the implementing regulations promulgated thereunder.

By order issued June 15, 1972, the matter was withdrawn from adjudication by the Commission. By order issued October 10, 1972, the Commission rejected the proposed consent order and re-

manded the matter to the administrative law judge. Hearings were held in Denver, Colorado on November 27, 28, 29 and 30, 1972.[1] At those hearings, testimony and documents were incorporated into the record in support of the complaint as well as in opposition thereto. This proceeding thus is before the administrative law judge upon the complaint, answer depositions, testimony and other evidence, proposed findings of fact and conclusions, and briefs filed by complaint counsel and by counsel for respondents. The proposed findings of fact, conclusions, and briefs in support thereof submitted by the parties have been carefully considered and those findings not adopted, either in the form proposed or in substance are rejected as not supported by the evidence or as involving immaterial matter.

Having heard and observed the witnesses and having carefully reviewed the entire record [2] in this proceeding, together with the proposed findings, conclusions, and briefs submitted by the parties as well as replies, the administrative law judge makes the following findings as to facts, conclusions and order.

FINDINGS OF FACT

1. Respondent Certified Building Products, Inc., was a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado from November 24, 1961 to November 17, 1970, with its principal office and place of business located at 3553 Brighton Boulevard, Denver, Colorado. (Comp. par. 1; Ans. par. 1; CX 1, 4, 5).

2. Respondent Certified Improvements Company is a corporation organized on January 18, 1961, existing and doing business under and by virtue of the laws of the State of Colorado, with its principal office and place of business located at 3553 Brighton Boulevard, Denver, Colorado. (Comp. par. 1; Ans. par. 1; CX 2, 3). It was reactivated on January 1, 1970; previously, it was dormant for an indefinite period (Tr. 349).

3. Respondent Michael P. Thiret was an officer of respondent Certified Building Products, Inc. He solely formulated, directed and controlled all of the acts and practices of respondent Certified

[1] At an earlier pretrial conference in Denver, Colorado on May 2, 1972, depositions were taken of certain respondents.

[2] References to the record are made in parenthesis, and certain abbreviations are used as followse

Comp.—Complaint	Tr.—Transcript page
Ans.—Answer	CX—Commission exhibit
	RX—Respondent's exhibit

Building Products, Inc. (Comp. par. 1; Tr. 340, 344, 345, 346-47). He also was the majority stockholder.

4. Respondent Michael P. Thiret is an officer of respondent Certified Improvements Company. He solely formulates, directs and controls all of the acts and practices of respondent Certified Improvements Company. (Comp. par. 1; Ans. par. 1; Tr. 349). He is the majority stockholder.[3]

5. From November 24, 1961 to November 17, 1970, respondent Certified Building Products, Inc. was, and since January 1, 1970, respondent Certified Improvements Company is, and with regard to both time periods, respondent Michael P. Thiret was, and is, respectively, engaged in the advertising, offering for sale, sale, distribution of and installation of residential siding materials to the public. (Comp. par. 2; Ans. par. 2).

Count I

With regard to the alleged violations of Section 5 of the Federal Trade Commission Act, the findings of Paragraphs One through Five are incorporated by reference.

6. In the course and conduct of their aforesaid business, respondents,[4] during the periods outlined in Paragraph 5, now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of Colorado to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned, a

[3] In accordance with Section 3.22(e) of the Commission's Rules of Practice, the administrative law judge entered a ruling on the record on November 30, 1972, dismissing the complaint with regard to respondents Jack Bitman and Claude Thiret (Tr. 678). Those rulings are now "taken into account" in the initial decision as contemplated by the rule. Respondent Claude Thiret was the general manager of respondent Certified Building Products, Inc., from October 15, 1968 to December 31, 1969, and the nominal president and minority stockholder of Certified Improvements Company from January 1, 1970 to October 31, 1971 (Tr. 315). Respondent Jack Bitman was a nominal officer of respondent Certified Building Products, Inc., as well as being secretary of respondent Certified Improvements Company (Ans. par. 1). As indicated in Findings 3 and 4, Michael P. Thiret is the sole individual who formulated, directed and controlled the acts and practices of both corporate respondents. These findings stand unrebutted on this record. There is no evidence of record to show that Claude Thiret and Jack Bitman "cooperated and acted together in carrying out the acts and practices" alleged in the complaint. At the hearing, complaint counsel did not oppose respondent Bitman's motion to dismiss (Tr. 645)e Moreover, the order proposed by complaint counsel in their "Proposed Findings and Conclusions" filed January 17, 1973, has no reference to either individual respondent, Claude Thiret or Jack Bitman. It would appear, therefore, that complaint counsel agree that the complaint should be dismissed with regard to both of these individual respondents.

[4] Hereinafter, respondents only refers to Certified Building Products, Inc., Certified Improvements Company and Michael P. Thiret, individually as an officer of said corporations.

substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. (Comp. par. 3; Ans. par. 3).

a. Respondents' gross annual revenue amount to $500,000 to $600,000 (Tr. 343).

b. About 10 percent or $50,000 to $60,000 comes from interstate sales (Ans. par. 3).

c. About 300 jobs are involved in the annual volume, as pertinent here, about 30 would be involved in interstate sales (Tr. 630).

d. All operations are within an area of about a 400-500 mile radius of Denver, Colorado (Tr. 341).

7. In the course and conduct of their business, and for the purpose of inducing the sale of their products, respondents Certified Building Products, Inc. and Michael P. Thiret, utilized national advertising material designed and made by Lumaside Corporation, a national manfacturer of steel siding, for an undefined period during 1965-1966. This maufacturer's national advertisement in Life Magazine indicated the manufacturer's suggested retail price as well as guarantees and performance of the manufacturer's product (CX 68; Tr. 533). There is no evidence of record showing any written statements or representations by these respondents, as alleged in the complaint as "[T]ypical and illustrative." The record merely shows that general oral statements were made by representatives of these respondents up to the date of the legal dissolution of Certified Building Products, Inc. on November 17, 1970—15 months prior to issuance of the complaint herein.

a. Sixteen public witnesses testified about their general recollections about the oral representations made on behalf of respondent Certified Building Products, Inc.

Witness	Date of Transaction	Transcript References	Was Witness Deceived	Customer Satisfied
Esteban Martinez P.O. Box 114 Chimayo, N. Mex.	10–26–66	Tr. 222–245	Yes	Basically (Tr. 243)

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William D. Reece 1325 N. Bailey North Platte, Neb.	3–3–67	Tr. 492–500	No	Yes (Tr. 498)
Alfred F. Balcom 6210 East Second North Platte, Neb.	3–5–67	Tr. 455–466	No	Yes (Tr. 462, 464)
John Daniels Rural Route 2 Oakley, Kan.	3–20–67	Tr. 517–525	No	Yes (Tr. 521)
Mary Trujillo 815 W. 11th St. North Platte, Neb.	4–4–67	Tr. 407–418	No	Yes (Tr. 417–418)
Robert E. Brown 421 E. North St. North Platte, Neb.	5–10–67	Tr. 291–300	No	Yes (Tr. 299–300)
James L. Gannon 304 Pearl St. Atwood, Kansas	5–18–67	Tr. 525–529	No	Yes (Tr. 529)
Dorothy L. Seckinger 1345 17th St. Gering, Nebraska	5–20–67	Tr. 383-394	No	Yes (Tr. 390, 393)
Charles Rogers 710 Martin Ave. Colby, Kansas	6–27–67	Tr. 562–578	No	Basically (Tr. 571)
Grace Brown 1109 E. 4th St. Ogallala, Neb.	7–10–67	Tr. 501–508	No	Yes (Tr. 504, 508)
Doyle R. Stapp RFD Beaver, Okla.	8–3–67	Tr. 484–492	No	Yes (Tr. 487)
Fred Austin Alamogordo, N. Mex.	11–13–67	Tr. 301–312	No	Yes (Tr. 310, 312–313)

Isabell Montoya Box 234 Roy, N. Mex.	1–8–70	Tr. 275–290	No	Yes (Tr. 287)
Moises Avila 445 W. Hugus Rawlins, Wyo.	3–10–70	Tr. 246–259	No	Basically
Edward Campbell 616 McMicken Rawlins, Wyo.	3–16–70	Tr. 160–190	No	Basically
James A. Cornish Winter, S. Dak.	4–18–70	Tr. 190–221	No	Yes

b. Since a preponderance of the witnesses testified about events that occurred at least five years earlier, only the most general findings can be derived from their testimony with regard to the nature of the offer, prices and time limitations as well as the manufacturer's guarantees and performance of its [the manufacturer's] products.[5]

c. A substantial number of the public witnesses testified that their initial contact with respondents resulted from an unsolicited knock on the door at their homes by respondents' representative (Tr. 192, 247, 261, 276, 292, 309–10, 384, 396, 409, 485, 493, 501, 510, 520, 526)o Two learned about respondents having seen respondents work on the house of a neighbor (Tr. 161, 457)o

8. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents Certified Improvements Company and Michael P. Thiret have made oral statements with regard to the nature of the offer, prices, time limitations as well as performance by the manufacturer's product as well as manufacturer's guarantees.

a. Six witnesses testified about their general recollections about oral representations made on behalf of respondent Certified Improvements Company.

