

IN THE MATTER OF
FIVE COUNTY BUILDERS AND CONTRACTORS
ASSOCIATION, INC.

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

Docket C-2890. Complaint, May 24, 1977 — Decision, May 24, 1977

This consent order, among other things, requires a Fort Myers, Fla., building trade association to cease entering agreement or engaging in any action that requires members and signatories to deal exclusively with association's bid depository, and impose sanctions on those parties who fail to restrict their dealings to such depository. The order further requires respondent to immediately reinstate recalcitrant participants previously suspended.

Appearances

For the Commission: *Thomas D. Wilson, Jr. and Truett M. Honeycutt.*

For the respondent: *John A. Noland, Henderson, Franklin, Starnes & Holt, Fort Myers, Fla.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the party respondent named or designated in the caption hereof, and hereinafter more particularly named, designated, described and referred to as respondent, has violated the provisions of the Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Five County Builders and Contractors Association, Inc., hereinafter referred to as respondent corporation or FCBCA, is a nonprofit corporation, organized and existing under the laws of the State of Florida, with its principal office located at 2301 Fowler St., Fort Myers, Florida.

Respondent corporation was organized for, and serves its members as, an instrumentality which promotes cooperative activity among its members, collects business data from its members and generally purports to assist them in the operation of their businesses. One of the functions of respondent corporation is the operation of a bid depository. Said respondent corporation's membership, together with the membership of the bid depository of respondent corporation,

represents a substantial, if not dominant, part of the construction industry contractors in the lower and central Gulf Coast area of the State of Florida.

The membership of said bid depository consists of electrical, plumbing, heating, ventilation and air conditioning and general contractors, who perform their respective contracting services in Lee, Collier, Charlotte, Hendry and Glades Counties in the State of Florida. Members of said bid depository are entitled to, among other things, vote for the members of the bid depository committee of said respondent corporation.

The control, direction and management of the bid depository of respondent corporation is vested in a bid depository committee elected by and from the members of the said bid depository. The directives of the bid depository committee are carried out by the executive director of the respondent corporation.

PAR. 2. In the course and conduct of its business, respondent corporation has actively operated a bid depository which has aided, abetted, guided and assisted its membership in the unlawful acts and practices herein alleged. Several companies or firms which are members of the bid depository of respondent corporation and which maintain their principal places of business in states other than the State of Florida, submit or solicit bids through said bid depository which are, or may be, used by such companies or firms to award or be awarded building construction contracts. Furthermore, a considerable amount of the materials used in the construction that is the subject of said depository bid submissions and solicitations is shipped from various States of the United States into the State of Florida. Such activity and conduct engaged in by the membership of the bid depository of respondent corporation during the time periods described herein result in a constant current of trade in or affecting commerce in said services or materials between and among the various States of the United States. Accordingly, the acts and practices of the respondent corporation, including, but not limited to, the operation of said bid depository, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 3. Since at least 1973, respondent FCBCA, members of the bid depository of respondent FCBCA, officers and directors of respondent FCBCA have conspired to engage, and have engaged, in unfair and unlawful acts, policies and practices, the result of which is, or may be, to unlawfully hinder, restrain or destroy competition in providing electrical, plumbing, heating, ventilation and air conditioning, general contracting and other services related to building construc-

tion in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

Pursuant to, and in furtherance of, said conspiracy, respondent has engaged in the following acts, policies and practices, among others:

Providing a bid depository service which purportedly assists members of the bid depository of respondent corporation in the awarding and securing of electrical, plumbing, heating, ventilation and air conditioning contracting services provided by electrical, plumbing, heating, ventilation and air conditioning contractors for the benefit of general contractors.

Pursuant to rules and regulations which govern the operation and administration of the bid depository and which rules and regulations were formulated, approved and implemented by the Board of Directors of the respondent corporation, participating members of the bid depository of said respondent corporation agree to submit bids exclusively through the aforesaid bid depository, and participating members of said bid depository agree to receive only those bids submitted through said bid depository.

Participating electrical, plumbing, heating, ventilation and air conditioning contractors who submit electrical, plumbing, heating, ventilation and air conditioning bids to general contractors not members of said bid depository of respondent corporation are subject to suspension from the use of said bid depository and fine for such conduct.

Likewise, member general contractors who receive bids from electrical, plumbing, heating, ventilation and air conditioning contractors not members of respondent corporation's bid depository are subject to suspension from the use of said bid depository and fine for such conduct.

