IN THE MATTER OF

GAMBLE-SKOGMO, INC., ET AL.

Docket 5575. Complaint, July 15, 1948—Decision, Oct. 28, 1954

Order of dismissal—following setting aside and remand by the Court of Appeals of the Commission's order to cease and desist, for the reason that the recommended decision was made by a substitute examiner who did not preside at the reception of evidence—of complaint charging a manufacturer and seller with violating section 3 of the Clayton Act and section 5 of the Federal Trade Commission Act through making sales of various merchandise to its 1600 retail dealer customers in many States on the condition that the purchasers not deal in similar goods of its competitors.

Before *Mr. Randolph Preston* and *Mr. Webster Ballinger*, hearing examiners.

Mr. William C. Kern, *Mr. William H. Smith* and *Mr. Andrew C. Goodhope* for the Commission.

Mr. W. P. Berghuis, of Minneapolis, Minn., for respondents

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

Whereas, the United States Court of Appeals for the Eighth Circuit, by judgment entered on February 25, 1954, in the matter of Gamble-Skogmo, Inc., a corporation, et al., Petitioners, vs. Federal Trade Commission, No. 14657,[1] set aside the decision and order of the Commission issued in this proceeding on June 11, 1952,[2] and remanded the cause to the Commission for proceedings consistent with the Court's opinion; and

Whereas, the Court's opinion was based on the view that the recommended decision, in which credibility evaluation of witnesses on a personal basis was a salient factor, was made by a substitute hearing examiner who did not preside at the reception of the evidence, and that this constituted a violation of Section 5 (c) of the Administrative Procedure Act, 5 U. S. C. A. § 1004 (c);

It appearing that the examiner who presided at the reception of the evidence is unavailable to the Commission, and, hence, that the procedural deficiency which provided the basis for the Court's decision could be remedied only by a trial *de novo*, either in whole or in part; and

It further appearing that the allegations in the complaint as well as the evidence in the record relate to acts and practices occurring

[1] 211 F. 2d 106.
[2] 48 F. T. C. 1396.

more than six years ago and that the Commission has no information as to the respondents' current practices; and

The Commission being of the opinion that in the circumstances it is not in a position to find that a retrial of the case would be warranted:

It is ordered that the complaint herein be, and it hereby is, dismissed, without prejudice, however, to the right of the Commission to make such investigation of the current practices of the respondents as may be necessary and to take such further or other action with respect thereto as the circumstances may warrant.

IN THE MATTER OF

K. C. SNOW CROP DISTRIBUTORS, INC., ET AL.

CONSENT ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. 2 (C) OF THE CLAYTON ACT AS AMENDED

Docket 6210. Complaint, June 1, 1954—Decision, Oct. 28, 1954

Consent order requiring a Kansas City distributor of food products, chiefly frozen foods and frozen juices, to cease receiving from various sellers brokerage fees or commissions paid to its corporate brokerage agent on purchases made for its own account.

Before *Mr. John Lewis*, hearing examiner.

Mr. Edward S. Ragsdale and *Mr. Cecil G. Miles* for the Commission.

Gage, Hillix, Moore, Park & Jackson, of Kansas City, Mo., for respondents.

COMPLAINT

The Federal Trade Commission, having reason to believe that parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have been and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act (U. S. C. Title 15, Section 13), as amended by the Robinson-Patman Act approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent K. C. Snow Crop Distributors, Inc., hereinafter sometimes referred to as Snow Crop, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri with its principal office and place of business located at 5th Street and Kaw River, Kansas City, Missouri. It was incorporated on or about March 7, 1947, with G. Arlon Wilson as President and Wendell R. Stopps as Secretary-Treasurer. These two individuals have owned and controlled the majority of the stock issued and outstanding in the corporate respondent since it was incorporated. During this entire period said respondent has been and is now engaged in the business of buying, selling and distributing frozen foods, frozen juices and other food products, all of which are hereinafter sometimes referred to as food products.

PAR. 2. Respondent Stoops & Wilson Brokerage Company, hereinafter sometimes referred to as the brokerage company, is a corporation organized, existing and doing business under and by virtue of the

laws of the State of Missouri, with its principal office and place of business located at 500 East Third Street, Kansas City, Missouri. It was organized and incorporated on or about July 11, 1951, with Wendell R. Stoops as President and G. Arlon Wilson as Vice President. These two officials have owned since that date, and now own, approximately 98% of all the capital stock issued and outstanding in corporate respondent. Respondent has been since the date of its incorporation and is now engaged principally in the food brokerage business representing various principals in the sale of their food products, chiefly frozen foods and frozen fruit juices, hereinafter sometimes referred to as food products.

A substantial part of respondent brokerage company's business, however, is acting as buying agent in making purchases for the corporate respondent Snow Crop, on which purchases the brokerage company receives, on behalf of the individual respondents and corporate respondent Snow Crop, brokerage fees or commissions from various sellers. It is this part of the respondent brokerage company's business that is being challenged by this complaint.

PAR. 3. Respondent, G. Arlon Wilson, is a major stockholder in corporate respondent Snow Crop and from the date of its incorporation in 1947, until January 26, 1953, was its President. In fact, he and respondent Wendell R. Stoops now own and control, and have since respondent Snow Crop was organized owned and controlled, the majority of the issued and outstanding capital stock of this corporate respondent. Except for a short period, respondent Stoops was either Secretary or Secretary-Treasurer of respondent Snow Crop from the date of its incorporation until September 1951, at which time he withdrew from Snow Crop as an officer and became active in the management of the brokerage company, but retained his stock ownership in respondent Snow Crop. Since Snow Crop was organized, Wilson and Stoops have exercised and still exercise substantial if not complete authority and control over the business conducted by said corporate respondent Snow Crop, including the direction of its purchase, sales and distribution policies.

On January 26, 1953, Charles W. Hammon was designated President of respondent Snow Crop but at the time of his designation or appointment and as late as June 1953, he owned not more than 10 shares of the issued and outstanding capital stock of subject corporation.

PAR. 4. Respondent Wendell R. Stoops is President of corporate respondent Stoops & Wilson Brokerage Company, with respondent G. Arlon Wilson as Vice President. These two individual respondents

have held these official positions with the brokerage company since it was organized in July 1951. These two individual respondents now own and control and have owned and controlled approximately 98% of the issued and outstanding capital stock of the brokerage company since the date of its organization and incorporation. As officers and majority stockholders of the brokerage company, respondents Wendell R. Stoops and G. Arlon Wilson now exercise and have exercised complete control and authority over the business conducted by the brokerage company, including its sales and distribution policies, since the date of its incorporation.

PAR. 5. The number of shares of capital stock issued and outstanding by the two corporate respondents hereinabove mentioned and the ownership of this stock by the individual respondents named herein are set out below:

	K. C. Snow Crop Distributors, Inc.	Stoops & Wilson Brokerage Co.
Stock issued and outstanding	369 shares	455 shares
owned by		
G. Arlon Wilson	100 shares	225 shares
Wendell R. Stoops	100 shares	225 shares

The remaining 169 shares of capital stock issued and outstanding in respondent Snow Crop are owned by nine other individuals, and the remaining five shares in the respondent brokerage company are owned by the Secretary of the company.

PAR. 6. In the course and conduct of the business of respondent Snow Crop since March 1947, and the business of respondent brokerage company since September 1951, said individual respondents, through corporate respondents, and each of them, have continuously made purchases of food products from or sales of food products for various sellers or manufacturers whose places of business were located in several States of the United States, other than the State in which said respondents are located. Said respondents, both individual and corporate, directly or indirectly, caused such food products, so purchased or sold, to be transported from said State of origin to destinations in other States. There has been at all times mentioned herein a continuous course of trade and commerce, as "commerce" is defined in the Clayton Act, in said food products, across State lines between said individual respondents through corporate respondents, and each of them, and the sellers of said food products. Said food products are sold and distributed for use, consumption or resale within various States of the United States.

PAR. 7. Since September 1951 said individual respondents G. Arlon Wilson and Wendell R. Stoops, and corporate respondent Snow Crop have made substantial purchases from sellers through cor-

porate respondent Stoops & Wilson Brokerage Company, on which purchases the various sellers granted or allowed said corporate respondent Stoops & Wilson Brokerage Company a commission or brokerage fee. During the year 1952 the purchases made by corporate respondent Snow Crop through the corporate respondent Brokerage Company amounted to approximately $229,750.00 on which the sellers paid a brokerage or commission to corporate respondent Brokerage Company in the amount of approximately $6,768.50.

PAR. 8. The acts and practices of respondents, corporate and individual, and each of them, individually and collectively since September 1951, in receiving and accepting commissions, brokerage, or other compensation, allowances or discounts in lieu thereof on purchases or sales of food products in commerce, as above-alleged, are in violation of subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated October 28, 1954, the initial decision in the instant matter of hearing examiner John Lewis, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on June 1, 1954, charging them with having violated Section 2 (c) of the Clayton Act, as amended by the Robinson-Patman Act. Copies of said complaint were duly served upon respondents who thereafter appeared by counsel and entered into a stipulation for consent order. Said stipulation provides that respondents admit all the jurisdictional allegations of the complaint and waive the requirement for issuance of a decision containing findings of fact and conclusions of law, and further procedural steps before the hearing examiner and the Commission to which respondents may be entitled under the Clayton Act, as amended, or the Rules of Practice of the Commission. Respondents consent in said stipulation to the entry of an order to cease and desist in the form therein provided for, with the same force and effect as if said order had been made after a full hearing, presentation of evidence, and findings and conclusions thereon, and waive any and all right, power or privilege to challenge or contest the validity of said order. Said stipulation

further provides that the signing thereof and consent by respondents to the entry of the aforesaid order is for settlement purposes only and does not constitute an admission of any facts, other than those pertaining to jurisdiction, or that respondents have violated the law as alleged in the complaint.

The aforesaid stipulation for consent order and an accompanying affidavit of respondent G. Arlon Wilson having been submitted to the above-named hearing examiner, theretofore duly designated by the Commission, for appropriate action in accordance with Rule V of the Commission's Rules of Practice, and it appearing to the hearing examiner that said stipulation affords the basis for an appropriate disposition of this proceeding, said stipulation and accompanying affidavit are hereby accepted and ordered filed as part of the record in this proceeding and, in accordance therewith, the hearing examiner makes the following:

JURISDICTIONAL FINDINGS

PARAGRAPH 1. Respondent K. C. Snow Crop Distributors, Inc., is a corporation organized under and by virtue of the laws of the State of Missouri with its office and principal place of business located at 5th Street and Kaw Avenue, Kansas City, Kansas. Prior to June 8, 1954, the individual respondents G. Arlon Wilson and Wendell R. Stoops, were directors of, and owners of 211 shares of stock in, the corporate respondent, K. C. Snow Crop Distributors, Inc., on which date said individual respondents resigned as directors of the corporate respondent and sold their remaining shares of stock therein to certain employees of said corporation.

PAR. 2. Respondent Stoops & Wilson Brokerage Company is a corporation organized under and existing by virtue of the laws of the State of Missouri with its office and principal place of business located at 500 East Third Street, Kansas City, Missouri. The individual respondents, G. Arlon Wilson and Wendell R. Stoops, are now and were at all times mentioned in the complaint Vice-President and President, respectively, of the respondent Stoops & Wilson Brokerage Company, with their principal office located at the same address as said corporate respondent.

PAR. 3. In the course and conduct of the business of the corporate respondents, the individual respondents, through the corporate respondents, and each of them, have continuously made purchases of food products from or sales of food products for various sellers or manufacturers whose places of business were located in several States of the United States, other than the State in which said respondents are lo-

cated. Said respondents, both individual and corporate, directly or indirectly, caused such food products, so purchased or sold, to be transported from said State of origin to destinations in other States. There has been at all times mentioned in the complaint a continuous course of trade and commerce, as "commerce" is defined in the Clayton Act, in said food products, across State lines between said individual respondents through corporate respondents, and each of them, and the sellers of said food products. Said food products are sold and distributed for use, consumption or resale within various States of the United States.

ORDER

It is ordered that the respondent, Stoops & Wilson Brokerage Company, a corporation, its officers, and the individual respondents Wendell R. Stoops and G. Arlon Wilson, individually and as officers of said Stoops & Wilson Brokerage Company, and their respective representatives, agents, and employees, directly or indirectly, or through any corporate or other device in connection with the purchase of food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon any purchase of food products by or for the account of K. C. Snow Crop Distributors, Inc., where either of the respondents G. Arlon Wilson or Wendell R. Stoops, or both, are the agents, representatives or other intermediaries acting for, or in behalf of, or are subject to the direct or indirect control of the said K. C. Snow Crop Distributors, Inc., or any other buyer.

It is further ordered that the respondent, K. C. Snow Crop Distributors, Inc., a corporation, its officers and the individual respondents, G. Arlon Wilson and Wendell R. Stoops, individually and as either officers or majority stockholders of said corporation, and their respective representatives, agents and employees, directly or through any corporate or other device, in connection with the purchase of food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from receiving or accepting, directly or indirectly, from any seller anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon any purchase of food products by or for the account of K. C. Snow Crop Distributors, Inc., or where either of the respondents G. Arlon Wilson or Wendell R. Stoops, or both, are the agents, representatives, or other intermediaries acting

for, or in behalf of, or are subject to the direct or indirect control of the said K. C. Snow Crop Distributors, Inc., or any other buyer.

ORDER TO FILE REPORT OF COMPLIANCE

It is 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 to cease and desist [as required by said declaratory decision and order of October 28, 1954].

IN THE MATTER OF

BRONCO MFG. CORP. AND MURRAY AND PETER SPIEWAK

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

Docket 6217. Complaint, June 23, 1954—Decision, Oct. 28, 1954

Consent order requiring a New York City manufacturer of heavy outerwear to cease representing falsely by its use of color, style, markings, insignia, etc., that its United States Armed Forces type jackets were manufactured for the United States Armed Forces and in accordance with Armed Forces specifications.

Before *Mr. John Lewis*, hearing examiner.
Mr. Terral A. Jordan for the Commission.
Mr. Jules Goldstein, of New York City, for respondents.

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 Bronco Mfg. Corp., a corporation, and Murray Spiewak and Peter Spiewak, 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 Bronco Mfg. Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 641 Sixth Avenue, New York, New York. Respondents Murray Spiewak and Peter Spiewak are respectively President and Secretary-Treasurer of said corporate respondent with their office and principal place of business located at the same address. These individuals acting in cooperation with each other formulate, direct and control all of the policies, acts and practices of said corporation.

PAR. 2. Respondents are now, and have been for more than two years last past, engaged in the manufacture, sale and distribution of heavy outerwear, including imitation Armed Services type jackets, in commerce, among and between the various States of the United

States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained a substantial course of trade in said garments, in commerce, among and between the various States of the United States.

PAR. 3. The garments manufactured, sold and distributed by respondents in the course and conduct of their business as aforesaid closely resemble the jackets and outer garments issued and furnished to members of the United States Armed Forces in color, pattern and style. Respondents also cause to be affixed to said garments certain markings, insignia, labels and tags which purport to designate the branch of service, model, contract number, specification number, stock number and directions as to the manner of use in substantially the same form, kind and manner as the markings, insignia, labels and tags prescribed and used by the United States Armed Forces on similar and like garments. Typical of the words and terms appearing on the markings, labels and tags are:

AIR PATROL

Spec. #BR-641

Order No. Q1079

JACKET, B-15 TYPE

This jacket increases greatly the warmth of clothing worn under it in cold and temperate climates because it is WINDPROOF.

USE: Sweat will chill you; therefore, when you start to get hot, open collar. If that is not enough, remove clothing worn underneath.

N-1

Type

B-15 TYPE

SPEC. #56478

STOCK #TL-19653

U. S. A.

Typical of insignia used on certain of said garments is that of the Army Air Forces, consisting of a five point star with two wings enclosed in a circle, under which the words "Army Air Forces" appear.

PAR. 4. Through the use of said colors, patterns and styles and the markings, insignia, labels and tags, as described in Paragraph 3 hereof, respondents have represented and implied and do represent and imply that said jackets and outer garments, manufactured, sold and distributed by them in commerce were manufactured for the United States Armed Forces and in accordance with specifications of said Armed Forces.

PAR. 5. Said representations and implications are false, misleading and deceptive. In truth and in fact, respondents' said garments were neither manufactured for the United States Armed Forces nor in accordance with specifications of said Armed Forces.

PAR. 6. By selling and distributing to wholesalers and dealers said products manufactured as aforesaid and having affixed to them the markings, insignia, tags and labels hereinabove described, respondents furnish to such wholesalers and dealers the means and instrumentalities through and by which they may mislead and deceive the purchasing public as to the origin, kind, type, and style of their said jackets and outer garments.

PAR. 7. In the course and conduct of their business respondents are in direct and substantial competition with other corporations and firms and individuals engaged in the sale in commerce of jackets and outer garments.

PAR. 8. The sale and distribution in commerce of said garments in the color, style, design and with markings, as hereinabove alleged, has had and now has the tendency and capacity to and does mislead a substantial portion of the purchasing public into the belief that said garments were manufactured for the United States Armed Forces and in accordance with specifications of said Armed Forces. As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated October 28, 1954, the initial decision in the instant matter of hearing examiner John Lewis, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 23, 1954, issued and subsequently served its complaint upon the respondents named in the cap-

tion hereof, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the provisions of said Act. Thereafter, respondents appeared by counsel and entered into a stipulation for consent order, dated September 9, 1954. Said stipulation provides that the answer heretofore filed by respondents is withdrawn and expressly waives a hearing before a hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner or the Commission to which respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission. Respondents consent in said stipulation to the entry of an order to cease and desist in the form therein provided for, which shall have the same force and effect as if made after full hearing, presentation of evidence, and findings and conclusions thereon, and respondents waive any and all right, power or privilege to challenge or contest the validity of said order. Said stipulation further provides that the signing thereof is for settlement purposes only and does not constitute an admission of violation by respondents, except that respondents admit all the jurisdictional allegations of the complaint.

The said stipulation having been submitted to the above-named hearing examiner, theretofore duly designated by the Commission, for his consideration in accordance with Rule V of the Commission's Rules of Practice, and it appearing that said stipulation provides for an appropriate disposition of this proceeding, the same is hereby accepted and ordered filed as part of the record herein by the hearing examiner who, after considering the complaint and said stipulation, finds that this proceeding is in the interest of the public and makes the following:

JURISDICTIONAL FINDINGS

PARAGRAPH 1. Respondent Bronco Mfg. Corp. is a corporation organized under and existing by virtue of the laws of the State of New York, with its office and principal place of business located at 641 Sixth Avenue, New York, New York. Respondents Murray Spiewak and Peter Spiewak are, respectively, President and Secretary-Treasurer of said corporate respondent. The address of the said individual respondents is the same as that of the said corporate respondent.

PAR. 2. Respondents are now, and have been for more than one year last past, engaged in the manufacture, sale and distribution of heavy outer-wear garments, including various Armed Service type jackets, in commerce, among and between the various states of the United States and in the District of Columbia. Respondents main-

tain, and at all times mentioned herein have maintained, a substantial course of trade in said garments, in commerce among and between the various states of the United States.

ORDER

It is ordered that respondents Bronco Mfg. Corp., a corporation, and Murray Spiewak and Peter Spiewak, individually and as officers of said corporate respondent and respondents' agents, representatives, and employees, directly or through any corporate or other device, in the offering for sale, sale or distribution of wearing apparel in commerce, as "commerce" is defined in the Federal Trade Commission Act, or of any other garments, do forthwith cease anad desist from representing, directly or by implication, by marking, branding, labeling, tagging, or in any other manner contrary to fact, that such merchandise was manufactured for the Armed Forces of the United States or in accordance with specifications of said Armed Forces.

ORDER TO FILE REPORT OF COMPLIANCE

It is 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 to cease and desist [as required by said declaratory decision and order of October 28, 1954].

IN THE MATTER OF

LAFAYETTE FOODS, INC.