[5] This finding is based essentially on observing the demeanor of the witnesses. The witnesses generally appeared to be pleased with the work of respondents. Their testimony regarding the matters raised in the complaint seemed unimportant to them at the time they signed the contract. Their recollections generally were hazy. Even the paternalistic overtones to the direct questioning of the witnesses by complaint counsel could not disguise this fact. The witnesses appeared to be intelligent and fully capable of understanding the ramification of the contractual obligations they undertook. As a general proposition, they did not appear to feel deceived in the ordinary meaning of the word. The preponderance of the witnesses were of the opinion that respondents' representatives did not utilize "high pressure" sales techniques.

Witness	Date of Transaction	Transcript References	Was Witness Deceived	Customer Satisfied
James Parette 453 Ann St. Chadron, Neb.	11–18–69	Tr. 467–483	No	Yes (Tr. 479, 480)
Donald W. Alexander 300 E. 4th St. Gordon, Neb.	11–69	Tr. 419–428	No	Yes (Tr. 427)
Robert Dye Willow Roads Garden Dodge City, Kansas	1–8–70	Tr. 428–455	No	Yes (Tr. 451; RX 2)
Robert J. Gaines 2705 E. Pine Enid, Okla.	1–10–70	Tr. 394–407	No	Yes (Tr. 403, 405)
Frances E. Hagen 425 N. Main St. Chadron, Neb.	2–17–70	Tr. 509–517	No	Yes (Tr. 514, 515–516)
Margurite Hauf 1885 Johnson Casper, Wyo.	3–14-70	Tr. 260–275	No	Yes (Tr. 273, 275)

b. These recollections were based on events that occurred about three years prior to the hearing.

9. There is absolutely no evidence of record that respondents are, or have been since March 1970, making any statements or representations, directly or indirectly by implication thate

a. The offer to sell proposed respondents' materials is for a limited time only.

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

c. All purchasers of respondents' siding materials will realize a 50 percent savings in their air-conditioning and heating bills.

d. Siding materials sold by respondents will never require repairing.

e. Respondents' siding materials and installations are unconditionally guaranteed in every respect, without condition or limitation, for a period of thirty (30) years or more.

f. The offer of respondents' siding, set forth in its advertising, was being made under a revolutionary new plan that would modernize a prospective customer's home and at the same time allow that prospective customer to receive up to $300 in cash.

g. Homes of prospective purchasers have been specially selected as model homes for the installation of respondents' products; after installations, such homes would be used for demonstration and advertising purposes by respondents; and, that as a result of allowing their homes to be used as models, purchasers would receive allowances, discounts, or commissions.

h. Purchasers of respondents' siding installations will receive enough commissions, from referrals of other prospective purchasers, to obtain their installation at little or no cost.

i. Prospective purchasers of respondents' siding will receive a free gift if they allow one of respondents' representatives to call on them in their home.

j. Respondents will perform all of the services and provide all of the materials as agreed to, both orally and in writing, by the parties.

10. Respondent Michael P. Thiret's reputation in the business community is excellent (Tr. 674, 678)e There is no factual foundation to even infer anything to the contrary.

Count II

With regard to the alleged violations of the Truth in Lending Act, and the implementing regulations promulgated thereunder, and of the Federal Trade Commission Act, the findings of Paragraphs One through Five hereof are incorporated by reference in Count II.

11. In the course and conduct of their business as aforesaid, during the period July 1, 1969 to about April 1970, respondents regularly extended consumer credit as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the

Federal Reserve System.[6] (Comp. par. 11; Ans. par 11; Tr. 642, 643).

12. During the period July 1, 1969 to April 1970, respondents, in the ordinary course and conduct of their business, and in connection with credit sales as "credit sale" is defined in Section 226.2(n) of Regulation Z, caused their customers to execute retail installment contracts, hereinafter referred to as contracts Form A and Form B. (Comp. par. 12; Ans. par. 12; CX 6, 39).

13. By and through the use of both contracts, Form A and Form B, respondents in a number of instances:

a. Have failed to disclose the date on which the finance charge begins to accrue if different from the date of the transaction, as required by Section 226.8(b)(1) of Regulation Z.

b. Have failed to state the due dates or period of payments scheduled to repay the indebtedness, and the sum of such payments, using the term, "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

c. Have failed to give a clear identification of the property to which any security interest relates or if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify, as required by Section 226.8(b)(5) of Regulation Z.

d. Have failed to use the terms "cash downpayment" and "total downpayment" and have failed to give the corresponding disclosures with those terms, as required by Section 226.8(c)(2) of Regulation Z.

e. Have failed to use the term "amount financed," and to give the corresponding disclosure with that term, as required by Section 226.8(c)(7) of Regulation Z.

f. Have failed to use the term "deferred payment price," and to give the corresponding disclosure with that term, as required by Section 226.8 (c)(8)(ii) of Regulation Z. (Comp. par. 13; Ans. par. 13; Tr. 679–80, 681; RX 9).

14. During the period July 1, 1969 to April 1970, by and through the use of contract Form A, respondents gave notice to their customers that a security interest, as "security interest" is defined

[6] The parties filed a stipulation of record in which respondents, in effect, admit the technical violations of the Truth in Lending Act during the period July 1, 1969 to April 1970 (Tr. 679-81). Complaint counsel concede no violations occurred after that date (Tr. 683).

in Section 226.2(z) of Regulation Z, has been or will be retained or acquired by the respondents in the real property which is expected to be used as the principal residence of the customer. Respondents' retention or acquisition of a security interest in said real property gave their customers, who are extended consumer credit, as "consumer credit" is defined in Section 226.2(k) of Regulation Z, the right to rescind the transaction until midnight of the third business day following the date of consummation of the transaction of the date of delivery of all the disclosures required by Regulation Z, whichever is later. (Comp. par. 14; Ans. par. 14)t

By and through the use of the aforementioned contract Form A, respondents, in a number of instances technicallyt

a. Failed to provide the "Notice of Opportunity to Rescind" to the customer on one side of a separate statement which identified the transaction to which it relates, as required by Section 226.9(b) of Regulation Z (CX 7; Tr. 582–83)t

b. Failed to set out the "Effect of Rescission," Section 226.9(d) of Regulation Z in the manner and form required by Section 226.9(b) of Regulation Z (CX 6, 7)t

c. Failed to furnish two (2) copies of the above referred-to notice to the customers, as required by Section 226.9(b) of Regulation Z (CX 6, 7)t

15. During the period July 1, 1969 to April 1970, by and through the use of contract Form B, respondents agreed to deliver to the owner of the property receiving the home improvements, the requisite lien waivers, to the end that no lien may attach to the owner's property by virtue of the work and materials to be furnished under the contract Form B. Respondents did not deliver the above referred-to lien waivers to their customers in a number of instances where delivery of such waivers was contracted for by the parties. In these instances, the security interests would not have been effectively waived (Tr. 584-85)t

16. During the period July 1, 1969 to April 1970, additional information and clause to appear in their contract Form B under "customer acknowledgementt"

That agreement is non cancellable, and that in case of cancellation, the contractor shall be entitled to 30% of the total amount of this agreement to recover delivery and credit expenses, or the total amount of this agreement if he has commenced work. (CX 39).

By and through the use of the above-quoted additional information and clause, respondents represented to their customers that they are liable for damages in the event that these customers exercise their right to rescind, thereby violating Section 226.9(d) of Regulation Z.

17. During the period July 1, 1969 to April 1970, respondents caused the following additional information and clauses to appear in their contracts Form A and Form B under "customer acknowledgement:"

That this agreement contains all agreements between the owner and contractor and no other agreements oral or written will be binding on contractor.

That this agreement becomes binding on purchaser immediately, but does not become binding upon contractor until same is countersigned by credit manager.

18. The installment sales contracts executed by respondents during the period July 1, 1969 to April 1970, were prepared by independent legal counsel retained by respondents in advance of July 1, 1969. Respondents intended to comply with the law and had reason to believe that they were in compliance with the law (Tr. 582–83, 636, 712–14)t As soon as respondents were notified by officials of the Federal Trade Commission that the forms were not in compliance with the Truth in Lending Act, corrections were immediately made and the forms revised accordingly (RX 9)t And the unrebutted evidence of record shows respondents to be in compliance from that date forward.

CONCLUSIONS

1. There is no substantial evidence of record to show that respondents have been or now are in substantial competition, in commerce, with corporations, firms, and individuals in the sale of residential siding materials and other products of the same general kind and nature as that sold by respondents.

a. As found above, the annual dollar volume of respondents' interstate business is only $50,000 to $60,000. Stated in terms of individual jobs, the figure represents about 30 jobs. (Findings 6 a, b, *supra*).

b. Stated in terms of annual jobs per state in the five statest Wyoming, Nebraska, Kansas, Oklahoma and New Mexico, the

average number of jobs per state would only be about six annually, which hardly could be characterized as "substantial competition."