PAR. 4. The capacity and tendency of the acts, policies and practices of the respondent as alleged in Paragraph Three have been, are or may be, to unlawfully restrict, restrain, hinder and destroy competition in providing electrical, plumbing, heating, ventilation, air conditioning and general contracting services in connection with building construction projects in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, within the intent and meaning of Section 5 of said Act.

PAR. 5. The policies, acts and practices of the respondent, as hereinbefore set forth, are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint and waivers and other provisions required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent had violated the said Act and the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedures prescribed in Section 2.34 of the Rules, the Commission hereby issues its complaint, making the following jurisdictional findings, and enters the following order:

1. Respondent Five County Builders and Contractors Association, Inc. is a nonprofit corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 2301 Fowler St., Fort Myers, Florida.

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

ORDER

It is ordered, That respondent Five County Builders and Contractors Association, Inc., its officers and directors, and the successors, assigns, agents, representatives and employees of said respondent, directly or indirectly, through any corporate or other device, or through any member of or signatory to its bid depository, in connection with the receipt, solicitation, use, submission or transmission of bids which are, or may be, employed in the awarding of

building construction contracts and subcontracts, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from entering into, continuing, cooperating in, or carrying out, any course of action, conspiracy, undertaking or agreement:

1. Which requires or provides that any member, signatory, company, firm or individual that employs or uses the bid depository of respondent corporation shall receive or solicit bids from, or submit bids to, only those companies, firms or individuals that are also members, signatories or participants in said bid depository;

2. Which subjects any company, firm or individual that employs or uses the bid depository of respondent corporation to suspension from participation in said bid depository or fine or any other kind of sanction, or the threat thereof, for receiving or soliciting bids from, or submitting bids to, any company, firm or individual that is not a member of the bid depository of said respondent corporation or that does not employ or use said bid depository;

3. (a) To suspend from participation in said bid depository, to fine or to impose any other sanction upon any company, firm or individual for submitting bids to any company, firm or individual that is not a member of the bid depository of respondent corporation or that does not employ or use said bid depository;

(b) To suspend from participation in said bid depository, to fine or to impose any other sanction upon any company, firm or individual for awarding contracts based upon bids received from any company, firm or individual that is not a member of the bid depository of respondent corporation or that does not employ or use said bid depository.

It is further ordered, That respondent immediately reinstate any company, firm or individual suspended from participation in said bid depository, which suspension resulted from conduct engaged in by respondent which hereinafter would amount to a violation of this order.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to all present and future members, signatories, companies, firms or individuals that participate in said bid depository.

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

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

IN THE MATTER OF
ALBANO ENTERPRISES, INC., ET AL.

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

Docket C-2891. Complaint, May 31, 1977 — Decision, May 31, 1977

This consent order, among other things, requires a Santa Ana, Calif., manufacturer and distributor of automatic gas-saver devices to cease misrepresenting the performance or efficacy of its products; that its devices will fit all engines; that these products are patented; or that they have been tested, inspected or recommended by government agencies. Further, the firm is required to substantiate all product claims; withdraw and destroy any promotional material containing false or unsubstantiated representations; make refunds to dissatisfied customers, within one year from time of product purchase; and disclose this refund policy in all advertising material. The order additionally requires the firm to maintain prescribed records; and institute a program of continued surveillance to ensure that its distributors conform to the terms of the agreement.

Appearances

For the Commission: *John M. Porter.*

For the respondents: *Edward J. Atkinson, Los Angeles, Calif.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Albano Enterprises, Inc., a corporation, and Louis Albano, individually and as an officer of said corporation, and Joseph Albano, individually, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Albano Enterprises, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 1570 E. Edinger, Santa Ana, California.

Respondent Louis Albano is an officer of the corporate respondent. Respondent Joseph Albano is the manager of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been

engaged in the manufacture and distribution of so-called automobile gas saver products, which are marketed under such trade names as "Mini-Turbo Charger," "H. P. Air Injector," "Variable Combustion Meter," "V. C. Meter," "Air Jet," "Ram Jet," "Power-on-Gas-Saver," and "Air Master." These products are designed to fit between the PCV valve (positive crankcase ventilation) of the intake manifold and the carburetor. At sufficiently high engine speed, these products are purported to introduce minute additional amounts of air into the carburetor, thus allegedly creating a significantly better fuel burn by improving (increasing) the air to fuel ratio. At lower engine speeds, these products are designed to be inactive and have no effect at all.