CONSENT ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. 2 (C) OF THE CLAYTON ACT AS AMENDED

Docket 6223. Complaint, June 29, 1954—Decision, Oct. 28, 1954

Consent order requiring a wholesaler of food products in Lafayette, Ind., to cease accepting from sellers brokerage fees on purchases of frozen foods or other commodities for its own account or while acting as an intermediary for a buyer or subject to the buyer's control.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Edward S. Ragsdale and *Mr. Cecil G. Miles* for the Commission.

Stuart, Devol, Branigin & Ricks, of Lafayette, Ind., and *Winston, Strawn, Black & Towner*, of Chicago, Ill., for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated, and is now violating, the provisions of subsection (c) of Section 2 of the Clayton Act (U. S. C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Lafayette Foods, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its prinicipal office and place of business located at Concord Road, Lafayette, Indiana. Respondent maintains branch offices at Chicago, Illinois, St. Louis, Missouri, and Indianapolis, Indiana.

PAR. 2. Respondent is a wholesaler of food products, who since October of 1945 has engaged in the purchase and sale of frozen foods, juices and canned goods, purchasing and selling substantial quantities of various types and varieties of frozen foods, juices and canned goods, including frozen vegetables, frozen fruits, frozen juices, frozen poultry, frozen fish, frozen meats, and some canned foods (all of which are hereinafter referred to as frozen foods).

Respondent in connection with its business also operates a wholly owned subsidiary, Continental Freezers, Inc., located at Lafayette, Indiana, which warehouses respondent's frozen foods.

Respondent is a substantial factor in the purchase and sale of frozen foods, operating a large number of refrigerated trucks used in selling such products to large grocery chains, many independent grocery stores, institutions, and other buyers.

PAR. 3. In the course and conduct of its business, since incorporation in October of 1945, and more particularly since January 1, 1950, respondent Lafayette Foods, Inc., has engaged, and is now engaged in commerce, as "commerce" is defined in the amended Clayton Act, purchasing frozen foods from sellers with places of business located in many states of the United States and causing such products to be transported from such places of business to respondent's places of business located in other states of the United States.

PAR. 4. Respondent Lafayette Foods, Inc., in the course and conduct of its business of buying food products for its own account in commerce as aforesaid, since October of 1945, and more particularly since January 1, 1950, has been and is now receiving and accepting from sellers, commissions, brokerages fees, or other compensation, or allowances or discounts in lieu thereof on purchases of frozen foods for its own account. As illustrative of the practices pursued by the respondent in receiving and accepting, directly or indirectly, commissions, brokerages fees or other compensation, or allowances or discounts in lieu thereof from interstate sellers are the following:

Respondent has purchased substantial quantities of frozen foods from Sodus Fruit Exchange of Sodus, Michigan, since 1945. Respondent since January 1, 1950, has received and accepted a 3 percent discount or commission on such purchases of this seller's products which is the customary rate of brokerage the seller paid its brokers for selling such frozen foods. Respondent is the only customer of this seller purchasing direct (that is, without the intervention of a broker), and is likewise the only customer receiving the 3 percent discount.

Respondent in March of 1953 purchased a substantial quantity of frozen concentrate orange juice from Fruit Industries, Brandenton, Florida. This specific sale was negotiated by Illinois Central Sale, Inc. of Chicago, Illinois, a brokerage firm representing the seller. The brokerage firm for its services in negotiating and selling the product received a 3 percent brokerage fee.

Respondent, however, thereafter had an understanding with this seller that it could make further purchases direct (that is, without the intervention of a broker) and that on such direct sales the 3 percent brokerage fee would be granted respondents on its purchases. Respondent subsequently purchased fruit juices from this seller and

has received the 3 percent brokerage fee formerly granted by the seller to its broker.

PAR. 5. The aforesaid acts and practices of respondent since January 1, 1950, in receiving and accepting directly or indirectly, commissions, brokerage, or other compensation, or allowances or discounts in lieu thereof on purchases of frozen foods in commerce, as set forth above, are in violation of subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated October 28, 1954, the initial decision in the instant matter of hearing examiner J. Earl Cox, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint in this proceeding charges the respondent, a corporation, with having violated subsection (c) of Section 2 of the Clayton Act, as amended, by receiving and accepting from sellers, commissions, brokerage fees or other compensation, or allowances or discounts in lieu thereof, on purchases of frozen foods for its own account.

After the issuance and service of the complaint and the filing of respondent's answer thereto, a stipulation was entered into by respondent and counsel supporting the complaint, in which the respondent admits all the jurisdictional allegations set forth in the complaint and agrees that the order set forth in the stipulation shall have the same force and effect as if made after a full hearing, presentation of evidence and findings and conclusions thereon, and specifically waives any and all right, power or privilege to challenge or contest the validity of the order entered in accordance with the stipulation.

The stipulation also provides, among other things, that all the parties request that the answer of the respondent be withdrawn, that they waive a hearing before a hearing examiner of the Commission, the making of findings of fact or conclusions of law, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which respondent may be entitled under the Clayton Act, as amended, or the Rules of Practice of the Commission. All parties agree that the stipulation, together with the complaint, shall constitute the entire record herein; that the order hereinafter set forth may be

entered in disposition of this proceeding without further notice; that the complaint herein may be used in construing the terms of said order which may be altered, modified or set aside in the manner provided by the statute for the orders of the Commission, and that the signing of the stipulation and consent by respondent to the entry of the aforesaid order are for settlement purposes only and do not constitute an admission by respondent that it has violated the law as alleged in the complaint.

The stipulation is made a part of the record herein; the request that the answer of the respondent be withdrawn is granted; this proceeding is found to be in the public interest; and, in conformity with the terms of the stipulation, the following order is issued:

ORDER

It is ordered that respondent Lafayette Foods, Inc., a corporation, its officers, and its respective representatives, agents, or employees, directly or indirectly, or through any corporate or other device, in connection with the purchase of frozen foods or other commodities in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase of frozen foods or other commodities made for its own account, or while acting for or in behalf of a buyer as an intermediate agent, or subject to the direct or indirect control of such buyer.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered that respondent Lafayette Foods, Inc., a corporation, 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 the order to cease and desist [as required by said declaratory decision and order of October 28, 1954].

IN THE MATTER OF

CADILLAC PUBLISHING COMPANY, INC., ET AL.

Docket 5570. Complaint, June 30, 1948—Decision, Oct. 29, 1954

Order dismissing complaint charging misleading and deceptive use of the word "free" in connection with the sale and distribution of books, for the reason that the Commission changed its policy respecting use in advertising of the word "free" subsequent to issuance of the complaint.

Mr. Jesse D. Kash for the Commission.
Mr. Horace J. Donnelly, Jr., of Washington, D. C., for respondents.

ORDER DISMISSING COMPLAINT

This matter came on to be heard by the Commission upon respondents' motion to dismiss the complaint and answer thereto of counsel supporting the complaint opposing the motion.

The complaint herein, which was issued on June 30, 1948, charges the respondents with misleading and deceptive use of the word "free" in connection with the sale and distribution of books. No hearings have been held in this matter because of the pendency of other proceedings involving similar charges. Subsequent to the issuance of the complaint, the Commission changed its position with respect to the use, in advertising, of the word "free." As announced by the Commission in the matter of Walter J. Black, Inc., Docket No. 5571 (September 1, 1953), henceforth, the use of the word "free" or other words of similar import or meaning, in advertising or in other offers to the public, to designate or describe an article of merchandise will be considered to be unfair and deceptive only (1) when all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or (2) when, with respect to the article of merchandise required to be purchased in order to obtain the "free" article, the offerer either increases the ordinary and usual price, reduces the quality, or reduces the quantity or size of such article of merchandise.

The Commission having duly considered respondents' motion to dismiss the complaint, answer thereto, and the record herein, and being of the opinion that respondents' use of the word "free" in the manner alleged in the complaint cannot be considered as unfair or

deceptive under its present policy on this subject, and that, therefore, the complaint should be dismissed:

It is ordered that respondents' motion to dismiss the complaint be, and it hereby is, granted.

It is further ordered that the complaint herein be, and it hereby is dismissed.

IN THE MATTER OF

WOOSTER RUBBER COMPANY

CONSENT ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSECS. 2 (d) AND 2 (e) OF THE CLAYTON ACT AS AMENDED

Docket 6216. Complaint, June 23, 1954—Decision, Oct. 31, 1954

Consent order requiring a manufacturer of "Rubbermaid" kitchen and household accessories and automobile mats in Wooster, Ohio, to cease exceeding its limitation of 5% of purchases in making allowances for newspaper advertising to some of its customers while adhering to it in others; and to cease furnishing demonstrator services to various customers at costs bearing no proportional relationship to their purchases.

Before *Mr. William L. Pack*, hearing examiner.

Mr. William H. Smith for the Commission.

Critchfield, Critchfield, Critchfield & Johnston, of Wooster, Ohio, for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent, named in the caption hereof, hereinafter designated and referred to as "respondent," has violated and is now violating the provisions of subsections (d) and (e) of Section 2 of the Clayton Act (U. S. C. Title 15, Section 13), as amended by the Robinson-Patman Act approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

Count I

PARAGRAPH 1. Respondent, Wooster Rubber Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at Wooster, Ohio.

PAR. 2. Respondent operates a factory at Wooster, Ohio, and since 1934, has been engaged in the manufacture of rubber kitchen and other household accessories. Respondent also manufactures rubber mats for use in automobiles. Its 1952 sales amounted to $10,171,394. Respondent markets its products under its trade name "Rubbermaid."

PAR. 3. Respondent has two principal methods of distribution for its household and kitchen products. It maintains salesmen in various districts who sell direct to department stores and large houseware

stores. Respondent also sells to distributors and jobbers who resell to retail stores who generally purchase in small quantities at a time. Respondent sells its rubber mats for automobiles to automobile companies and automobile accessory stores.

PAR. 4. In the course and conduct of its business, respondent transports its said products, or causes the same to be transported from the State and place of manufacture to its customers and purchasers thereof located in States and places other than the State of manufacture; and there is now, and has been for many years last past, a constant current of trade and commerce in said products between and among the various States of the United States and the District of Columbia.

PAR. 5. Respondent has promulgated an "Advertising Agreement," which it makes available to all of its customers who desire to advertise respondent's products in newspapers. Under this contract, and in consideration of the purchase of respondent's merchandise, respondent agrees to pay and allow 50% of the cost of newspaper space devoted to the advertisement of its products under respondent's trade name "Rubbermaid." The agreement further provides that the actual cost of the space used is to be equally divided between the advertiser and respondent, provided respondent's share does not exceed 5% of the advertiser's net purchases during the calendar year.

PAR. 6. Respondent, in applying the terms of its "Advertising Agreement," as referred to in Paragraph 5 herein, at times does not limit its payment and allowances for newspaper advertising to 5% of purchases, as provided by said agreement; but, in many cases, exceeds this 5% limitation in the case of some of its customers, while adhering to said limitation in the case of others of its competing customers. As illustration, respondent allowed one of its larger customers in excess of 10% of net purchases. Said agreement and the payments and allowances made by respondent thereunder for newspaper advertising as between some of respondent's competing customers are, therefore, not made on proportionally equal terms.

PAR. 7. The aforesaid acts and practices of respondent, as herein alleged, are in violation of Section 2 (d) of the Clayton Act, as amended by the Robinson-Patman Act.

Count II

PAR. 8. Paragraphs 1 to 4, inclusive, of Count I hereof, are hereby repeated and made a part of this Count as fully and with the same force and effect as though here again set forth in full.

PAR. 9. Respondent has promulgated a program for the furnishing of demonstrators in the stores of its retail customers. The program is contained in a written contract entered into on an annual basis and is denoted by respondent "Rubbermaid Retail Representative Program."

The essential contract provisions appear to be as follows:

The stated objective of the program is to reach a minimum annual "Rubbermaid" sales volume of $20,000 retail—$12,000 at store cost. The contract states that it is established upon the mutual agreement of respondent and the customer. The contract further provides, in effect, that a "Rubbermaid Retail Representative" or demonstrator of "Rubbermaid" products, shall be selected by both respondent and the customer. It is agreed that the salary of the demonstrator will be established at an amount conforming to the customer's usual wage policies. Depending on store preference, the demonstrator's salary will be paid either by respondent direct, or indirectly, through the customer paying the demonstrator's salary, which will then debit respondent periodically with the cost thereof. In addition, respondent, by its contract, agrees to pay the demonstrator a commission of 1% of the store's net "Rubbermaid" purchases. It is agreed that the demonstrator will be free to concentrate her time on the "Rubbermaid" line and insofar as is practicable, will not be required to perform duties not pertaining to the store's "Rubbermaid" counter display, "which, by virtue of its size and location will be of positive value in reaching the sales goal of the program," and to maintain the basic inventory at all times, as specified in the agreement.

PAR. 10. To those of its store customers which desire to avail themselves of respondent's "Rubbermaid Retail Representative Program," as described in Paragraph 9 herein, respondent allows a discount of 40% from list on all of its products purchased by the store, including the basic stock order, while to other of its store customers, which do not avail themselves of respondent's demonstrator offer, respondent allows a discount on purchases of 40% plus 5% off list.

PAR. 11. Respondent's demonstrator contract, as hereinbefore described, contains no rule or formula for the computation of the amounts respondent is to pay or contribute to any of its customers for the employment and use of demonstrators, and no rule or formula whereby the value of the services furnished by respondent or contributed to by it may be measured or determined, whereby the terms of such payments made or such services contributed to by respondent to its customers who avail themselves of respondent's demonstrator service will be proportionally equal. Nor does respondent in its ap-

plication of the terms and provisions of said agreement do so upon terms that are proportionally equal as between its competing customers and purchasers.

Many of respondent's competing customers are furnished demonstrator services by respondent at a cost to respondent which has no proportional relationship as between such customers to the purchases of respondent's products by such customers from respondent; nor are such services proportionalized by respondent upon any other legal basis as between many of its competing purchasers. On the contrary, respondent's said demonstrator agreement, as interpreted and applied by respondent among and between its various competing customers, partakes of the nature of a personal negotiation by respondent with each purchaser availing itself of said service, and is tailored to suit each individual's desire, rather than upon terms which are proportionally equal to all competing purchasers.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged, are in violation of Section 2 (e) of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated October 31, 1954, the initial decision in the instant matter of hearing examiner William L. Pack, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges respondent with violation of subsections (d) and (e) of Section 2 of the Clayton Act, as amended. A stipulation has been entered into by respondent and counsel supporting the complaint which provides, among other things, that respondent admits all of the jurisdictional allegations in the complaint; that the filing of an answer to the complaint is waived and that the complaint and stipulation shall constitute the entire record in the proceeding; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission to which respondent may be entitled under the Clayton Act, as amended, or the Rules of Practice of the Commission; that the order hereinafter set forth may be entered in disposition of

the proceeding, such order to have the same force and effect as if made after a full hearing, presentation of evidence and findings and conclusions thereon, respondent specifically waiving any and all right, power and privilege to challenge or contest the validity of such order; that the complaint may be used in construing the terms of the order; that the order may be altered, modified or set aside in the manner provided by statute for other orders of the Commission; and that the signing of the stipulation is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

The stipulation is hereby accepted and made a part of the record and the following order issued:

ORDER

It is ordered that respondent, Wooster Rubber Company, a corporation, directly or indirectly, through its officers, directors, agents, representatives or employees, or through any corporate or other device, or otherwise in, or in connection with, the offering for sale, sale or distribution of household or kitchen or automobile accessories or equipment made of rubber, or of which rubber is a part, or any other household or kitchen or automobile accessories or equipment, in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

(a) Paying, or contracting for the payment of, anything of value to or for the benefit of any customer of respondent as compensation or in consideration for any advertising services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products manufactured or sold by respondent, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products.

(b) Discriminating, directly or indirectly, among competing purchasers of its products, by contracting to furnish, or furnishing, or contributing to the furnishing of any demonstrator services or facilities connected with the processing, handling, sale or offering for sale of any products manufactured or sold by respondent to any purchaser upon terms not accorded to all competing purchasers on proportionally equal terms.

(c) The commission of any other like or related acts or practices to those herein set forth in Paragraphs (a) and (b) of this order.

ORDER TO FILE REPORT OF COMPLIANCE

It is 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 the order to cease and desist [as required by said declaratory decision and order of October 31, 1954].

IN THE MATTER OF

O. A. SUTTON CORPORATION

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

Docket 6213. Complaint, June 18, 1954—Decision, Nov. 4, 1954

Consent order requiring a manufacturer in Wichita, Kans., to cease misrepresenting in advertising the capacity or performance of its "Vornado Turnabout Window Fan."

Before *Mr. Abner E. Lipscomb*, hearing examiner.
Mr. John J. McNally for the Commission.
Fleeson, Gooing, Coulson & Kitch, of Wichita, Kans., for respondent.

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 O. A. Sutton Corporation, a corporation, hereinafter referred to as respondent, has 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 O. A. Sutton Corporation, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its principal office and place of business located at 1812 West Second Street, Wichita, Kansas.

PAR. 2. Respondent is now and for several years last past has been, engaged in the business of manufacturing and distributing electric fans, including various models of ventilating fans which were designated by respondent as "Vornado Turnabout Window Fans." In the course and conduct of said business, respondent causes said fans, when sold, to be transported from its place of business located within the State of Kansas to the purchasers thereof located in various other States in the United States and the District of Columbia and at all times mentioned herein has maintained a course of trade in commerce among and between the various States of the United States. Its volume of trade in said commerce is substantial.

PAR. 3. The "Vornado Turnabout Window Fan," while it may also be used inside a home or other area to circulate air within such area,

was primarily designed, manufactured, represented and sold by respondent as an instrument for ventilation, by causing the air within such area to be replaced by air from outdoors. When so used for ventilation, the fan housing is placed in a window or other aperture; its adjustable sides permitting it to fit various sizes thereof. The power unit and blades are contained in a bell-shaped duct assembly which has a protective grill covering the blade. The entire blade assembly is so mounted on its horizontal axis as to permit its being turned so that the grill-protected blade faces outdoors or indoors, without disturbing the fan housing mounted in the window. According to the position of the blade assembly, said fan may be used either as an "exhaust" or as an "intake" fan, when used in conjunction with other windows or similar apertures in the area to be ventilated.

In its "exhaust" position, said fan draws indoor air through its blades and expells it outdoors. As a result thereof a like amount of outdoor air is drawn into the area through other windows or apertures, thereby ventilating such area.

In its "intake" position, the operation is reversed. Said fan draws outdoor air through its blade into the area. As a result thereof a like amount of indoor air is expelled outdoors through other windows or apertures, thereby ventilating such area.

PAR. 4. In the course and conduct of its business, respondent, through the use of sales literature and other means of advertising, has made certain statements in connection with its "Vornado Turnabout Window Fan." Among and typical, but not all inclusive of said statements, are the following:

In a sales brochure entitled *"A NEW MEMBER OF THE WORLD FAMILY"*

* * * DAY AND NIGHT VORNADO TURNABOUT—The reversible, adjustable window air circulator—give you AIR COOLING Year 'ROUND

(Depiction illustrating fan adjusted for use as a window "intake" fan.)

Pull wave after wave of cool, refreshing night and morning air into every room.

(Depiction illustrating fan adjusted for use as a window exhaust fan.)

Turn about—and force all that hot, stale, stuffy daytime air out of the entire house!

(Series of 4 depictions showing fan in use as a window fan in a sleeping room, a living room, a kitchen and an office.)

TURNABOUT COOLS ALL YOUR ROOMS with its very high air-moving capacity—outperforms costlier, bigger ventilating units.

(Depiction showing a home in daytime with arrows indicating movement of air out of one window and movement of air in through two windows).

DAYTIME—TURNABOUT pulls hot, stagnant air from every connecting room—expels it out doors—stirs, enlivens and freshens all the air in your home.

(Depiction of home at nighttime with arrows indicating movement of air in through one window and movement of air out through two windows).

NIGHTTIME—TURNABOUT brings cool night air into sleeping and living rooms—pushes it along into connecting rooms—cools the entire house quickly, quietly.