2. There is no substantial credible evidence that respondents have made false, misleading and deceptive statements, representations and practices which have the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

a. There is no substantial evidence of record to ascertain with clarity what, if any, statements, representations and practices by respondents have had or now have thetcapacity to mislead members of the purchasing public into the purchase of substantial quantities of respondents' products.

(1) Virtually all representations were oral; witnesses had to recollect events that occurred up to five to six years prior to the hearing. No salesmen were called to testify. The record shows absolutely no evidence of any unlawful conduct by respondents for a two year period prior to issuance of the complaint.

(2) The record shows that virtually all of the home improvement work was completed in accordance with the contractual agreement and to the customer's satisfaction.

(3) A preponderance of the public witnesses conceded that they were not deceived but rather thought they had contracted for and received a "good deal."

3. There is no substantial credible evidence that respondents have committed any acts and practices which have resulted in prejudice and injury of the public and of respondents' competitors or which constituted and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

4. The violations of the Truth in Lending Act which occurred during the period July 1, 1969 to April 1970, appear to be technical rather than substantative in character.

a. Customer's obligations were not sold to various financial institutions but rather only to onet the Central Bank & Trust of Denver, Colorado (Tr. 690, 672).

b. No injury or damage to the public is shown of record and the substance of the disclosures required by the Truth in Lending Act

and Regulation Z appear to have been met. For example, the amount of the payments was disclosed and the record shows that customers knew them to be monthly payments.

c. There is no evidence of record to show that the forms challenged in the complaint were designed, utilized or placed by respondents to mislead or confuse the customer or that they contradict, obscure or detract from information required by Regulation Z.

5. The challenged violations of the Truth in Lending Act were discontinued immediately upon notification and the unrebutted evidence of record shows that respondents have been in compliance for almost three years. There is not a scintilla of evidence of record to indicate any reasonable likelihood that violations will be resumed in the foreseeable future.[7]

6. The Federal Trade Commission has jurisdiction of and over respondents as well as the subject matter of this proceeding.

7. For the reasons set forth above, the administrative law judge has determined that the complaint must be dismissed.

ORDER

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

DISSENTING STATEMENT

BY JONES, *Commissioner*

I dissent from that part of the opinion concluding that it is not necessary here to bar a holder of consumer paper from becoming a holder in due course. I do not agree that notification to the buyer before consummation of the sale of the legal status of a holder in due course is adequate to avoid the unfair and deceptive consequences resulting from the operation of the holder in due course doctrine.

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[7] The senior vice president of the Central Bank & Trust Company of Denver, testified that respondent Michael P. Thiret "is a satisfactory customer who has high integrity and a good moral standing" (Tr. 674). The Regional Administrator for the United States Department of Housing and Urban Development testified that respondent Michael P. Thiret "is highly regarded [in the community] as a businessman and a citizen." (Tr. 678).

OPINION OF THE COMMISSION

BY ENGMAN, *Commissioner*

This case involves alleged violations of Section 5 of the Federal Trade Commission Act in connection with the promotion and sale of residential steel siding material, as well as violations of the Truth in Lending Act. On February 14, 1972, the Commission filed the complaint in this matter against respondents Certified Building Products, Inc., Certified Improvement Co., Michael Thiret and Jack Bitman, individually and as officers of the corporate respondents, and Claude Thiret, individually and as general manager of the corporate respondents.

Following four days of administrative hearings in Denver, Colorado, the administrative law judge filed his initial decision and order on February 8, 1973, dismissing the complaint in its entirety. He found that complaint counsel had failed to sustain the burden of proof with respect to each of the allegations in Count I of the complaint. He further found that respondents were in violation of the Truth in Lending Act and Regulation Z, as alleged in Count II of the complaint, but he considered the disclosures required by statute and regulation and the alleged violations to be "technical" rather than substantive in nature. He further found that respondents had discontinued the challenged practices during the staff investigation prior to issuance of the complaint and would not resume them in the future. The administrative law judge decided that an order binding respondents to further compliance was unnecessary and dismissed the complaint.

Complaint counsel have appealed to the Commission, requesting review of the findings of fact and the interpretations of applicable law set forth in the initial decision. We have reviewed the record in this proceeding and are vacating the findings of the ALJ with respect to Count I of the complaint. The ALJ's introductory findings of fact,[1] findings of fact with respect to Count II of the complaint, and conclusions, except to the extent they are inconsistent with findings and conclusions made in this opinion, are

[1] Findings of Fact 1–5 [I.D. 2–4] [pp. 1013–14 herein].

supported by the record and are hereby adopted as findings of the Commission.[2]

Respondent Certified Building Products, Inc. was a corporation established under the laws of the State of Colorado and was engaged primarily in the sale and installation of residential steel siding materials to customers residing in Colorado, Wyoming, Nebraska, Kansas, and New Mexico [Tr. 330, 341]. It ceased doing business in November, 1970. Respondent Certified Improvements Co. was organized in 1961 but remained a dormant corporation until activated in January, 1970 [Ans. Sec. I; CX 2, 3; Tr. 349]. From the date of its activation, Certified Improvements has carried on and continued the business of Certified Products from the same offices with the same personnel, using the same business practices and under substantially the same ownership and control [Ans. Par. 2; Tr. 349, 579]. In this proceeding, these two corporations will be treated as one [*P. F. Collier & Son Corp.* v. *FTC*, 427 F.2d 261 (6th Cir. 1970), *cert. denied*, 400 U. S. [illegible]6].

A. COUNT I OF THE COMPLAINT

Questions of fact rather than law predominate in this appeal. Indeed, most of the legal issues are well settled. In essence, the key question is whether the testimony of respondents' customers is reliable. After a trial in which testimony was received from 22 of those customers, the ALJ was unable to determine from the record whether claims challenged in the complaint had actually been made [I.D. 5, 6 pp. 1015–17 herein]. He did find one witness who had been deceived, but in his view, all witnesses appeared to be satisfied with the work respondents had performed.[3] As noted by the ALJ, these findings were based upon his

[2] The following abbreviations will be used for citations:
Comp.—Complaint
I.D.—Initial Decision of the Administrative Law Judge (ALJ)
Pre. Tr.—Prehearing Transcript
Tr.—Transcript of Testimony
CX—Commision Exhibit
RX—Respondents' Exhibits
App. Br.—Brief on Appeal of Complaint Counsel (CC)
Ans. Br.—Answering Brief
Rep. Br.—Reply Brief
O.A.—Transcript of Oral Argument on Appeal

[3] We need not dwell at length over the test consistently applied by the Commission and upheld by the courts in determining the legality of sales promotions under Sec. 5 of the FTC Act. The questions before us on this appeal are whether claims challenged in the complaint were made by respondents' salesmen, and if so, whether such claims have a tendency

observation of the demeanor of witnesses testifying before him. It was the administrative law judge's impression that the witnesses were generally "hazy" in recalling the precise details of the representations made to them in the course of the sales presentation and that he, therefore, could not rely upon their testimony as an evidentiary basis supporting a specific finding relating to any of the challenged claims.

The Commission has examined the record for evidence of "hazy" recall on the part of each witness testifying in this proceeding. This examination disclosed direct and specific testimony relating to claims which the witnesses could recall. The consumer witnesses testified to the best of their recollections as to the nature and content of the representations made to them by respondents' salesmen. They admitted candidly, upon direct and cross-examination, their inability to recollect with certainty every specific detail of the presentations. But this does not warrant the conclusion that the testimony is unreliable in its entirety.

We do not require that a witness demonstrate an instant-replay memory before we will accord any weight to that witness' testimony. The transactions and communications with which we are concerned took place in the homes of these witnesses. Oddly enough, respondents' salesmen who were listed as potential witnesses and who might have refuted the testimony of respondents' customers were not called to testify. Thus, there is no need on this record to weigh conflicting testimony or to determine which of two witnesses is better able to recall the content of a particular sales "pitch." We need only assess the evidentiary value to be accorded the unrebutted testimony of each witness as revealed on

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or capacity to mislead the purchasing public. *U. S. Retail Credit Ass'n.* v. *FTC*, 300 F.2d 212, 221 (4th Cir. 1962). It was not complaint counsel's burden to establish that respondents' customers were injured by the claims, and the fact that respondents had satisfied customers is irrelevant. *Basic Books, Inc.* v. *FTC*, 276 F.2d 718 (7th Cir. 1960); *Erickson Hair and Scalp Specialists* v. *FTC*, 272 F. 2d 318 (7th Cir. 1959), *cert. denied*, 362 U.eS. 940; *Exposition Press, Inc.* v. *FTC*, 295 F.2d 869, 873 (2d Cir. 1961), *cert. denied*, 370 U. S. 917 (1962); *Independent Directory Corp.* v. *FTC*, 188 F.2d 468 (2d Cir. 1951); *Charles of the Ritz Distributors Corp.* v. *FTC*, 143 F.2d 676, 680 (2d Cir. 1944). The Commission's concern here is with "methods designed to get a consumer to purchase a product, not with whether the product, when purchased, will perform up to expectations." *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 388 (1965).

