IN THE MATTER OF

HARRY J. ASLAN DOING BUSINESS AS HARRY ASLAN CO. ET AL.

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

Docket C-124. Complaint, Apr. 25, 1962—Decision, Apr. 25, 1962

Consent order requiring 13 California shippers of white muscat juice grapes, used primarily for wine-making, in the Fresno area—their shipments and sales of which during the 1961 season represented more than half of all interstate carlot shipments made from California—to cease conspiring to fix and adhere to minimum prices for juice grapes, as they did at a series of meetings held beginning about mid-September of 1961, slightly prior to the shipping season, and continuing to early October.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint, stating its charges in respect thereto as follows:

PARAGRAPH 1. Harry J. Aslan, individually and doing business as Harry Aslan Co., has places of business at Kingsbury and Del Rey, Calif., with his principal place of business at 1060 Simpson Street, Kingsburg, Calif.

L. W. Crosby, individually and doing business as Del Rey Fruit Distributors, has his office and principal place of business at 12480 E. American Avenue, Del Rey, Calif.

Giannini Fruit Sales, Inc. is a corporation organized and existing under and by virtue of the laws of the State of California with it office and principal place of business at 496 South N. Street (P.O. Box 155), Dinuba, Calif. In 1961 its officers, who were also its directors, were Leroy G. Giannini, president; Wayne H. Towne, vice president; and Ruth E. Giannini, secretary-treasurer.

Chris Sorensen Packing Co. is a corporation organized and existing under and by virtue of the laws of the State of California with its

office and principal place of business at Newmark Avenue (Box 338), Parlier, Calif. In 1961 its officers were Chris Sorensen, president; George Domoto, vice president; James Ruby, treasurer; and Chris Sorensen, Jr., secretary. The directors were Mr. and Mrs. Chris Sorensen and James Ruby.

Edwin L. Barr, Sr., Edwin L. Barr, Jr., Merle Barr and Caroline Barr, individually and as co-partners doing business as Barr Packing Company, a patnership, have their office and principal place of business at Seventh and L Streets (P.O. Box 207), Sanger, Calif.

Tennis H. Erickson, individually and doing business as Erickson Packing Company, has his office and principal place of business at American and Portola Streets, Del Rey, Calif.

William P. Condry, H. Y. Hamilton and Samuel B. Randall, individually and as co-partners doing business as Hall Packing Company, a partnership, have their office and principal place of business at Sanger, Calif.

John B. Jorgensen, Sr., individually and doing business as Jorgensen Farms, has his office and principal place of business at First and East Grant Streets, Selma, Calif.

Jack Young, individually and doing business as Youngstown Grape Distributors, has his office and principal place of business at 16th Street (Box 271), Reedley, Calif.

Ballantine Produce Co., Inc. is a corporation organized and existing under and by virtue of the laws of the State of California with its office and principal place of business at (Box 185) Sanger, Calif. In 1961 its officers, who were also its directors, were Herman A. Albertson, president; Virgil E. Rasmussen, vice president; and Ed Schoenburg, secretary-treasurer.

Bianco Packing Co., Inc. is a corporation organized and existing under and by virtue of the laws of the State of California with its office and principal place of business at 930 M Street (Box 274), Sanger, Calif. In 1961 its officers, who were also its directors, were Alphonse Bianco, president, Dominic Bianco, vice president, and Anthony Bianco, Jr., secretary-treasurer.

Mike Fierro and Vaughn Girazian, individually and as co-partners trading as G & F Fruit Distributors, a partnership, have their office and principal place of business at 39400 14th Avenue, West, Kingsburg, Calif.

Floyd J. Harkness, Inc. is a corporation organized and existing under and by virtue of the laws of the State of California, doing business as United Packing Co., with its office and principal place of business at 216 Rowell Building, Fresno, Calif. In 1961 the officers

of the corporation were Floyd J. Harkness, Sr., president; W. Hoyt Colgate, vice president, and Floyd J. Harkness, Jr., secretary-treasurer. The directors of the corporation were its officers and Molly Harkness and Harriette Colgate.

PAR. 2. All of the respondents herein are and for the several years last past have been engaged in the business, among others, of selling and shipping juice grapes to various purchasers thereof. Juice grapes, as distinguished from table stock grapes, are raised and sold primarily for the purpose of winemaking. Respondents in the course and conduct of their business of selling and shipping juice grapes during the 1961 season and in previous years have all sold such grapes to purchasers located in Canada and in States other than the State of California and the District of Columbia. Respondents have caused such grapes so sold to be transported and shipped to the places where such purchasers were located. All of the respondents herein during the 1961 season were engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act in connection with the sale and shipment of juice grapes.

PAR. 3. The great bulk of all grapes produced in the United States, whether for juice or table purposes comes from the State of California. During the seasons for each year from 1950 through 1960 California carlot rail shipments of grapes have exceeded 98% of the total of such shipments in the United States. And of the total California carlot rail shipments of grapes in each of these years, more than 95% represented interstate carlot rail passings. Few, if any, juice grapes are shipped throughout the United States from any State other than California.

Juice grapes may be separated into two classes, namely, black juice grapes and white juice grapes. There are a number of different kinds of varieties of grapes within each classification. In the black juice class the great bulk of interstate carlot rail passings from California during each of the years since 1950 has been composed of Alicante and Zinfandel grapes. In the white juice category such shipments during each of the same years, except for 1950, were composed of more than 95% of Muscat grapes.

The shipping season for juice grapes in California generally commences about the first of September for black juice and about mid-September for white juice grapes, and extends to the end of October or the first few days of November for both classifications. The great bulk of these grapes, however, is shipped in a much more concentrated period. To illustrate, during the 1960 season more than 95% of California carlot rail shipments of white juice grapes occurred

during the period between the weeks ending September 17 and October 22. A comparable illustration for black juice grapes during the same season reflects more than 95% of shipments occurring during the period between the weeks ending September 17 and October 29.