COMPARE * * * Turnabout moves 3,000 cubic feet of air every minute. That's real COOLING POWER!

In a brochure entitled "THE GENUINE VORNADO—WORLD'S FINEST AIR CIRCULATORS"

* * * PULLS FRESH AIR IN from outdoors or PUSHES STALE AIR OUT of your rooms for better cooling * * * DAYTIME—your Turnabout pushes hot, stuffy air outside to keep you cooler. AT NIGHT—your Turnabout pulls lots of cool, fresh night air into your rooms * * * SPECIFICATIONS MODEL 30W1 * * * C. F. M. 3,000 *.

* * * Capacity in cubic feet of air per minute when used as an intake fan. NOTE: Exhaust C. F. M. on Models 30W1, is 1,000 * * *

PAR. 5. Through the use of the aforesaid depictions and statements, and others of the same import not set forth herein, respondent represented that its "Vornado Turnabout Window Fan," Model 30W1 has the capacity to ventilate a given area, such as a home:

(a) When used as an "exhaust" fan, by replacing 1,000 cubic feet of indoor air per minute with a like amount of outdoor air,

(b) When used as an "intake" fan, by replacing 3,000 cubic feet of indoor air per minute with a like amount of outdoor air.

PAR. 6. The aforesaid statements and representations of respondent are false and deceptive. In truth and in fact:

(a) When used as an "exhaust" fan, said "Vornado Turnabout Window Fan" does not have the capacity to ventilate to the extent of replacing 1,000 cubic feet of indoor air per minute with a like amount of outdoor air.

(b) When used as an "intake fan," the Vornado Turnabout Window Fan" does not have the capacity to ventilate to the extent of replacing 3,000 cubic feet of indoor air per minute with a like amount of outdoor air.

On the contrary, the difference, if any, between the "exhaust" and the "intake" capacity of said fan to ventilate a given area, is slight and the actual ventilating capacity or measure of the ability of said fan to draw air through its blades into or away from a given area such as a home, is considerably less than the lowest rated capacity given by

respondent for said fan, this being the representation of 1,000 C. F. M. of exhaust capacity.

PAR. 7. In the course and conduct of its business, respondent is in substantial competition with other individuals, firms and corporations engaged in the manufacturing, distributing and selling of electric fans in commerce.

PAR. 8. The use by respondent of the false and misleading statements and representations with respect to the capacity of its fans had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were true.

As a result thereof a substantial portion of the purchasing public were induced to purchase substantial quantities of respondent's "Vornado Turnabout Window Fan" by reason of such erroneous and mistaken belief, and substantial trade in commerce has been unfairly diverted to respondent from its competitors and substantial injury has been done to competition in commerce.

PAR. 9. The aforesaid acts and practices of respondent as herein alleged are all to the prejudice and injury of the public and of respondent's competitors, and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated November 4, 1954, the initial decision in the instant matter of hearing examiner Abner E. Lipscomb, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint in this proceeding charges the respondent with unfair and deceptive acts and practices in the offering for sale, sale and distribution of various models of ventilating fans, which have been designated by respondent as "Vornado Turnabout Window Fans," in violation of the Federal Trade Commission Act. In lieu of submitting an answer to said complaint, respondent on September 14, 1954, entered into a Stipulation For Consent Order with counsel supporting the complaint, which was duly approved by the Director and Assistant Director of the Bureau of Litigation.

Respondent is identified in the above-mentioned stipulation as a corporation, with its office and principal place of business located at 1812 West Second Street, Wichita, Kansas.

Respondent admits all the jurisdictional allegations set forth in the complaint and stipulates that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. Respondent expressly waives the filing of an answer to the complaint and further proceedings before the Hearing Examiner and the Commission. Respondent agrees that the order contained in said stipulation shall have the same force and effect as if made after a full hearing, presentation of evidence and findings and conclusions thereon, and expressly waives all right, power and privilege to contest the validity of said order.

Said stipulation provides that the complaint may be used in construing the terms of the order contained in the stipulation, and that said order may be altered, modified, or set aside in the manner prescribed by statute for orders of the Commission.

Respondent also agrees that said Stipulation For Consent Order, together with the complaint herein, shall constitute the entire record in this proceeding. Inasmuch as this initial decision, and the decision of the Commission, if it affirms such initial decision, will hereafter also become part of the record, the aforesaid provision of the stipulation is interpreted to mean that it is agreed that the complaint and Stipulation For Consent Order shall constitute the entire record upon which the initial decision herein shall be based. It is further agreed that the order contained in said stipulation may be entered without further notice upon the record, in disposition of this proceeding.

In view of the provisions of the stipulation as outlined above, the fact that the order embodied in the stipulation differs from the order accompanying the complaint only in that the phrase "the ventilating capacity or performance of said fans" has been modified by the insertion of the word "ventilating" immediately preceding the word "performance," and that such change in phraseology serves merely to clarify the limitations of the order, it appears that the Stipulation For Consent Order should be accepted; and that such action, together with the issuance of the order contained in the stipulation, will resolve all the issues arising by reason of the complaint in this proceeding, and will safeguard the public interest to the same extent as could be accomplished by full hearing and all other adjudicative procedure waived in said stipulation. Accordingly, the Hearing Examiner, in consonance with the terms of said agreement, accepts the

Stipulation For Consent Order submitted, and issues the following order:

It is ordered, That respondent O. A. Sutton Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of electric fans in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, the ventilating capacity or ventilating performance of its said fans, through the use of a numerically expressed rating or otherwise, which rating or other statement as to capacity or performance is in excess of the amount of cubic feet of air per minute that such fan is capable of drawing through its blades under ordinary operating conditions, into or away from any place or area to be ventilated.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That respondent O. A. Sutton Corporation, a corporation, 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 the order to cease and desist [as required by said declaratory decision and order of November 4, 1954].

IN THE MATTER OF

LUSTBERG, NAST & COMPANY, INC.

MODIFIED CEASE AND DESIST ORDER

Docket 2536. Orders and opinion, November 8, 1954

Order modifying cease and desist order dated July 10, 1942, 35 F. T. C. 132, 139, which required respondent to cease using the term "Buck Skein" to describe any product not made from the skin of the deer or elk, by adding the provision that nothing therein "shall be construed to prohibit the respondent from using the words 'Buck Skein Brand' * * * for garments which neither simulate nor resemble leather".

Mr. Joseph Callaway for the Commission.

Feinberg, Jerry & Lewis, of Plattsburgh, N. Y., and *Mr. Martin Whyman* and *Hays, St. John, Abramson, & Schulman*, of New York City, for respondent.

ORDER RULING ON PETITION TO MODIFY AND MODIFYING PARAGRAPH (1) OF THE ORDER OF JULY 10, 1942

This matter coming on to be heard upon the petition filed on August 18, 1954, by the respondent requesting that Paragraph (1) of the order to cease and desist as entered on July 10, 1942, be modified, and upon the answer of counsel on the Commission's staff interposing no objection to modification of such order; and

The Commission having duly considered the matter and having determined, for the reasons set forth in the accompanying opinion, that the respondent's request for modification of the order to cease and desist should be granted and that the proceeding accordingly should be reopened for the purpose of modifying Paragraph (1) of said order:

It is ordered, That the petition of the respondent be, and it hereby is, granted.

It is further ordered, That this proceeding be, and it hereby is, reopened solely for the purpose of modifying Paragraph (1) of the order to cease and desist.

It is further ordered, That the order to cease and desist heretofore entered in this matter be, and it hereby is, modified by changing Paragraph (1) thereof to read as follows:

1. Using the term "Buck Skein," either alone or in conjunction with the outline of a deer's head, or any other colorable simulation of the word "buckskin," in advertising, or otherwise, to describe,

designate, or refer to any product which is not made from the skin of a deer or elk; *provided, however*, that nothing herein shall be construed to prohibit the respondent from using the words "Buck Skein Brand" on labels and in advertising for garments which neither simulate nor resemble leather.

It is further ordered, That the General Counsel of the Commission be, and he hereby is, authorized and directed to initiate proceedings appropriate in the light of the Commission's foregoing action, before the United States Court of Appeals for the Second Circuit.

It is further ordered, That a modified order to cease and desist incorporating the modification provided for be issued and served upon the respondent.

OPINION OF THE COMMISSION

Per CURIAM:

This matter is presented for our consideration upon the petition filed by the respondent on August 18, 1954, requesting that Paragraph (1) of the order to cease and desist, heretofore issued by the Commission on July 10, 1942, be modified. Staff counsel have filed answer interposing no objection to modification to accomplish the objectives and purposes expressed in the petition.

The first paragraph of that order forbids use of the term "Buck Skein" either alone or in conjunction with the outline of the deer's head or any other colorable simulation of the word "buckskin" in advertising, or otherwise, to designate or describe any product not made from the skin of the deer or elk. The respondent requests that this particular provision be modified so that it will be permitted to use the expression "Buck Skein Brand" in connection with the advertising and labeling of garments which do not simulate or resemble leather.

It appears that the years since the Commission's order to cease and desist was issued have seen various changes occur in the respondent's business. When the instant proceeding was instituted, the respondent was engaged primarily in producing rough garments used by outdoor workers and others, and included in its line were jackets made from a type of cotton which, when processed, resembled leather. The company concentrates now, however, on manufacturing from textile fabrics certain highly-styled leisure and semi-dress wear which it states are in a garment category often referred to in the trade as "country club" clothing. Formerly a substantial part of respondent's volume was distributed through mail order channels. This has been discontinued and the concern's products currently are sold through

retail stores in the course of over-the-counter transactions presenting opportunity for pre-purchase visual inspection of the merchandise. Furthermore, the sale of the cotton jackets referred to above has been discontinued for more than a decade, and it additionally appears that no garments made of materials simulating leather have been distributed during that period.

To be noted also in these connections, are certain advertising practices adopted by the respondent pursuant to its report to the Commission respecting the manner in which it proposed to offer its products in the light of the order to cease and desist. Thereunder, the respondent signified its intention to use on packing labels a trademark containing the words "Buck Skein Joe" with an outline of a cowboy's head appearing between the words "Buck" and "Skein." It also expressed intention similarly to use that mark on garment labels and in advertising and, in those connections, proposed additionally to refer to the person thus depicted as maker of the garments. Designating a homespun, philosophical character, the name "Buck Skein Joe" was created to epitomize the company and had been featured in respondent's advertising for many years prior to that time. Information contained in the petition suggests that, as a designation for the more highly-styled merchandise presently offered, this name and mark lack consumer appeal and, in instances, have even served to deter retail stores from handling the respondent's garments. Since 1921, the respondent has expended very large sums in popularizing this mark and others used prior to its adoption. It is apparent, therefore, that hardship may be entailed if, in order to abandon use of the word "Joe," the respondent were obliged, likewise, to discontinue its heretofore permitted use of other words contained in that name.

Under its original decision, the Commission, in effect, found that the words "Buck Skein" constituted a distorted spelling of the word "buckskin" and that the use of the words "Buck Skein," with or without the deer's head in juxtaposition thereto, had the capacity and tendency to cause purchasers to believe that the respondent's products were made of leather or buckskin or possessed some of the latter's prized qualities or characteristics. Under the manifest view that only excision of the name would adequately protect the public and competitors, the proscription directed to use of the term "Buck Skein," as then adopted by the Commission, was an absolute prohibition. As stated by the Commission, however, in its recent decision in the matter of *Country Tweeds, Inc., et al.*, Docket No. 5957, every effort should be made in proceedings wherein deception is found to inhere in a trade name to formulate a remedy which will afford the public and

competitors reasonably accurate protection and likewise avoid unnecessary hardship or loss to the owner of the name. If less drastic measures will suffice, these valuable business assets should be saved.

In the light of our foregoing action and with due regard to the changed conditions of fact which appear here, we have concluded that the provisions of the order to cease and desist are unduly restrictive.

We are of the view that adequate protection of the public and the respondent's competitors will be afforded if our order is modified to permit use by the respondent of the expression "Buck Skein Brand" to designate and refer to garments nowise resembling or simulating leather. We accordingly are granting the petition.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding was heard by the Federal Trade Commission upon the record and the Commission, having made its findings as to the facts and its conclusion that the respondent had violated the provisions of the Federal Trade Commission Act, issued its order to cease and desist on July 10, 1942. Thereafter, the respondent filed its petition for review of such order in the United States Circuit Court of Appeals for the Second Circuit, and on May 29, 1944, pursuant to motion jointly filed by counsel, that Court entered its decree dismissing said petition for review and affirming and enforcing the order to cease and desist.

On August 18, 1954, the respondent filed with the Commission a petition requesting modification of the said order to cease and desist, and the Commission having duly considered and granted such petition, and having issued its order reopening the proceeding and modifying the order to cease and desist in the respects set out therein, now issues this, its modified order to cease and desist:

It is Ordered, That respondent Lustberg, Nast & Company, Inc., a corporation, its officers, directors, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of coats, shirts, mackinaws, jackets, or other garments, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "Buck Skein," either alone or in conjunction with the outline of a deer's head, or any other colorable simulation of the word "buckskin," in advertising, or otherwise, to describe, designate, or refer to any product which is not made from the skin of a deer or elk; *provided, however*, that nothing herein shall be construed to prohibit the respondent from using the words "Buck Skein Brand"

on labels and in advertising for garments which neither simulate nor resemble leather.

2. Representing directly or by implication in any advertisement, or on labels, or otherwise, that any product made of wool or cotton or any other woven fabric is made of buckskin or other type of leather.

It is further ordered, That the respondent 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

ALL AMERICAN SPORTSWEAR COMPANY, INC., ET AL.

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

Docket 6218. Complaint, June 23, 1954—Decision, Nov. 9, 1954

Consent order requiring a manufacturer in New York City to cease representing that its Armed Services-type jackets and parkas were manufactured for the U. S. Armed Forces and in accordance with specifications thereof.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Harold A. Kennedy and *Mr. Terral A. Jordan* for the Commission.

Lane & Winard, of New York City, for respondents.

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 All American Sportswear Co., Inc., a corporation, and Samuel Werber and Nathan Klimerman, 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 All American Sportswear Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 745 Broadway, New York, New York. Respondents Samuel Werber and Nathan Klimerman are respectively president and treasurer of corporate respondent. The individual respondents, acting in cooperation with each other, formulate, direct and control all of the policies, acts and practices of said corporation. The address of said individual respondents is the same as that of said corporate respondent.

PAR. 2. Respondents are now, and have been for more than one year last past, engaged in the manufacture, sale and distribution of heavy outerwear, including imitation Armed Services type jackets and parkas, in commerce, among and between the various States of the United States and in the District of Columbia. Respondents

maintain and at all times mentioned herein have maintained, a substantial course of trade in said garments, in commerce, among and between the various States of the United States.

PAR. 3. The garments manufactured, sold and distributed by respondents in the course and conduct of their business as aforesaid closely resemble the jackets and outer garments issued and furnished to members of the United States Armed Forces in color, pattern and style. Respondents also caused to be affixed to said garments certain markings, insignia, labels and tags which purport to designate the branch of service, model, contract number, specification number, stock number and directions as to the manner of use in substantially the same form, kind and manner as the markings, insignia, labels and tags prescribed and used by the United States Armed Forces on similar and like garments. Typical of the words and terms appearing on the markings, labels and tags, are as follows:

JACKET, INTERMEDIATE, FLYING
TYPE B-15
SPECIFICATION NO. 1872FS
STOCK NO. 754-28937
ORDER NO. 55-7283
ARMY AIR FORCES TYPE.
B-29
SPEC. NO, 2078——
STOCK NO. 30202-160
TYPE U. S. ARMY.
TANKER JACKET
SPECIFICATION NO. 1872FS
STOCK NO. 754-28937
ORDER NO. 55-7283
ARMY AIR FORCES TYPE.
ARMY AIR FORCE STYLE
B-9 PARKA
CONTRACT MFR. 6475
SIZE.

Typical of insigna used on certain of said garments is that of the Air Forces, consisting of a five point star with two wings enclosed in a circle, with the words "U. S. Air Force" appearing immediately below.

PAR. 4. Through the use of said colors, patterns and styles and the markings, insignia, labels and tags, as described in Paragraph Three hereof, respondents have represented and implied and do represent and imply that said jackets and outer garments, manufactured, sold and distributed by them in commerce were manufactured for the United States Armed Forces and in accordance with specifications of said Armed Forces.

PAR. 5. Said representations and implications are false, misleading and deceptive. In truth and in fact, respondents' said garments were neither manufactured for the United States Armed Forces nor in accordance with specifications of said Armed Forces.

PAR. 6. By selling and distributing to wholesalers and dealers said products manufactured as aforesaid and having affixed to them the markings, insigna, tags and labels hereinabove described, respondents furnish to such wholesalers and dealers the means and instrumentalities through and by which they may mislead and deceive the purchasing public as to the origin, kind, type, and style of their said jackets and outer garments.

PAR. 7. In the course and conduct of their business respondents are in direct and substantial competition with other corporations and firms and individuals engaged in the sale in commerce of jackets and outer garments.

PAR. 8. The sale and distribution in commerce of said garments in the color, style, design and with markings, as hereinabove alleged, has had and now has the tendency and capacity to and does mislead a substantial portion of the purchasing public into the belief that said garments were manufactured for the United States Armed Forces and in accordance with specifications of said Armed Forces. As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated November 9, 1954, the initial decision in the instant matter of hearing examiner J. Earl Cox, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint in this proceeding charges that respondent All American Sportswear Company, Inc., a corporation, and respondents

Samuel Werber and Nathan Klimerman, President and Treasurer, respectively, of the corporate respondent, individually and as officers of said corporation (all of 745 Broadway, New York, New York), have engaged in unfair and deceptive acts and practices and in unfair methods of competition in commerce in violation of the provisions of the Federal Trade Commission Act. Specifically, respondents are charged with having represented, directly or by implication and contrary to fact, that certain heavy outerwear, including jackets and parkas, which they manufactured, sold and distributed in commerce, were manufactured for the United States Armed Forces and in accordance with the specifications of said armed forces.

After the issuance and service of the complaint, a stipulation was entered into by respondents and counsel supporting the complaint, in which respondents admit all the jurisdictional allegations set forth in the complaint and agree that the order set forth in the stipulation shall have the same force and effect as if made after a full hearing, presentation of evidence and findings and conclusions thereon, and specifically waive any and all right, power or privilege to challenge or contest the validity of the order entered in accordance with the stipulation.

The stipulation also provides, among other things, that all the parties waive the filing of answer, a hearing before a hearing examiner of the Commission, the making of findings of fact or conclusions of law, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which respondents may be entitled under the Federal Trade Commission Act as amended, or the Rules of Practice of the Commission. All parties agree that the stipulation, together with the complaint, shall constitute the entire record herein; that the order hereinafter set forth may be entered in disposition of this proceeding without further notice; that the complaint herein may be used in construing the terms of said order which may be altered, modified or set aside in the manner provided by the statute for the orders of the Commission, and that the signing of the stipulation is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The stipulation is made a part of the record herein; this proceeding is found to be in the public interest; and, in conformity with the terms of the stipulation, the following order is issued:

ORDER

It is ordered, That respondents All American Sportswear Company, Inc., a corporation, and Samuel Werber and Nathan Klimerman, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of jackets, parkas, or other wearing apparel, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, by marking, branding, labeling, tagging, or in any other manner, contrary to fact, that such merchandise was manufactured for the Armed Forces of the United States or in accordance with specifications of said Armed Forces.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That respondents All American Sportswear Company, Inc., a corporation, and Samuel Werber and Nathan Klimerman, individually and as officers of said corporation, 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 to cease and desist [as required by said declaratory decision and order of November 9, 1954].

IN THE MATTER OF

UNIVERSAL EDUCATIONAL GUILD, INC., ET AL.

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

Docket 5938. Complaint, Nov. 21, 1951—Decision, Nov. 20, 1954

Order requiring the publisher and six regional distributing corporations of the "World Scope Encyclopedia" to cease the use by their door-to-door salesmen, as a pretext to secure admission to homes, of representations that they were taking a radio or television poll or survey, and to cease representing falsely through said salesmen that their encyclopedia was offered at a reduced price and to selected homes only.