PAR. 3. Respondents sell their products through distributors, and supply advertising materials and other promotional materials to these distributors for their use in reselling gas savers to the general public. These advertising materials and other promotional materials are disseminated to respondents' distributors located in various States of the United States, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. Typical, but not all inclusive thereof, of such advertisements and promotional material disseminated by respondents are the following:

- A. MAKE YOUR CAR AN AIR BURNER — GET AS MUCH AS 37% MORE FUEL, MORE POWERFUL FUEL OUT OF EVERY GALLON OF GAS YOU BUY
- B. WITH SUPERCHARGING you increase your horsepower dramatically up to 28% more full-time firing power.
- C. GAIN 2 to 6 OR MORE MILES PER GALLON.
- D. SAVE UP TO 2 GALLONS OF GAS EVERY HOUR YOU DRIVE
- E. HORSEPOWER INCREASE * * * Some increases: 36%, 18.75%, 55%, 43%.
Test Lab-Walton's Auto Lab., Massachusetts
- F. *Better Gas Mileage* * * * test result from one of the top U.S. labs. 16.7% MORE M.P.G. test lab: Fema Corporation, CA.
- G. *Less Air Pollution* * * * Percentages of Reduction: HC 13.74%, Co: 19.96%, NOX: 30.85%—Test Lab: Anaheim, California.

PAR. 4. At the time respondents disseminated the representations contained in advertisements and other promotional materials as alleged in Paragraph Three, respondents did not possess and rely upon a reasonable basis for making these representations. Therefore, the said advertisements and other promotional materials were and are unfair and/or deceptive.

PAR. 5. The advertisements and other promotional materials disseminated as alleged in Paragraph Three, and others substantially similar thereto represent, directly or by implication, that respondents, at the time the advertisements and other promotional materials were disseminated, possessed and relied upon a reasonable

basis for making the representations contained in the advertisements and other promotional materials.

PAR. 6. In truth and in fact, at the time respondents made the representations contained in the advertisements and other promotional materials as alleged in Paragraph Three, respondents did not possess or rely upon a reasonable basis for making such representations. Therefore, the said advertisements and other promotional representations were and are unfair and/or deceptive.

PAR. 7. In connection with advertising materials and other promotional materials regarding product efficacy supplied by respondents to distributors as alleged in Paragraph Three, respondents supply additional advertising and promotional materials to their distributors for their use in reselling gas savers to the general public. Typical, but not all inclusive thereof, of such advertisements and promotional materials disseminated by respondents are the following:

- A. will fit all cars, domestic and foreign, and any truck or boat that runs on gasoline;
- B. approved by the State of California;
- C. an automotive device so original it was granted U.S. Patent No. 2454480 as a *BASIC* invention

PAR. 8. Through the use of the promotional representations set forth in Paragraph Seven above, and others of similar meaning and import, respondents represent directly or indirectly that their gas saver products:

- A. will fit all cars, including all imported cars, and all trucks and boats which run on gasoline;
- B. are "approved" by the State of California;
- C. are automotive products so original they are patented as a basic invention.

PAR. 9. In truth and in fact, respondents' gas saver products:

- A. will not fit all vehicles, most notably certain foreign cars and diesel engine vehicles;
- B. are not approved by the State of California and in fact California law expressly prohibits the use of the term "approved" in the advertising of such products;
- C. are not protected by any U.S. patent currently in effect.

PAR. 10. The advertisements and other promotional claims, as set forth in Paragraph Seven herein, therefore contain false, misleading, and deceptive statements and representations concerning respondents' gas saver products.

PAR. 11. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondents have been and now are in

substantial competition in or affecting commerce with corporations, firms, and individuals engaged in the sale and distribution of gas saver products of the same general kind and nature as that sold by respondents.

PAR. 12. The use by respondents of the aforesaid unfair and/or deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of the aforesaid products manufactured and distributed by respondents. Further, as a result thereof, substantial trade is being unfairly diverted to respondents from their competitors.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of the Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Albano Enterprises, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1570 E. Edinger, Santa Ana, California.

Respondent Louis Albano is an officer of said corporation, and respondent Joseph Albano is the manager of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above-stated address.

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

ORDER

It is ordered, That respondents Albano Enterprises, Inc., a corporation, its successors and assigns, and its officers, and Louis Albano, individually and as an officer of said corporation, and Joseph Albano, individually, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the manufacturing, advertising, offering for sale, sale, or distribution of any products promoted as capable of causing a beneficial effect in the fuel economy, emission or other performance characteristics of any internal combustion engine in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

1. Making, directly or by implication, any statement or representation regarding the performance or effectiveness of said products unless such statement or representation is based upon and supported by prior, fully documented, adequate and well-controlled scientific studies or tests.