The production and shipping areas for black juice grapes in the State of California are substantially larger than for those in the white juice classification. By way of illustration, in the 1960 season interstate carlot rail passings of California grapes for the black juice class emanated from loading stations within 11 counties while the corresponding figure for white juice grapes embraced only five counties. Production and shipment of white juice grapes is largely concentrated in an area within a 20 to 30 mile radius of Fresno. Of all interstate carlot rail passings of white juice grapes in California during 1960, more than 99% were Muscat grapes and more than 60% of this total emanated from loading stations within Fresno County. All respondents herein, with the exception of Giannini Fruit Sales, Inc., have their offices and places of business in communities included among such loading stations.

PAR. 4. Respondent grape shippers as a group do now and for several years last past have occupied a strong and dominant position in the business of shipping and selling juice grapes, particularly white juice Muscat grapes. For example, their combined shipments of such grapes during the 1961 season approached or exceeded 1,000 carlots or the equivalent thereof. From the time in September when they, or some of them, commenced shipments of Muscat grapes through October 7, 1961, such shipments in the aggregate represented more than 50% of total carlot equivalents of all interstate passings of such grapes from California.

PAR. 5. Each of the respondents herein is and has been in competition with one or more of the other respondents and with other shippers and vendors of juice grapes not parties hereto, in the sale and distribution of juice grapes in commerce, as "commerce" is defined in the Federal Trade Commission Act, except to the extent that actual and potential competition has been hindered, lessened, restricted, restrained and eliminated by the acts and practices hereinafter alleged.

PAR. 6. Respondent shippers herein have agreed, combined, conspired or otherwise engaged in a course of dealing or reached a common understanding to fix and establish minimum prices for juice grapes during the shipping season for 1961 to which they would and did adhere and below which they did not and would not sell. The result of this combination, conspiracy, course of dealing or common under-

standing as heretofore alleged, and acts and practices engaged in by respondents pursuant thereto, has been or may be to unlawfully hinder, restrain and destroy competition between and among respondents herein and others not parties hereto who are engaged in the sale and distribution of juice grapes in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. The agreement, combination, conspiracy, course of dealing or common understanding among respondents to fix and adhere to minimum prices for juice grapes was reached at a series of meetings among which were those held in Sanger, California. These meetings were held at intervals of a few days or a week beginning about mid-September of 1961 at or slightly prior to the commencement of the shipping season for juice grapes and continuing thereafter to a date within the first few days of October. Each of the respondents herein or a representative or representatives thereof attended one or more of these meetings. Among the matters discussed, and agreed upon, at such meetings were minimum prices to be charged and adhered to in the sale of Muscat grapes.

PAR. 8. Respondents' shipments and sales of juice grapes, particularly white Muscat, during the 1961 season through October 7, 1961, represented more than half of all interstate carlot shipments or the equivalent, of such grapes made from California and the greatest percentage of such sales were made pursuant to the agreement, combination, course of dealing, or common understanding reached by and among the respondents as heretofore alleged.

PAR. 9. The capacity, tendency and effect of said agreement, understanding, conspiracy, combination or course of dealing, and the acts and practices of the respondents and each of them done and performed pursuant thereto and in furtherance thereof are now and have been or may be to substantially lessen, restrain, restrict and prevent price competition between and among said respondents in the sale of juice grapes and, because of respondents' dominant position as a group in this business, have had and now have or may have the effect of creating high and artificial prices to purchasers thereof in interstate commerce.

PAR. 10. The concerted acts and practices of the respondents, all and singularly, as hereinbefore set forth, are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Harry J. Aslan, individually and doing business as Harry Aslan Co., has places of business at Kingsburg and Del Rey, Calif., with his principal place of business at 1060 Simpson Street, Kingsburg, Calif.

Respondent L. W. Crosby, individually and doing business as Del Rey Fruit Distributors, has his office and principal place of business at 12480 E. American Avenue, Del Rey, Calif.

Respondent Giannini Fruit Sales, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California with its office and principal place of business at 496 South N Street (P.O. Box 155), Dinuba, Calif.

Respondent Chris Sorensen Packing Co. is a corporation organized and existing under and by virtue of the laws of the State of California with its office and principal place of business at Newmark Avenue (Box 338), Parlier, Calif.

Respondents Edwin L. Barr, Sr., Edwin L. Barr, Jr., Merle Barr and Caroline Barr, individually and as co-partners doing business as Barr Packing Company, a partnership, have their office and principal place of business at Seventh and L Streets (P.O. Box 307), Sanger, Calif.

Respondent Tennis H. Erickson, individually and doing business as Erickson Packing Company, has his office and principal place of business at American and Portola Streets, Del Rey, Calif.

719-603—64——55

Respondents William P. Condry, H. Y. Hamilton and Samuel B. Randall, individually and as co-partners doing business as Hall Packing Company, a partnership, have their office and principal place of business at Sanger, Calif.

Respondent John B. Jorgensen, Sr., individually and doing business as Jorgensen Farms, has his office and principal place of business at First and East Grant Streets, Selma, Calif.

Respondent Jack Young, individually and doing business as Youngstown Grape Distributors, has his office and principal place of business at 16th Street (Box 271), Reedley, Calif.

Respondent Ballantine Produce Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of California with its office and principal place of business at (Box 185) Sanger, Calif.

Respondent Bianco Packing Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of California with its office and principal place of business at 930 M Street (Box 274), Sanger, Calif.

Respondents Mike Fierro and Vaughn Girazian, individually and as co-partners trading as G & F Fruit Distributors, a partnership, have their office and principal place of business at 39400 14th Avenue, West, Kingsburg, Calif.