Before *Mr. J. Earl Cox* and *Mr. Webster Ballinger*, hearing examiners.

Mr. G. M. Martin, *Mr. J. Doukas* and *Mr. Charles S. Cox* for the Commission.

Harris, Corwin & Post, of New York City, for respondents.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated November 20, 1954, the initial decision in the instant matter of hearing examiner Webster Ballinger, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY WEBSTER BALLINGER, HEARING EXAMINER

The Pleadings and Preliminary Procedural Steps

November 21, 1951, the Federal Trade Commission issued its complaint in this proceeding naming the corporations and individuals listed in the caption hereof as respondents and charging them, and each of them, with certain acts and practices, hereinafter set forth, in the sale of the World Scope Encyclopedia, alleged to constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. Service being made, respondents answered denying the charges and also pleading *res judicata* predicated upon a prior order of the Commission dated June 12, 1951, entered in Docket No. 5718, dismissing the complaint, wherein the

parties named in this proceeding were therein named as respondents and charged with substantially the same offenses charged in this proceeding, the dismissal being "without prejudice to the right of the Commission to institute further proceedings, should further facts warrant."

Issues joined, the matter was referred to J. Earl Cox, a duly commissioned Hearing Examiner, for hearing. The plea of *res judicata* was not expressly ruled on, but the Examiner, upon consideration of the prior decision of the Commission in Docket No. 5718, by order dated May 14, 1952, limited the scope of the inquiry to methods, acts and practices of the respondents subsequent to the year 1948. Hearings were thereafter held in New York, New York, and Boston, Massachusetts, at which all parties to the proceeding were represented by counsel and 644 pages of testimony taken by counsel for the complaint and documentary evidence introduced by counsel for the complaint and by counsel for the respondents. Thereupon by order of the Commission J. Earl Cox was permitted to withdraw as Hearing Examiner and Webster Ballinger was later substituted. A trial *de novo* was demanded by respondents and denied by the Commission. Thereafter, hearings were held before the substitute Examiner at which all parties to the proceeding were represented by counsel and further evidence offered and received in support of the allegations of the complaint. Counsel for the complaint then rested the Commission's case in chief. Thereupon counsel for respondents moved to dismiss the complaint against all respondents on the ground that the evidence failed to make out a prima facie case against any of the respondents, which motion was overruled.

To conserve time and expense, a stipulation as to the facts relating to all issuable matters as disclosed by the record was thereafter prepared and executed by counsel for the complaint and counsel for the respondents, approved by the Acting Chief, Division of Investigation and Litigation, Bureau of Antideceptive Practices, and by the Hearing Examiner. The stipulation (Par. 15) also includes a form of order disposing of all factual matters, with one exception, wherein the facts are stipulated and decision reserved to the Hearing Examiner and the Commission. The stipulation further provides that if it is not accepted by the Commission and the form of order therein set forth, with the addition only of any order that may be entered on the question reserved to the Hearing Examiner and the Commission for decision, "This stipulation shall be null and void and the respondents shall be in the same status quo position in which they were prior to entering into this stipulation."

FINDINGS AS TO THE FACTS

I. Corporate Respondents and Their Officers

(*a*) Respondent Universal Educational Guild, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business at 17 Smith Street, Brooklyn, New York. The principal officers of the corporate respondent at the time of the issuance of the complaint herein and for more than two years prior thereto were the following named respondents: Abe Halperin, Myron C. Gelrod and S. Leslie Schwartz. The aforesaid individual respondents during said time had their office and principal place of business, as officers of the corporation, at the same address as the corporate respondent.

(*b*) Respondent Book Distributors, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business at 17 Smith Street, Brooklyn, New York. Said corporate respondent at the time of the issuance of the complaint herein and for more than two years prior thereto was an affiliate of respondent Universal Educational Guild, Inc., and shared the same office. The principal officers of said corporate respondent Book Distributors, Inc., at the time of the issuance of the complaint herein and for more than two years prior thereto were the following named respondents: Abe Halperin, Mac Gache, Isidore J. Halperin and Myron C. Gelrod. The aforesaid individual respondents during said period had their office and principal place of business, as officers of the corporation, at the same address as the corporate respondent.

(*c*) Respondent Public Distributors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 17 Smith Street, Brooklyn, New York. Said corporate respondent at the time of the issuance of the complaint herein and for more than two years prior thereto was an affiliate of respondent Universal Educational Guild, Inc., and respondent Book Distributors, Inc. The principal officers of said corporate respondent at the time of the issuance of the complaint herein and for more than two years prior thereto were the following named respondents: Abe Helperin, Myron C. Gelrod and S. Leslie Schwartz, who during this period had their office and principal place of business, as officers of the corporation, at the same address as the corporate respondent.

(*d*) Respondent New England Home Educators, Inc., is a corporation organized, existing and doing business under and by virtue

of the laws of the State of Massachusetts with its office and principal place of business at 739 Boylston Street, Boston, Massachusetts. The principal officers of said corporate respondent at the time of the issuance of the complaint herein and for more than two years prior thereto were the following named respondents: Samuel Holtz and Morris Rubin, who, during said time, had their office and principal place of business, as officers of the corporation, at the same address as the corporate respondent.

(*e*) Respondent Eastern Guild, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of Pennsylvania with its office and principal place of business at 1649 North Broad Street, Philadelphia, Pennsylvania. The principal officers of said corporate respondent at the time of the issuance of the complaint herein and for more than two years prior thereto were the following named respondents: Jack Weinstook, Robert K. Bertin, Nat Leroy, Jack Gerstel and Louis Tafler, who, during said time, had their office and place of business, as officers of the corporation, at the same address as the corporate respondent.

(*f*) Respondent Capitol Guild, Inc., was incorporated under the laws of the State of Maryland and had and maintained its principal office and place of business at 200 West Saratoga Street, Baltimore, Maryland. At the time of the issuance of the complaint, said corporation had ceased doing business and was in process of liquidation, but not formally dissolved.

(*g*) Respondent Keystone Guild, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of Pennsylvania with its office and principal place of business at 336 Fourth Avenue, Pittsburgh, Pennsylvania. Its principal officers at the time of the issuance of the complaint herein and for more than two years theretofore were the following named respondents: Charles Lester and Ned Leroy, who during said period had their office and place of business, as officers of the corporation, at the same address as the corporate respondent.

(*h*) Respondents National Distributors, Inc.. is a corporation organized and doing business under and by virtue of the laws of the State of Michigan with its office and principal place of business at Room 1307, Industrial Bank Building, Detroit, Michigan. Its principal officers at the time of the issuance of the complaint and for more than two years theretofore were the following named respondents: M. Marcus, Jack Marcus and L. Tiger who, during said period, had their office and place of business, as officers of the corporation, at the same address as the corporate respondent.

Where the name of an individual respondent appears as an officer of more than one of the corporate respondents hereinabove referred to, that name applies to the same person. Acting individually and in their official capacities at the time of the issuance of the complaint herein and for more than two years prior thereto, the aforesaid individual respondents directed and controlled the policies, acts, practices and business affairs of each of the corporate respondents of which they were an officer or officers.

(*i*) The respondents World Surveys, Inc., and Pacific Guild, Inc., and their officers named in the complaint were dismissed as respondents in this proceeding by the Examiner's decision dated June 17, 1953, which became final.

II. Publication, Distribution and Sale of Encyclopedia by Door-to-Door Salesmen

Respondent, Universal Education Guild, Inc., is the owner of the copyright on a set of books known as the World Scope Encyclopedia and, at the time of the issuance of the complaint and for more than two years prior thereto, respondent was and is now the publisher of said encyclopedia. During said period, the corporate respondent has also compiled, copyrighted and published "sale kits," consisting of many leaflets upon each of which appear printed and pictorial matter, for use by salesmen and designed to aid them in obtaining subscriptions to the encyclopedia.

Respondent Book Distributors, Inc., is a distributor of the World Scope Encyclopedia which it purchases from respondent Universal Educational Guild, Inc. In the course and conduct of its business, respondent Book Distributors, Inc., entered into franchise agreements with respondents Eastern Guild, Inc., Capitol Guild, Inc., Keystone Guild, Inc., National Distributors, Inc., and New England Home Educators, Inc., hereinafter referred to as "franchise distributors," by the terms of which said franchise distributors agreed to buy from respondent Book Distributors, Inc., and to resell to the public by means of door-to-door salesmen the World Scope Encyclopedia in certain designated territory alloted each of them.

Respondent Public Distributors, Inc., purchases the aforesaid encyclopedia directly from respondent Universal Educational Guild, Inc., and resells said encyclopedia by means of door-to-door salesmen.

Respondent Book Distributors, Inc., purchases the "sale kits" from respondent Universal Educational Guild, Inc., and resells them in whole or in part to its franchise distributors and to Public Distributors,

Inc., for use by their door-to-door salesmen in soliciting subscriptions for the encyclopedia.

III. Interstate Commerce and Competition

Interstate Commerce.—All of the respondents are now, and for more than two years last past have been, engaged in the sale of the aforesaid World Scope Encyclopedia in commerce between and among the various States of the United States and have caused said World Scope Encyclopedia, when sold, to be transported from their respective places of business to the purchasers thereof located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said World Scope Encyclopedia in commerce among and between various States of the United States, with the exception of respondent Capitol Guild, Inc., which has ceased doing business prior to the issuance of the complaint.

Competition.—In the course and conduct of their business of selling said encyclopedia, all of the respondents are now, and for more than two years last past have been in substantial competition in commerce with individuals, firms, partnerships and corporations engaged in the sale in commerce of encyclopedias and other books of similar nature, with the exception of respondent Capitol Guild, Inc., which had ceased doing business when the complaint issued.

IV. Survey to Determine Public Preference for Radio and Television Programs to be Taken by the Door-to-Door Salesmen of the Corporate Distributors While Soliciting Subscriptions to the Encyclopedia

In August 1948, Universal Educational Guild, Inc., entered into a contract with Radio Best, Inc., publisher of "Radio Best Magazine" later known as "Radio Best and Television Magazine" and "TV Screen," which remained in force until on or about October 15, 1951, by the terms of which Universal Educational Guild, Inc., agreed to have "our salesmen" solicit three-month subscriptions to Radio Best Magazine at the special price of $.50 per subscription, the three-month subscription to be offered to every subscriber of World Scope Encyclopedia, and in the event subscribers desired to renew their subscriptions for one or more years to pay Radio Best Magazine 37½¢ for each one-year renewal; 50¢ for each two-year renewal; and 60¢ for each three-year renewal. The radio survey was to be conducted "by World Scope salesmen in accordance with questions prepared and submitted by Radio Best Magazine," the results to be published

monthly in Radio Best Magazine under the name of WORLD-SCOPE-RADIO-BEST-SURVEY-PANEL. For said services, Radio Best Magazine agreed to pay respondent Universal Educational Guild $500.00 per month and for the sale of each three-month "introductory subscription," 12½¢.

On October 15, 1951, the contract with Radio Best Magazine was terminated and respondent Universal Educational Guild, Inc., entered into a contract with Academy Magazine, similar, but not identical with, the previous contract with Radio Best Magazine, the principal difference being that under the new contract only subscriptions to Academy Magazine for a three-month period were solicited at the price of 37½¢.

Following each of the aforesaid agreements, respondent Universal Educational Guild, Inc., entered into agreements whereby each of the six corporate respondents, selling direct to the public, agreed to conduct the radio and television survey through their door-to-door salesmen. A printed form was prepared by Radio Best Magazine and copies thereof furnished the door-to-door salesmen for use in ascertaining and recording the preference of each individual for radio and television stars and programs.

V. Use of Radio and Television Poll by Salesmen to Obtain Entrance to Homes and Inducement to Subscribe to Encyclopedia

Following the execution of the agreements referred to in Parts II and IV, *supra*, the sales representatives of the corporate respondents then selling direct to the public, called upon householders, many of whom were housewives. The salesmen generally first informed the occupant of the home that they were conducting a radio or television survey or poll for one of the radio or television magazines for whom the survey or poll was being taken. Many of the householders were interested in the quality and nature of radio and television programs and readily admitted the salesmen into their homes in a desire to participate in the survey or poll and register their preference for radio and television stars and programs. Upon securing admission the salesmen obtained and noted on a form provided for listing the householder's preference for radio and television stars and programs. The salesmen then made known that they were also soliciting subscriptions to the World Scope Encyclopedia, and offered a three-month subscription to Radio Best Magazine or (after October 15, 1951) to Academy Magazine, "free" or "without charge" therefor, if the householder would subscribe to the encyclopedia. Some of the householders testified that had they first been informed that the sales-

men were soliciting subscriptions to an encyclopedia, they would not have admitted them to their homes, while others testified they had no objection to such salesmen. The only compensation the door-to-door salesmen received was for subscriptions to the encyclopedia. The complaint alleges that respondents' door-to-door salesmen, by first announcing to persons solicited to purchase the encyclopedia that they were taking a radio or television poll or survey, used said representation as a pretext to secure admission to homes.

The stipulation contains a provision in the order to be entered prohibiting respondents' door-to-door salesmen, in soliciting subscriptions for or making sales of World Scope Encyclopedia, from announcing to the person solicited that they are conducting a poll or survey for any purpose, unless they *first* inform such person that they are representing World Scope Encyclopedia, or such other organization as the case may be

VI. Representations made by Respondents' Salesmen Alleged to be False, Misleading and Deceptive

The complaint (Comp. Par. 14) sets forth two and a half pages of extracts from leaflets appearing in sale kits used by respondents' door-to-door salesmen offering the World Scope Encyclopedia for sale. It is then alleged (Comp. Par. 15) that said advertising matter imported to the public that—

"(1) the hereinbefore referred to opinion poll or survey is conducted by the sales representatives for and on behalf of radio or television program sponsors, or both;

"(2) because of the cooperation of the purchasers of the World Scope Encyclopedia in participating in the survey or poll and in sending in the answers to the questionnaire that is part of the installment payment booklet, radio and television sponsors of such poll or survey, by subsidization make it possible for the World Scope Encyclopedia to be purchased at a lesser price than would be possible except for such subsidization with the result that substantial savings are afforded purchasers who participate in the poll or survey;

"(3) the World Scope Encyclopedia is offered at a reduced price;

"(4) the World Scope Encyclopedia is offered to selected homes only;

"(5) the World Scope Encyclopedia is approved, endorsed, or recommended by Boards of Education;

"(6) the Ten Year Consultation Service is 'free' and 'without charge'."

It is then alleged (Comp. Par. 16) that all of said statements were false, misleading and deceptive. Respondents admit that the advertising matter set forth in Paragraph Fourteen of the complaint did in fact appear on leaflets in sale kits used by their salesmen in offering the encyclopedia for sale, and with the exception of the statement "(4) the World Scope Encyclopedia is offered to selected homes only," (Comp. Par. 15) did import the meaning attributed to them (Comp. Par. 16). Respondents further admit that representations (1), (2), (3) and (5) were misleading. It is stipulated (Stip. Par. 16) that the representation (6), "the Ten Year Consultation Service is 'free' and 'without charge'", was not deceptive, the stipulation reciting—

"The statements appearing in leaflets in the sales kits wherein the words 'free' and 'without charge' appeared, as set forth in Paragraph Fourteen, were not false, misleading and deceptive as there was no extra charge to subscribers to the World Scope Encyclopedia for the 'ten year information service,' nor was the price increased or the quality or size of the encyclopedia decreased, and the conditions and obligations relative to the receipt and retention of the 'information service' were clearly and conspicuously set out in conjunction with the offer."

In December 1950, respondent Educational Guild, Inc., revised the sale kits and, with the exception of the leaflets, containing the statements relating to the words "free" and "without charge," eliminated therefrom all leaflets containing any of the statements set forth in Paragraph Fourteen and alleged to be false, misleading and deceptive in Paragraph Sixteen of the complaint.

A prior complaint issued December 5, 1949, in Docket No. 5718, wherein the same respondents named in this proceeding were therein named and charged with substantially the same offenses, was dismissed without prejudice June 12, 1951. Since that date, none of the representations made by respondents' salesmen and alleged in the complaint to be false, misleading and deceptive were repeated with the following two and possibly three exceptions:

1. "(6) the Ten Year Consultation Service is 'free' and 'without charge'." It is stipulated (Stip. Par. 16) that the above statement was not false, misleading and deceptive.

2. "(3) the World Scope Encyclopedia is offered at a reduced price." It is stipulated (Stip. Par. 14) that the above representation was untrue as the encyclopedia has never been offered at a reduced price and a provision appears in the order prohibiting any repetition of this statement.

3. "(4) the World Scope Encyclopedia is offered to selected homes only." It is stipulated that in fact the sale of the encyclopedia was never limited to selected homes. Counsel for the complaint contended that the above-quoted representation was inferentially repeated by salesmen to householders on three occasions subsequent to June 12, 1951, the statements made by salesmen and relied upon by counsel for the complaint being stipulated as follows:

"They said that they had picked several people out in each neighborhood and they were going around just to those people to make the survey.

"And then he went to the encyclopedia, they were only allowing ten families the privilege of buying them just a little above cost, they were introducing them in the area, it would give us all a chance at such a good book at a low price.

"* * * and he said 'We are not going to every person in the neighborhood, we are only taking a few, and each person is going to get a set of encyclopedias for answering the questions.' "

The contention of counsel for the complaint is opposed by counsel for respondents and it is stipulated (Stip. Par. 14, p. 9) that this question may be determined by the Hearing Examiner and the Commission and that its determination by them shall be final. The Hearing Examiner accordingly finds that the first and third statements of the salesmen above set out did import to the householders that the encyclopedia was not being offered generally to the public but to a selected group, which was the same as representing that they were being offered to selected homes only.

VII. The word "Guild" appearing in the Corporate Name

It is alleged in the complaint that by the use of the word "Guild" in the corporate names of four of the respondents and on their letterheads and stationery the respondents have represented that their "business is an association of educators formed for the mutual aid and protection of its members and the prosecution of their common interests." It is stipulated (Stip. Par. 15) that this charge is not sustained by the evidence.

CONCLUSION

Respondents interposed a plea of *res judicata* which was not expressly ruled on. The plea is pivoted upon the dismissal of a prior proceeding before the Commission wherein a complaint issued December 5, 1949, in Docket No. 5718, named as respondents substantially all of the corporations and individuals named as respondents in this

proceeding and charging them with substantially the same acts and practices charged in the complaint in this proceeding. The dismissal of the prior complaint was "*without prejudice to the right of the Commission to institute further proceedings, should future facts warrant.*" There was, therefore, no final determination of all issuable matters in the prior proceeding, in the absence of which, as here, the plea of *res judicata* has no application and is overruled.

The acts and practices of the respondents' door-to-door salesmen in first announcing to householders that they were taking a radio and television poll or survey, as set forth in Part V; in representing that the World Scope Encyclopedia was being offered at a reduced price, as set forth in Part VI; and in representing inferentially that the World Scope Encyclopedia was offered for sale to selected homes only, as set forth in Part VI of the findings were all to the prejudice and injury of the public, and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

The evidence fails to sustain all other charges in the complaint.

The evidence establishes that the complaint should be dismissed as to the following corporation and individuals:

Capitol Guild, Inc., and Robert K. Bertin, individually and as an officer of the corporation. The corporate respondent had ceased doing business when the complaint issued and was in process of liquidation, but not formally dissolved.

Robert K. Bertin, named individually and as an officer of respondent Keystone Guild, Inc., in the complaint, was never an officer of said corporation or connected therewith.

Seymour Schwartz, named in the complaint as an officer of respondent National Distributors, Inc., was not an officer of said corporation when the complaint issued, and was not connected with said corporation subsequent to May 18, 1950.