2. Failing to maintain copies of all documentation for the studies or tests referred to in subparagraph (1) of this paragraph.

3. Representing, directly or by implication, that respondents' products will fit all vehicles which are powered by gasoline engines.

4. Representing, directly or by implication, that the respondents' products have been approved, inspected, recommended or tested by the State of California or any other agency of government unless prior written approval is secured from the particular agency, or include in any public representation the name of any such agency without prior written authorization.

5. Representing, directly or by implication, that the respondents' products have been granted a patent unless there is in fact a current United States patent in force protecting those products.

It is further ordered. That any advertisement or other form of promotional representation respecting the efficacy or utility of respondents' products in the form of testimonials, must be based on fully documented, adequate, and well-controlled scientific studies or tests performed prior to the publishing or dissemination of said testimonials.

It is further ordered. That respondents shall forthwith cause the recall from all further use and destruction of all advertising copy, brochures and any other form of promotional representation, distributed to non-retail purchasers, which include statements or representations concerning the efficacy or utility of respondents' products that are inconsistent with any of the provisions set forth in this order.

It is further ordered. That respondents refund to each retail purchaser of the product the purchase price paid, in the event that such purchaser is dissatisfied with the product for any reason, within a period of one year from the date of purchase. Furthermore, should the product have any defect in workmanship or materials, the respondents shall replace the defective part or the product, as necessary, free of charge, within a one-year period from the date of purchase. Respondents shall clearly and conspicuously disclose their refund policy pursuant to the exact provisions of this order, in all advertising, promotional literature, package insert materials and the like, pertaining to the product.

It is further ordered. That each respondent shall forthwith

1. Deliver a copy of this order to cease and desist to all persons now engaged, or who become engaged in the advertising, offering for sale, sale, or distribution of respondents' products, as respondents' agent, salesman, franchisee, independent contractor, representative, or employee, and secure from each of said persons a signed statement acknowledging receipt of a copy thereof. For purposes of brevity, said persons shall be referred to hereinafter as "distributors."

2. Inform all distributors that the respondents are obligated by the acts or practices prohibited by this order, under the circumstances set forth in subparagraph 4 of this paragraph.

3. Institute a program of continuing surveillance to reveal whether the business operations of each of said distributors conform to the requirements of this order.

4. Upon receiving actual knowledge from any source (including but not limited to respondents' program of surveillance, and representatives of the Federal Trade Commission) of facts indicating a violation of any provision of this order by any distributor, or by any of such distributor's present and future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, or

other representatives, respondents shall within 24 hours notify such distributor by certified mail, return receipt requested, that such violation of this order has occurred ("Notice"), and that respondents will discontinue dealing with said distributor upon receipt by respondents of actual knowledge of one (1) or more further violations of this order by such distributor, or by any of such distributor's present and future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors or other representatives, within one hundred and eighty (180) days of receipt of said Notice by such distributor. Respondents shall obtain from such distributor written acknowledgement of receipt of such Notice, which acknowledgement shall indicate the date of receipt of such Notice.

Upon receiving actual knowledge from any source (including but not limited to respondents' program of surveillance, and representatives of the Federal Trade Commission) of facts indicating one (1) or more violations of any provision of this order, within one hundred and eighty (180) days following a distributor's receipt of the aforesaid "Notice," by a distributor, or by any of such distributor's present or future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors or other representatives, respondents shall permanently discontinue dealing with such distributor.

5. Maintain complete records for a period of no less than three years from the date of the incident, of any written or oral information received which indicates the possibility of a violation of this order by any respondent or distributor, or any of such distributor's present and future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, or other representatives; and maintain complete records of notifications of violations as required by subparagraph 4 of this paragraph, and of distributors' acknowledgements of receipt of such notifications. Any oral information received indicating the possibility of a violation of this order shall be reduced to writing, and shall include the name, address and telephone number of the informant, the name and address of the distributor involved, the date of the communication, and a brief summary of the information received. Such records shall be available upon request to representatives of the Federal Trade Commission, at normal business hours upon reasonable advance notice.

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

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order; the respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the manufacturing, advertising, offering for sale, sale, or distribution of any products promoted as capable of causing a beneficial effect in the fuel economy, emission or other performance characteristics of any internal combustion engine, or of his affiliation with a new business or employment in which his own duties and responsibilities involve the manufacturing, advertising, offering for sale, sale, or distribution of any products promoted as capable of causing a beneficial effect in the fuel economy, emission or other performance characteristics of any internal combustion engine. Such notice shall include the respondent's new business address and a statement as to the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligations arising under this order.

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