In this proceeding, the standard which will be applied and against which claims established on this record will be evaluated is whether such claims have a tendency or capacity to mislead. The ALJ did not reach this question in his initial decision [I.D. Findings 7(a) and (b), 8(a) and (b)].

the record in determining whether or not he or she could recall the salesman making a particular claim.

Our review of the record discloses numerous instances where different witnesses recall similar claims by different salesmen. These common threads linking the testimony of several witnesses provide corroboration for testimony of the individual witness and persuade us that the ALJ was in error in dismissing the testimony on the ground of "hazy recollection." At the request of respondents' counsel, before the first witness was called the ALJ issued an order excluding all non-party witnesses from the hearing room and directing counsel to instruct each witness not to discuss the subject matter of the testimony with other prospective witnesses in this proceeding [Tr. 54, 55, 58–60]. This was a prudent precaution taken to deter the witnesses from sharing their experiences, and we believe the ALJ should have considered the effect of his instructions in evaluating testimony on this record, particularly where witnesses demonstrated a common recollection of events. In these circumstances, we find no basis for completely ignoring direct corroborated testimony responsive to the charges at issue.

The ALJ, however, also noted cryptically that his findings of fact essentially were based on his observations of the witnesses' demeanors. Since the initial decision accords very little weight to much of the specific testimony relating to the claims in issue, we must assume this reference to demeanor addresses a separate issue of credibility.

Ordinarily we leave undisturbed those findings of an ALJ derived from his observations of the demeanor of witnesses and the bearing this has on his evaluation of the character and quality of the testimony received at trial. We appreciate the unavoidable deficiency of hearing transcripts in failing to capture the voice inflections, mannerisms, and appearance of the witness which round out and give additional meaning to the words spoken. For this reason, the ALJ, whose presence at the trial permits him to acquire important insight into the record, is charged with responsibility of assessing the demeanor of witnesses appearing before him and to base his decision upon the whole record, including his impression of witness credibility. This is a vital function of the administrative law judge in Commission adjudicative proceedings, but where the ALJ is found to have acted arbitrarily in

dismissing the testimony of a witness for reasons of his demeanor at trial, the Commission will set aside the ALJ's ruling.

In this instance, the ALJ considered the demeanor of 22 witnesses sufficiently questionable to justify dismissal of testimony concerning their encounters with respondents' salesmen. Eschewing details, the ALJ failed to indicate with any degree of particularity what it was about the demeanor of these witnesses which influenced his decision to disregard the testimony on a wholesale basis. Since the demeanor and credibility of each witness is a matter requiring individual evaluation and appraisal by the judge, it appears most unusual to find only one general and ambiguous observation in a footnote in the initial decision which casts a cloud over the testimony of respondents' customers.

Furthermore, we question whether demeanor and credibility evaluations are properly controlling since the consumer testimony in question was received without objection. It stands unrefuted.

After reviewing the record in its entirety, we find that we are unable to agree with the ALJ's assessment of the reliability of the cumulative testimony and we find he has not explained adequately his findings relative to demeanor. Accordingly, we will consider whether the record before us, as a whole, otherwise supports the ALJ's dismissal of Count I of the complaint. Each of the relevant charges will be considered separately.

1. Model Home Representations

Numerous witnesses testified that they were offered substantial discounts on the price of the siding for granting respondents permission to use their homes as models or demonstrators for advertising puorposes. Respondents deny that their salesmen made such offers and contend that they had employed only two sales promotion programs [Res. App. Br. 15].[4] The first promotion

[4] It should be noted that respondents employ five or six experienced salesmen who earn commissions on the sale of respondents' product [Tr. 340, 628–29]. These salesmen are provided with credentials identifying them as respondents' authorized representatives [Tr. 627–28] and canvas door-to-door, soliciting customers for residential steel siding installations. The salesmen are not assigned to specific territories [Tr. 628–29, 635] but generally limit their operations within a 400-to-500 mile radius of Denver [Tr. 341]. Respondents equip each salesman with customary sales aids, including samples of siding in different colors, promotional literature, and copies of respondents' retail installment contract and referral commission agreement. In these circumstances, respondents are clearly responsible for the acts and practices employed by the salesmen to induce the sale of respondents' products and services. *International Art Co.* v. *FTC*, 109 F.2d 393 (7th Cir. 1940), *cert. denied*, 310 U.S. 632 (1940); *Standard Distributors* v. *FTC*, 211 F.2d 7 (2d Cir. 1954); *Goodman* v. *FTC*, 244 F.2d 584 (9th Cir. 1957); *Consumer Sales Corp.* v. *FTC*, 198 F.2d 404 (2d Cir. 1952), *cert. denied*, 344 U.S. 912 (1953).

involved the use of an advertisement placed in Life Magazine by respondents' supplier [CX 68, Tr. 533–35, Ans. Br. 9]. This advertisement listed a manufacturer's suggested retail price for the siding at $1.95 per square foot. Since respondents customarily charged $1.50 per square foot for the same siding,[5] they contend that this advertisement was employed as a sales promotion for the limited purpose of showing customers the difference between the manufacturer's suggested price and the price at which respondents would be willing to sell the same siding [M. Thiret, Tr. 533, 608]o Respondents deny representing the manufacturer's suggested price as their regular price or representing their regular price as a reduced or discount price available only to selected customers [M. Thiret, Tr. 533, 608–09]o

Respondents' second sales promotion consisted of a referral commission agreement executed contemporaneously with the retail installment contract [CX 25, 41, 46, 55, 57, 71]o This program encouraged customers to submit the names of relatives, friends, and neighbors who might be interested in purchasing respondents' siding. In this way, respondents were introduced to prospective customers through "leads" provided by past customers. When a sale resulted, the customer who had made the referral received a commission from respondents [Tr. 346, 579]o Approximately 15 percent of respondents' sales volume is attributable to "leads" acquired by referralso and the evidence discloses that commismissions were, in fact, paid to customers under terms of the referral agreement [Tr. 347]o Complaint counsel contends, however, that respondents exaggerated the amount of commissions ordinarily received by participants in the referral program and misrepresented the terms and conditions of payment under the program.

It is clear on this record that neither the comparative price promotion nor the referral progam were limited by respondents with respect to time, neither program entitled the customer to a discount from respondents' regular price, and under neither promotion did respondents use the customer's home as a model or demonstrator for which respondents' regular selling price would

[5] Respondents regularly and customarily charged $1.50 per square foot for siding "if there was no other considerations besides the siding to go into a contract" [M. Thiret, Tr. 533]. Mr. M. Thiret testified that prices might vary from job to job depending upon estimates of the cost of labor required to prepare the exterior of the home or cut and fit the siding, but he did not indicate that any promotional discounts were offered [Tr. 536].

be reduced [M. Thiret, Tr. 369, 370, 582, 533–34; CX 38, 134; Res. App. Br. 11, 15, 16]t

Respondents believe the passage of time has led to confusion on part of their customers, and this accounts for the failure of the record to describe accurately how the Life Magazine ad was used or to distinguish between the use of a home as a model home in connection with the referral commission agreement and the offering of a price reduction for use of a home as a model or demonstrator [Res. App. Br. at 17]t Respondents argue that the witnesses merely inferred on their own, unassisted by the salesmen, that since they would be paid commissions on any referral cards sent in which resulted in a consummated transaction, they could, in essence, use their own home as a model home or a show home [Res. App. Br. 16].

(a) *Discount Price Representation*

Respondents' contentions are contrary to the undisputed record evidence. Respondents' salesmen represented to several customers that the contract price for the installation reflected a discount from respondents' regular price because the customer's home had been chosen as a model home and would be used in respondents' advertising [Cornish, Tr. 192, 194–95, 219; Avila, Tr. 248; Gaines, Tr. 400, 406; Trujillo, Tr. 410–11; Parette, Tr. 471, 474; G. Brown, Tr. 503, 506]t These customers were told they had been selected to receive a special bargain price, a discount on the price which other customers paid for siding, as compensation for the use of their homes in respondents' promotion. To lend further credibility to the model home representation, customers were told that signs advertising the home as a product of respondents' workmanship would be placed in their yards and that pictures of the home would be taken before and after installation of the siding as a demonstration of respondents' capability in improving the appearance of a home [Cornish, Tr. 192; Gaines, Tr. 399–400; Trujillo, Tr. 410,t417; G. Brown, Tr. 506; O.A. 38, 29]t Moreover, there is unrefuted testimony that customers were induced to accept the model home offer immediately because the promotion was represented as being available for a limited time only [Seckinger, Tr. 384–85, 391–92; Parette, Tr. 470–71, 474]t As Mr. Cornish, one of respondents' customers, testifiedt "* * * they told me if I bought at that time I would save a thousand dollars if they could use my house for advertising purposes." [Tr. 192]t

Subsequently, this witness testified: "If I didn't take it, he [the salesman] was going to go to another place that they had in mind with the same offer * * * I asked him if we could discuss it and he said they were just there for two days and they had some other people they wanted to see, so it was either then or forget the thousand dollars, but we could still get the siding." [Tr. 194–95].