ORDER

It is ordered, That Universal Educational Guild, Inc., a corporation, and its officers, and Abe Halperin, Myron C. Gelrod and S. Leslie Schwartz, individually and as officers of said corporation; Book Distributors, Inc., a corporation, and its officers, and Abe Halperin, Mac Gache, Isidore J. Halperin and Myron C. Gelrod, individually and as officers of said corporation; Public Distributors, Inc., a corporation, and its officers, and Abe Halperin, Myron C. Gelrod and S. Leslie Schwartz, individually and as officers of said corporation; New

England Home Educators, Inc., a corporation, and its officers, and Samuel Holtz and Morris Rubin, individually and as officers of said corporation; Eastern Guild, Inc., a corporation, and its officers, and Jack Weinstock, Robert K. Bertin, Nat Leroy, Jack Gerstel and Louis Tafler, individually and as officers of said corporation; Keystone Guild, Inc., a corporation, and its officers, and Charles Lester and Ned Leroy, individually and as officers of said corporation; and National Distributors, Inc., a corporation, and its officers, and M. Marcus, Jack Marcus, and L. Tiger, individually and as officers of said corporation; and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of the World Scope Encyclopedia, or other merchandise, do forthwith cease and desist from:

1. Representing directly or by implication, that the sales representative is conducting a poll or survey for any purpose, unless the sales representative making such representation first informs the person to whom such representation is made that he is a representative of World Scope Encyclopedia, or such other organization as the case may be.

2. Representing, directly or by implication, that the World Scope Encyclopedia is offered at a reduced price, unless such is a fact.

3. Representing directly or inferentially that the World Scope Encyclopedia is being offered for sale to selected homes only, unless such is a fact.

It is further ordered, That the complaint be, and it is hereby, dismissed as to Robert K. Bertin as an officer of respondent Keystone Guild, Inc., as to Seymour Schwartz, individually and as an officer of National Distributors, Inc.; and as to respondent Capitol Guild, Inc., and its officer Robert K. Bertin.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That respondents Universal Educational Guild, Inc., a corporation, and Abe Halperin, Myron C. Gelrod and S. Leslie Schwartz, individually and as officers of said corporation; Book Distributors, Inc., a corporation, and Abe Halperin, Mac Gache, Isidore J. Halperin and Myron C. Gelrod, individually and as officers of said corporation; Public Distributors, Inc., a corporation, and Abe Halperin, Myron C. Gelrod and S. Leslie Schwartz, individually and as officers of said corporation; New England Home Educators, Inc., a corporation, and Samuel Holtz and Morris Rubin, individually and

as officers of said corporation; Eastern Guild, Inc., a corporation, and Jack Weinstock, Robert K. Bertin, Nat Leroy, Jack Gerstel and Louis Tafler, individually and as officers of said corporation; Keystone Guild, Inc., a corporation, and Charles Lester and Ned Leroy, individually and as officers of said corporation; and National Distributors, Inc., a corporation, and M. Marcus, Jack Marcus, and L. Tiger, individually and as officers of said corporation, 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 to cease and desist [as required by said declaratory decision and order of November 20, 1954].

The Commission adopted an earlier initial decision dismissing complaint as to certain respondents, as follows:

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, the attached initial decision of the hearing examiner shall, on July 30, 1953, become the decision of the Commission.

INITIAL DECISION BY WEBSTER BALLINGER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on the 21st day of November, 1951, issued and subsequently served its complaint in this proceeding upon each of the corporations and individuals named and referred to in the caption hereof, acting in the respective capacities set forth and described in said caption, charging them and each of them with unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act. Respondents answered and, after seasonable notice, hearings were held by the undersigned duly commissioned Hearing Examiner, at which testimony and documents were offered by counsel for the complaint and received in evidence, which evidence, reduced to writing, and documents have been duly filed and recorded in the office of the Commission. Counsel for the complaint then rested the Commission's case in chief.

Thereupon counsel for respondents moved to dismiss the complaint in so far as it related to respondents World Surveys, Inc., Murray Moss, individually and as an officer of World Surveys, Inc., and respondents Pacific Guild, Inc., and Murray Moss, individually and as an officer of Pacific Guild, Inc., on the stated ground that there was no evidence tending to show any violation of law by any of said

named respondents, to the granting of which counsel for the complaint made no objection.

There being no evidence in the record tending to show a violation of the Federal Trade Commission Act by any of said respondents, it is this 17th day of June, 1953,

Ordered, That the complaint be, and it is hereby, dismissed against respondents World Surveys, Inc., Pacific Guild, Inc., and Murray Moss, individually and as an officer of either of said corporate respondents; said dismissal being without prejudice to the institution of further proceedings against said respondents, should circumstances warrant.

IN THE MATTER OF

REVLON PRODUCTS CORPORATION[1]

Docket 5685. Complaint, Aug. 1, 1949—Order, Nov. 22, 1954

Order denying respondent's motion to reopen proceedings for new evidence that respondent's exclusive-dealing agreements did not stop a competitor from emerging as one of the leaders in the field, since even if this were proven, respondent's contracts still had the requisite likelihood of adversely affecting the power of smaller cosmetic companies to compete; and denying as not in the public interest respondent's alternative motion for reargument because of a change in membership of the Commission.

Before *Mr. Earl J. Kolb*, hearing examiner.

Mr. William C. Kern and *Mr. Andrew C. Goodhope* for the Commission.

Blumberg, Singer, Heppen & Blumenthal, of New York City, and *Davies, Richberg, Tydings, Beebe & Landa*, of Washington, D. C., for respondent.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

This opinion relates to respondent's motion to reopen this proceeding for the reception of further evidence or in the alternative to grant reargument before the Commission. It was filed after the Commission's decision denying respondent's appeal from the hearing examiner's decision holding that respondent had violated section 3 of the Clayton Act, but prior to receipt of the decision by respondent. By a supplementary memorandum filed after its receipt of the Commission's decision, respondent urges that its motion be granted to admit newly discovered and additional evidence relating to the effect of its exclusive dealing agreements on competition. Counsel supporting the complaint opposes this motion in its entirety.

Respondent's motion for reargument points out, among other considerations, that there has been a change in the membership of the Commission since the oral argument in this matter. It notes that Commissioners Howrey and Gwynne have succeeded Commissioners Carson and Spingarn and that Commissioner Carretta was being succeeded by Commissioner Secrest on September 27, 1954.

In fact, this matter was decided unanimously on September 23, 1954, by Commissioners Mason, Mead and Carretta, each of whom heard oral argument. Respondent's appeal from the initial decision

[1] Order to cease and desist, *supra*, p. 260.

and an earlier motion by respondent for reargument on substantially the same grounds were both denied in that decision.

Respondent now urges that the matter be reopened to allow it to present evidence as to the economic effect of respondent's exclusive dealing contracts. It points out that counsel supporting the complaint urged that evidence as to the effect of the exclusive dealing agreements should be limited to a showing of the substantiality of the volume of business done through the foreclosed outlets of distribution. However, this view did not prevail. Respondent was permitted to present fully evidence as to the lack of effect of its exclusive dealing agreements on competition. The record in this proceeding contains 2,224 pages of transcript of hearings. Of this, over 1,000 pages contain defensive matter presented by respondent. The Commission in reaching its decision considered the entire record and concluded that the greater weight of the evidence established that respondent's agreements had a substantial probability of lessening competition.

Where, as here, the parties have been given a full opportunity to present defensive evidence, it is not in the public interest to retry the same issues because of a change in membership of the Commission or because additional evidence, available at the time of trial, may be relevant. At some stage there must come an end to litigation if our regulatory processes are to be effective. Respondent's contention that evidence relating to conditions in 1949 and before is obsolete, is rejected as the complaint on which the proceeding is based alleged violation of the Clayton Act prior to the date of its issuance on August 1, 1949.

The request for reopening for presentation of newly discovered evidence presents a different question. The newly discovered evidence relates to the emergence of Hazel Bishop, Inc., as an important competitor, especially in the lipstick field, since the issuance of the complaint in this proceeding. Respondent claims that this company, with no sales in 1949, has risen to where its sales by the end of this year will total $9,800,000 annually. It contends that this company's ability to grow to this extent establishes that respondent's exclusive dealing agreements with beauty supply jobbers, in fact, did not and do not foreclose its competitors from the market.

As an order to cease and desist is of a continuing nature, an absolute prohibition against use of exclusive dealing agreements entitles respondent to move to modify it if in fact conditions have so changed that the exclusive dealing agreements no longer have the requisite likelihood of adverse effect on competition. Thus, the question before the Commission is: Accepting the findings of fact and decision that

respondent violated section 3 of the Clayton Act prior to August 1, 1949, as alleged, would prove that Hazel Bishop, Inc., has been able to emerge as a leading competitor in the face of respondent's exclusive dealing agreements establish that these agreements do not have the requisite likelihood of adversely affecting competition at the present time? If not, there is no necessity for reopening this proceeding.

In support of its motion, respondent has filed an affidavit of one of its attorneys as to the facts it could prove if this proceeding were reopened. For the purposes of this decision, the Commission has considered the facts stated in the affidavit as if they were proven. It states that Hazel Bishop, Inc., since 1949 has risen to be a leading competitor in the lipstick field, that it is making heavy inroads in the beauty parlor field in the sale of lipsticks, that it entered the nail enamel field in 1953, and that it is making similar inroads in the beauty parlor fields in the sale of nail enamel. It further shows that Hazel Bishop, Inc., has spent millions of dollars annually in the advertising of its products and has a complete jobbing setup from coast to coast.

From these facts, it is clear that respondent's exclusive dealing agreements did not have the power to stop Hazel Bishop, Inc., from emerging as one of the leaders in the lipstick field and from making inroads into the nail enamel field. However, this is far different from finding that these exclusive dealing agreements with respondent's beauty supply jobbers do not have a substantial restrictive effect on smaller competitors who do not have sufficient resources to spend millions for advertising or to establish a complete jobber setup for their products from coast to coast. The Clayton Act is concerned with helping small business. The fact that a company with a large advertising budget and an equally strong jobber organization is not foreclosed from the market, does not remove the fact that smaller companies are denied access to a substantial part of the beauty supply jobber market by respondent's agreements. As to the smaller cosmetic companies, respondent's exclusive dealing contracts still have the requisite likelihood of adversely and substantially affecting their power to compete.

For these reasons, the Commission is of the opinion that respondent's newly discovered evidence, if established, would not justify a retrial or a modification of the order to cease and desist. The motion, therefore, is denied.

ORDER DENYING RESPONDENT'S MOTION TO REOPEN PROCEEDING OR FOR REARGUMENT

This matter having come before the Commission upon respondent's alternative motion for reopening of proceedings for reception of further evidence or for reargument before the Commission on respondent's appeal from the initial decision, the answer of counsel supporting the complaint opposing said motion, and respondent's memorandum and affidavit in support of said motion; and

The Commission having fully considered the matter and, for the reasons stated in the written opinion of the Commission issued simultaneously herewith, being of the opinion that said motion should be denied;

It is ordered, That said motion is hereby denied.

IN THE MATTER OF

WILLIAM R. PEARSALL, FRANCIS COLUCCI AND AARON SILVERMAN DOING BUSINESS AS BOND SEWING STORES

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

Docket 6112. Complaint, May 5, 1954 [1]*—Decision, Nov. 23, 1954*

Order requiring a concern engaged in selling domestic and imported sewing machines from its principal office in New York City and branches in New Jersey, Pennsylvania, Maryland, Georgia, and Florida, to cease branding sewing machines made in Japan or machines of which Japanese heads were a part with the legend "Made in U. S. A." and American names and selling them with no disclosure of their foreign origin; advertising as "bait", machines never intended to be sold at the prices published, for the purpose of obtaining leads to prospects; advertising false guarantees of parts actually unobtainable; and misrepresenting the ease of operation of advertised machines.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Michael J. Vitale for the Commission.

Mr. Eugene W. DuFlocq, of New York City, for respondents.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

On July 27, 1953, the Commission, pursuant to the provisions of the Federal Trade Commission Act, issued and subsequently served its complaint in this processing upon the respondents herein, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. There are two charges in the complaint: (1) that respondents have sold to the purchasing public sewing machines, the heads of which are manufactured in and imported from Japan, and that these sewing machine heads have been inadequately marked with the result that purchasers thereof have been deceived into believing that the machines were of domestic manufacture; and (2) that respondents by extensive advertising of very low priced sewing machines have secured the names and addresses of customers interested in the purchase of sewing machines, but that respondents, on demonstration of the advertised machines, have made no real

[1] As amended.

effort to sell the machines advertised, have disparaged them, and have attempted to sell, and did sell, different and more expensive machines.

In other words, that respondents have engaged in "bait advertising." After answer, various postponements and some testimony offered in support of the complaint, hearings were suspended for six months to enable counsel in support of the complaint to secure an amendment thereto from the Commission, broadening the complaint to include radio continuities and television broadcasts. Thereafter, hearings continued, and at the close of the evidence in support of the complaint, counsel for respondents moved to dismiss same, which motion was denied, and thereafter evidence offered by respondents was received and the case closed on August 16, 1954, and testimony and other evidence were duly filed in the office of the Commission. The proceeding now comes on for final consideration by the Hearing Examiner, theretofore duly designated by the Commission, on the complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel. The Hearing Examiner has duly considered such record and finds that this proceeding is in the interest of the public and finds the facts as follows:

1. Respondents William R. Pearsall, Francis Colucci and Aaron Silverman are, and for four years last past have been, co-partners, doing business under the name of Bond Sewing Stores, with their office and principal place of business located at 41—20 Queens Boulevard, Sunnyside, Long Island, New York. As such, they were engaged in the retail sale of both domestic and imported sewing machines and have a number of branches in the states of New Jersey, Pennsylvania, Maryland, Georgia and Florida for that purpose, with a gross annual volume of 1½ million, 50 percent of which was sold in New York State through their various retail stores located therein. Respondents do not import machines, but buy them from those who do.

2. In the conduct of their business, respondents cause, and have caused, their said sewing machines and accessories thereto, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in various other states of the United States. They maintain, and throughout their partnership existence have maintained, a course of trade in said products in commerce among and between the various states of the United States, which course of trade was, and has been, substantial.

3. There is no evidence that respondents have at any time sold sewing machine heads imported from Japan without any marking of the place of origin whatsoever, but they have admittedly bought and

resold to the purchasing public, sewing machine heads imported from Japan marked in letters of gold decalcomania on the black enamel of the machine head placed on the rear of the vertical arm. These sewing machine heads are all designed for electrical operation, and when a motor is attached thereto, at the only place on the head to which it could be attached, namely on the rear of the vertical arm, this decalcomania marking showing the place of origin of the machine head is effectively concealed from even careful inspection, short of removing the motor or of turning the machine to a very awkward and unusual position from the ordinary user's standpoint. This action would eventuate only from the desire to see that particular spot, but is entirely unlikely to ensue from ordinary and normal use of the machine, since the user faces the front of the vertical arm with the sewing mechanism to her left. There is substantial evidence in the record that purchaser-users are never shown this concealed marking and never suspect the foreign origin of their purchase until it is called to their attention long after purchase and use by someone familiar with these imported machine heads. The finding is that such marking is, for all practical purposes and to the ordinary user or purchaser, completely and effectively concealed.

4. Other sewing machine heads imported from Japan and purchased by respondents for resale had on the front of the vertical arm, in some instances, a gold metal plaque, hexagonal, oval or round in shape, about 1½ inches, vertically and 1 inch horizontally in gold or brass finish bearing the legend "Deluxe" in raised ¼ inch letters and below that "Deluxe Family Sewing Machine" in raised letters approximately ⅛ inch in length, and below that the word "Japan" approximately 1/16 inch in length.

5. Others of these imported machine heads, sold by respondents, have a similar gold metal plaque riveted to the front of the vertical arm, but bearing the name "Royal" in the center thereof in raised letters approximately 3/16 inch in height, above which in smaller raised letters appears '1953" Series," and below which, in still smaller raised letters about 1/16 inch in height, appear "Made in Japan." Still others have the same plaques in size and color, but bearing the word "Simplex" instead of "Royal," the words "Washington, D. C." instead of "1953 Series," and the words "Made in Japan" in the same relative position as the "Royal" plaque above-described, the legends being of the same relative size and shape.

6. All of these medallions are in bright gold color, in small raised letters only of the same color, with no background coloring to emphasize the raised letters so that the words "Japan" or "Made in

Japan" are not distinct and are difficult to read at a distance greater than one foot or so, unemphasized and distinguishable only by careful inspection. There is substantial evidence in the record that users and purchasers either did not see, or seeing did not comprehend, such marking.

7. Other machines imported from Japan and purchased by respondents for resale were marked with a small gun metal plaque approximately ⅜ inch in height and a 1 inch to 1½ inch in width at the foot of the front of vertical arm, bearing the legend "Made in Occupied Japan." The gun metal coloring of this plaque, attached by rivets as it is, to the black japanned finish of the machine head, leaves it unemphasized and difficult to read the letters themselves at a distance of more than a foot or so. There is also substantial evidence in the record that users and purchasers either did not see this legend, or if they saw it did not make out the lettering thereon.

8. When these markings are taken with the additional facts that the motors attached to these machine heads all bore the legend "Made in U. S." or "Made in the United States" marked on the top of such motor which labels are plain and conspicuous when the machine is viewed from above and that respondents' circulars and its extensive advertising in newspapers, by radio and by television, nowhere mentions the place of manufacture of the machine, or the fact that it was imported, and that these machines were all branded with American names, such as "Margaret," "Bond," "Royal" and "Simplex," it is plain that many purchasers would be, and as the record shows, were in fact, deceived into the belief that respondents' sewing machines were made in the United States.

9. Not all, but a substantial portion of the purchasing public has a decided preference for products of domestic manufacture over those of foreign make, particularly machinery of any kind, and when sewing machines are advertised, exhibited, and offered for sale to the purchasing public and such articles are inadequately marked to show their foreign origin, or if marked and the markings are concealed, such purchasing public understands and believes such articles to be wholly of domestic origin. A representative number of purchasers from respondents so testified.

10. The finding, accordingly, is that respondents' imported sewing machines and sewing machine heads are not adequately marked to show the place of manufacture and origin, that a number of purchasers from respondents bought them in the erroneous and mistaken belief that they were made in the United States and that they would not have purchased such machines if they had known that they were imported from Japan.

11. One purchaser from respondents testified that she informed respondent Pearsall, when she came in to inquire in response to respondents' advertising, that she wanted an American-made product and respondent Pearsall assured her that the machine that she purchased was not imported. This assertion was denied by respondent Pearsall. Since the complaint does not charge active and positive misrepresentation and deception, but only inadequate marking, the Hearing Examiner makes no finding on this conflicting evidence.

12. On the second charge in the complaint, that respondents advertised startlingly cheap merchandise, not for the purpose of sale, but with the intent, after names and addresses had thus been received, of selling much more expensive and therefore profitable merchandise, the record shows that respondents spent in excess of $18,000.00 in one year in newspaper advertising at weekly intervals, and in excess of $7,000.00 a year in television and radio advertising, all in the New York City sales area alone, confined according to the exhibits, to sewing machines offered at $29.50, $32.50 and $39.50 with several attachments included in these prices, and at times, free gifts of various sorts also included. Demonstration was offered free within 90 miles, delivery free within 50 miles. It is seldom that a new sewing machine can be obtained for less than $89.50 and upwards.

13. Examples of these advertisements follow:

2 DAYS ONLY
SALE PRICED *NOW!*

(Picturization of Portable Electric Sewing Machine)

BRAND NEW 1951
ROUND BOBBIN
SEWING MACHINE

10 Year Part Guarantee
Full Size Electric Model
including Carrying Case
which can be used as an overnight bag

$29.50
Full Cash
Price

SEWS EVERYTHING

Sews Over Pins Automatic Tension
Darns Monograms AC–DC Motor
Forward and Reverse Stitch
New Style Bobbin Winder
Complete—Nothing extra to buy

10 DAY HOME TRIAL

Try it at home for 10 days. If you are not pleased in every way, Bond refunds your deposit!

470 Decision

BRAND NEW ROUND BOBBIN
DECORATOR CONSOLE
SEWING MACHINE

DARNS, MONOGRAMS
AND EMBROIDERS
WITHOUT ATTACHMENTS!

