mation required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

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.

IN THE MATTER OF

ROYAL CONSTRUCTION COMPANY TRADING AS ATLAS ALUMINUM COMPANY ET AL.

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

Docket 8690. Complaint, June 27, 1966—Decision, June 1, 1967

Order requiring a Memphis, Tenn., home improvement firm to cease using false pricing, guarantee and "free" claims, deceptive time limited offers, "bait" tactics, and other misrepresentations in selling aluminum siding and other products.

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 Royal Construction Company, a corporation, trading as Atlas Alur num Company, and Bernard Kleiman, Molly T. Kleiman and Eugene B. Kleiman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Royal Construction Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located, 3214 Summer Avenue, Memphis, Tennessee, and formerly located at 224 East Gaston Street, Greensboro, North Carolina.

At various times during the past few years Royal Construction Company has used the trade name Atlas Aluminum Company.

Respondents Bernard Kleiman, Molly T. Kleiman and Eugene

*Respondent Mollie T. Kleiman erroneously referred to as Molly T. Kleiman in the complaint.

B. Kleiman are officers of the corporate respondent. They cooperate and act together in formulating, directing and controlling the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale, distribution and installation of various items of home improvements, including aluminum siding, to the purchasing public.

PAR. 3. In the course and conduct of their business, 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 North Carolina 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. Respondents also introduced advertising circulars and other promotional material in commerce as "commerce" is defined in the Federal Trade Commission Act for the purpose of inducing the sales of their products.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have made numerous statements and representations in advertising circulars and other promotional material respecting the nature of their offer, price, time limitations, quality and free gifts. Typical and illustrative of the foregoing, but not all inclusive thereof, is the following:

S A V E !
—Limited Time Only—
Aluminum Siding Sale
BIG SAVINGS DURING
THIS SALE
S P E C I A L
OUR REGULAR—$569^{00}
ALUMINUM SIDING
NOW ONLY
$ 2 4 9 ^{00}
COMPLETELY INSTALLED
NO EXTRAS
A L U M I N U M S I D I N G
IN BEAUTIFUL DECORATOR COLORS
As Low As
$ 2 4 9 ^{00}
Installed With All Costs of Labor And
Material for Average Home of 1000 Sq. Ft.

FREE BONUS GIFT!
If You Mail This Card Now We Will Include
FREE: • RADIO CLOCK WITH ALARM OR
• 10,000 Top Value Stamps with
Purchase of Aluminum Siding Special
FREE
Clock Radio
With Alarm
—or—
10,000
S & H
Green
Stamps
If
You
Act
NOW!

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning not specifically set out herein, and through oral statements made by their salesmen and representatives, respondents have represented, directly or by implication, that:

1. The offer set forth in said advertisement was a bona fide offer to sell said siding material of the kind therein described at the prices and on the terms and conditions stated.

2. The offer set forth in said advertisement was for a limited time only.

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

4. Homes of prospective purchasers had been specially selected as model homes for the installation of respondents' siding; after installation such homes would be used for demonstration and advertising purposes by respondents; and, as a result of allowing their homes to be used as models, purchasers would be granted reduced prices or would receive allowances, discounts or commissions.

5. Their siding materials are unconditionally guaranteed.

6. All persons who purchase said aluminum siding would receive either a clock radio with alarm, 10,000 Top Value Stamps or 10,000 S & H Green Stamps.

PAR. 6. In truth and in fact:

1. The offer set forth above, was not a genuine or bona fide offer but was made for the purpose of obtaining leads as to persons interested in the purchase of respondents' products. After

obtaining such leads, respondents, their salesmen or representatives would call upon such persons at their homes or wait upon them at respondents' place of business. At such times and places, respondents, their salesmen or representative would disparage the advertised aluminum siding and otherwise discourage the purchase thereof and would attempt to sell, and did sell, different and more expensive aluminum siding.

2. The offer set forth above, was not for a limited time only. Said merchandise was advertised regularly at the represented prices and on the terms and conditions therein stated.

3. Respondents' products are not being offered for sale at a special or reduced price and savings are not granted respondents' customers because of a reduction from respondents' regular selling price. In fact, respondents do not have a regular selling price but the price at which respondents' products are sold vary from customer to customer depending on the resistance of the prospective purchaser.

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

5. Respondents' siding materials are not unconditionally guaranteed. Such guarantee as may have been provided was subject to numerous terms, conditions and limitations, and the guarantee failed to set forth the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor, would perform thereunder.

6. Many of the individuals who purchased respondents' aluminum siding did not receive either a clock radio with alarm, 10,000 Top Value Stamps, or 10,000 S & H Green Stamps.

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

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of aluminum siding and other building materials of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices

has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 9. 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 Trace Commission Act.

Mr. John T. Walker and *Mr. Stanley W. Brown, Jr.*, supporting the complaint.

Mr. Joseph J. Lyman and *Mr. Jacob A. Stein*, of Washington, D.C., for respondents.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

JANUARY 30, 1967

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PRELIMINARY STATEMENT*

The complaint in this proceeding was issued by the Federal Trade Commission on June 27, 1966, and was duly served on all respondents. It charges respondents with violation of Section 5 of the Federal Trade Commission Act. Specifically, it alleges mis-

*Respondent Mollie T. Kleiman erroneously referred to as Molly T. Kleiman in the complaint. See footnote 7.

representation in the sale of home improvements, including aluminum siding. Respondents filed on July 15, 1966, a Motion for a More Definite Statement, which counsel supporting the complaint filed answer in opposition on July 25, 1966. The motion was denied by the examiner on July 25, 1966, and respondents filed answer on August 1, 1966, generally denying the allegations of the complaint.

At a prehearing conference on August 8, 1966, the complaint was amended to reflect the current business address of respondents (Prehearing Conference Transcript, pp. 9–10; Order Confirming Amendment of Complaint, October 7, 1966), and respondents admitted certain factual allegations of the complaint while continuing to deny any violation of law.

At the prehearing conference, complaint counsel voluntarily furnished to respondents' counsel copies of questionnaire responses signed by witnesses scheduled to testify on behalf of the Government (Prehearing Conference Transcript, pp. 53–55)n Complaint counsel also furnished to the examiner for *in camera* inspection the interview reports relating to such prospective witnesses, with the understanding that if the examiner found they were producible to respondents under Commission precedents interpreting the Jencks Act, 18 U.S.C. § 3500, they might be given to respondents in advance of the hearing. After inspection, the examiner ruled that there was no basis for making the reports available to respondents (Order Denying Respondents Access to Interview Reports, October 7, 1966)n Meanwhile, on August 19, 1966, respondents filed a motion for the production and disclosure of other documents. This motion was opposed by complaint counsel (see answer filed October 5, 1966) and was certified to the Commission on October 7, 1966, with a recommendation that it be denied. By order filed October 1[illegible] 1966, the Commission denied respondents' request for access to the documents.[2]

Hearings for the reception of testimony and other evidence in support of the complaint were held in Roanoke, Virginia, October 24–27, 1966, with a hearing for the reception of defense testimony and other evidence following in Washington, D.C., on November 1, 1966.[3]

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[2] Respondents renewed their request at the hearing (Tr. 181–95, 211–16, 276–78) and again in their Proposed Findings (p. 8), but the request was and is denied on the authority of the Commission's order of October 17, 1966.