On this record we conclude that respondents claimed to offer a special limited-time-only model home promotion for which a reduction or discount from respondents' regular price would be granted. The capacity for deception inheres in these false claims, even though customers may have failed to perceive it and may have testified that they were satisfied in their dealings with respondents. As one witness described his reaction when respondents subsequently failed to use his home as a model: "* * * they did give me the thousand dollars off, which was no big complaint as far as I was concerned." [Cornish, Tr. 196]. Thus, customers may indeed have been satisfied in their delusions fostered by respondents' salesmen—and, in fact, may have had "no big complaint" with regard to the results after respondents' departure. Nonetheless, just as the misplaced elation of an art aficionado does not vitiate the fraud in the sale to him of a 1973 Rembrandt, so, too, the apparent contented state of mind of respondents' customers cannot excuse the deceptive practices of respondents.

(b) *Manufacturer's Suggested Price Represented as Regular Price*

We also find that respondents' salesmen falsely represented the manufacturer's suggested retail price of $1.95 per square foot, listed in the Life Magazine ad, as the price at which they ordinarily sold siding materials and that they falsely represented the regular price of $1.50 as a special discount price available to the consumer because his home had been selected for display.[6] They thereby deceived the consumer into believing that he could obtain the siding at a bargain price. As the Commission has observed in the past, "* * * one of the most effective ways of selling [people] something is to tell them they are getting a bargain price. A misrepresenta-

[6] Tr. 471, 474, 192, 194, 248, 256, 511, 512. Copies of the advertisement in question, although placed in Life Magazine by respondents' supplier, were furnished by respondents to their salesmen for use as a sales aid [M. Thiret, Tr. 533-34]. As such, respondents must bear responsibility under Section 5 of the Federal Trade Commission Act in instances where the ad was used by the salesmen in a way which possessed a tendency and capacity to deceive the public. *See, Perma-Maid Co.* v. *FTC*, 121 F.2d 282 (CA-6, 1941).

tion of the existence or extent of the bargain * * * has long been held a violation of Section 5." *Diener's, Inc.*, Docket No. 8804 (December 21, 1972) [81 F.T.C. 945,974]. Respondents' claims fall within this proscribed category.

(c) *Misrepresentations as to Terms and Conditions of the Referral Program*

The record further shows that respondent's salesmen misrepresented the terms and conditions of the referral commission program and exaggerated the amount of commission payments customarily received by participants in the program. Respondents' referral commission agreement form reads[7] "This Agreement can be worth $1,500 to the Owner * * *." Pursuant to this agreement, respondents agreed to pay $100 for each referral a customer submitted which resulted in a contract for installation of siding similar to that used on the customer's home.[7] The agreement further required the customer to submit the names of people who might be interested in purchasing respondents' siding.

While there is undisputed evidence of commission payments having been made to customers under this agreement, there is substantial evidence of misrepresentation employed by respondents' salesmen in using this agreement as a sales aid. For example, on several occasions, salesmen represented that homes would be used as models by them to demonstrate the improvements which might be made to the homes of prospective customers and that commissions would be paid to "model home" owners from sales consummated in this way [Tr. 224, 522–25, 528–29].

Contrary to these representations, respondents do not use their customers' homes for model or demonstration purposes. We find, therefore, that these representations possess a tendency and capacity to mislead customers into an erroneous and mistaken belief about the terms and conditions of payment under the referral program, the respective obligation of respondents in using the home for demonstration purposes, and the customer's obligation to find and submit to respondents the names of prospective customers.

[7] If the referred customer installed siding different from the siding installed by the contracting owner, the contracting owner received a $50 commission [CX 134]. At one time, respondents made referral payments in the form of two shares of the stock in U. S. Steel Corp. [M. Thiret, Tr. 346].

As an additional inducement, respondents salesmen in several instances misrepresented the amount of commissions a customer could reasonably expect to receive through participation in the referral program. Respondents' salesmen represented to several customers that commissions from the referral program would permit them to purchase the siding at little or no cost [Martinez, Tr. 224; Stapp, Tr. 488–89; Hauf, Tr. 272; Austin, Tr. 308]. Yet respondents admitted in their answer that few, if any, customers received enough referral commissions to obtain their installation at little or no cost; and evidence of a single customer who had paid for the installation in this way was not introduced at trial. Accordingly, we find that respondents have misrepresented the benefits of the referral program to prospective customers in order to induce the sale of their product and, in so doing, have violated Section 5 of the Federal Trade Commission Act.

2. Fuel Bill Savings Claims

The complaint also alleged misrepresentation by respondents in describing the insulation qualities of steel siding and in claiming that it would reduce by 50 percent the cost of heating and cooling a home.[8] In a nutshell, the record evidence demonstrates that respondents' customers ordinarily do not realize fuel bill reductions which respondents' salesmen touted, and several customers realized no savings at all [Campbell, Tr. 166; Avila, Tr. 249, 252; Hauf, Tr. 270–71; R. Brown, Tr. 296; Cornish, Tr. 195, 211, 217; Parette, Tr. 472,0479; Seckinger, Tr. 386, 393; Daniels, Tr. 522]. Thus, we find respondents' false fuel bill savings claim possesses a tendency and capacity to mislead prospective customers into a mistaken belief as to the effectiveness of the insulation and the reductions which reasonably could be expected in the cost of heating and cooling a home. We conclude that respondents' exaggerated fuel bill savings claims violate Section 5 of the Federal Trade Commission Act.

3. Representations Relating to Workmanship and Materials

We next turn to the charge that respondents failed to provide the materials and perform the services agreed upon. The testimony

[8] Although the evidence does not conform precisely to this allegation, it clearly was directed at exaggerated and misleading insulation claims, and the issues were fully briefed on appeal.

of respondents' customers and the documents in evidence establish that, in many instances, respondents agreed to complete the installation in workmanlike manner to the customer's satisfaction; and we find the record evidence insufficient to establish a failure by respondents to provide the promised services.

Respondents also represented U. S. Steel Corporation as the producer of the siding [CX–70; Stapp, Tr. 487; Seckinger, Tr. 388; Parette, Tr. 473]t Undisputed evidence shows that respondents' suppliers purchased steel coils from U. S. Steel which were imprinted, coated with vinyl, reformed, cut into precise sizes, and packaged for resale [M. Thiret, Tr. 720]. Respondents argue in their answer brief that customers were not particularly concerned about the source of the raw steel; rather, their major concern was the performance of the finished product as installed on their homes. We believe the evidence shows, however, that respondents have misrepresented the identity of the manufacturer of the finished product.

As is discussed in greater detail later, respondents' sales representations emphasized the durability of the siding, including characteristics of color fastness and resistance to peeling, chipping, and scratching which relate to the application and quality of the vinyl covering. By misrepresenting the identity of the manufacturer of the finished product, respondents deprive their customers of information which may bear upon the customer's perception of quality and the anticipated reliability of a product represented to last 30 years. Furthermore, the siding is represented as guaranteed by the manufacturer for a period of 30 years, and it is clearly deceptive to identify incorrectly the firm which is offering the guarantee. Accordingly, we find the manner in which respondents used the name "U. S. Steel" has a tendency and capacity to mislead prospective customers and to cause them to believe U. S. Steel produced and guaranteed the steel siding.

4. Claims Relating to the Durability of Siding

The complaint further charged respondents with misrepresentations, both express and implied, in describing the durability of the siding materials and in claiming that it will "never require repairing." In their answer,t respondents admit the siding will require repair but deny making representations to the contrary [Ans. pg. 7]. On appeal, respondents assert two additional grounds

in defense to this charge. First respondents contend that any representations relating to the need for repairs were limited to specified characteristics of durability, such as the ability to withstand the impact of hail, color fastness, and scratch resistance. Second, respondents rely upon evidence of satisfaction with the siding's performance by the majority of witnesses testifying at the trial [Ans. Br. 14]e

Several witnesses testified that respondents' salesmen extolled the excellence of the product, claiming, without qualification, that it would not chip, peel, dent, or discolor, and further guaranteeing such performance unconditionally [Cornish, Tr. 195; Gaines, Tr. 397–98; Avila, Tr. 250–51; Seckinger, Tr. 392–93; Alexander, Tr. 421; Parette, Tr. 469ę Stapp, Tr. 486–87; Reese, Tr. 495]e

These unqualified claims of durability possess a tendency and capacity to lead consumers to believe that the siding would not incur damage from contact with everyday hazards and the need for repairs would not arise from such contacts. Since these durability claims were made without qualification, we have evaluated the claims in the same context and find evidence that the siding was not damage resistant even within the limited range of durability characteristics specifically claimed.[9] Accordingly, we find these representations false and in violation of Section 5 of the FTC Act. Since it is clear that the siding may be damaged and repairs may be needed under conditions in which respondents have expressly described the siding as damage resistant, it is unnecessary to decide whether respondents represented that the product would never, under any circumstances, require repair.