(Picturization of Console Electric Sewing Machine)

32.50
Full Cash Price
1.25 Weekly
forward and reverse stitch
sews over pins
ac-dc motor

You get these
BOND EXTRAS:
6 FREE Attachments!
Darner, Mender and
Button-holder!
Pinking Shears!
Personal instruction!
20 YEAR PARTS GUARANTEE!
Write or phone for
FREE HOME DEMONSTRATION

BOND
Sewing Stores
MAIN SHOWROOMS
IN NEW YORK and vicinity
41–20 Queens Blvd.
L. I. C., N. Y.
Stores in New York Newark Philadelphia Baltimore

An example of a television continuity of respondents on these same sewing machines is as follows:

AUDIO

Allen Christopher presents Bond D Sewing Stores. Ladies, I guess all of you have dreamed of owning a beautiful modern portable electric sewing machine. Well, famous BOND SEWING STORE makes your dream come true at last . . because you don't have to pay $200 for a good machine. You don't have to pay $100 . . . you don't even have to pay $50.

How would you like to get a *brand new* 1951 model ROUND BOBBIN SEWING MACHINE—Console Model—delivered to your door for the amazing low price of only $39.50? You heard that did'nt you? $39.50 is not the down payment—$39.50 is ALL you pay for this beautiful machine . . . a full-size electric model that's just rolled off the assembly line. It's not rebuilt. It's not reconditioned. It's a brand new machine from top to bottom, including the brand new motor and it comes with a wonderful 10-year GUARANTEE on parts . . and only $39.50 complete. That's the full cash price . . and you can have easy terms even at that low price.

Ladies, you'll love this wonderful BRAND NEW 1951 ROUND BOBBIN Console Sewing Machine. This is not a chain stitch machine, it is a ROUND BOBBIN, Console machine.

You can lock stitch with it just as you do on machines costing $200 and $300. This machine is all-metal, with handsome chrome finish . . and watch now. I want to show you some of the special features.

You can do your regular forward stitching of course and then . . at the flip of this lever, just like in expensive machines, you can do your reverse stitching.

This magnificent new 1951 Console Model sewing machine can even sew right over pins * * * in fact you can adjust it so beautifully that if you wanted to, you would sew right over toothpicks. Ladies, you are watching a remarkable machine * * * a full-size electric portable machine * * * And it's yours for only $39.50. The machine runs on both AC and DC current, so you can use it anywhere. And remember, there's a terrific 10-year guarantee on parts. Your guarantee of confidence and satisfaction * * * a full 10-year guarantee on parts. Ladies * * * when your beautiful new 1951 model machine arrives * * * see how you can start whipping up those new Fall and Winter drapes. Turn out school togs and Sunday best clothes for the kiddies. See how you'll save dollars and dollars turning last year's dresses into the very latest styles. Make hats, make doilies, and curtains for the house * * * anything you want. If you're not thrilled, you return the machine. There's no obligation, you owe nothing. The representative will simply thank you for letting him call. Folks, this is a special introductory offer—so here's something extra. When Bond delivers the machine to your door, your Bond representative will give you at no extra charge with machine—a hostess set of 6 glasses, 6 fruit dishes, stirrers and a wooden tray * * * at no additional charge * * * with your machine.

So there you are * * * the offer of a LIFETIME. First you get a brand new 1951 machine, NOT rebuilt, NOT reconditioned, but BRAND NEW and ready to serve you for years and years. It's guaranteed. You get the special carrying case, plus the wonderful pinking shears * * * all at no extra cost, because you get everything for that one full cash price—only $39.50 complete * * * easy payment terms if you wish.

And folks, remember this. If you're not absolutely thrilled with the demonstration you are not obligated in any way. Bond's representative will merely thank you for allowing him to show you this amazing machine. You owe nothing. That's all there is to it. You simply cannot lose. I'm just sorry that we don't have enough machines for EVERY WOMAN who'll want one * * * so don't miss out. Call or write now.

14. It is true that the record shows that when anyone attracted by these advertisements came in, that the machine advertised was on hand in adequate supply, that it was shown and demonstrated, that if the potential customer called, the machine advertised was taken out to his or her home and demonstrated, that if the customer was insistent, the machine was sold and at the price advertised. Nevertheless, other facts in the record convince the Hearing Examiner that respondents had no intention of selling the machines advertised, but that the whole effort was a sales scheme, deliberately conceived and executed to obtain

thereby the names of people interested in purchasing sewing machines, (not otherwise easily identifiable) and then deliberately to high pressure them into buying sewing machines for between $100.00 and $200.00.

15. These facts are as follows: the machine advertised by respondents for $29.50 cost respondents about $24.00; the $32.50 machine cost $30.00; the $39.50 machine cost $28.00. In addition, there was a minimum salesmen's commission of $2.00. Respondent Pearsall testified that most salesmen worked on commission *and* salary. He was very vague about travel allowances and was unable to say anything definite about overhead allocation. It is obvious, however, that the expensive advertising load, the expenses of running a $1,500,000 annual business with many retail outlets in five or six states, the expenses of giving free demonstrations in a radius of 90 miles and free delivery within 50 miles must have more than consumed the $3.50 margin on the $29.50 machine, the 50¢ margin on the $32.50 machine and substantially consumed the $9.50 margin on the $39.50 machine. In fact, respondent Pearsall admitted that respondents could not have remained in business selling these items alone.

16. Respondent Pearsall admitted in testimony that his salesmen "usually" carry along much more expensive sewing machines (those selling for $100.00 upwards) with them when demonstrating these three machines described above. From the testimony of purchasers from respondents, this would appear to be an unvarying practice. Respondent Pearsall also admitted in testifying that "occasionally" his salesmen have disparaged the machines advertised, when demonstrating them to a customer who called in response to the advertising but that he always discharged them if witness heard of it. But the unanimous testimony of the consumer-purchasers was to the effect that this was a constant practice, that the salesmen were unable to make the machines, about which the customers called, work, or if they did, the customers were unable to do so, the salesmen explaining that the machines would jam unless the pressure on the foot pedals was just so much and no more; that the salesmen explained to the potential customer that she could not get parts for replacement, in spite of the fact that respondents advertised a 10-year guarantee on parts, and that the salesmen assured the prospects that if they wanted a good working machine which would give them good service the salesmen had just the thing out in their cars. The salesman would then get it, compare the two machines, and make every effort to sell the latter. This was natural inasmuch as his commission would then be 15 percent of the sales price of $139.50 or $179.50, as the case

might be. The prospect would then be further intrigued by that threadbare but still potent bait that she could have the machine at $10.00 or $15.00 off the price because the machine had a small scratch on the enamel, which scratch could seldom be found.

17. The offer to sell as advertised was not bona fide; the Hearing Examiner has no doubt from seeing and hearing these witnesses and the respondent Pearsall that respondents' salesmen—not just one, but several—actively and deliberately disparaged the machines advertised and had no intention of selling them unless it was a case of selling them or not selling anything at all. Respondent Pearsall admitted also the obvious, that respondents prefer to sell the much more expensive machines; that complaints have been made to respondents of their salesmen disparaging the machines advertised and of using high-pressure tactics to get prospects to purchase the more expensive machines. Coupled with the further facts that 80 percent of the sales were on calls, 20 percent in respondents' stores; that only 25 percent of the units sold by respondents, and only 8 to 10 percent of their sales volume, were in these cheap machines, and 75 percent of these cheap machines sold were returned, mostly for dissatisfaction and mostly as trade-ins on the more expensive machines; the picture to the Hearing Examiner is that of high-pressure advertising of a loss leader, certainly known by respondents, after several years of such experience, not to be a satisfactorily operable sewing machine to the majority of those responding to the advertising, with disparagement thereof, and insistent attempts to sell other and more profitable products.

18. Furthermore, respondents' advertising set out by sample in extenso in paragraph No. 13 above, directly represents, in the Hearing Examiner's opinion, to the typical housewife or other potential purchaser inexpert in the construction, repair or use of a temperamental sewing machine first, that the machine advertised was operable by any reader and was in fact quite versatile in its sewing abilities, second, that parts being guaranteed for ten years, were easily replaceable if and when broken. These representations, on the record herein were deceptive and misleading, if not actually false. Potential customers were consistently told that part replacements were unobtainable, and actually shown by demonstration, that the machines advertised were either not operable at all, or operable only with great care—as a practical matter, unusable by the typical prospect for the purpose advertised.

19. Respondents are admittedly in competition with other persons, firms and corporations, but there is no substantial evidence in the

record of the kind and extent of this competition nor any proof that respondents' acts and practices as hereinabove found have diverted, fairly or unfairly, substantial trade to them from their competitors or caused substantial injury to competition in commerce.

CONCLUSION

1. Respondents' acts and practices as hereinabove found are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

2. The fact that during the pendency of this proceeding, respondents went into bankruptcy, either voluntary or at the instance of creditors, and that their assets are consequently in the custody of a trustee, is no bar to the issuance of the cease and desist order herein below issued. That corrective action in no way directly affects the ratable distribution of assets, but corrects only the commercial practices of respondents in selling or creating those assets.

3. Bankruptcy, of course, causes a cessation of the practices herein attacked, but only temporarily. This proceeding is not only against the partnership which is in bankruptcy, but is also against the individuals composing that partnership. Those individuals may alone, in a new partnership with each other, or in concert with others, engage in the same business and use the same practices herein found to be illegal. This is not the case of a corporation whose bankruptcy usually ends the corporate identity for all purposes.[1] There is nothing in this record to warrant the Hearing Examiner in believing that there will be no resumption. The practices herein found to be illegal are too commercially attractive, insidious, smooth and profitable not to encourage repetition, absent anything to indicate they will not. Bankruptcy is but a temporary suspension at best.

ORDER

It is ordered, That the respondents William R. Pearsall, Francis Colucci and Aaron Silverman, individually and as copartners, doing business as Bond Sewing Stores or under any other name, their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of sewing machine heads, or sewing machines, in commerce as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from:

[1] The Galter Case, 186 F. 2d 810 is not in point. There corporations dissolved.

1. Offering for sale, selling or distributing foreign-made sewing machine heads or sewing machines of which foreign-made heads are a part, without clearly and conspicuously disclosing on the heads the country of origin thereof, in such a manner that it cannot readily be hidden or obliterated.

2. Representing, directly or indirectly, that sewing machine parts are guaranteed for 10 years, or any other period of time, when such parts are in fact unobtainable.

3. Representing in any manner, a sewing machine as operable and as satisfactory for everyday usage by one without special knowledge or training, when in fact it is not operable at all, or when in fact it can be operated only with special precautions.

4. The use of any sales plan or procedure involving the use of deceptive or misleading statements or representations in advertising which are designed to obtain leads or prospects for the sale of other or different merchandise than that advertised.

Order dated January 24, 1955 denying, for failure to file within the 60-day period set by Commission's Rules of Practice, motion by counsel supporting the complaint requesting an extension of time within which to file brief on appeal from initial decision.

ORDER REJECTING MOTION FOR EXTENSION OF TIME

This matter coming on to be heard upon the motion filed on November 26, 1954, by counsel supporting the complaint requesting an extension of time within which to file brief on appeal from the initial decision; and

The Commission having determined, for reasons stated in the opinion accompanying this order, that such motion should not be entertained:

It is ordered, That the motion of counsel supporting the complaint be, and it hereby is, denied.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

Presented for our determination here is a motion filed on November 26, 1954, by counsel supporting the complaint requesting a thirty-day extension of time within which to file his brief on appeal from the initial decision. It is stated in support of the request that the failure to file appeal brief within the time prescribed under the Com-

mission's Rules of Practice occurred through inadvertence incident to counsel's absence from Washington on other hearings, and no answer in opposition to such motion has been filed by the respondents. We have concluded, however, that under applicable provisions of those rules, the initial decision must be deemed to have become the decision of the Commission on November 23, 1954, and that the motion of November 26, 1954, accordingly should not be entertained.

In these connections, we note that the service card in the record attests receipt of service of the initial decision on behalf of counsel supporting the complaint under date of October 20, 1954, and service of the initial decision upon the parties was completed thereafter on October 23, 1954. Timely notice of intention to appeal pursuant to the requirements of subparagraph (a) of Rule XXIII, was filed by counsel supporting the complaint on October 29, 1954. Subparagraph (f) of Rule XXIII provides that an appeal brief shall be filed within thirty days from service of the initial decision. The brief on appeal, accordingly, was due to be filed on or before November 19, 1954, such date being thirty days after service upon appellant of the initial decision.

A companion rule, Rule XXII of the Commission's Rules of Practice, provides that the initial decision shall become the decision of the Commission thirty days from service thereof upon the parties unless prior thereto (1) an appeal is filed under the provisions of Rule XXIII, (2) the Commission, by order, stays the effective date of the decision, or (3) the Commission, upon its own initiative, issues an order placing the case on its own docket for review. Although Rule XXIII provides that any party who has duly filed notice of intention to appeal may appeal from an initial decision, neither of these rules, however, contemplates that fulfillment of the requirement for timely notice constitutes the filing of the appeal itself.

Neither contingency (2) nor contingency (3) mentioned above ever occurred. As of November 19, 1954, no brief on appeal had been filed and no motion in lieu thereof requesting an extension of time for good cause shown had been submitted, as permitted under Rule XI. The operation of Rule XXII, accordingly, was not stayed and the initial decision of the hearing examiner must be deemed to have become the decision of the Commission on November 23, 1954, which date represents the thirty-first day after service of the initial decision upon the parties. In these circumstances, therefore, the motion should not be entertained and our order which is separately issuing here provides for its denial.

ORDER OF THE COMMISSION

The hearing examiner having filed his initial decision herein and counsel supporting the complaint having seasonably filed a notice of his intention to appeal from said initial decision, but no appeal brief having been filed within the time provided by the Commission's Rules of Practice:

Now therefore, pursuant to Rules XXII and XXIII of the Commission's Rules of Practice, the attached initial decision of the hearing examiner did automatically, on November 23, 1954, become the decision of the Commission.

It is ordered, That the respondents 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 to cease and desist.

IN THE MATTER OF

MALCOLM E. SMITH, JR., ET AL. DOING BUSINESS AS LOAMIUM COMPANY OF AMERICA

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

Docket 6130. Complaint, Oct. 27, 1953—Decision, Nov. 23, 1954

Consent order requiring a partnership in Harrison, N. J., to stop claiming that their chemical products "Kem-Kut" would produce an even lawn, make lawn mowing unnecessary, make grass greener, thicker, and more luxurious, was safe, and would not adversely affect the appearance of a lawn.

Before *Mr. Abner E. Lipscomb*, hearing examiner.
Mr. Terral A. Jordan for the Commission.
Mr. Harry T. Davimos, of Newark, N. J., for respondents.

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 Malcolm E. Smith, Jr., Casper Pinsker, Jr., and Richard H. Davimos, individuals and copartners doing business as Loamium Company of America, 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. Respondents Malcolm E. Smith, Jr., Casper Pinsker, Jr. and Richard H. Davimos are individuals and copartners doing business as Loamium Company of America, with their office and principal place of business located at 2 Kingsland Avenue, Harrison, New Jersey.

PAR. 2. Since February 1953, respondents have been engaged selling a product designated Kem-Kut and chemically known as maleic hydrazide, a preparation represented as effective in controlling the growth of lawn grass. Respondents' cause said product, when sold, to be transported from their place of business in the State of New Jersey to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial

course of trade in their said product in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of Kem-Kut, respondents have made numerous statements and representations concerning their said product by means of advertisements caused to be published in newspapers having a large circulation outside the State of New Jersey and by means of circulars disseminated among retail outlets. Among and typical of such statements and representations, but not all inclusive thereof, are the following:

NOW! TRIM YOUR LAWN JUST ONCE A YEAR WITH NOTHING BUT A WATERING CAN! REVOLUTIONARY NEW "KEM-KUT" SAFELY SLOWS GRASS GROWTH, NO MORE BACKACHES! JUST SPRINKLE ON! AT LAST! U. S. RUBBER COMPANY DEVELOPS AMAZING CHEMICAL THAT "CUTS" GRASS CHEMICALLY! KEEPS GRASS FROM GROWING TALLER! MAKES IT THICKER, GREENER!

It's amazing, yet it's true! Modern Science now makes it possible for you to trim your lawn with a watering can! Just imagine! No more hard work! No more backaches! No more sweating under a hot Summer Sun * * * thanks to a new miracle chemical!

This Spring and Summer while your neighbors are huffing and puffing cutting their grass, simply dissolve an amazing new chemical in a watering can * * * saunter around your lawn edges sprinkling as you go * * * and presto! Your grass is "cut". What's more, it will stay "cut" all Summer long! You do this simple easy thing once early in the season * * * and your grass trimming is finished for the whole Summer.

BUT that's not all. Not only will your grass NOT grow taller * * * it will be greener, thicker, more luxurious!

The amazing new chemical that makes this labor saving dream come true is called KEM-KUT with U. S. Rubber Company's patented growth inhibitor: Maelic Hydrazide. This remarkable product is the result of years of painstaking research and experimenting. It has been tested * * * and proven safe for finest lawns! It does not adversely affect grass roots. It does not harm the soil! But what a miraculous time, work and money saver it is! Imagine! If the grass around your house grows so fast you have to cut it 17 times a year, simply sprinkle on KEM-KUT with U. S. Rubber Company's discovery MH-40.

As it touches the grass KEM-KUT is absorbed into each grass blade, and slows down the formation of new cells inside each blade! Your grass acts as though it were already full-grown! New cells do not form on top of present cells to add additional height! Grass treated this way does not have to be cut again all season long!

What's more, since your grass remains about the same height, your grass becomes thicker * * * it becomes greener * * * it looks richer, heavier, more luxurious.

Yes, modern science has found a new way to save you time and money. No more bending and stooping to cut hard to reach grass around trees, stones, fence posts and hedges! No more backaches and blisters cutting grass around

paths, driveways, borders, shrubs and flower plots! No more sweating and straining cutting grass over and over again around your house! And no more spending four or five dollars every week having someone do these necessary jobs!

Instead you simply dissolve some miracle KEM-KUT in a watering can and sprinkle on! And you do this ONCE ONLY! Your KEM-KUT treated grass will be neat and trim all Summer long. You'll have a perfect edge around your driveway and paths. You'll have short, neat grass edges around every tree, every bush, every flower plot, every fence post. You'll have the neatest, trimmest, most even lawn in your neighborhood. And your grass will be greener, thicker, more luxurious than ever before!

PAR. 4. By and through the use of the foregoing statements and representations and others of similar import, but not specifically set out herein, respondents have represented, directly and by implication:

(1) That Kem-Kut retards the growth of lawns;

(2) That Kem-Kut produces an even lawn;

(3) That Kem-Kut makes lawn mowing unnecessary;

(4) That Kem-Kut makes grass greener, thicker and more luxurious;

(5) That Kem-Kut is safe and when applied to a lawn will not adversely affect the appearance of the lawn.

PAR. 5. The aforesaid representations are false, misleading and deceptive. In truth and in fact, respondents' product Kem-Kut will not retard the growth of lawns. While it may slow or retard the growth of some species of lawn grass, it accelerates rather than retards the growth of crab grass and some other plant species found in lawns. Its use will not, therefore produce an even lawn or make it unnecessary to mow the lawn. Respondents' product will not make grass greener. When applied in sufficient quantities to be effective in retarding the growth of any species of lawn grass, it causes the grass to turn brown. The growth of new cells is necessary for grass to become thicker and more luxurious and since respondents' product inhibits the growth of new cells in existing plants, it cannot cause grass to become thicker and more luxurious. It is not safe to apply Kem-Kut to a lawn for the reason that when applied in the prescribed quantities, it causes the grass to turn an undesirable brown color, thereby adversely affecting the appearance of the lawn.

PAR. 6. The use by respondents of the foregoing false and misleading statements and representations has had and now has the capacity and tendency to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of said product because of such erroneous and mistaken belief.