Respondent Floyd J. Harkness, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California, doing business as United Packing Co., with its office and principal place of business at 216 Rowell Building, Fresno, Calif.

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

ORDER

It is ordered, That respondents Harry J. Aslan, individually and doing business as Harry Aslan Co., L. W. Crosby, individually and doing business as Del Rey Fruit Distributors, Giannini Fruit Sales, Inc., its officers and directors, Chris Sorensen Packing Co., its officers and directors, Edwin L. Barr, Sr., Edwin L. Barr, Jr., Merle Barr and Caroline Barr, individually and as co-partners doing business as Barr Packing Company, Tennis H. Erickson, individually and doing business as Erickson Packing Company, William P. Condry, H. Y. Hamilton and Samuel B. Randall, individually and as co-partners doing business as Hall Packing Company, John B. Jorgensen, Sr., individually and doing business as Jorgensen Farms, Jack Young, individ-

ually and doing business as Youngstown Grape Distributors, Ballantine Produce Co., Inc., its officers and directors, Bianco Packing Co., Inc., its officers and directors, Mike Fierro and Vaughn Girazian, individually and as co-partners doing business as G & F Fruit Distributors, and Floyd J. Harkness, Inc., doing business as United Packing Co., its officers and directors, their respective successors and assigns, 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 juice grapes, do forthwith cease and desist from entering into or continuing, cooperating in or carrying out any planned and concerted course of action, understanding or agreement between any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts or things:

To establish, fix, or maintain the prices or level of prices, or the terms or conditions of shipment, sale or distribution of juice grapes.

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

IN THE MATTER OF

ASSOCIATED CONSTRUCTION PUBLICATIONS ET AL.

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

Docket 7285. Complaint, Oct. 21, 1958—Decision, Apr. 26, 1962

Order dismissing without prejudice—the allegations not having been sustained—complaint charging a Detroit association and its 14 member publishers with combining illegally to eliminate competition and to monopolize the advertising business of advertisers using regional construction trade papers, including limitation of membership to one publication in a given area, allocation of territories so as to exclude overlapping in circulation, securing of patronage of advertisers by unlawful means and diverting it from competing publications, and agreements upon prices, discounts, and terms of sale for advertising space.

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 the parties named in

the caption hereof and hereinafter more particularly described and designated as respondents, have violated and are violating the provisions of Section 5 of said Federal Trade Commission 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 Associated Construction Publications is a non-profit membership corporation, organized and existing under and by virtue of the laws of the State of Michigan, with its home office and principal place of business located at 2746 Penobscot Building, Detroit, Mich. Said respondent will be hereinafter referred to as respondent ACP. Its officers are as follows: Richard C. Mertz, President, Robert O. Schaefer, First Vice President, Roscoe Laing, Vice President, and Gordon L. Anderson, Secretary-Treasurer. The foregoing individuals, together with Earl P. Keyes, comprise the Board of Directors and Executive Committee of respondent ACP. The business address of all the foregoing individual respondents is 2746 Penobscot Building, Detroit, Mich.

PAR. 2. (a) Respondents Eunice Chapin, Thomas Chapin and Harold C. Chapin are individuals and co-partners trading and doing business under the partnership name of Chapin Publishing Co. The business address of said respondents is 1022 Lumber Exchange Building, Minneapolis, Minn. Said respondents are engaged in the business of publishing a regional construction publication known as CONSTRUCTION BULLETIN.

(b) Respondent Construction Publishing, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Virginia, with its home office and principal place of business located at Peoples Federal Building, Roanoke, Va. Respondent is engaged in the business of publishing a regional construction publication known as CONSTRUCTION. Respondent Kenneth O. Dinsmore is an individual and President of respondent corporation; William Beury is an individual and Vice President of respondent corporation; George C. Stewart is an individual and is Secretary of respondent corporation. The address of said respondents is Peoples Federal Building, Roanoke, Va.

(c) Respondent Construction News, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Arkansas, and its business address is Post Office Box 2421, Little Rock, Ark. Respondent is engaged in publishing a regional construction publication known as CONSTRUCTION NEWS. Respondents Ray Metzger, E. L. Gaunt, Marie Metzger are individuals and President, Vice

President, and Secretary-Treasurer, respectively, of respondent corporation. Respondents' address is Post Office Box 2421, Little Rock, Ark.

(d) Respondent Reports Corporation, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and respondent's business address is 6 South Orange Avenue, South Orange, N.J. Respondent is engaged in publishing a regional construction publication known as CONSTRUCTIONEER. Respondents George C. Stewart, Kenneth O. Dinsmore, and Hermon S. Swartz are individuals and are President, Vice President, and Secretary-Treasurer, respectively, of respondent corporation. Said individual respondents' address is the same as the corporate respondent Reports Corporation, Inc.

(e) Respondents Fred Johnston, Sr., Anna C. Johnston, Fred Johnston, Jr., Jerry Johnston, and Mary Anne Howard are individuals and co-partners trading and doing business as Construction Digest. Respondents' address is 101 East 14th Street, Indianapolis, Ind. Respondents are engaged in publishing a regional construction publication known as CONSTRUCTION DIGEST.

(f) J. O. Bowen, as Trustee for Margaret E. Bowen, owns and publishes a regional construction publication known as DIXIE CONTRACTOR, with offices at 110 Trinity Place, Decatur, Ga.

(g) Respondent Contractor Publishing Company is a corporation organized and existing under and by virtue of the laws of the State of Michigan, with its home office and principal place of business located at 642 Beaubien Street, Detroit, Mich. This respondent publishes a publication known as MICHIGAN CONTRACTOR AND BUILDER. Respondents Richard C. Mertz, Jane Huey Mertz, and Rena A. Beardsley are individuals and President-Treasurer, Vice President, and Secretary, respectively, of respondent corporation. Respondents' address is 642 Beaubien Street, Detroit, Mich.