[3] This deviation from § 3.16 (d) of the Rules of Practice for Adjudicative Proceedings was authorized by Commission order of October 17, 1966, pursuant to the examiner's certificate of necessity filed on October 4, 1966.

At the hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. Such testimony and evidence have been duly recorded and filed in the office of the Commission. The parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

Proposed findings of fact and conclusions of law and a proposed form of order, accompanied by supporting briefs, have been filed by counsel supporting the complaint and by counsel for respondents.

Proposed findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

After carefully reviewing the entire record in this proceeding, together with the proposed findings, conclusions, and order filed by both parties, the hearing examiner finds that this proceeding is in the interest of the public and, on the basis of such review and his observation of the witnesses, makes findings of fact, enters his resulting conclusions, and issues an appropriate order.

As required by Section 3.21(b)(1) of the Commission's Rules of Practice, the Findings of Fact include references to principal supporting items in the record. Such references to testimony and exhibits are thus intended to comply with that rule and to serve as convenient guides to the principal items of evidence supporting the findings of fact, but those record references do not necessarily represent complete summaries of the evidence considered in arriving at such findings. Where reference is made to proposed findings submitted by the parties, such references are intended to include their citations to the record.

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

CB	Brief of complaint counsel
CPF	Proposed Findings, etc., of complaint counsel[4]
CX	Commission exhibits
p.	page
pp.	pages
Par.	Paragraph
RPF	Respondents' Proposed Findings, etc.[4]
RX	Respondents' exhibits
Tr.	Transcript.[5]

[4] References to the submittals of counsel are to *page numbers*—for example, CPF 19.

[5] Sometimes, references to testimony cite the name of the witness and the transcript page number without the abbreviation Tr.—for example, Wilson 292.

Counsel supporting the complaint may be variously referred to as complaint counsel, Government counsel, or the Government, and witnesses called by Government counsel may be referred to as Government witnesses.

FINDINGS OF CT

I. Respondents and Their Business

Respondent Royal Construction Company (sometimes referred to herein as Royal, respondent corporation, or the corpora spondent) is a corporation organized, existing, and doing bu under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at 3214 Summer Avenue, Memphis, Tennessee, formerly located at 224 East Gaston Street, Greensboro, North Carolina.[6] On occasion during the past few years, Royal has used the trade name Atlas Aluminum Company. (Prehearing Conference Transcript, pp. 9–10; Order Confirming Amendment of Complaint, October 7, 1965; Tr. 18–19; CX 5 C.)

Royal Construction Company was organized in May 1964, succeeding a partnership between Mr. and Mrs. Kleiman that had operated under the same name in Greensboro, North Carolina, since about 1946 (Tr. 14–15; CX 3 A, C)n

Respondents Bernard Kleiman, Mollie T. Kleiman,[7] and Eugene B. Kleiman are officers of the respondent corporation. They cooperate and act together in formulating, directing, and controlling the acts and practices of the respondent corporation, including the acts and practices described in these findings. Their business address is and has been the same as that of the respondent corporation.

Although respondents denied the allegations of the complaint concerning the joint responsibility of the Kleimans for corporate actions (Answer, Par. 1; Prehearing Conference Transcript, p. 8), the facts of record furnish the proof. Each individual respondent is and has been an officer of the corporation, as follows:

Bernard Kleiman—President (Tr. 12, 14)n

Eugene B. Kleiman—Vice-President (Tr. 88)n

Mollie T. Kleiman—Secretary-Treasurer (Tr. 57–58)n

Bernard Kleiman and Eugene Kleiman also actively engage in selling (Tr. 15–16, 89)n while Mrs. Kleiman supervises the office

[6] The record does not disclose the exact date that respondents moved from Greensboro to Memphis, but tax returns indicate that it was subsequent to April 30, 1965 (CXs 1 A, 2 A)e

[7] Mrs. Kleiman's first name was misspelled in the complaint as Molly; see Tr. 57, 333; CXs 1 E-F, 2 E-F, and 3 C; RPF 1, 3.

with the assistance of her son, Eugene (Tr. 58)o The respondent corporation is a closely held family corporation, with Mr. and Mrs. Kleiman each owning 37½ percent of the stock, and Eugene Kleiman owning 25 percent (Tr. 15, 17; CXs 1 F, 2 F). On the record as a whole, it is clear that the individual respondents have cooperated and acted together in formulating, directing, and controlling the acts and practices of the respondent corporation (Tr. 22, 40–42, 51, 53, 58–59, 86, 88 89, 363)o

Respondents are now, and for some time have been, engaged in the offering for sale, sale, distribution, and installation of various items of home improvements, including aluminum siding. (The practices disclosed by this record relate primarily, if not exclusively, to the advertising and sale of aluminum siding.)

In the course and conduct of their business, respondents now cause, and for some time have caused, their products, when sold, to be shipped from their place of business in the States of North Carolina or Tennessee to purchasers located in various other States of the United States, and maintain, and have maintained, a substantial [8] course of trade in such products, in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents also introduced advertising circulars and other promotional material in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing the sale of their products (Prehearing Conference Transcript, pp. 8–9; P earing Order, Par. 3, p. 4; Tr. 61).

In t ourse and conduct of their business, respondents are and ha. . been in substantial competition in commerce with other corporations, firms, and individuals in the sale of aluminum siding and other building materials of the same general kind and nature as that sold by respondents (Tr. 27–28, 345, 347).

II. The Challenged Practices and Representations

Summary Findings

On the basis of his consideration of the testimony and other evidence, the examiner makes summary findings as follows:

In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have made numerous statements and representations in advertising circulars and other promotional material respecting the nature of their offer, price, time limitations, quality, and free gifts. Typical

[8] Gross sales approximated $440,000 between May 1, 1965, and April 30, 1966 (CX 2 A; Tr. 68)e

and illustrative of such statements and representations, but not all-inclusive, is the following:

S A V E !
—Limited Time Only—
Aluminum Siding Sale
BIG SAVINGS DURING
THIS SALE
S P E C I A L
OUR REGULAR—$569^{00}
ALUMINUM SIDING
NOW ONLY
$ 2 4 9 ^{00}
COMPLETELY INSTALLED
NO EXTRAS
A L U M I N U M S I D I N G
IN BEAUTIFUL DECORATOR COLORS
As Low As
$ 2 4 9 ^{00}
Installed With All Costs of Labor And
Material for Average Home of 1000 Sq. Ft.
F R E E B O N U S G I F T !
If You Mail This Card Now We Will Include
FREE: • RADIO CLOCK WITH ALARM OR
• 10,000 Top Value Stamps with
Purchase of Aluminum Siding Special
F R E E
Clock Radio
With Alarm
—or—
10,000
S & H
Green
Stamps
If
You
Act
NOW!