5. Representations of an Unconditional Guarantee

The complaint also charged respondents with misrepresenting the terms and conditions of the guarantee applicable to the siding materials and with claiming both materials and labor are guaranteed unconditionally for 30 years. Respondents assert in response that the siding materials were guaranteed in writing bye the manufacturer and that purchasers received no additional guarantees [Ans. 7]e Respondents point to the written guarantees provided by the manufacturers which contain numerous terms and conditions to limit the scope of coverage to siding materials only,

[9] Gaines, Tr. 403; Daniels, Tr. 521.

thus excluding defects in workmanship which might occur during installation, and the cost of labor in replacing defective materials. These guarantees also include provisions for *pro rata* decrements in the manufacturers' liability over a 30-year period based on the number of years the siding is in place [CX 47, CX 43(a) and (b)t]. In addition to the contention that customers received only the manufacturer's written guarantee, respondents' defense is also predicated upon the durability of the siding [10] and an alleged absence of evidence indicating respondents failed to honor whatever guarantees were given to their customers.

Contrary to respondents' assertions, the record shows that respondents represented that the siding materials and the workmanship are guaranteed for a period of 30 years [Cornish, 195, 196; Avila, 250, 251; Alexander, 421; Reese, 495; Hauf, 262-63; Montoya, 281; Parette, 469, 472; Gaines, 398; Trujillo, 412; Stapp, 486–87]. Although respondents dismiss the consumer testimony as evidencing faulty recollection on the part of these witnesses and as demonstrating the extent to which their memories of the representations made had dimmed [Res. App. Br. 15]t there is documentary evidence in the record which corroborates this testimony and establishes that respondents claimed to offer an unconditional guarantee.[11] The record shows that respondents have represented their guarantee as unconditional, both orally and, in some instances, in the customer's retail installment contract.

The record does not support respondents' further contention that no evidence was adduced at trial to indicate a failure on their

[10] Respondents argue that the siding, in nearly every instance, has performed in a manner consistent with the written guarantee [Res. App. Br. 14, 15]. This, of course, is irrelevant. Whether the product actually performs as represented in a majority of installations is not the test of respondents' liability. When respondents represent the product as guaranteed for 30 years without disclosing the limitations and conditions of their performance, customers are justified in believing that risks of damage or defects in material and workmanship and the cost of all repair rest with respondents. The purpose of the guarantee is to cover damages which may occur over an extended period of time; and neither the demonstrated durability of the siding in a majority of installations, nor the fact that very few claims are submitted, provide justification for misleading customers in respect to respondents' performance under the guarantee if and when damage is incurred.

[11] In several installment contracts, respondents represented that: "Faulty work or material to be replacd free of charge." [CX 6, 10, 21, 40, 58, 60, 64, 67]. The term "faulty material" is not defined in the contract, and standing alone it fails to reflect clearly the kinds of "faults" which respondents may have intended it to include. However, in view of the oral representations by the salesmen that the guarantee was unconditional, and in view of the durability claims noted in Paragraph 4 *supra*, the Commission believes that consumers perceive the meaning of the term "faulty material" as including material which in any manner fails to perform as represented.

part to live up to the guarantees given to their customers [Res. Br. 14]. In the only instance noted in this record in which a customer submitted a claim under the guarantee as a result of damage incurred from a hailstorm,[12] respondents failed to perform in accordance with the customer's contract, which provided: "We [respondents] will replace any faulty workmanship or material at any time." [CX 64, 65; Tr. 521–22]. Shortly after this claim was filed with respondents, the witness was requested by Mr. Thiret to submit "* * * measurements as to the extent of damage along with pictures showing this area, then we could give you an accurate cost of repair which I am sure will be covered by your insurance." [CX 66]. This request not only required the customer to incur the cost of inspecting the damage, a condition not disclosed in the guarantee as represented,[13] but it indicated respondents would not bear the cost of repairs. Respondents did nothing further about the claim; and as the witness recalled, "I dropped it, and I guess they did, too." [Daniels, Tr. 522].

In view of respondents' answer which denies any guarantee was given to purchasers other than the manufacturer's written guarantee, and in view of their demonstrated failure to perform in accordance with a written representation of an unconditional guarantee in the customer's contract, we conclude that respondents' representations of unconditional guarantees, whether oral or written, are false and deceptive.

6. Negotiable Instruments

When a prospect agrees to become a customer of respondents, retail installment contracts and promissory notes are executed. Respondents then customarily negotiate this commercial paper to the Central Bank and Trust Co. of Denver, Colorado. The complaint charged a violation of Section 5 of the Federal Trade Commission Act by reason of respondents' practice of negotiating customer obligations procured through the use of false, misleading and deceptive statements and representations. The complaint

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[12] The written guarantees submitted to the purchasers by the manufacturers expressly excluded defects or damage resulting from faulty installation and weather conditions [Ans. Br. 14; CX 47, 43(a) and (b)]. Several witnesses, however, were led to believe that they would receive a guarantee which would cover such hazards [Avila, Tr. 250-251; Alexander, Tr. 421; Reese, Tr. 495; Parette, Tr. 469; Stapp, 486–87].

[13] *See, Benrus Watch Co.* v. *FTC*, 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966).

further alleged that negotiation of the instruments of indebtedness may cut off various personnel defenses (otherwise available to the customer) which arise out of the misleading and deceptive acts and practices of the respondents or their failure to perform under the contract. In essence, the complaint challenged respondents' practice of negotiating consumer paper on allegations well grounded under Section 5 in that negotiation to a holder in due course may materially alter the nature of the transaction and may mislead and deceive the customer as to the rights and liabilities he initially contemplated under the contract.

Respondents contend that the record evidence is insufficient to establish a violation since the only financial institution to which respondents negotiated their customer obligations did not, as a matter of policy, assert the holder in due course doctrine as a defense with regard to home improvement paper. Although the record demonstrates the accuracy of this assertion, the Commission is not persuaded that its decision should rest upon the internal policies of the bank with which respondents now choose to conduct business. The Commission has observed before that the practices of the assignee are not controlling; rather, it is the seller's practice of routinely negotiating consumer paper to a holder in due course which may materially alter the nature of the transaction the buyer believes he is entering. What is deceptive and prohibited under Section 5 is respondents' failure to disclose to the buyer how his rights may be limited and his exposure to liability increased by negotiation to a holder in due course. *In the Matter of All-State Industries of North Carolina, Inc.*, FTC Dkt. 8738, 75 FTC 465, 490 (1969), *affirmed, All-State Industries of N. C., Inc.* v. *FTC*, 423 F.2d 423 (4th Cir. 1970), *cert. denied*, 400 U.S. 828.

Moreover, it is clear that the finding of deception is not, as respondents seem to contend, predicated upon a showing of actual consumer injury caused by the seller's assignment. The absence of testimony by consumers who had confronted the holder in due course defense in legal proceedings is immaterial since the deception occurs in respondents' customer relations well before the consumer would actually be exposed to the legal defenses of an assignee. As the Commission found in *Household Sewing Machine Co.*, 76 FTC 237, 246 (1969):

> The buyer must be made to understand—*before* the sale is consummated—

that a demand for payment from a third party assignee may not be defeated even if the product turns out to be defective or worthless, even if the seller fails to perform contractual obligations—and even if the seller goes out of business.

The practice of negotiating consumer obligations introduces a third party to the transaction with whom the consumer must deal and against whom the consumer is virtually defenseless even though the instrument of indebtedness may have been procured by misleading and deceptive sales practices. In such circumstances, the Commission finds that the status of the debtor of a holder in due course must be imparted to consumers before the transaction is closed if deception as to the nature of the transaction is to be avoided.[14] Our order will so require.

In formulating our order, we have considered the argument of complaint counsel urging us to require respondents to notify assignees that the instrument of indebtedness may be vulnerable to buyer claims and defenses. We believe that it may be necessary to bar a holder of consumer paper from becoming a holder in due course where it is demonstrated that the doctrine is unfair to consumers. We have observed, for example, that such relief may be entered in appropriate cases where a pattern of default by the seller is evident subsequent to negotiation of consumer contracts. However, complaint counsel have made no showing of unfairness, and we conclude that the broader relief advocated in this particular instance is not warranted.

B. COUNT II OF THE COMPLAINT

The ALJ found, and respondents concede, that retail installment contracts executed by respondents between July 1, 1969, and June, 1970, violated the Truth in Lending Act, Regulation Z and Section 5 of the Federal Trade Commission Act as alleged in the complaint [I.D. 9–12 [pp. 1019–22 herein]; Res. Br. 30]. He also found, however, that respondents' 12 violations were unintentional technical violations which were discontinued over a year before the complaint was first served upon respondents in September, 1971 [I.D. 12, 13] [pp. 1022–23 herein]. The ALJ did not issue an order and complaint counsel have appealed.

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[14] Our order is fashioned to take into account the laws of any jurisdiction which may impose more stringent requirements upon transactions involving negotiable instruments than would our order.