(h) Respondent Mid West Records, Inc., is a corporation organized and exisiting under and by virtue of the laws of the State of Missouri, with its home office and principal place of business located at 2537 Madison, Kansas City, Mo. Respondent is engaged in publishing a regional construction publication known as MID WEST CONTRACTOR. Respondents Elbert E. Smith, Norman D. Smith, and Clifford B. Smith are individuals, and are President, Vice President, and Secretary-Treasurer, respectively, of respondent corporation. Said individual respondents' address is the same as the corporate respondent Mid West Records, Inc.

(i) Respondent R. O. Schaefer, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Tennessee and its home office and principal place of business is located at 425 DeBaliviere Avenue, St. Louis, Mo. Respondent is engaged in publishing a regional construction publication known as MISSISSIPPI VALLEY CONTRACTOR. Respondents R. O. Schaefer, R. O. Schaefer, Jr., and Margaret E. Schaefer are individuals and President and Treasurer, Secretary, and Director, respectively, of respondent corporation. Said individual respondents' address is the same as the corporate respondent R. O. Schafer, Inc.

(j) Respondent Construction Publishing Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Massachusetts with its home office and principal place of business located at 27 Muzzey Street, Lexington, Mass. Respondent is engaged in publishing a regional construction publication known as NEW ENGLAND CONSTRUCTION. Respondents Hermon S. Swartz, Dorothy Swartz, Richard Nichols, and Charles Goodhue are individuals and President and Treasurer, Secretary, Director, and Clerk, respectively, of respondent corporation. Said individual respondents' address is the same as that of the corporate respondent Construction Publishing Co., Inc.

(k) Respondent Pacific Builder & Engineer, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Washington, and its home office is located at 2418 Third Avenue, Seattle, Wash. Respondent is engaged in publishing a regional construction publication known as PACIFIC BUILDER & ENGINEER. Respondents Nancy B. Chapin, William Anderson, and Llewellyn Wing are individuals and are President, Vice President, and Secretary-Treasurer, respectively, of respondent corporation. Said individual respondents' address is the same as the corporate respondent Pacific Builder & Engineer, Inc.

(l) Respondent Mountain Publishing Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Indiana, with its home office and principal place of business located at 855 Lincoln Street, Denver, Colo. Respondent is engaged in publishing a regional construction publication known as ROCKY MOUNTAIN CONSTRUCTION. Respondents Lewis S. Parsons, Gettie A. Parsons, and James L. Parsons are individuals and President, Secretary, and Treasurer, respectively, of respondent corporation. Respondents' business address is 855 Lincoln Street, Denver, Colo.

(m) Respondent Iles-Ayars Publishing Co. is a corporation organized and existing under and by virtue of the laws of the State of

California, with its home office and principal place of business located at 1660 Beverly Boulevard, Los Angeles, Calif. Respondent is engaged in publishing a regional construction publication known as SOUTHWEST BUILDER & CONTRACTOR. Respondents John D. Bowler, Dean I. Bowler, E. J. Evans, and John D. Bowler, Sr., are individuals and President, Vice President, Vice President and Secretary, and Vice President and Treasurer, respectively, of respondent corporation. Respondents' address is 1660 Beverly Boulevard, Los Angeles, Calif.

(n) Respondent Peters Publishing Co., is a corporation organized and existing under and by virtue of the laws of the State of Texas, with its business address as Post Office Box 1706, Dallas, Tex. It publishes TEXAS CONTRACTOR. Respondents W. A. McDonald, Wm. B. Morrison, and B. R. Pruitt are individuals and President, Vice President, and Secretary-Treasurer, respectively, of respondent corporation. Respondents' address is Post Office Box 1706, Dallas, Tex.

(o) Respondent Western Builder Publishing Co., is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin and its business address is 407 East Michigan Street, Milwaukee, Wis. Respondent is engaged in publishing a regional construction publication known as WESTERN BUILDER. Respondents Earl P. Keyes, Dorothy C. Keyes, Emil Hoenig, and Arthur G. Larsen are individuals and President, Secretary, Vice President, and Treasurer, respectively, of respondent corporation. Said individual respondents' address is the same as the corporate respondent Western Builder Publishing Co.

The individual respondents hereinabove named in their individual capacities and as copartners and/or as officers of respondent corporations promulgate, direct, and control the policies, acts, and practices of the partnerships and corporations with which they are connected.

PAR. 3. Respondent ACP is a non-stock membership corporation, composed of the fifteen respondent publishers hereinbefore named and described. It was organized as an unincorporated association by twelve of its present members in 1938 and incorporated as a Michigan corporation in 1957. It performs functions commonly performed by trade associations and in addition sells advertising space on behalf of its members, employing one or more paid employees for the purpose. Members pay dues, but most of the revenue expended by respondent is obtained from members by special assessment or collected in the form of enrollment fees. The present fee for enrollment as a member is $5,000.

PAR. 4. Each respondent publisher named in paragraph 2 hereof is engaged in publishing a paper or magazine commonly classified and referred to as a regional construction magazine or regional construction paper. These are trade papers for the construction industry conveying news, informative data, and advertising to those engaged in the construction industry.

There are in the United States approximately thirty-five regional construction publications. Most of the revenue of said publications is derived from the sale of space for advertising. The remainder is derived from the sale of paid subscriptions.

Magazines published by the respondents are generally recognized by advertisers as being well established and well recognized publications in their regions. Together, respondents enjoy approximately 90% of the nation's regional construction magazine advertising business.