(CXs 5 A–C, 20 B; Tr. 18, 34–35, 346; see also Tr. 59–60.)

By and through the use of such statements and representations, and others of similar import and meaning not specifically set out herein, and through oral statements made by their salesmen and representatives, respondents have represented, directly or by implication, that:

1. The offers set forth in such advertisements were bona fide offers to sell siding material of the kind described at the prices and on the terms and conditions stated.

2. The offers set forth in such advertisements were for a limited time only.

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

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

5. Their siding materials are unconditionally guaranteed.

6. All persons who purchase aluminum siding would receive either a clock radio with alarm, 10,000 Top Value Stamps, or 10,000 S & H Green Stamps.

In truth and in fact:

1. The advertised offers were not genuine or bona fide offers but were made for the purpose of obtaining leads to persons interested in the purchase of respondents' products. After obtaining such leads, respondents or their salesmen called upon them at their homes or dealt with them at respondents' place of business. At such times and places, respondents or their salesmen disparaged the advertised aluminum siding and otherwise discouraged its purchase and attempted to sell, and did sell, different and more expensive aluminum siding.

2. The advertised offers were not for a limited time only. Such merchandise was advertised regularly at the represented prices and on the terms and conditions therein stated.

3. Respondents' products are not being offered for sale at a special or reduced price, and savings are not granted respondents' customers because of a reduction from respondents' regular selling price. Respondents do not have a regular selling price, but the prices at which respondents' products are sold vary from customer to customer depending on the resistance of the prospective purchaser.

4. Homes of prospective purchasers are not specially selected as model homes for installations of respondents' siding; after installations, such homes are not used for demonstration and 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.

5. Respondents' siding materials are not unconditionally guaranteed. Such guarantee as may have been provided was subject to numerous terms, conditions, and limitations, and the guarantee failed to set forth the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor would perform.

6. Many of the individuals who purchased respondents' aluminum siding did not receive either a clock radio with alarm, 10,000 Top Value Stamps, or 10,000 S & H Green Stamps.

Therefore, respondents' statements and representations, as set forth herein (*supra*, pp. 770–772)9 were and are false, misleading and deceptive.

Evidentiary Support for Summary Findings

The record fully supports the summary findings, which are virtually identical to the allegations of the complaint. The analysis that follows includes detailed findings on the material issues of fact and law, together with record references and an exposition of the reasons or basis for such findings.

1. Extent and Nature of Advertising

Respondents annually circulated through the mail several hundred thousand of the advertisements exemplified by CXs 5 A–C and 20 B, the response to which was one-tenth of one percent or less (Tr. 29–30, 59–60, 65–66)o In addition, respondents engaged in some newspaper advertising (CX 24o but see Tr. 18, 60, 101)o The advertisements represented that respondents' "regular" $569 aluminum siding was being offered for $229 (CX 5 B)o or $249 (CX 5 A, C), or $269 (CX 20 B). A newspaper advertisement (CX 24) purported to offer regular $495 siding for $269. The siding advertised by respondents was a second-line aluminum siding material of .019 22–23, 63, 92–94).

2. "Bait and Switch" Tactics [9]

The advertised special was merely a "come-on" for the purpose of getting leads for the sale of higher priced aluminum siding—a sales scheme aptly called "bait and switch."

The record fails to disclose any sales at the so-called regular price of $495 or $569o in fact, as far as the advertising of respondents was concerned, the "regular" price has been $229, $249, or $269, so that the higher figures were fictitious prices (Tr.

[9] This section includes findings on price representations and "model home" claims as part of respondents' sales plan.

50–51). They were not the regular selling prices of respondents.

Mr. and Mrs. Kleiman claimed "some" sales at the price of $569 per thousand square feet (Tr. 23–24, 72–73), and their son, Eugene, reported "a few" such sales (Tr. 101–02), but their testimony was vague, unconvincing, and utterly lacking in documentary corroboration (Tr. 50, 73–76).

Moreover, sales of the advertised siding at the "special" prices of $229, $249, or $269 were just as rare. Although there were some isolated sales of the advertised material, most customers were switched to a higher priced product.

Bernard Kleiman conceded that there were "very few sales" of the advertised special (Tr. 358). He frankly acknowledged that the advertising brochures were mailed in vast numbers to "reach people that might have an interest in aluminum siding," but that in most cases, "they don't buy the advertised product" (Tr. 346). Sales of the advertised siding were few, he said, because "when we explain it to the customers, they want the better material" (Tr. 347).

Although he denied that the pattern was to withhold the advertised material (Tr. 347–48), Kleiman gave only a qualified denial of testimony that he had told customers that they would not want the advertised material. He contended that he "never put it in quite that way," but "explained the different materials and it's up to them to make a choice" (Tr. 348).

Eugene Kleiman acknowledged that the "great majority" of the sales he made were the result of customer inquiries stemming from their receipt of the ad for the so-called special (Tr. 102). Denying that he discouraged customers from buying the advertised special (Tr. 95), he testified nevertheless that he sold "any number" of the advertised special—he couldn't estimate how many—but people then changed their minds and bought something better. (Tr. 97). He insisted that after a contract was signed for the advertised special, he didn't try to sell the customer something else, but if they wanted a better quality product, he "would show them the advantages of it" (Tr. 117). In a classic understatement, he declared that he was "not reluctant" to tell customers about other siding after they had signed a contract for the advertised special (Tr. 128).

Young Kleiman frankly admitted that he would rather sell the higher priced product because it was more profitable (Tr. 126).

Mrs. Kleiman also confirmed that sometimes salesmen went through the formalities of having the customer sign a contract at the advertised price but then persuaded the customer to "trade

up"—that is, to substitute more expensive siding. She made the revealing comment that "a lot" of sales were made at the advertised price, "but people change their minds and want better material" (Tr. 69, 72)o She had "no idea" of the percentage of total sales made at the advertised price (Tr. 69–70)o

The inference of disparagement characteristic of bait and switch operations is inescapable. But the bait and switch findings are not based merely on inference. Indeed, respondents disparaged the advertised product while on the witness stand, and eight consumer witnesses told of efforts (generally successful) to switch them to higher priced siding.

Bernard Kleiman said that the second-line siding involved in the advertised special "has certain imperfections," including varying thickness, making it difficult to fit it properly (Tr. 352)o Respondents sell more of the first-line products than the advertised special because "the customer preferred it." The reason? "The first line has a better finish on it, and it's more firmly secured, and it has a complete accessory package with it." (Tr. 352–53.)