1. Substantiality of the Violations

The ALJ's curious distinction between technical and substantive violations of this law can find neither support nor refuge in the statutory framework and purpose of the act and implementing regulations. It is true that the disclosure and notice requirements of the law are detailed, but they were deemed to be necessary by the Congress to effectuate a better understanding by the consumer of the terms and conditions applicable to a credit transaction and the cost of dealing on a time-payment basis. Thus, the statute and regulations require the disclosure of credit terms in precise and technical language to promote uniformity of information provided to consumers and to insure a basis for rational cost comparisons. Moreover, the importance which Congress assigned to these disclosure requirements is evident in enforcement Sections 108, 112, and 130 of the act, which provide for administrative remedies and, in appropriate cases, civil damages and criminal penalties. Since it is clearly the intent and purpose of the statute and the regulations to require creditors to disclose specific information to consumers in a useful form, we are unable to agree with the ALJ that respondents' failure to comply with these disclosure requirements in 12 respects is an insubstantial violation of law.

2. Bona Fide Errors

Respondents also rely upon Section 130(c) of the Truth in Lending Act which provides that a creditor shall not be liable under Section 130 if it is established that the violation resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Respondents argue that these administrative proceedings qualify as a civil action and that their errors, having been caused by the advice obtained from independent legal counsel, were bona fide; therefore, no order can issue against them [Res. Br. 32, 33].

In view of the plain language of the statute, which expressly limits Section 130(c) to actions brought by debtors for the recovery of civil damages, respondents' defense must fail. The Commission need not determine whether the facts as alleged by respondents might constitute a defense in a private damage suit brought under Section 130 since it is clear this section is not applicable to administrative proceedings initiated pursuant to Sec-

tion 108(c) of the Truth in Lending Act and enforced under the Federal Trade Commission Act. While a creditor may assert certain good-faith defenses to violations established by a debtor under Section 130, no similar defenses are provided for in enforcement proceedings under Section 5 of the FTC Act before this Commission. *Koch* v. *FTC*, 206 F.2d 311, 320 (6th Cir. 1953)t; *Charles of the Ritz* v. *FTC*, 143 F.2d 676 (2d Cir. 1941); *Feil* v. *FTC*, 285 F.2d 879 (9th Cir. 1960); *Merck & Co., Inc.* v. *FTC*, 392 F.2d 921, 925 (6th Cir. 1968)t

3. Issue of Abandonment

The ALJ concluded that the challenged violations of the Truth in Lending Act were discontinued by respondents immediately after they were questioned about their retail installment contract forms by Commission staff personnel investigating respondents' business practices. He also found no record evidence of any reasonable likelihood that these violations will be resumed in the future [I.D. 14] [p. 1024 herein]t Complaint counsel dispute these findings. They contend that respondents have failed to sustain the burden of establishing abandonment of the challenged practices and have failed to adduce evidence sufficient to show that an order preventing violations in the future is not in the public interest.

As the Commission observed in *Zale Corp.*, Docket 8810, 473 F.2d 1317 (5th Cir. 1973), *rehearing denied,* (March 9, 1973)t: "[T]he mere fact that the offending practices have been discontinued prior to issuance of the complaint does not provide, by itself, the requisite assurance that an order is unnecessary and not in the public interest." The record shows that respondents have not rushed headlong into compliance. First, they revised their retail installment contract forms in June, 1970, subsequent to a visit by Commission investigators who questioned the legality of the forms and the extent to which they complied with the Truth in Lending Act [Tr. 714, 716; RX 9 (b, c, and d)]. These revised forms, however, still failed to disclose the date on which the finance charge began to accrue if different from the date of the transaction as required by Section 226.8(b)(1) of Reg. Z [RX 9(b and c)t; I.D. 10] [p. 1020 herein]t; and respondents offered

no evidence to show that the finance charge began to accrue on the date of the transaction.[15]

In addition, respondents failed to delete from the revised forms the objectionable language which purported to bind the customer immediately to the transaction. This notwithstanding, respondents claim they were providing the notice of the three-day right of rescission in accordance with Section 226.9(a) of Regulation Z [RX 9(b)t (c) and (d)f]. Clearly, respondents' revised forms continued to contradict and detract from the required rescission notice, thereby misleading and confusing customers as to their rights under the law.[16]

Thus, it was not until August or September of 1972, when respondents revised their forms a second time subsequent to the issuance of the complaint in September, 1971, that respondents

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[15] Following the inquiry by Commission staff personnel, respondents, by letter of June 9, 1970, submitted copies of the revised forms to the investigating attorney and requested his comments as to the legality of the forms. In a subsequent conversation with Mr. Thiret, the staff attorney allegedly expressed the view that the revisions were "O.K." or "fine." This advice, although mistaken, would not otherwise preclude the Commission from taking such action as may be required in the public interest. *Compare, P. Lorillard Co.* v. *FTC*, 186 F.2d 52, 55 (4th Cir. 1950); *Utah Power & Light Company*, v. *U.S.*, 243 U.S. 389, 409 (1917), *with U.S.* v. *American Greetings Corps.*, 168 F. Supp. 45, 50 (N.D. Ohio, 1958), *affirmed*, 272 F.2d 945 (6th Cir. 1959), a civil penalty proceeding in which the court ruled that the failure of Commission employees over a four-year period to speak out against practices which violated a Commission order would be considered in mitigation of the penalty but would not preclude enforcement of the order. The case law demonstrates that inadvertence or mistake on the part of staff counsel does not bar entry of an order, the effect of which is wholly prospective and which is designed to insure against the resumption of practices found unlawful.

[16] It is established that a security interest under the act does include liens which arise against the buyer's home by operation of law, and transactions which may give rise to the creation of such liens must include a three-day right to rescind. *Fabbis, Inc.*, Dkt. 8833 (October 30, 1972) [83 F. T. C. 678]. *See also, Gardner and North Roofing and Siding Corp.* v. *Board of Governors of the Federal Reserve Systm*, 464 F.2d 838 (C.A.D.C. 1972); *N. C. Freed Co., Inc.* v. *Board of Governors of the Federal Reserve System*, 473 F.2d 1210, (2d Cir. 1973).

Further, and notwithstanding the above, we note in the revised form a statement which assured the customer "that no security interest is or will be retained or acquired in the * * * real estate property" of the customer. Yet, the record shows that respondents did not customarily seek to extinguish all liens which these transactions may spawn. Mr. M. Thiret's testimony is quite clear in this regard:

> I never took liens so I never gave lien waivers unless they were requested * * * if I had to give out lien waivers, it would have made such a mess, a lot of times there are things that are purchased in a little lumberyard and maybe you would have to go through fifteen or twenty material men to get lien waivers. It would be asking way too much * * *." [Tr. 584–85].

From this it may be inferred that respondents were well aware of the possibility that by their actions others might acquire security interests in the customer's home, and it is contradictory and misleading to represent that no such security interests would or could arise.

apparently brought themselves into compliance with the Act.[17] As such, the alleged discontinuance occurred after respondents were aware that their practices were under investigation; and the fact that respondents have not resumed these practices during the time in which they were under investigation and administrative proceedings were in progress does not persuade us that such practices will not be resumed in the future. *Giant Food, Inc.* v. *FTC*, 322 F.2d 977, 986–87 (C.A.D.A. 1963); *cert. denied*, 376 U. S. 967 (1964); *Automobile Owners Safety Insurance Co.* v. *FTC*, 255 F.2d 295, 297–98 (8th Cir. 1958); *cert. denied*, 358 U.S. 875 (1958); *Merck & Co., Inc.* v. *FTC*, 392 F.2d 921, 927 (6th Cir. 1968). *See also, Marlene's, Inc.* v. *FTC*, 216 F.2d 556, 559 (7th Cir. 1954); *Clinton Watch Co.* v. *FTC*, 291 F.2d 838, 841 (7th Cir. 1961); *cert. denied*, 368 U.S. 952; *Galter* v. *FTC*, 186 F.2d 810, 813 (7th Cir. 1951), *cert. denied*, 342 U.S. 818; *FTC* v. *Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260 (1938). Since the Commission cannot assume voluntary compliance will meet the objectives of its order, we conclude that an order is necessary to protect the public against the resumption of the practices found unlawful in this proceeding.

C. LIABILITY OF INDIVIDUAL RESPONDENTS

The complaint in this matter named Michael P. Thiret and Jack Bitman individually andas officers of the corporate respondents and Claude Thiret individually and as general manager of the corporate respondents, charging them with responsibility for the acts and practices alleged. In his initial decision, the ALJ found that respondent Michael Thiret solely formulated, directed, and controlled all of the acts and practices of the corporate respondents, and he dismissed the complaint as to Bitman and Claude Thiret [I.D. 3, 4] [pp. 1013–14 herein]. Complaint counsel have appealed the ALJ's findings in respect to the dismissal of respondent Claude Thiret.[18]

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[17] RX 10, 11; Tr. 716. Respondents' most recently revised forms entered on the record are "For use in Wyoming." There is evidence, however, that respondents may be using different forms to transact business in other states, depending upon the particular requirements of state law [Tr. 717, 718]. Whether forms which respondents may be using in states other than Wyoming are in compliance with the Truth in Lending Act is not apparent on this record.