PAR. 7. The aforesaid acts and practices of respondents as herein alleged are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated November 23, 1954, the initial decision in the instant matter of hearing examiner Abner E. Lipscomb, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint in this proceeding charges the respondents with unfair and deceptive acts and practices in violation of the Federal Trade Commission Act, in the advertising of a product designated as Kem-Kut, and chemically known as maleic hydrazide. Specifically, respondents are charged with misrepresenting that Kem-Kut will retard the growth of lawns; will produce an even lawn; will make lawn-mowing unnecessary; will make grass greener, thicker and more luxurious; and that it is safe and will not adversely affect the appearance of the lawn. At the initial hearing, the first of the above allegations, that Kem-Kut, when applied to lawns, will retard the growth thereof, was abandoned on the record by counsel supporting the complaint as being contrary to fact.

On October 4, 1954, respondents entered into an agreement with counsel supporting the complaint, and, pursuant thereto, submitted to the hearing examiner a stipulation for a consent order disposing of all issues remaining in this proceeding.

Respondents are identified as individuals and copartners doing business as Loamium Company of America, located at 2 Kingsland Avenue, Harrison, New Jersey.

Respondents admit all the jurisdictional allegations set forth in the complaint, and stipulate that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. Respondents, in effect, request that their answer to the complaint herein, filed on November 17, 1953, be withdrawn, and expressly waive the filing of an answer to the complaint and further proceedings before the hearing examiner or the Commission.

It is stipulated that the signing of this stipulation is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

Respondents agree that the order contained in said stipulation shall have the same force and effect as if made after full hearing, presentation of evidence, and findings and conclusions thereon, and expressly waive all right, power and privilege to contest the validity of said order. Said stipulation recites that said complaint may be used in construing the terms of said order, and that said order may be altered, modified or set aside in the manner provided by statute for orders of the Commission.

It is specifically agreed that said Stipulation For Consent Order, together with the complaint, shall constitute the entire record in this proceeding. Inasmuch as this initial decision, and the decision of the Commission, if it affirms such initial decision, must hereafter also become part of the record, the aforesaid provision of the stipulation is interpreted to mean that it is agreed that the complaint and Stipulation For Consent Order shall constitute the entire record upon which the initial decision herein shall be based. It is further agreed that the order contained in said stipulation may be entered without further notice upon the record, in disposition of this proceeding.

In view of the provisions of the stipulation as outlined above, and the fact that the order embodied in the stipulation differs from the order accompanying the complaint only in the omission of the prohibition, "Will retard the growth of lawns," which was abandoned on the record by counsel supporting the complaint, it appears that the Stipulation For Consent Order should be accepted, and that such action, together with the issuance of the order contained in the stipulation, will resolve all the issues arising by reason of the complaint in this proceeding, and will safeguard the public interest to the same extent as could be accomplished by full hearing and all other adjudicative procedure waived in said stipulation. Accordingly, the hearing examiner, in consonance with the terms of said agreement, accepts the Stipulation For Consent Order submitted herein; grants respondents' request that their answer to the complaint herein, heretofore submitted, be withdrawn; and issues the following order:

It is ordered, That the respondents Malcolm E. Smith, Jr., Casper Pinsker, Jr., and Richard H. Davimos, individually and as copartners, doing business as Loamium Company of America, or under any other name, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with

the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of their chemical plant growth inhibitor designated as Kem-Kut, or any other product of substantially similar composition or possessing substantially similar properties, whether sold under the same name or under any other name, do forthwith cease and desist from representing, directly or by implication, that the use of said product:

1. Will produce an even lawn;
2. Makes lawn mowing unnecessary;
3. Makes grass greener, thicker or more luxurious;
4. Is safe or will not adversely affect the appearance of a lawn.

It is further ordered, That the answer to the complaint herein, filed by respondents on November 17, 1953, be, and the same hereby is, withdrawn from the record.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That respondents Malcolm E. Smith, Jr., Casper Pinsker, Jr., and Richard H. Davimos, individuals and copartners doing business as Loamium Company of America, 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 to cease and desist [as required by said declaratory decision and order of November 23, 1954].

IN THE MATTER OF

WILL-WELD MANUFACTURING COMPANY ET AL.

Docket 5922. Complaint, Sept. 11, 1951—Order, Nov. 24, 1954

Order setting aside cease and desist order issued Mar. 13, 1952, 48 F. T. C. 965, and dismissing complaint for the reason that said order went further than necessary to apprise users of potential dangers involved in the use of respondents' welding machines and also required respondents to make considerably more disclosures as to such dangers than other sellers of similar products were required to make; the matter being settled by respondents' subsequent execution of an informal stipulation and agreement to cease and desist.

Before *Mr. Webster Ballinger*, hearing examiner.
Mr. John M. Russell for the Commission.

OPINION OF THE COMMISSION

Per CURIAM:

The Commission on September 11, 1951, issued its complaint against the respondents charging them with the use of unfair and deceptive acts and practices in connection with the advertising and sale of unassembled home welding machines. Respondents filed their answer denying the material allegations of the complaint. Thereafter a hearing was held in Washington, D. C., before a hearing examiner of the Commission at which five pieces of advertising material used by the respondents were introduced in evidence and the testimony of an electrical safety engineer employed by the National Bureau of Standards was taken. Respondents were not represented at this hearing and they did not exercise their right to request a hearing for the purpose of taking testimony in opposition to the complaint.

The hearing examiner on December 29, 1951, filed his initial decision in which he found the facts to be substantially as alleged in the complaint and ordered the respondents to cease and desist from:

(1) Representing, directly or indirectly, that their electric home welding machine, made by the assembling of the various parts sold by them for a complete machine, will operate consistently and safely on the electric circuit ordinarily found in a home with a 30 ampere fuse.

(2) Selling or offering for sale their electric home welding machine without, in large type appearing in all literature relating thereto, expressly informing the purchaser or purchasers that their home welding machine cannot be safely connected with the electric current

ordinarily found in a home by an ampere fuse in excess of 15 amperes and that the use of a larger fuse may cause an overloading of the electric circuit and produce a dangerous fire-hazard condition.

Respondents filed a notice of their intention to appeal from this decision of the hearing examiner but the appeal was not perfected. The Commission on March 13, 1952, adopted the hearing examiner's decision as its decision.

Upon our own motion we have reconsidered our decision in this matter. We have also considered our action in other matters involving similar advertising representations. It now appears that the order goes further in its requirements than is necessary to adequately apprise users and prospectve users as to the potential dangers involved. It also appears that the order in this case requires the respondents to make considerably more disclosures with respect to the dangers involved in the use of their welding machines than we have required other sellers of similar products to make.

Subsequent negotiations between the Commission's Bureau of Consultation and the respondents have resulted in the execution by the respondents of an informal stipulation as to the facts and agreement to cease and desist in which the respondents agree to cease and desist from offering for sale or selling for home use their welding machine, assembled from the various parts sold by them for a complete machine:

(1) Without making in all their advertising a clear and affirmative disclosure as to the proper wiring and fusing of the circuit on which the machine is used; and

(2) Unless on said welder, or accompanying it, there is a notice as to the proper wiring and fusing of the circuit on which the machine is used, together with a clear "Warning" or "Caution" that failure to follow this direction may create a dangerous fire hazard.

It is our opinion that this stipulation and agreement to cease and desist is adequate and appropriate to prevent a continuation or resumption of the unfair and deceptive acts and practices in which the respondents were found to have engaged and that it would be in the public interest to reopen this proceeding, vacate and set aside the order to cease and desist, and dismiss the complaint without prejudice. An order to that effect will be entered.

ORDER REOPENING PROCEEDING, VACATING AND SETTING ASIDE ORDER TO CEASE AND DESIST AND DISMISSING COMPLAINT WITHOUT PREJUDICE

The Commission, on its own motion, having reconsidered its decision of March 13, 1952, in this matter, and having determined, for

the reasons appearing in the accompanying opinion, that this proceeding should be reopened; that the order to cease and desist should be vacated and set aside; and that the complaint should be dismissed without prejudice:

It is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist entered herein on March 13, 1952,[1] be, and it hereby is, vacated and set aside.

It is further ordered, That the complaint herein be, and it hereby is, dismissed without prejudice to the right of the Commission to institute further proceedings should the facts warrant such action.

[1] See 48 F. T. C. 965.

IN THE MATTER OF

CHARLES ANTELL, INC. ET AL.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER TO CEASE AND DESIST, AND OPINION OF THE COMMISSION

Docket 6102. Order and Opinion, Nov. 26, 1954

Order modifying cease and desist order of December 19, 1953,[1] to bring it into conformity with the stipulated facts so as to prohibit representations that the main ingredient from a percentage standpoint in respondents' product "Charles Antell Formula No. 9" was lanolin, and that said product would remedy the cause of cracked or split hair.

Before *Mr. John Lewis*, hearing examiner.

Mr. William L. Pencke for the Commission.

Mr. Bernard H. Herzfeld, of Baltimore, Md., for respondents.

Modified Order

It is ordered, That the respondent Charles Antell, Inc., a corporation, and its officers and respondents, Charles D. Kasher, Leonard L. Rosen and Julius J. Rosen, individually, and respondent T. A. A., Inc., a corporation, and its officers, and respondents' respective agents, representatives and employees, directly or through any corporate, or other device, in connection with the offering for sale, sale or distribution of Charles Antell Formula No. 9 and Charles Antell Shampoo, or any products of substantially similar composition or possessing substantially similar properties, whether sold under the same names or any other names, do forthwith cease and desist from, directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents directly or through inference,

(a) With respect to Charles Antell Formula No. 9:

(1) That the main ingredient in said product from a percentage standpoint is lanolin;

(2) That lanolin is the only natural oil or grease that is absorbed by the hair or scalp or that the lanolin in said product is absorbed by the scalp to the extent that it will reach the roots of the hair;

(3) That the lanolin in said product will cleanse the hair;

[1] 50 F. T. C. 543.

(4) That its use will loosen the scalp or constitute an effective treatment for dandruff or infected scalp;

(5) That it will remedy the cause of cracked or split hair;

(6) That the use of said product, as directed or otherwise, will promote the growth of the hair;

(7) That the use of said product will give the hair health or vitality, except to the extent that brushing, pulling and massaging of the hair and scalp with said product regularly serves as a stimulant to circulation around the hair roots and thereby helps maintain normal scalp and hair health;

(8) That the use of said products will not change the color of the hair or will not leave grease on the hair, unless such representation is limited to cases where said product is used in moderate amounts as directed;

(9) That its use will cause the hair to curl;

(10) That its use will prevent the loss of hair or baldness.

(b) With respect to Charles Antell Shampoo: That the hormones present in said product will have any cleansing action on the hair.

2. Disseminating, or causing the dissemination of any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of either of said products, which advertisement contains any of the representations prohibited in Paragraph 1 hereof.

It is further ordered, That respondents Charles Antell, Inc., a corporation, and its officers, and respondents Charles D. Kasher, Leonard L. Rosen and Julius J. Rosen, individually, and respondent T. A. A., Inc., a corporation, and its officers, and respondents' respective agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of the product known as Hexachlorophene Soap, or any other soap or product of substantially similar properties, whether sold under the same name or any other name, do herewith cease and desist from:

1. Misrepresenting, directly or by implication, the effectiveness of said soap as a cleansing agent.

2. Representing, directly or by implication, that the use of said soap will prevent impetigo or cradle cap in case of babies or prevent the development of pimples, boils, blackheads or other skin blemishes generally.

Modified Order

It is further ordered, That respondents Charles Antell, Inc., a corporation, and its officers, and respondents Charles D. Kasher, Leonard L. Rosen and Julius J. Rosen, individually, and respondent T. A. A., Inc., a corporation, and its officers, and respondents' respective agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any article of merchandise do forthwith cease and desist from representing, directly or by implication:

That it is being sold at a reduced price when such price is the price at which the article is usually and regularly sold.

The order is published as modified by Commission order reopening proceeding and modifying order to cease and desist, as follows:

This matter having come on to be heard by the Commission upon respondents' motion to modify the order entered herein on December 18, 1953, and answer thereto by counsel supporting the complaint; and

The Commission having determined, for the reasons appearing in the accompanying opinion, that this proceeding should be reopened and the order to cease and desist modified in the respects requested by the respondents:

It is ordered, That this proceeding be, and it hereby is, reopened for the purpose of modifying paragraphs 1 (a) (1) and 1 (a) (5) of the order to cease and desist entered herein on December 18, 1953.

It is further ordered, That paragraph 1 (a) (1) of said order to cease and desist, which now reads:

"That the main ingredient in said product is lanolin"; be, and it hereby is, modified to read:

"That the main ingredient in said product from a percentage standpoint it lanolin"

and that paragraph 1 (a) (5) of said order to cease and desist, which now reads:

"That it will remedy the cause of cracked or split hair or will remedy the damage caused by improper dyeing of the hair, permanents, burning or other harmful practices having to do with the hair";

be, and it hereby is, modified to read:

"That it will remedy the cause of cracked or split hair."

Commissioner MEAD dissenting for the reason that he would reopen and remand the case for the purpose of taking evidence as to the factual questions raised by respondents' motion.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

This is a motion by respondents for the modification of an order to cease and desist on the ground that certain parts of said order are not justified by the facts.

The complaint charged unfair and deceptive acts and practices in the advertising of a product for the hair known as Charles Antell Formula No. 9. A stipulation was entered into as to the facts and the initial decision based thereon became the decision of the Commission December 18, 1953.

In paragraph 1 (a) (1) of the order the respondents were directed to cease and desist from representing "That the main ingredient in said product is lanolin." Respondents' motion requests that said inhibition should be modified to read "That the main ingredient in said product from a percentage standpoint is lanolin." The reason for the modification is that the stipulated facts are that "The main ingredient in said product from a percentage standpoint is not lanolin, but the lanolin present in the product is of full strength or maximum potency."

Counsel supporting the complaint makes no objection to this part of the motion.

The suggested amendment would bring the order into conformity with the agreed facts and therefore the motion with regard to paragraph 1 (a) (1) is granted.

"(5) That it will remedy the cause of cracked or split hair *or will remedy the damage caused by improper dyeing of the hair, permanents, burning or other harmful practices having to do with the hair.*"

Respondents' motion would strike out the *italicized* part of the above order. On this point the stipulation provides as follows:

"The use of said product will make the hair less brittle and more pliable and improve the appearance of hair that is cracked, split or otherwise damaged by improper dyeing, permanents, burning and other harmful practices, but its use will not remedy the cause of cracked or split hair."

The finding made by the Hearing Examiner was in similar language.

The agreed facts clearly set forth that the use of the formula will not remedy the *cause* of cracked or split hair and that part of the order is not questioned. There is no direct statement in the stipulation or findings as to whether use of the product will or will not remedy the *damage* caused by improper dyeing, permanents, burning or other harmful practices unless improving of the appearance of damaged hair can be said to be a remedy of such damage. It appears that

cracked or split hair may be caused by improper dyeing, permanents, burning and other harmful practices. It also appears that there may be other damage but just what that damage may be is not disclosed nor do the facts set out whether use of the product will or will not remedy such damage.

Counsel supporting the complaint argues that the clear and obvious meaning of the finding is "that where there is hair that is cracked and split due to the enumerated causes, the efficacy of said formula No. 9 is limited to improving the appearance of the hair."

This is a possible construction of the sentence; however, the finding, together with any inference properly drawn therefrom, are not clear enough to warrant that part of the order which is in question.

It is therefore directed that respondents' motion be granted; that paragraph 1 (a) (1) be modified to read as follows:

"(1) That the main ingredient in said product from a percentage standpoint is lanolin."

and that paragraph 1 (a) (5) be modified to read as follows:

"(5) That it will remedy the cause of cracked or split hair."

It is further directed that an order in accordance herewith be prepared and filed.

Commissioner Mead dissents for the reason that he would reopen and remand the case for the purpose of taking evidence as to the factual questions raised by respondents' motion.

IN THE MATTER OF

BROOKLYN PAINT & WALLPAPER DEALERS ASSOCIATION, INC., ET AL.

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

Docket 6224. Complaint, June 29, 1954—Decision, Dec. 2, 1954

Consent order requiring a trade association and its 182 member retailers of paint and wallpaper to cease concertedly classifying particular purchasers or groups of purchasers as legitimate or illegitimate, acting to induce suppliers to refrain from selling to disapproved dealers, and boycotting suppliers who disregarded their requests.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Everette MacIntyre for the Commission.

Proskauer, Rose, Goetz & Mendelsohn, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by the said Act, the Federal Trade Commission, having reason to believe that the Brooklyn Paint & Wallpaper Dealers Association, Inc., its officers, Board of Governors and members, named or referred to in the caption hereof and hereinafter referred to as respondents, have violated the provisions of the 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, Brooklyn Paint & Wallpaper Dealers Association, Inc., is an association of members organized and existing as a corporation under the laws of the State of New York, with its principal office and place of business located at 166 Montague Street, Brooklyn, New York. Sometimes hereinafter it will be referred to as respondent "Association." The membership of the said respondent Association is composed of approximately 182 individuals, partnerships and corporations located in the metropolitan area of New York, New York, and who are engaged in the distribution of paint and wallpaper and kindered lines of merchandise at retail. All members of respondent Association are hereby made respondents herein and sometimes hereinafter will be referred to as respondent "Members."

Said respondent Association was organized for the ostensible purpose of promoting trade practices approved by them collectively. It also appears that one of the objects of respondent Association was to act for members collectively. The names and addresses of the officers are as follows:

Marvin Passick, President,
9504 Church Avenue,
Brooklyn, New York.

Maxwell M. Schames, Vice President,
477 Livonia Avenue,
Brooklyn, New York

Bernard Gladstone, Treasurer,
924 Broadway,
Woodmere, Long Island.

Sidney Beyer, Executive Secy.,
166 Montague Street,
Brooklyn, New York.

The names and addresses of the members of the Board of Governors of said respondent Association, who individually and as members of said Board are named as respondents herein, are as follows:

Max Brudner,
3411 Church Ave.,
Brooklyn, New York

Maxwell M. Schames,
477 Livonia Ave.,
Brooklyn, New York

Gerald H. Cobin,
60-02 Roosevelt Ave.,
Woodside, Long Island

Martin E. Erwich,
1806 Avenue U,
Brooklyn, New York

William A. Goldsmith,
275-A Reid Ave.,
Brooklyn, New York

Albert Lefland,
113-03 Queens Blvd.,
Forest Hills, L. I.

David Levine,
348 Central Ave.,
Lawrence, Long Island

Isadore Malacoff,
1764 Nostrand Ave.,
Brooklyn, New York

Mac Neier,
65-03 Grand Ave.,
Maspeth, Long Island

David Neiss,
1105 Coney Island Ave.,
Brooklyn, New York

Louis Padnick,
7215 New Utrecht Ave.,
Brooklyn, New York

Murray Rein,
5217 Church Ave.,
Brooklyn, New York

Samuel Resnick
84-29 Roosevelt Ave.,
Jackson Heights, New York

Charles Tyler,
409 Utica Ave.,
Brooklyn, New York

Louis Weinstein,
5022 Ft. Hamilton Parkway,
Brooklyn, New York

George Weston,
8503 Third Ave.,
Brooklyn, New York

The membership of respondent Association constitutes a class so numerous and changing as to make it impracticable to specify here the name of each present member. The following, among others, are members of respondent Association, are fairly representative of the

whole membership and are named as respondents herein in their individual dual capacities, in their capacities as members of respondent Association and as representatives of all members of respondent Association as a class, including those not herein specifically named:

Passick's Color Mart,
9504 Church Avenue,
Brooklyn, New York
M. Schames & Son,
477 Livonia Avenue,
Brooklyn, New York
Gladstone & Sons,
924 Broadway,
Woodmere, Long Island
Embe Paint & Wallpaper Co.,
3411 Church Avenue,
Brooklyn, New York
Paint Masters, Inc.
60–02 Roosevelt Avenue
Woodside, Long Island
Arrow Paint Company,
1806 Avenue U,
Brooklyn, New York
Goldsmith Paint Supplies,
275–A Reid Avenue,
Brooklyn, New York
Nu-Mode Wallpaper Corp.,
113–03 Queens Blvd.,
Forest Hills, L. I.
W & L Paint & Wallpaper Co.,
348 Central Avenue,
Lawrence, Long Island
David Malacoff & Company,
1764 Nostrand Avenue,
Brooklyn, New York
Irmac Paint & Wallpaper Co., Inc.,
65–03 Grand Avenue,
Maspeth, Long Island
Brooklyn Paint Supply Co.,
1105 Coney Island Avenue,
Brooklyn, New York
Louis Padnick & Sons, Inc.,
7215 New Utrecht Avenue,
Brooklyn, New York
S. Rein & Son,
5217 Church Avenue,
Brooklyn, New York
Resnick's,
84–29 Roosevelt Avenue,
Jackson Heights, New York
Charles-Howard Wallpaper Co.,
409 Utica Avenue,
Brooklyn, New York
Atlantis Paint & Shellac Co., Inc.,
5022 Ft. Hamilton Parkway,
Brooklyn, New York
Weston Paint & Wallpaper Co.,
8503 Third Avenue,
Brooklyn, New York

PAR. 2. The respondent Members of respondent Association, consisting of approximately 182 individuals, co-partnerships and corporations, are located in the metropolitan area of New York, New York, and are engaged in the business of selling, at retail, paint, wallpaper and kindred merchandise.