Mrs. Kleiman described it as "a second material" that is "not regular quality." She agreed that it was "inferior." (Tr. 63–64.)

Similarly, Eugene Kleiman conceded that the advertised product was "a second," but he insisted that "it made a fair looking job. It looks all right for the price" (Tr. 94, 121)o

Despite their general concession that there were only a few sales at the advertised price, respondents made an abortive effort to demonstrate the actuality of such sales. But out of four customer files produced for this purpose, only one definitely involved sale and installation of the advertised special (Tr. 349–50, 355–63)o

The lack of any good faith interest in selling the advertised special is also established by the fact that respondents purchased only 4,400 square feet during the relevant time period (CXs 11 A–Z–27; Tr. 330–31)o They simply did not have it to sell.

When a stubborn customer insisted on holding respondents to the advertised offer, the contract was fulfilled by the installation of more expensive siding (Tr. 298–99, 358–62, 365; CX 25 A–I).

The deceptive pattern of respondents' operation is clearly discernible in the testimony of the eight consumer witnesses presented by complaint counsel. Directly or indirectly, the advertised product was disparaged and the customer was discouraged from

buying it and persuaded—sometimes pressured—into signing a contract for an amount many times the price of the advertised special.

Respondent Bernard Kleiman told one customer that the advertised siding was "not the siding that he would recommend"—that he did not think the customer would want it. On seeing the sample, the customer agreed with him, and signed up instead for a siding job in the amount of $1,690 [10]—which was represented to be a discount from the quoted price of over $2,000. The customer understood from the salesman that the discount was for the use of his home for advertising purposes and that he might obtain additional rebates if sales were made to others on that basis. Nothing ever developed along those lines. (Hinkle 140–44, 149–56.)

Another salesman used substantially the same technique as Bernard Kleiman: He professed willingness to sell the advertised special but warned the customer that he would not be satisfied because he "had too nice of a looking home to put something like that on it." The salesman helped the customer to see the flaws in the advertised product and proceeded to sell a better grade siding for $1,100 after first quoting a price of $1,290. (Martin 220–21.)

In another instance, the disparagement was more subtle, with the salesman capitalizing on the customer's doubts about the product, which evidently had some self-disparaging characteristics. The upshot was that the customer agreed to pay $850 for respondents' "best grade" siding. The salesman (Bernard Kleiman again, CX 22 M) first quoted a price of $1,450 but discounted it to $850, ostensibly for use of the house for demonstration and advertising purposes, but the house never was so used. (Roark 162–64, 167, 173, 178–80.)

Sometimes the technique was to make a quick sale of the advertised special, getting the customer's signature on a contract and then switching him to a higher priced job. For example, after one customer had signed the contract for the advertised special, the salesman (Bernard Kleiman, CX 15–0) brought in a sample and said, "Here's what you have purchased." The salesman then "started throwing off on it * * *." He told the customer that the product "wasn't even fit for a barn * * *," and he would not recommend it to anybody. The salesman next dis-

[10] Although the customer referred to the price as $1,690, this was the cash price (see CX 14–S), and because he contracted to make monthly payments over a period of five years, the "time price differential" amounted to $570.80 for a total price of $2,260.80 (CX 14–D).

played a better grade of siding, which he first priced at around $1,500 or $1,600, but when he met resistance from the customer, "he kept on coming down, maybe $100 at a time until he come down to $1,060." Again, the price reduction was represented as involving the use of the customer's house for demonstration and advertising. (Powers 200–04.)

The record contains still another example of the technique of switching the customer after signing him up for the advertised special. After the contract was signed for the advertised special, the salesman [11] extolled the virtues of a different siding and advised the customer "to trade this siding in and get the other siding." Whereas the price for the advertised special would have been something over $300 (because the size of the house exceeded the 1,000 square feet maximum involved in the advertised offer), the customer ultimately signed a contract to pay $1,736. This supposedly was discount from $2,000 on the basis that respondents would use the house as a model to promote other sales in the neighborhood.[12] (Hudson 321–23.)

Another witness flatly stated that the salesman "simply discouraged" purchase of the advertised special and detailed all the flaws that made it unsuitable for the customer's house, with the result that the customer signed a contract in the amount of $1,190 for what he called "the good siding." (Hostetter 242–44, 255–56, 260–61.)

One of the most flagrant examples involved a 71-year-old farmer who actually was satisfied to take the advertised product but ultimately yielded to the high-pressure salesmanship of respondents' representative.[13] The story was graphically told:

> Well, I kept telling him [the salesman] I ought to put that cheap on and he kept on talking to put that other on and he'd give a good job and he wanted to advertise, and give a good job so he could advertise * * * the other aluminum * * *.
>
> Well, he said the cheap wouldn't last like the other. He said it was cheap, you couldn't expect it to last like it, and he said put this other on, he'd give a good price and he wanted to fix it up so he could advertise it. I told him I'd rather take the cheap, I could pay for that, then I decided to take the other. (Carter 269–70; see also Tr. 267–68.)

The "switch" was further described on cross-examination:

> Q Now, you can see yourself that there was a difference between that sid-

[11] It appears that Bernard Kleiman also may have been the salesman in this instance (Tr. 321, 324–25)e

[12] This "model home" had no running water and no bath (Tr. 324).

[13] The almost undecipherable signature on the contract in this case appears to be that of Bernard Kleiman (CX 21). The witness did not remember the name of the salesman.

ing that you called the cheap siding, and the siding that you finally bought.

A Yes, sir, but not much.

Q There was a difference?

A Well, there wasn't much difference. There wasn't that much difference in it, because I liked that siding more that I called 'em to put on, but he come and talked [me] out of that.

Q You say he convinced you that what you called the better siding was what you should have, is that correct?

A That's right.

Q But, you really wanted the advertised siding?

A I wanted that cheap siding, something that I could pay for. (Carter 279; see also Tr. 283.)

The customer ultimately signed a contract in the amount of $1,600 (CX 21), compared to about $400 for the advertised special (Tr. 270–71).[14]

The bait and switch nature of respondents' operation is clearly demonstrated by the experience of a Graham, North Carolina, high school principal. The delays and difficulties he encountered after he signed a contract for the advertised special and refused to be switched demonstrate that the advertised special was simply a device to turn up prospects for more lucrative sales. After the customer complained to the Better Business Bureau in Greensboro, and also threatened legal action, respondents finally furnished more expensive siding at the contract price, but they insisted on extra payment for corners. (Wilson 292–300, 312.)

Thus, respondents not only misrepresented the "regular" price of the so-called advertised special, but they also misrepresented the "regular" price of the higher priced siding to which they switched prospects.

The fact is that there was no regular price of $569 from which the advertised special represented a reduction. Similarly, the supposed "discount" offered for other grades of aluminum was a reduction from a wholly fictitious price. The pattern is clear: The respondents and their salesmen simply charged whatever the traffic would bear. If they met sales resistance to a high price, they quickly said that it could be discounted as part of their advertising and promotional plan, usually relying on the "model home" pitch, which, like the quoted prices, was wholly fictitious.