[18] Respondent Michael Thiret admitted his responsibility for the formulation, direction, and control of acts and practices of the corporate respondent; and as such, he is personally liable

The evidence shows that Claude Thiret was general manager of respondent Certified Building Products, Inc. from October 15, 1968, to December 31, 1969 [Pre. Tr. 21]. On January 1, 1970, he purchased 40 percent of stock in Certified Improvement Co. and served as the president of that company until October 31, 1970, when he started a home improvement business of his own [Tr. 315–17; Pre. Tr. Dep. 40, 41, 121]. In a prehearing deposition, entered on record by order of the ALJ on November 27, 1972. Thiret admitted his responsibility for the daily operations of the business of both corporations [Pre. Tr. 38, 40, 41]. He frequently discussed selling practices employed by the salesmen, and the evidence indicates he was aware that deceptive practices were being used by the salesmen [Pre. Tr. 31–34, 37; Tr. 326–27]. Moreover, he had supervisory authority over the salesmen [Tr. 327–329; Pre. Tr. 89, 90; M. Thiret Pre. Tr. 112–113]. That Thiret may have instructed the salesmen to avoid deception in their sales presentation [Tr. 337] does not relieve him of ultimate responsibility for their acts and practices. He testified that respondents employed a limited number of salesmen in order to maintain control of their activities [Tr. 336], and his demonstrated failure to exercise that control while in a position to do so subjects him to personal liability under Section 5 of the FTC Act. *Goodman* v. *FTC, supra; Parke, Austin & Lipscomb, Inc.* v. *FTC*, 142 F.2d 437 (2d Cir. 1944); *Benrus Watch Co.* v. *FTC*, 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Sebrone Co.* v. *FTC*, 135 F.2d 676 (7th Cir. 1943); *FTC* v. *Standard Education Society*, 302 U.S. 112 (1937).

For the reasons herein set forth, the appeal of complaint counsel is granted and an order will be entered as to all respondents, with the exception of Mr. Jack Bitman. The complaint against Mr. Bitman will be dismissed without prejudice. An appropriate order accompanies this opinion.

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for the practices found unlawful in this proceeding [Pre. Tr. 111, Tr. 345]. Complaint counsel have not appealed the dismissal as to Mr. Jack Bitman. The evidence shows that Bitman was a nominal officer of the corporate respondents, serving principally as secretary and bookkeeper [Pre. Tr. Dep. 45, 46, 95, 100, 104-05, 116, 118]. He had no authority over the salesmen and did not formulate, direct, or control sales policies [Pre. Tr. Dep. 117-18]. Accordingly, we affirm the ALJ's dismissal of the complaint as to respondent Bitman.

FINAL ORDER

Counsel supporting the complaint having filed an appeal from the initial decision of the administrative law judge, and the matter having been heard upon briefs and oral argument; and

The Commission having rendered its decision determining that the initial decision issued by the judge should be modified in accordance with the views and for the reasons expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision be modified by striking the order dismissing the complaint and substituting therefor the following:

ORDER

I.

It is ordered, That respondents, Certified Building Products, Inc., a corporation, and its officers; Certified Improvements Company, a corporation, and its officers; and Michael P. Thiret and Claude Thiret, individually and as officers of said corporations; trading under said corporate names or under any trade name or names; and respondents' agents, representatives and employees, successors and assigns, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, distribution or installation of residential siding materials or other home improvement products or services or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, orally or in writing, or by any other means that:

1. Respondents' offer of products and/or services is limited as to time, or is limited in any other manner.

2. Any price for home improvements or other products and/or services is a special or reduced price from the price respondents normally charge, unless respondents can affirmatively show that such price constitutes a significant reduction from the price at which respondents have sold or installed substantially similar home improvements or other products or services for a reasonably substantial period of time in the recent regular course of their business.

3. Purchasers of respondents' residential siding materials and/or services will realize any specific percentage or amount of savings, or that substantial savings can be had generally in their air-conditioning or heating bills.

4. Residential siding materials and/or services sold by respondents will never require repairing; or misrepresenting, in any manner, the durability, performance, or quality of respondents' products.

5. Any of respondents' products or installations are guaranteed, unless the nature, extent, and duration of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed in writing to the purchaser before the transaction is consummated, and unless the guarantor will, in fact, perform as stated in the disclosed guarantee.

6. The home of any of respondents' customers or prospective customers has been specially selected as a model home to be used or will be used as a model home, or otherwise, for advertising, demonstration or sales purposes, or that such customers will thereby be granted any allowance, discount, or commission.

7. Purchasers will receive compensation in any form, including but not limited to commissions and/or discounts from referrals which will permit the purchase of respondents' products or services at little or no cost.

B. Failing to disclose, orally prior to the time of sale and in writing on any trade acceptance, conditional sales contract, promissory note, or other instrument of indebtedness executed by the purchaser, with such conspicuousness and clarity as is likely to be observed and read by such purchaser:

1. The disclosures, if any, required by federal law or the law of the state in which the instrument is executed;

2. Where negotiation of the instrument to a third party is not prohibited by the law of the state in which the instrument is executed, that the trade acceptance, conditional sales contract, promissory note or other instrument may, at the option of the seller and without notice to the purchaser, be negotiated or assigned to a finance company or other third party; and

3. Where the law of the state in which the instrument is executed does not preserve as against any holder of the instrument all the legal and equitable defenses the purchaser may assert against the seller, that in the event the instrument is negotiated or assigned to a finance company or other third party, the purchaser may have to pay such finance company or other third party the full amount due under his contract whether or not he has claims against the seller's merchandise as defective; the seller refuses to service the merchandise; or the seller is no longer in business, or other like claims.

II.

It is further ordered, That respondents, Certified Building Products, Inc., a corporation, and its officers; Certified Improvements Company, a corporation, and its officers; and Michael P. Thiret and Caude Thiret, individually and as officers of said corporations; trading under said corporate names or trading or doing business under any other name or names; and respondents' representatives, agents, and employees, successors and assigns, directly or through any corporate or other device, in connection with any extension of consumer credit or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. § 226) of the Truth in Lending Act (Pub.L. 90–321, 15 U. S. C. 1601 *et seq.*), forthwith cease and desist from:

A. Failing to disclose the date on which the finance charge begins to accrue when that date is different from the date of the transaction, as required by Section 226.8(b) (1) of Regulation Z.

B. Failing to disclose the due dates or period of payments scheduled to repay the indebtedness, and the sum of such payments, using the term "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

C. Failing to disclose a clear identification of the property to which any security interest relates or if such property is not identifiable, an explanation of the manner in which the creditor retains or may acquire a security interest in such property which the creditor is unable to identify, as required by Section 226.8(b) (5) of Regulation Z.

D. Failing to use terms "cash downpayment," and "total downpayment" and failing to disclose the corresponding information with these terms, as required by Section 226.8(c)(2) of Regulation Z.

E. Failing to use the term "amount financed" and failing to give the corresponding disclosures with that term, as required by Section 226.8(c)(7) of Regulation Z.

F. Failing to use the term "deferred payment price" and failing to give the corresponding disclosures with that term, as required by Section 226.8(c)(8)(ii) of Regulation Z.

G. Failing to provide the "Notice of Opportunity to Rescind," to the customer, on one side of a separate statement which identifies the transactions to which it relates, as required by Section 226.9(b) of Regulation Z.

H. Failing to set out the "Effect of Rescission," Section 226.9(d) of Regulation Z, in the manner and form as required by Section 226.9(b) of Regulation Z.

I. Failing to furnish two copies of the above referred to notices to the customer as required by Section 226.9(b) of Regulation Z.

J. Failing to give notice to the customer of his right to rescind the transaction, as required by Section 226.9(b) of Regulation Z, when all of the security interests in the customer's principal residence which have been or will be retained or acquired, have not been effectively waived.

K. Entering into any other type or means of contractual relationship with a customer which results in an evasion of Regulation Z.

L. Representing, directly or by implication, on retail installment contracts, promissory notes, or on any written document or orally, that customers will or may be liable for damages, penalties, or any other charges for exercising their right to rescind that is provided by Section 226.9 of Regulation Z.

M. Supplying any additional information, contract clause, or other statement about the customer's liability or obligations in the event that the customer exercises his right to rescind except that information furnished in accordance with Section 226.9 of Regulation Z.

N. Supplying any additional information, contract clause, or other statement pertaining to a transaction generally, un-

less such additional information, contract clause, or other statement is provided in a fashion which complies with Section 226.6 (c) of Regulation Z.

O. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form, and amount required by Sections 226.6, 226.7, 226.8, 226.9, and 226.10 of Regulation Z.

It is further ordered, That respondents shall forthwith deliver a copy of this order to cease and desist to all present and future salesmen and/or other persons engaged in the sale of respondents' products and/or services, and to all present and future personnel of respondents, engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising of that consumer credit, and shall secure from each such salesman and/or other person a signed statement acknowledging receipt of said order.

It is further ordered, That with respect to Jack Bitman the matter be, and it hereby is, closed, without prejudice to the right of the Commission to take such further action as future events may warrant.

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

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

It is further ordered, That respondents maintain adequate records which disclose the factual basis for any representations or statements as to any type of savings claims, including reduced price claims and comparative value claims, and as to any similar representations or statements of the type disclosed in the various

paragraphs of this order; and from which the validity of the aforesaid representations or statements can be determined.

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

Commissioner Jones dissenting.