PAR. 5. The respondents are in commerce within the meaning of the Federal Trade Commission Act in that they sell and ship their publications across state lines to subscribers, many of whom are located in states of the United States other than the state of origin of said shipments. They also exchange with each other and in connection therewith transmit and/or ship across state lines news items, advertising plates, and mats.

PAR. 6. For more than two years last past respondents have been engaging in and carrying out, and are continuing to engage in and carry out a combination, agreement, understanding, and planned common course of action to eliminate and restrain competition among and between themselves and with others and to monopolize in themselves the advertising business of those using regional trade papers designed for the construction industry, as an advertising medium. Pursuant to and in furtherance of their unlawful combination, agreement, and planned common course of action, respondents have, among other things, engaged in and used the following acts, practices, and methods:

(a) Created and organized the respondent ACP as an instrumentality through which to carry out their agreed upon purposes;

(b) So organized and operated ACP as to limit membership to one publication in any given area;

(c) Allocated territories to members so as to exclude overlapping in the circulation of their publications;

(d) Used ACP as a means of securing the patronage of advertisers for themselves and diverting it from competitive publications; and

(e) Have agreed upon prices, discounts, and terms of sale to be charged or applied for advertising space in their publications.

PAR. 7. The tendency and effect of the acts, practices, and methods of respondents, as herein alleged, are now and have been to unduly restrict and restrain competition; cause injury to competitors; stabilize prices for advertising in members' trade papers; impose a barrier to the establishment and development of new trade papers; and to tend to create in respondents a monopoly in the publication of regional trade papers for the construction industry.

Said acts and practices of respondents are all to the injury of competition and the public and constitute unfair methods of competition and unfair acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Lynn C. Paulson, supporting the compliant.

Mr. Marshall M. Massey of *Dykema, Jones, Wheat, Spencer & Goodnow*, of Detroit, Mich.; and *Mr. John J. Hudson* of *Gibson, Dunn & Crutcher*, of Los Angeles, Calif.; *Mr. Robert W. Kroening*, of St. Louis Mo.; and *Baker & Daniels*, of Indianapolis, Ind., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

PRELIMINARY STATEMENT

The complaint in the above-entitled and numbered proceeding alleges that Associated Construction Publications, a corporation, its officers and members, engaged in a planned common course of action to monopolize the sale of advertising space in regional trade magazines published by the individual member respondent publications now serving the construction industry in violation of Section 5 of the Federal Trade Commission Act. They deny in substantial part the allegations of the complaint.

At the conclusion of the Commission's case-in-chief, counsel for respondents moved to dismiss the complaint for lack of proof to sustain the charges. The motion was argued orally before the hearing examiner and denied. Thereafter, at further hearings, counsel for respondents offered oral testimony and documentary evidence in opposition to the allegations of the complaint. Proposed findings of fact, conclusions of law and order have been submitted by respective counsel and oral argument had thereon. All proposed findings of fact and conclusions of law not specifically found or concluded herein have ben rejected. Upon the basis of the entire record, the undersigned hearing examiner makes the following findings of fact, conclusions of law drawn therefrom and issues the following order:

FINDINGS OF FACT

1. The respondent Associated Construction Publications is a nonprofit corporation, which will hereinafter be referred to as ACP, oragnized and doing business under the laws of the State of Michigan, with its office and principal place of business located at 2746 Penobscot Building, Detroit, Mich. Roscoe Laing, named in the complaint as Vice President of respondent Associated Construction Publications, was not at the time of the issuance of the complaint nor is he now an officer of said corporation, and will, therefore, be dismissed from this proceeding. At the time of the issuance of the complaint herein the officers of ACP were as follows:

Ray Metzger, President
W. A. McDonald, First Vice President
Fred G. Johnston, Jr., Second Vice President, and
Gordon L. Anderson, Secretary-Treasurer

The foregoing individuals, together with Richard C. Mertz, comprise the board of directors of the respondent ACP. The respondent ACP is not a publisher and does not publish a trade magazine and, beginning in 1955 or 1956, it assisted its member regional publications as a group in obtaining so-called "national" advertising as contrasted to regional or local advertising. This is advertising from manufacturers of general industrial equipment, such as trucks and wire rope, which are not solely for the construction industry but can be used in the construction as well as in other industrial fields. This is a market which regional magazines have not in the past been able to penetrate. Individual regional construction magazines are not able to compete with national publications for this business.

2. The respondent members of ACP are as follows:

(a) Respondents Eunice, Thomas, and Harold C. Chapin are copartners doing business under the trade name of Chapin Publishing Co. The business address of said respondents is 1022 Lumber Exchange Building, Minneapolis, Minn. Said respondents are engaged in the business of publishing a regional construction magazine known as "Construction Bulletin."

(b) The respondent Construction Publishing, Inc., is a corporation organized and doing business under the laws of the State of Virginia with its office and principal place of business located at Peoples Federal Building, Roanoke, Va. Respondent is engaged in the business of publishing a regional construction magazine known as "Construction". The individual respondent Kenneth O. Dinsmore is President of said corporation, William Beury is Vice President, and George C. Stewart

is Secretary of said corporation. The address of the individual respondents is the same as that of the corporate respondent.

(c) The respondent Construction News, Inc., is a corporation organized and doing business under the laws of the State of Arkansas, with its office and principal place of business located in Little Rock, Ark. Its mailing address is Post Office Box 2421 in said city and state. The respondent Construction News, Inc. is engaged in the business of publishing a regional construction magazine known as "Construction News". The individual respondents Ray Metzger and Marie Metzger are President and Secretary-Treasurer, respectively, of said respondent corporation. E. L. Gaunt named in the complaint as an officer of said corporation was not then nor is he now an officer of said corporation and, for this reason, will be dismissed from this proceeding.