The conclusion is inescapable that respondents had no regular price for any of their siding. Respondents' own records fail to disclose any sales at $569, and respondents concede that there were

[14] The cash price specified in the contract was $1,600, but with payments on the installment plan over a period of five years, the "time balance" was $2,888. However, the customer subsequently refinanced the job through a local bank. (Tr. 271–72, 280–82.)

only a few sales at the advertised prices of $229, $249, or $269. Similarly, respondents' records disclose no regular price for the other grades of siding, and this was confirmed by Bernard Kleiman. His testimony was to the effect that respondents had no regular prices—that prices varied from customer to customer depending upon what the salesman could get for a siding job. (Tr. 49–51.)

One of the techniques used by respondents to disparage the advertised special was their refusal to furnish the accessories required for a complete siding job. Their advertisements (CXs 5 A–C) represented that the siding would be "completely installed" at the advertised price, with "no extras." The advertised price was represented as including "labor & material for an average home up to 1,000 square feet." This representation was coupled with a repetition of the "no extras" promise.

Although customers naturally interpreted the "no extras" representation as meaning no extra charges (Wilson 301–03, 312), respondents interpreted it to mean that they furnished nothing "extra" beyond the actual siding. Their "completely installed" siding job did not include the corners or trim for windows and doors. Such an important omission was used by the salesmen to switch the customer to a job that was "completely installed" at a price many times that of the advertised special.

When Mrs. Kleiman was asked to explain the representations "completely installed" and "no extras," she gave a short but significant answer: "No accessories." She then defined accessories as "Corners, foil, starter strip, backers, molding, caulking, and inner corners and outer corners." She agreed that under her interpretation of the advertisement, "completely installed" simply meant "nailing ten squares of aluminum right on the side of the house." (Tr. 70; see also Tr. 47–48, 106–10, 352–53.)

Finally, the record makes clear that as a general proposition, respondents and their salesmen were strongly motivated to avoid sales of the advertised special. The reason is plain: There was no profit in such sales—perhaps even a loss. No salesman would be satisfied to sell at the advertised price because his commission would amount to little or nothing. (Tr. 44–49, 67–68, 126, 366–67.)

To recite respondents' practices is to present a classic case of bait and switch. Respondents' sales scheme clearly fits the definition of this unfair practice set forth in the Commission's Guides Against Bait Advertising (CCH Trade Regulation Reporter, Par. 7893, November 24, 1959):

Bait advertising is an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. The primary aim of a bait advertisement is to obtain leads as to persons interested in buying merchandise of the type so advertised.

The bait and switch nature of respondents' operation is evidenced by practices condemned by the Guides:

1. Respondents' advertisements are not a *bona fide* effort to sell the advertised product (Guide 1).

2. Respondents' advertisements misrepresent the product and the nature of the offer in such a manner that, on disclosure of the true facts, the purchaser may be and is switched from the advertised product to another. The first contact or interview with the customer is secured by deception (Guide 2).

3. Respondents refuse to sell the product offered in accordance with the terms of the offer (Guide 3(a)).

4. Respondents and their representatives disparage the advertised product and its lack of guarantee (Guide 3(b)).

5. Respondents do not have a sufficient quantity of the advertised product to meet reasonably anticipated demands (Guide 3(c)).

6. Respondents show or demonstrate a product that is defective, unusable, or impractical for the purpose represented in the advertisement (Guide 3(e)).

7. Respondents use a sales plan or a method of compensation for salesmen designed to prevent or to discourage them from selling the advertised product (Guide 3(f)).

8. Respondents sometimes actually make a sale of the advertised product and then engage in "unselling" with the intent and purpose of selling other merchandise in its stead. There was at least one instance of failure to make delivery of the advertised product within a reasonable time. There also was disparagement of the advertised product and its lack of guarantee. (Guides 4(b) and (c).)

Even if respondents had made more sales of the advertised products than are disclosed by the record, this would not preclude the existence of a bait and switch scheme. In the language of the Guides, "this is a mere incidental by-product of the fundamental plan * * * intended to provide an aura of legitimacy to the over-all operation."

3. "Limited Time" of Offer

Although respondents' advertisements specifically represent that their special offer was for a "limited time only" (CXs 5 A–C, 20 B, 24), the facts of record establish that respondents regularly advertised the so-called aluminum siding special over a period of two years (Tr. 18, 50). The fact that the advertised price was juggled within a range of $20 to $40 ($229, $249, $269) does not detract from the actuality that the so-called special was a continuing offer, albeit merely a bait designed to make sales at higher prices.

4. Guarantee Representations

With possibly one exception (CX 20 A),[15] guarantee representations attributable to respondents were orally made by salesmen, including the Messrs. Kleiman, with respect to the higher priced siding. The advertising brochure contained no guarantee claims, and for the most part, salesmen did not represent that any guarantee attached to the advertised special. As a matter of fact, the absence of a guarantee on the advertised product and the furnishing of a guarantee with a higher priced job were part of the bait and switch tactics of respondents. One of the selling points used in switching customers was the lack of any guarantee on the advertised special.

Seven of the eight consumer witnesses presented in support of the complaint testified that they were told that the siding they purchased carried a guarantee, but no written guarantee was ever delivered to them. Four of them testified that they were promised a "lifetime guarantee" (Martin 221–22; Hostetter 243–44, 249, 259; Carter 271; and Hudson 322–23). The other three were told that the siding they purchased carried a 20-year guarantee (Hinkle 142–43; Roark 163, 180; Powers 202–04, 208–09, 211).

Respondents have no guarantee of their own but rely on the guarantees furnished by manufacturers of the siding they sell (Tr. 351). Bernard Kleiman acknowledged failure to furnish copies of the guarantees to all customers but blamed such omissions on "neglect in the office" (Tr. 351) and said the guarantees were generally transmitted to customers (Tr. 354).

Although Kleiman acknowledged that customers were simply told they had a 20-year guarantee, he made the incredible claim that he read the manufacturer's guarantee to some customers

[15] This was a contract for the advertised special specifying "Guaranteed baked enamel finish."

(Tr. 52). The Alsco guarantee (CX 6) contains about 500 words.

Respondents sold aluminum siding purchased from several suppliers, but the only guarantee in the record is that for Alsco aluminium siding, a product of Alsco, Inc. (CX 6; see Tr. 113–17, 330–33). It is represented as a 20-year guarantee, but it is subject to numerous terms and conditions. Among other things, the guarantee is invalid unless the homeowner's certificate of coverage is signed by the purchaser and the dealer or builder and is mailed to Alsco within thirty days after installation. It is obvious that if any of the customers who testified in this proceeding had purchased Alsco siding, they were not covered by the Alsco's limited guarantee since they did not even see the guarantee.