Said respondent Members of respondent Association are now and have been, during all the times mentioned herein, in free, active and substantial competition with others engaged in the sale, at retail, of paint, wallpaper and kindred merchandise, except insofar as that competition has been hindered, lessened, restricted and eliminated by the acts, methods and practices hereinafter set forth. In that connection, respondent Members purchase for resale, paint, wallpaper and

kindred merchandise directly from manufacturers or importers thereof located in various states, and said manufacturers of said products when so purchased from their respective places of business in other States, cause the same to be transported to said respondent Members or to consignees designated by respondent Members into States other than the State of manufacture or import. Competitors of respondent Members likewise engage in transactions in interstate commerce. Such commerce has been hindered and is being interfered with by respondents through the acts, methods, practices and policies hereinafter set forth. The respondent Members comprise a substantial part of the retailers engaged in such resale of paint, wallpaper and kindred merchandise in some areas of metropolitan New York, New York.

PAR. 3. Respondent Members of said respondent Association, acting in cooperation with each other and through and in cooperation with said respondent Association and its officers and Board of Governors, and each of them, during the period of time, to wit, from March, 1953, to the date of this complaint, have entered into and carried out a planned common course of action, understanding, agreement, combination and conspiracy among themselves and with and through respondent Association, its officers and Board of Governors, and others not parties respondent herein, to hinder and restrain competition in the interstate sale and distribution of paint, wallpaper and kindred lines of merchandise to retailers, and in turn, to hinder and suppress competition in the resale of such products at retail. Pursuant to, and as a part of said planned common course of action, understanding, agreement, combination and conspiracy, and in furtherance thereof, the respondents have acted in concert and in cooperation with each other in doing, among others, the following acts and things:

1. Urged all members of respondent Association to inquire of manufacturers and other suppliers of paint, wallpaper and kindred merchandise, whether such suppliers subscribed to the policy of restricting sales to "recognized" and "legitimate" paint and wallpaper dealers;

2. Used the offices of respondent Association to advise respondent Members that some manufacturers and suppliers of paint, wallpaper and kindred merchandise "are making no bones about selecting outlets other than the legitimate paint and wallpaper dealer," and urged such members to "CLOSE RANKS," "LET'S FACE IT!" and "WE FIGHT BACK—OR PERISH!";

3. Acted through the representatives of respondent Association in inducing manufacturers and suppliers of paint, wallpaper and kindred

merchandise to refrain from selling some retailers and to discontinue selling to a number of other retailers not classified by respondents as paint and wallpaper dealers.

4. Acted to boycott manufacturers and other suppliers of paint, wallpaper and kindred merchandise, who disregarded requests of respondents that such manufacturers discontinue sales to certain competitors of respondents.

PAR. 4. The results of said planned common course of action, understanding, agreement, combination, conspiracy, and the acts and things done thereunder and pursuant thereto by said respondents, as hereinbefore set forth, are contrary to public policy because of their dangerous tendency unduly to hinder competition or create a monopoly, and, therefore, constitute unfair acts and practices and unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated December 2, 1954, the initial decision in the instant matter of hearing examiner Frank Hier, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Complaint herein was issued by the Federal Trade Commission June 29, 1954, charging respondents with combination, conspiracy and agreement to boycott manufacturers and other suppliers of paint, wallpaper, and kindred merchandise who sold to competitors of respondents and to use other means to restrict such sales to respondents or to firms approved by them, in violation of Section 5 of the Federal Trade Commission Act. After service of the complaint upon respondents and the filing of answer thereto by them, counsel for respondents entered into a stipulation with counsel suporting the complaint for consent order. Said stipulation provides that respondents admit all the jurisdictional allegations set forth in the complaint and stipulate that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. Said stipulation further provides that respondents withdraw their answer to the complaint, expressly waive the filing of answer, a hearing before a hearing examiner, the making of findings of fact or con-

clusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission and all further and other procedure before the hearing examiner and the Commission to which respondents may be entitled. Respondents further agree in said stipulation that the order hereinafter made shall have the same force and effect as if made after full hearing, presentation of evidence, and findings and conclusions thereon, that the complaint may be used in construing the terms of the order agreed upon and they specifically waive any and all right, power, or privilege and challenge or contest the validity of the order entered in accordance with this stipulation, and that the latter, together with the complaint, shall constitute the entire record herein. It is further provided that such stipulation is for settlement purposes only and constitutes no admission by respondents of any violation of law as charged in the complaint.

In view of the provisions of the stipulation for consent order as outlined above, it appears that respondents' request to withdraw their answer to the complaint should be granted, and that such action, together with the issuance of the order agreed upon in said stipulation, will resolve all of the issues arising by reason of the complaint and respondents' answer thereto, will appropriately dispose of this proceeding and will adequately safeguard the public interest to the same extent as could be accomplished by trial.

Accordingly, the hearing examiner, grants respondents' request to withdraw their answer, accepts, as in the public interest, the stipulation for consent order agreed upon by all counsel, directs that the same be filed, and in consonance with the terms thereof issues the following order:

ORDER

It is ordered, That the respondents, Brooklyn Paint & Wallpaper Dealers Association, Inc., a membership corporation, its officers: Marvin Passick, President, Maxwell M. Schames, Vice President, Bernard Gladstone, Treasurer, and Sidney Beyer, Executive Secretary, individually and as officers of said respondent, Brooklyn Paint & Wallpaper Dealers Association, Inc., the members of the Board of Governors of Brooklyn Paint & Wallpaper Dealers Association, Inc.: Maxwell M. Schames, Max Brudner, Gerald H. Cobin, Martin E. Erwich, William A. Goldsmith, Albert Lefland, David Levine, Isadore Malacoff, Mac Neier, David Neiss, Louis Padnick, Murray Rein, Samuel Resnick, Charles Tyler, Louis Weinstein and George Weston, individually and as members of said Board of Governors, the members of Brooklyn Paint & Wallpaper Dealers Association, Inc., and Passick's Color Mart, M. Schames & Son, Gladstone & Sons,

Embe Paint & Wallpaper Co., Paint Masters, Inc., Arrow Paint Company, Goldsmith Paint Supplies, Nu-Mode Wallpaper Corp., W & L Paint & Wallpaper Co., David Malacoff & Company, Irmac Paint Co., Inc., Brooklyn Paint Supply Co., Louis Padnick & Sons, Inc., S. Rein & Son, Resnick's, Charles-Howard Wallpapers Co., Atlantis Paint & Shellac Co., Inc., and Weston Paint & Wallpaper Co., directly or indirectly, individually and as representatives of all members of Brooklyn Paint & Wallpaper Dealers Association, Inc., in connection with the purchase or sale or with or in connection with the offer to purchase or sell or distribute paint, wallpaper and kindred merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, cooperating in, carrying out or continuing in a planned common course of action, understanding, agreement or conspiracy between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts, practices or things:

1. Acting to classify any particular purchaser or group of purchasers as legitimate paint and wallpaper dealers for the purpose or with the effect of classifying other purchasers as illegitimate paint and wallpaper dealers;

2. Requesting a manufacturer, or other supplier, to refrain from selling or offering to sell or making available, for purchase, to any purchaser, paint, wallpaper or kindred merchandise;

3. Acting in any manner or through any method or means to boycott any manufacturer or supplier of paint, wallpaper or kindred merchandise;

4. Utilizing the offices of any representative in any association or any other agency to do or perform or to aid or abet in doing or performing anything prohibited by any provision of this order.

ORDER TO FILE REPORT OF COMPLIANCE

It is 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 to cease and desist [as required by said declaratory decision and order of December 2, 1954].

Commissioner Mason concurs on the basis of his own opinion that the phrase "members herein" embodied in the order to cease and desist and the phrase "respondents herein" embodied in the order to file report of compliance, impose no individual civil liability upon any person, who, even though a member of a class sued, neither was served with the complaint nor consented to the order.

IN THE MATTER OF

BOND VACUUM STORES, INC., ET AL.

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

Docket 6209—Complaint, May 27, 1954—Decision, Dec. 9, 1954

Consent order requiring a concern in Washington, D. C., to cease advertising falsely that certain vacuum cleaners and sewing machines were offered for sale when such offers were not bona fide, that it operated stores in principal cities, gave big trade-in allowances on customers' old merchandise, and furnished a five-year guarantee on its reconditioned Singer sewing machines; to cease representing fictious prices as the customary prices of their merchandise; and to cease charging customers a "recording fee" when it did not record its sales contracts but retained the money thus collected for its own use.

Before *Mr. Loren H. Laughlin*, hearing examiner.
Mr. Michael J. Vitale for the Commission.
Kamerow & Kamerow, of Washington, D. C., for respondents.

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 Bond Vacuum Stores, Inc., a Delaware corporation, and Albert Hyatt, Philip Morris, Harold Stengel and Julius Langsner, 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 Bond Vacuum Stores, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 610 Ninth Street, Northwest, Washington, D. C. Respondents Albert Hyatt, Philip Morris, Harold Stengel and Julius Langsner are individuals and president, vice-president-treasurer, vice president and secretary, respectively, of the corporate respondent. These individual respondents formulate, control and direct the policies, acts and practices of the corporate respondent. Their address is the same as that of the corporate respondent.

PAR. 2. The respondents are now, and for several years last past have been, engaged in the sale and distribution, among other things, of vacuum cleaners and sewing machines. In the course and conduct of their said business respondents have caused their vacuum cleaners and sewing machines when sold, to be transported from their place of business at the aforesaid address to purchasers thereof located in the District of Columbia and in various States of the United States. They maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce in the District of Columbia and between the District of Columbia and various States of the United States. Their volume of trade in said commerce has been and is substantial.

PAR. 3. At all times mentioned herein respondents have been, and are now, in direct and substantial competition with other corporations, firms and individuals engaged in the sale and distribution of vacuum cleaners and sewing machines in commerce.

PAR. 4. In the course and conduct of their business, as aforesaid, and for the purpose of inducing the purchase of their vacuum cleaners and sewing machines, the respondents have engaged in extensive advertising in newspapers and on television and radio. Among and typical of the statements and representations made in such advertising relating to their said products are the following:

ACT NOW! QUANTITIES LIMITED
BOND RECONDITIONED
ELECTROLUX
COMPLETE WITH 8 ATTACHMENTS
(Picture of vacuum cleaner)
RECONDITIONED BY
BOND EXPERTS
WITH BOND PARTS
1-Year Guarantee parts and labor
$10.95
FREE HOME DEMONSTRATION
Big trade-in allowance for your
old vacuum cleaner
B O N D
Vacuum Stores, Inc.
610—9th St. N. W.

PHONE NOW!
Ex. 3-5380 for Free Home Demonstration
RECONDITIONED PORTABLE ELECTRIC
SINGER
Plus At no extra cost
Pinking Shears with
every Machine purchased
(Picture of Singer sewing machine)
$21.50 5 Years' Guarantee
Full cash price
EASY TERMS ARRANGED
Free Home Demonstration
Big Trade-In Allowance on Your Old Sewing Machine
BOND
Vacuum Stores, Inc.
STORES IN PRINCIPAL CITIES

PAR. 5. By and through the use of the aforesaid statements and representations and others of similar import, but not specifically set out herein, respondents represented, directly or by implication:

1. That they were making bona fide offers to sell reconditioned Electrolux vacuum cleaners and reconditioned Singer sewing machines at the low prices specified in the advertising and that the said products would do a satisfactory job of cleaning and sewing, respectively;

2. That they operate stores in principal cities;

3. That in connection with the sale of vacuum cleaners and sewing machines they will give big trade-in allowances on customers' old cleaners and sewing machines;

4. That they furnish a 5-year guarantee on their reconditioned Singer sewing machines.

PAR. 6. The aforesaid statements and representations were false, deceptive and misleading. In truth and in fact:

1. The said cleaners and sewing machines would not do a satisfactory job of cleaning and sewing, respectively, and the said offers were not genuine or bona fide offers to sell the cleaners and sewing machines advertised, but were made for the purpose of obtaining leads and information as to persons interested in the purchase of vacuum cleaners and sewing machines. After obtaining such leads, through responses to said advertisements, respondents' salesmen called upon the persons so responding at their homes or waited upon them at respondents' place of business and in many instances demonstrated such cleaners and sewing machines, well knowing that their performance would be unsatisfactory; made no effort to sell the advertised cleaners and sewing machines, but in many instances belittled and disparaged such cleaners and sewing machines and attempted to, and fre-

quently did, sell different and much more expensive vacuum cleaners and sewing machines to such persons;

2. Respondents do not operate stores in principal cities. The store located at the address hereinabove set forth is the only store operated by respondents.

3. Respondents do not make or give big trade-in allowance, or any trade-in allowances, on customers' old cleaners and sewing machines when they purchase new or reconditioned cleaners and sewing machines, since the price of the merchandise purchased in so-called trade-in transactions is increased to cover and take care of the so-called trade-in allowance made or given.

4. Respondents' 5-year guarantee is not a bona fide guarantee because it does not set forth the terms thereof or the manner in which respondents will perform thereunder. Such a guarantee is confusing and misleading to the purchasing public.

PAR. 7. In addition to the foregoing, the respondents, in connection with the offering for sale and sale of vacuum cleaners and sewing machines, have misrepresented the regular and customary prices at which they sell their merchandise. In advertising literature such as instruction booklets which they exhibit to purchasers and prospective purchasers respondents have represented that the regular and customary price of their Kingston vacuum cleaner is $129.95; that the regular and customary price of their Monarch sewing machine is $189.50 and that the regular and customary price of their Kingston sewing machine is $199.50. These prices are fictitious and far in excess of the prices at which the respondents regularly and customarily sold the said merchandise.

In connection with the sale of vacuum cleaners and sewing machines respondents have also engaged in the practice of charging purchasers an amount of $2.50 represented as being a "recording fee." Respondents have not had any of their sales contracts recorded but have retained the money thus collected for their own use.

PAR. 8. The use by the respondents of the aforesaid false, deceptive and misleading statements, representations and practices had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were true and because of such statements, representations and practices to purchase substantial quantities of respondents' vacuum cleaners and sewing machines, particularly their more expensive vacuum cleaners and sewing machines. As a result thereof, substantial trade in commerce has been

unfairly diverted to respondents from their competitiors and substantial injury has been and is being done to competition in commerce.

PAR. 9. The aforesaid acts and practices, as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated December 9, 1954, the initial decision in the instant matter of hearing examiner Loren H. Laughlin, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (hereinafter referred to as the Commission) on May 27, 1954, issued its complaint herein under the Federal Trade Commission Act against all of the above-named respondents, charging them with having committed certain alleged unfair or deceptive acts and practices which purport to be violations of Section 5 of said Act. All respondents joined in an answer filed on June 18, 1954, after due service of the complaint upon each of them.

On September 24, 1954, the respondent corporation, by its president and its attorney, and all individual respondents except Julius Langsner, both in person and by their attorney, stipulated in writing with counsel supporting the complaint that a consent order against such respondents be entered herein which stipulation was approved by the Director and Assistant Director of the Commission's Bureau of Litigation. By said stipulation, among other things, said respondents admit all the jurisdictional allegations set forth in the complaint and stipulate that the record herein may be taken as if the Commission had more findings of jurisdictional facts in accordance with such allegations; that such stipulation is made for settlement purposes only, and does not constitute an admission by said respondents that they have violated the law as alleged in the complaint, and that respondents withdraw their said answer filed on June 18, 1954.

It was further stipulated that the complaint, insofar as it concerns the respondent Julius Langsner, be dismissed for the reasons set forth in his affidavit executed August 27, 1954, attached to said stipulation, which affidavit in substance states that theretofore having

held stock in and having been a member of the Board of Directors of respondent Bond Vacuum Stores, Inc. in July 1953, the said Julius Langsner sold all of his said stock and thereupon severed all connections with said corporations; and that neither as an employee or director of said respondent corporation did he ever formulate, control or direct its policies, acts and practices; and that he has no intention of again being connected in any way with said corporation or any similar corporation engaged in a like business, having been since August, 1949, and presently being employed by the United States Government.

Said stipulation further provides that all the parties thereto expressly waive a hearing before a Hearing Examiner or the Commission, the making of findings of facts or conclusions of law by the Hearing Examiner or the Commission, and the filing of exceptions and oral argument before the Hearing Examiner and the Commission to which respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission; and that the cease and desist order therein set forth and hereafter made, shall have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon. Respondents further specifically waive any and all right, power or privilege to challenge or contest the validity of the order entered in accordance with said stipulation, and agree that the complaint herein may be considered in construing its terms in any further proceedings which may arise involving said order.

The said stipulation for consent order and the accompanying affidavit of respondent Julius Langsner were submitted on October 4, 1954, by the Commission's Bureau of Litigation to the undersigned Hearing Examiner duly designated by the Commission, for appropriate action by him under Rule V of the Commission's Rules of Practice. After due consideration, it appearing to the Hearing Examiner from the presentation of such matter that only such acts and practices alleged in the complaint as are unsupportable by evidence or are repetitious have been deleted from the sanctions of the proposed consent order and that the said stipulation and affidavit afford the basis for appropriate disposition of this proceeding, said stipulation and affidavit are accepted and ordered filed as a part of the record in this proceeding. The withdrawal of respondents' answer is hereby approved.

Upon the whole record as now made, in accordance with the said stipulation, the Hearing Examiner finds that the Commission has jurisdiction of the subject matter of this proceeding and of all of

the parties respondent; that this proceeding is in the interest of the public; and that the following order as proposed in said stipulation is appropriate for the disposition of this proceeding, and the same therefore should be, and hereby is, entered as follows:

ORDER

It is ordered, That respondent Bond Vacuum Stores, Inc., a corporation, and its officers, respondents Albert Hyatt, Philip Morris, and Harold Stengel, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of vacuum cleaners and sewing machines, or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that certain merchandise is offered for sale when such offer is not a bona fide offer to sell the merchandise so offered;

2. Representing that they operate more stores than they do in fact operate;

3. Representing, directly or by implication, that any merchandise sold or offered for sale by respondents is guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed;

4. Representing, directly or by implication, that respondents usual or customary price of any merchandise is in excess of the price at which said merchandise is regularly and customarily sold by respondents in the normal course of respondent's business.

5. Requiring purchasers to pay sums of money to respondents represented by them as being for recording fees or for other expenses to be paid to others by respondents, when such sums are retained by respondents.

It is further ordered, That the complaint insofar as it relates to the respondent Julius Langsner be, and the same is, hereby dismissed.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent, Bond Vacuum Stores, Inc., a corporation, and its officers, and Albert Hyatt, Philip Morris, and Harold Stengel, individually and as officers of said corporation, 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 to cease and desist [as required by said declaratory decision and order of December 9, 1954].