(d) The respondent Reports Corporation, Inc., is a corporation organized and doing business under the laws of the State of New Jersey with its office and principal place of business located at 6 South Orange Avenue, South Orange, N.J. Respondent Reports Corporation, Inc. is engaged in the business of publishing a regional construction magazine known as "Constructioneer". The individual respondents George C. Stewart, Kenneth O. Dinsmore and Hermon S. Swartz are President, Vice President, and Secretary-Treasurer, respectively, of said corporation. The address of said individual officers are the same as that of the corporation.

(e) The individual respondents Fred Johnston, Sr., Anna C. Johnston, Fred Johnston, Jr., Jerry Johnston, and Mary Anne Howard are co-partners doing business under the trade name "Construction Digest", located at 101 East 14th Street, Indianapolis, Ind. Said respondents are engaged in the business of publishing a regional construction magazine known as "Construction Digest".

(f) The individual respondent J. O. Bowen, as Trustee for John Mann Bowen, William McGowan Bowen and Margaret Elizabeth Bowen, owns and publishes a regional construction magazine known as "Dixie Contractor", with its office at 110 Trinity Place, Decatur, Ga.

(g) The respondent Contractor Publishing Company is a corporation organized and doing business under the laws of the State of Michigan, with its office and principal place of business located at 642 Beaubien Street, Detroit, Mich. This corporation publishes a magazine known as "Michigan Contractor and Builder". The individual respondents Richard C. Mertz, Jane Huey Mertz and Rena A. Beardsley are President-Treasurer, Vice President, and Secretary, respec-

tively, of said corporation. The address of said officers is the same as that of the corporation.

(h) The respondent Mid-West Records, Inc. is a corporation organized and doing business under the laws of the State of Missouri, with its office and principal place of business located at 2537 Madison, Kansas City, Mo. Said corporation is engaged in the business of publishing a regional magazine known as "Mid-West Contractor". The individual respondent Elbert E. Smith is Chairman of the Board of Directors of said corporation and his address is the same as that of the corporation. Norman D. Smith and Clifford B. Smith, named in the complaint as officers of the corporate respondent Mid-West Records, Inc., are not now and were not officers of said corporation at the time of the issuance of the complaint herein and, therefore, will be dismissed from this proceeding.

(i) R. O. Schaefer, Inc., a corporation, alleged in the complaint to be publisher of the regional construction magazine "Mississippi Valley Contractor," is now and was, at the time of the hearings in this proceeding, out of business, and said corporation is no longer publishing said magazine. Therefore, the complaint against said corporation and its former officers R. O. Schaefer, Jr., and Margaret E. Schaefer will be dismissed.

(j) The respondent Construction Publishing Co., Inc., is a corporation organized and doing business under the laws of the State of Massachusetts with its office and principal place of business located at 27 Muzzey Street, Lexington, Mass. Said corporate respondent is engaged in the business of publishing a regional construction magazine known as "New England Construction". Respondents Hermon S. Swartz, Dorothy Swartz, Richard Nichols, and Charles Goodhue are President and Treasurer, Secretary, Director, and Clerk, respectively, of said corporation. The address of the individual respondent officers is the same as that of the corporate respondent.

(k) The respondent Pacific Builder and Engineer, Inc., is a corporation organized and doing business under the laws of the State of Washington, with its office and principal place of business located at 2418 Third Avenue, Seattle, Wash. Said corporate respondent is engaged in the business of publishing a regional construction magazine known as "Pacific Builder & Engineer". The individual respondents Nancy B. Chapin, William Anderson, and Llewellyn Wing are President, Vice President, and Secretary-Treasurer, respectively, of said corporation. The address of the individual respondents is the same as that of the corporation.

(l) The respondent Mountain Publishing Co., Inc., is a corporation organized and doing business under the laws of the State of Indiana, with its office and principal place of business located at 855 Lincoln Street, Denver, Colo. Said corporation is engaged in the business of publishing a regional construction magazine known as "Rocky Mountain Construction". The individual respondents Lewis S. Parsons, Gettie A. Parsons, and James L. Parsons are President, Secretary, and Treasurer, respectively, of said corporation. Their address is the same as that of the respondent corporation.

(m) The respondent Iles-Ayars Publishing Co. is a corporation organized and doing business under the laws of the State of California, with its office and principal place of business located at 1660 Beverly Boulevard, Los Angeles, Calif. Said corporate respondent is engaged in publishing a regional construction magazine known as "Southwest Builder & Contractor". The individual respondents John D. Bowler, Dean I. Bowler, E. J. Evans, and John D. Bowler, Sr., are President, Vice President, Vice President and Secretary, and Vice President and Treasurer, respectively, of said corporation. The address of the individual officer respondents is the same as that of the corporate respondent.

(n) The respondent Peters Publishing Co. is a corporation organized and doing business under the laws of the State of Texas with its office and principal place of business located in Dallas, Tex. Its mailing address is Post Office Box 1706 in said city. Said respondent is engaged in publishing a regional construction magazine known as "Texas Contractor". The individual respondents W. A. McDonald, Wm. B. Morrison, and B. R. Pruitt are President, Vice President and Secretary-Treasurer, respectively, of said corporation. The address of the individual respondent officers is the same as that of the corporation.

(o) The respondent Western Builder Publishing Co. is a corporation organized and doing business under the laws of the State of Wisconsin, with its office and principal place of business located at 407 East Michigan Street, Milwaukee, Wis. Said corporation is engaged in the business of publishing a regional construction magazine known as "Western Builder". The individual respondents Earl P. Keyes, Dorothy C. Keyes, Emil Hoenig, and Arthur G. Larsen are President, Secretary, Vice President, and Treasurer, respectively, of said corporation. The address of the individual officers is the same as that of the corporation.