Aside from the self-serving testimony of respondents (Tr. 351, 354), there is no evidence that any written guarantees were furnished to respondents' customers.

Whether or not printed guarantees were furnished to customers, it is apparent that they contained numerous terms, conditions, and limitations undisclosed by respondents or their sales representatives. Thus, respondents' guarantee representations were false, misleading, and deceptive.

5. "Free Bonus Gifts"

Regarding the "free bonus gift" offered in connection with the advertised special, the promise in one section of the brochures (CXs 5 A–C, 20 B) is to the effect that respondents would supply "free" a clock radio, a camera, screens, doors, or thousands (either 5,000 or 10,000) of Top Value Stamps or S & H Green Stamps if the customer acted "now." Elsewhere in the brochure is a statement to the effect that if the customer mailed the return card "now," respondents would include the gift "with the purchase of our aluminum siding special."

It is significant that the unqualified offer of a "free" gift for prompt action ("If You Act Now!") is prominently printed in color on that part of the folder containing the homeowner's address. The representation there makes no reference to the alleged requirement that the advertised special must be bought to qualify for the gift. In connection with the exhortation to "mail this card today," there is a further statement that "This card must be mailed to our office within 5 days to become eligible for this savings, plus FREE GIFT." Again, the customer must look further to learn that respondents will include the gift "with the purchase of our aluminum siding special."

To compound the confusion, at still another point in the bro-

chures, the customer is simply promised a "free * * * gift with siding purchase." Notice the absence of any limitation to the "special."

Small wonder that respondents' counsel had to ask witnesses if they read the ad "carefully" (see, for example, Tr. 280, 300–01).

These representations are obviously open to the interpretation that if the customer promptly mailed the return card and made a purchase, he was entitled to the free bonus gift. The examiner and the Commission may infer that a substantial number of the purchasing public would not interpret the offer as being limited to the purchase of the exact product (the "Special") embraced in the advertisement, but would consider themselves eligible if they mailed the card and made a siding purchase. Moreover, such an inference is supported by live testimony.

One customer apparently had some doubt about the meaning of the offer, but wrote respondents to inquire whether he was entitled to a radio. He received no answer, nor did he get the gift (Hinkle 143, 146).

Another customer was told by the salesman that he was not eligible for the gift because he had not bought the advertised special, and he did not receive either the radio or the S & H Green Stamps (Hostetter 244, 249).

A third customer wrote respondents about his failure to receive a free gift but never got a reply (Powers 204). When, on cross-examination, respondents' counsel suggested that the witness was not entitled to the gift because he did not buy the advertised special, the witness replied: "I didn't know for sure, but it looked to me like if you bought the higher priced stuff, you should be entitled to the gift anyway. * * * if they could give it with a $249 job, [if] you get a $1,000 job, surely they can give it" (Tr. 207–08).

A fourth witness had requested the stamps but never received any reply. The salesman had told him he was not sure that he could get him all of the stamps but he would do his best (Martin 222–23). On cross-examination, respondents' counsel again suggested that the customer was not entitled to the stamps because he had not bought the advertised special, but that was not his understanding (Tr. 224–25).

One customer who actually signed the contract for the advertised special, but was then persuaded to trade it in on more expensive siding, was led to believe by the salesman that he was entitled to the bonus gift—either a clock radio or 10,000 stamps, but the gift was never delivered (Hudson 323–24).

Two customers finally received the stamps, but their success was due to their persistence, not respondents' good faith or generosity. One had made many demands and had notified respondents of his having been in contact with the Federal Trade Commission (Roark 164–66, 170–71, 177–78; CX 22 D).

The other—the elderly farmer described *supra* (pp. 777–78)—understood from respondents' advertisement that he was entitled to S & H Green Stamps, but he was initially told that they came only with the advertised special. Ultimately the stamps were delivered, but only after the bank refused to make payment on the contract until this was done (Carter 271–72, 280–83).

Nevertheless, respondents persist in their restrictive interpretation of their offer (Tr. 79–80, 102, 345–46).

Ironically, in the only clear-cut instance in which the customer purchased the advertised special, he was not furnished the 10,000 S & H Green Stamps that the ad promised (Wilson 299–300, 303, 314–16). Respondents' counsel even suggested that this customer was not entitled to the stamps because they were not provided for in the contract he signed for the advertised special (Tr. 314).

It is abundantly clear that the "free bonus gift" offer was part and parcel of the deceptive sales plan operated by respondents. They knew that there would be few, if any, sales of the advertised special, so they could afford to make this apparently generous offer under their restrictive interpretation. And the fact is that their delivery under the free bonus gift offer was minimal (Tr. 81–83; see also CPF 23)o

Respondents' basic policy was to interpret the offer strictly, but this policy was flexible enough to permit the use of the offer as a sales gimmick when they met customer resistance to making the switch to a higher priced product or when a customer persisted in demanding his rights under the advertised offer.

Thus, Eugene Kleiman testified that in some cases he gave the gift with non-advertised siding. Respondents had no standard practice for the free gift. "It all depended on the circumstances * * *." (Tr. 102–03.)

The issues respecting the "gift" offer, as delineated by the complaint (Paragraphs Five (6) and Six (6)), are narrow: (1) Did respondents represent that siding purchasers would receive a gift? and (2) Did respondents deliver such gift? The respective answers are clear: (1) Yes and (2) No.

Thus, the "free bonus gift" representation was false, misleading, and deceptive.

Although the foregoing findings dispose of the issues properly before the examiner, it may be worth noting that respondents' "free bonus gift" representations appear dubious in the light of Rule 10 of the Trade Practice Rules for the Residential Aluminum Siding Industry (CCH Trade Regulation Reporter, Par. 41,057, April 6, 1962) and the case law which the Rule synthesizes.

That Rule provides in pertinent part:

> In connection with the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to use the word "free," or any other word or words of similar import, in advertisements or in other offers to the public, as descriptive of an article of merchandise, or service, which is not an unconditional gift, under the following circumstances:
>
> (a) When all the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise or service offered are not clearly and conspicuously set forth at the outset so as to leave no reasonable probability that the terms of the offer will be misunderstood * * *.

Even a bare reading of respondents' gift representations—but particularly in the light of the testimony of the consumer-witnesses—suggests that such ambiguous representations hardly meet the Rule's standard that all the conditions, etc., respecting the "free" article must be "clearly and conspicuously set forth at the outset so as to leave no reasonable probability that the terms of the offer will be misunderstood * * *." (See also the "Note" appended to Rule 10.)

Neither the order proposed in the complaint nor that proposed by complaint counsel meets this problem. And the examiner considers that, under the pleadings, it is beyond his authority to broaden the order to cover it.

III. Respondents' Defense

The factual aspects of respondents' defense are largely disposed of in Section II (*supra*, pp. 770–785)o Certain of the legal aspects, however, call for some further comment.

In addition to attacking the sufficiency of the evidence, respondents have raised questions concerning (1) their responsibility for the acts of their salesmen and (2) the liability of the individual respondents. The last two points will be considered first.

Liability of Respondents for Acts of Salesmen

In their answer and throughout the hearing, respondents have

contended that the acts and practices alleged, if committed, were committed by salesmen who were "independent contractors" beyond the control of respondents. This defense is not pressed in respondents' proposed findings and conclusions, perhaps because such a contention finds no support in the evidence or in the controlling law. One major flaw, of course, is that two of the individual respondents were and are salesmen, and the record shows their personal involvement in the unlawful sales practices. They were the only salesmen at the time of hearing (Tr. 104).

During 1964–66, respondents employed an average of four salesmen in addition to Bernard and Eugene Kleiman (Tr. 28, 334). Respondents supplied their salesmen with sample cases, contracts bearing the name Royal Construction Company, and blank promissory notes, as well as leads to prospects based on returns from the direct-mail advertising brochures (Tr. 35–37). Salesmen drew no salaries but were paid commissions and were allowed to draw advances (Tr. 79, 336–37, 343–44). Respondents arranged financing for the installation of the products sold by their salesmen and, if the credit was approved, performed on all contracts and accepted the proceeds (Tr. 39, 364).

Salesmen might be part-time or full-time; some even worked for competitors. Respondents imposed no requirements respecting working hours and, according to their testimony (uncontradicted but suspect as self-serving), gave the salesmen no instructions regarding the sales pitch to be used. Salesmen furnished their own transportation and paid their own expenses (Tr. 336–37).

The contract forms carried and used by salesmen contained the name and address of Royal Construction Company, and each purported to represent an agreement between a property owner and the company. Two types of contracts were used (for example, CXs 12 A and 12 D). One type (CX A) provided space at the bottom of the form for signatures of the customer and of the company's "Representative." This form contained further language indicating the necessity for acceptance by the company, although, in the body of the contract, reference was made to Royal's "duly authorized agent." The other form (CX D) was set up so as to indicate that the salesman was signing on behalf of the company; the form contained the printed signature of Royal Construction Co., and the salesman's signature was placed below it, preceded by the word "By."

Although Bernard Kleiman referred to the salesmen as "agents," he testified that the company had "no control over [them] beyond that fact" (Tr. 30). He testified that when

salesmen were taken on, they were given no instructions as to what they should say or what they should not say in making sales representations. As a general rule, he stated, respondents provided no indoctrination for their salesmen—"just gave them samples and that's all" (Tr. 366). Regardless of the truth of this testimony, it does not relieve respondents of responsibility for the representations made on their behalf.

The salesmen did not purchase respondents' products for resale. They sold respondents' products on behalf of respondents and thus were employees and agents of respondents and not independent contractors and dealers. Whatever limitations there might have been on the actual authority of the salesmen as agents of respondents (and this was not developed), the fact is that they were acting for and on behalf of respondents and were clothed with at least the apparent authority to make representations and otherwise act in the name of respondents.

Whatever the legal relationship between respondents and their salesmen might have been under the law of contracts or the law of agency, it is well established in trade regulation law that respondents are responsible under the Federal Trade Commission Act for the representations of their sales representatives. *Goodman* v. *Federal Trade Commission,* 244 F. 2d 584 (9th Cir. 1957); *Standard Distributors, Inc.* v. *Federal Trade Commission,* 211 F. 2d 7 (2d Cir. 1954); *Steelco Stainless Steel, Inc.* v. *Federal Trade Commission,* 187 F. 2d 693 (7th Cir. 1951); *International Art Co.* v. *Federal Trade Commission,* 109 F. 2d 393 (5th Cir. 1940), *cert. denied,* 310 U.S. 632.

When the facts of this case are considered in the light of the controlling case law, the conclusion must be that whether or not the salesmen were independent contractors for certain purposes, they were nevertheless duly authorized representatives of respondents. Therefore, respondents are properly held liable in this proceeding for the acts of such representatives.

Liability of Individual Respondents

A major portion of respondents' Proposed Findings is devoted to a plea that the order be limited to the respondent corporation and not directed against the individual respondents in their individual capacities.

The examiner rejects the argument that to enter an order binding upon the individual respondents would be "a very harsh step" unwarranted by the circumstances.

In considering the necessity and propriety of an order against

the Kleimans individually, as well as in their corporate capacities, we start with the firmly grounded proposition that the Commission has authority to enter an order to cease and desist against officers, directors, and stockholders of a corporation where necessary to effectively prohibit unfair trade practices. *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 120 (1937)o; *Pati-Port, Inc.* v. *Federal Trade Commission*, 313 F. 2d 103, 105 (4th Cir. 1963); *Surf Sales Co.* v. *Federal Trade Commission*, 259 F. 2d 744 (7th Cir. 1958); *Standard Distributors, Inc.* v. *Federal Trade Commission*, 211 F. 2d 7, 14–16 (2d Cir. 1954); *Consumer Sales Corp.* v. *Federal Trade Commission*, 198 F. 2d 404, 407–08 (2d Cir. 1952), *cert. denied*, 344 U.S. 912 (1953)o

The case of *Flotill Products, Inc.* v. *Federal Trade Commission*, 358 F. 2d 224 (9th Cir. 1966; *petition for cert. filed*, 34 U.S.L. Week 2541 (U.S., Oct. 12, 1966) (No. 668)), is relied on by respondents as discrediting the "alter ego doctrine" applied by the Commission in that case and others as a basis for attaching individual liability. But *Flotill* is readily distinguishable from this case. The two cases are similar in that in both, three individuals owned and controlled the corporation. But there the similarity ends. The history, magnitude, operations, and stability of the two corporations are materially different. In addition, there is missing in *Flotill* the evidence of personal participation in the violations that marks the instant proceeding.

Moreover, the *alter ego* doctrine is but one of the factors impelling the conclusion that personal liability is demanded in this case.

Royal Construction Company is a "family corporation" which succeeded a family partnership. The corporation is completely controlled by the three family members—father, mother, and son. They own 100 percent of the stock. They are the sole officers of the corporation. They formulate the policies of the company, and each actively participates in its business affairs. Directors' meetings were admittedly infrequent and very informal. Respondents ran the business as though there were no corporate organization. They can continue the business in some other form. Conceivably, each may become employed by another business entity in the same or a related field.

The likelihood that the Kleimans, jointly or severally, may engage in the challenged practices as individuals is sufficiently real to warrant an order binding on them personally as well as in their representative capacities, *Lovable Company*, Docket 8620 (June

29, 1965) [67 F.T.C. 1326]. Here there has been such "personal participation" of the officers as to warrant the order sought, *Coro, Inc.* v. *Federal Trade Commission,* 338 F. 2d 149 (1st Cir. 1964), *cert. denied,* 380 U.S. 954 (1965). The order must be directed against the Kleimans as well as the corporation to effectuate the prohibition against continuation of the unfair practices found.