3. Trade publications for the construction industry generally are either "national" magazines or "regional" magazines. National mag-

azines have nationwide circulation. The circulation of regional magazines is limited to a particular region or area of the United States, such as a state or states. Each of the respondent magazines named in paragraph 2 above is engaged in publishing a magazine generally referred to as a regional construction magazine. Generally, they contain news, advertisements for bids, informative data and advertising of interest to the construction industry. They are circulated to contractors, engineers, architects, companies engaged in construction, mining, such as oil and gas, coal, sand, gravel, and also to federal, state and local public works officials. Their principal income is derived from the sale of advertising space to manufacturers, distributors and dealers of construction equipment. The fourteen respondent publishers are engaged in "commerce" within the meaning of the Federal Trade Commission Act in that they sell and ship their magazines across state lines to subscribers, many of whom are located in states of the United States other than the state of origin of said shipments. They also exchange and ship to each other across state lines, news items, advertising plates and mats. Their course of trade in said magazines, in "commerce", is substantial.

4. Although the complaint alleges there are 35, in his Proposed Findings of Fact, counsel supporting the complaint contends that there are only 26 regional construction magazines in the United States, of which fourteen belong to ACP and the remaining twelve are non-ACP magazines. Counsel further contends that there are ten or twelve national magazines circulated to the construction industry and only four of these are the principal competitors of ACP magazines for advertising from general industrial advertisers. Counsel for respondents do not agree with these contentions. Counsel for respondents offered and there were received in evidence RX–10 and 11. These exhibits purport to list the names of all national and regional construction magazines, showing, among other things, their advertising rates and other information. Most of the information contained in RX–10 was obtained from *Standard Rate and Data*, a reliable advertising publication. There was testimony to substantiate the information contained in RX–10 and 11. These exhibits show that there are approximately seventeen national construction magazines and approximately 119 regional, sectional and local publications in the United States circulated to the construction industry. Upon consideration of all of the testimony and evidence, it is found that there are at least seventy-two regional and local construction publications and seventeen national construction publications circulated to the construction

industry in the United States. All of these magazines compete for construction advertising.

5. The complaint alleges that the respondent publishers of the fourteen regional construction magazines and the individuals alleged to control them, have conspired to restrain competition and create a monopoly in themselves, the advertising business of those using regional construction magazines for advertising purposes. Pursuant to these purposes, the complaint alleges that the respondents have engaged in the following acts and practices:

(a) Created and organized the respondent ACP as an instrumentality to carry out their agreed upon purposes;

(b) Organized and operated ACP so as to limit membership to one publication in any given area;

(c) Allocated territories to members so as to exclude overlapping in the circulation of their publications;

(d) Used ACP as a means of securing the patronage of advertisers for themselves and diverting it from competitive publications; and

(e) Have agreed upon prices, discounts, and terms of sale to be charged or applied for advertising space in their publications.

The complaint in the following paragraph (Seven), further alleges that the tendency and effect of these acts and practices has been to unduly restrain competition; cause injury to competitors; stabilize prices for advertising in member publications; impose a barrier to the establishment of new trade papers; and create in respondents a monopoly in the publication of regional trade papers for the construction industry. It was further alleged that these acts and practices amount to unfair methods of competition and unfair acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act. The evidence in the record with respect to paragraph 6 of the complaint and each sub-paragraph thereof, will now be discussed and evaluated.

Was ACP Created and Organized by Respondents As An Instrumentality Through Which To Carry Out Their Agreed Upon Purposes?

6. As found in paragraph 3 above, each of the fourteen [1] respondent magazines involved in this proceeding is a "regional" construction magazine. The respondent Associated Construction Publications was

[1] The complaint herein was directed against a fifteenth regional magazine, "Mississippi Valley Contractor", and its publishers. However, at the time of hearings herein, said magazine had gone out of business and had ceased publication. It was agreed, therefore, that the complaint against the publishers of this magazine would be dismissed.

organized by the owners and publishers of eleven of the respondent regional magazines, and originally was an unincorporated, non-profit association. The respondent Associated Construction Publications was organized in 1938 at the instance of several advertising men handling construction advertising accounts who were interested in approving the quality of regional construction magazines. These advertising men believed that, if the then existing standards of regional construction magazines were raised, the effectiveness of advertising in regional construction magazines would be improved. At that time, the advertised circulation figures of many of the regional construction magazines were not reliable, the page sizes of the magazines were not uniform, requiring different size advertising plates for different magazines, and the editorial content and general make-up of many of the magazines were inferior to the national construction magazines. Therefore, these advertising men believed that, if the regional construction magazines would improve the quality of their publications, such as furnishing audited circulation figures, establishing uniform page sizes so that the same size advertising plates could be used interchangeably by all regional magazines, and raise the editorial and general content of the magazines, the regional magazines would be more acceptable to advertisers, not only national advertisers, but regional and local advertisers. Accordingly, several advertising men, including Mr. Harvey Scribner, now president of Russell T. Gray Advertising Agency, Chicago, Illinois; Mr. Arnold Andrews, then Advertising Manager of the Bucyrus-Erie Company; Ervin Goes, Advertising Manager of the Koehring Company; George McNutt, Advertising Manager of Le-Tourneau, all manufacturers of heavy construction equipment, and Mr. Jim Costello, of the Giddings Advertising Agency, Milwaukee, Wisconsin, called together representatives of fourteen of the then existing regional construction magazines to outline and discuss their objectives. Several of these advertising men and representatives of regional magazines testified at hearings in this proceeding. The fourteen magazines selected by the advertising men to attend this first meeting were considered by these advertising men to be representative of the best and most satisfactory of the then existing regional construction magazines. In short, the idea for the creation of the respondent ACP came from the advertisers, not the publishers of the regional magazines, and the purpose was to raise the quality of the regional magazines. It was the belief of these advertisers that, by raising the quality and standards of the magazines, their usefulness to the advertiser, reader and publisher would be improved. Duplication of coverage or so-called "overlap" among the magazines was not con-