Respondents have failed to show why the attachment of personal liability is "a very harsh step" (RPF 2). They will be subject to sanctions only if they violate the order. In that event, there is no reason they should enjoy immunity because they might be acting other than as officers of Royal.

Perhaps, as respondents' counsel suggests (RPF 3–4), Bernard Kleiman is the dominant figure in the business. If this is a fact, it supports an order against him, but at the same time, it affords no basis for omission of his wife and son from the full coverage of the order.

Counsel's argument (RPF 4) would relieve the stockholder-officers of personal responsibility because they testified truthfully, instead of deceitfully, concerning their active roles in the practices found. A novel concept, but wholly untenable.

The finding under all the circumstances of this case must be that an order against the individual respondents is necessary to effectively prohibit the violations found.

Other Defense Contentions

The other principal contention made by respondents (RPF 5) is that their sales scheme lacks key elements characterizing bait and switch operations. The facts found respecting that subject (*supra,* Section II (2), pp. 773–780) essentially dispose of respondents' argument, but some further brief discussion may be useful.

Respondents rely on the case of *Clarence Soles,* Docket 8602 (Order Vacating Initial Decision and Dismissing Complaint, December 3, 1964) [66 F.T.C. 1234], as parallelling the evidence in the instant case. But the facts of the *Soles* case clearly distinguish it from the instant case. There was an evidentiary gap in the *Soles* case, but there is no similar gap in this record. In the *Soles* case, there was no evidence of disparagement and insufficient evidence to support a finding that the advertised offer to sell was not genuine. In the instant case, the evidence of disparagement is not only substantial but actually uncontroverted. Moreover, the evidence that the advertisement was not a *bona fide*

offer to sell comes out of respondents' own mouths and out of their files.

The parallels that respondents profess to see between the *Soles* case and this one (RPF 5) are simply non-existent. Indeed, the rationale of the *Soles* case provides strong support for the decision reached here.

No lengthy citation of authority is required in a bait and switch case as clear as this one, but to round out the record, the precedents are collected in CCH Trade Regulation Reporter, Par. 7815; see also FTC Guides Against Bait Advertising, *supra*.

Finally, the foregoing findings provide the answer to respondents' arguments (RPF 6–8) concerning what they call the failure of proof of the allegations dealing with the "limited time," "model home," and "free bonus gift" representations. Similarly, the well-worn "puffing" defense is unavailing as a basis for dismissal of the "model home" charge. The defense advanced against the deceptive guarantee charge (RPF 7) is essentially irrelevant.

Thus, these defense contentions are likewise rejected.

IV. Conclusionary Findings

Despite respondents' ill-conceived and unsuccessful effort to discredit one Government witness (Wilson 304–16), there is essentially no factual conflict dependent on credibility. Accordingly, in the present state of the record, no further comment is required on that subject or on the weight of the evidence.

Even without the consumer testimony that illuminates the acts and practices of respondents, the record contains persuasive evidence in support of the complaint's allegations drawn from respondents' own testimony and business records. The combination presents a convincing basis for the findings of law violation and the entry of an order against its continuation or resumption.

In addition to violating virtually every prohibition in the Commission's Guides Against Bait Advertising (*supra*, p. 780), respondents' sales activities represent a catalog of deceptive practices prohibited by the Trade Practice Rules for the Residential Aluminum Siding Industry (CCH Trade Regulation Reporter, Par. 41,057, April 6, 1962)o See Rules 1–4, 6, 10, and 16.

The facts of record and the applicable law are clear. An order to cease and desist should issue.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.

2. The complaint herein states a cause of action, and this proceeding is in the public interest.

3. The use by respondents of the false, misleading, and deceptive statements, representations, and practices, as found herein, has had and may have the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of that erroneous and mistaken belief.

4. The acts and practices of the respondents, as found herein, 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.

5. The examiner having found the facts to be as alleged in the complaint, the order entered is substantially that appended to the complaint as the form of order that the Commission had reason to believe should issue if the allegations were proved.[16]

ORDER

It is ordered, That respondents Royal Construction Company, a corporation, trading and doing business as Atlas Aluminum Company or under any other name or names, and its officers, and Bernard Kleiman, Mollie T. Kleiman, and Eugene B. Kleiman, individually and as officers of such corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, distribution, or installation of residential aluminum siding or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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

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

[16] Some minor editorial changes were made.

3. Discouraging the purchase of or disparaging any merchandise or services which are advertised or offered for sale.

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

5. Representing, directly or by implication, that respondents' offer of products is limited as to time, or in any other manner: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that any represented limitation as to time or other represented restriction is actually imposed and in good faith adhered to by respondents.

6. Representing, directly or by implication, that any price for respondents' products is a special or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products have been sold in substantial quantities by respondents in the recent regular course of their business, or misrepresenting in any manner the savings available to purchasers.

7. Representing, directly or by implication, that the home of any of respondents' customers or prospective customers has been selected to be used or will be used as a model home, or otherwise, for advertising purposes.

8. Representing, directly or by implication, that any allowance, discount or commission is granted by respondents to purchasers in return for permitting the premises on which respondents' products are installed to be used for model homes or demonstration purposes.

9. Representing, directly or by implication, that any of respondents' products are guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

10. Representing, directly or by implication, that persons will receive a gift of a specified article of merchandise, or anything of value: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that the item referred to as a gift was in fact delivered to each eligible person.

FINAL ORDER

This matter having been heard by the Commission upon the respondents' appeal from the hearing examiner's initial decision

and upon briefs and oral argument in support of and in opposition to such appeale and

The Commission having determined, with the exception of certain paragraphs in the initial decision, beginning with the first paragraph on page 785 and ending with the fourth paragraph on page 785, which are unclear and unnecessary and should be stricken, that the initial decision of the hearin e examiner is appropriate to dispose of this proceeding:

It is ordered, That the initial decision be, and it hereby is, modified by striking therefrom the paragraphs beginning with the first paragraph on page 785 to and including the fourth paragraph on page 785.

It is f ordered, That the initial decision of the hearing examine odified by this order, be, and it hereby is, adopted as the decision of the Commission.

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

IN THE MATTER OF

MAR-CAL SPORTSWEAR OF CALIFORNIA, INC., TRADING AS DI VINCI ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket C-1212. Complaint, ...e 6, 1967—Decisio June 6, 1967

Consent order requiring a Los Angeles, Calif., clothing manufacturer to cease misbranding its wool products, and furnishing false guaranties in violation of the Wool Products Labeling Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939 and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Mar-Cal Sportswear of California, Inc., a corporation, trading as di Vinci, and Joseph A. Capitano, individually and as an officer of the said corporation, hereinafter referred to as respondents, have violated the provisions of said