sidered in the formulation and organization of ACP, nor was it intended to create the ordinary type of trade association among the publishers. Thereafter, the publishers met and discussed the suggestions made by the advertising men. As a result, in 1938, eleven of the fourteen publishers who had attended the first meeting with the advertising men formed ACP as an unincorporated association. Approximately 19 years later, in 1957, ACP was incorporated under the laws of the State of Michigan. During this time the membership in ACP was increased from the original 11 to 15 but, as stated on page 865 hereof, one member magazine, "Mississippi Valley Contractor," ceased publication after issuance of the complaint herein. The by-laws, minutes of annual and semi-annual meetings of ACP and documentary evidence offered and received in evidence at the hearings demonstrate that the principal purpose for the information of ACP was to raise the publishing standards of the regional construction magazines. Originally, the initiation or enrollment fee for each member was $50, but has since been increased from time to time. The present membership enrollment fee is $5,000 for each new member. The procedure for admitting new members is provided for in the by-laws. Membership is by invitiation only. Proposals for membership are communicated by the secretary to the members. A committee composed of the then current officers of ACP determines the eligibility of the applicant and makes a recommendation with respect to said applicant at the next membership meeting. A three-fourths affirmative vote of the members is required to admit the prospective new member to membership in ACP.

Have Respondents Organized and Operated ACP So As to Limit Membership to One Publication in Any Given Area?

7. At the initial meeting called by the advertisers to discuss the raising of standards of regional construction magazines and the formulation of ACP, representatives of fourteen regional construction magazines appeared and eleven of these magazines joined in the organization of ACP. At the initial meeting and at the organization of ACP, the question of overlapping or duplication of circulation between the regional magazines was not discussed. The advertisers who called the meeting had as their prime purpose the raising of standards of the regional magazines and the magazines who were invited to attend the original meeting were selected because, in the opinion of the advertising men, they were the most satisfactory of the then existing regional magazines. There were varying degrees of overlapping and duplication of circulation among and between some of the regional

construction magazines who were original members when ACP was first organized. As an example, the geographical circulation area of *Mississippi Valley Contractor* was overlapped or duplicated by three of the other original members of ACP, *Construction Digest*, *Construction News*, and *Mid-West Contractor*. ACP has not restricted its membership to the original charter members. Since 1938, five regional construction magazines have been accepted to membership in ACP, these being *Construction Bulletin* in 1943, *Constructioneer* in 1945, *Construction* and *Rocky Mountain Construction* in 1953, and *Pacific Builder and Engineer* in 1956. However, one of the important considerations in the selection of the last three magazines to membership in ACP, *Construction*, *Rocky Mountain Construction*, and *Pacific Builder and Engineer* was the growing importance of nation-wide coverage in competing with national construction magazines for general industrial advertising. With the addition of these last three construction magazines, nation-wide circulation coverage was achieved for the first time and made it possible for ACP to begin to compete with national construction magazines for general industrial advertising. Even in the selection of *Construction Bulletin*, *Construction Engineer*, *Construction*, *Rocky Mountain Construction* and *Pacific Builder and Engineer* to membership in ACP, there was some overlap. *Construction Bulletin* overlapped *Mid-West Contractor* with respect to the State of Iowa. *Rocky Mountain Construction* overlapped *Southwest Builder and Contractor* with respect to Arizona and part of Nevada. *Pacific Builder and Engineer* overlapped *Rocky Mountain Construction* in the states of Montana, Wyoming, Utah and Idaho.

8. Since the formation of ACP in 1938 only two applications for membership have been denied and neither of these applications was denied by reason of overlapping or duplication of circulation coverage. The first application to be rejected was the application of Mr. Maurice Baker of Lansing, Michigan, for his magazine, *Michigan Roads and Construction*, in 1947. Mr. Baker was one of the principal Commission witnesses. Mr. Baker testified that, in his opinion, his application was denied by reason of the fact that his magazine duplicated the circulation coverage of *Michigan Contractor and Builder*, an ACP magazine. A preponderance of the evidence shows that one of the reasons for the rejection to membership was due to the inferior quality of his magazine, *Michigan Roads and Construction*, in comparison to *Michigan Contractor and Builder*, a competing ACP magazine. Another reason was that some of the ACP members acquired a personal dislike for Mr. Baker by reason of his alleged threats to institute antitrust proceedings if his magazine was not admitted to membership in ACP. Some of the members charac-

terized such threats as blackmail. Several members of ACP testified at the hearing concerning Mr. Baker's application. They testified that the principal reason for the rejection of Mr. Baker's application for membership in ACP was due to the overall inferiority of Mr. Baker's magazine, *Michigan Roads and Construction.* Their testimony was corroborated by the testimony of several advertisers of construction equipment who testified at the hearing. Each of these witnesses who testified concerning the quality of Mr. Baker's magazine, *Michigan Roads and Construction*, testified that it is inferior in quality to its competitor *Michigan Contractor and Builder*, the ACP publication. The evidence does not sustain the contention by counsel supporting the complaint that Mr. Baker's magazine would have been admitted to membership in ACP had it not duplicated the territory of *Michigan Contractor and Builder.* The other application for membership in ACP which was rejected was the application of *Pacific Builder and Engineering Review* for its California Supplement in 1951. This was Mr. Roy Fellom's publication. Mr. Fellom testified in support of the complaint and his testimony will be discussed more in detail later on in this decision. The circulation of *California Supplement* covered northern California. At that time there was no ACP magazine which covered the northern California area. Consequently, it cannot be found that duplication of territory with a competing ACP publication determined the rejection of either of these magazines to membership in ACP.

Has ACP Allocated Territories to Members So As to Exclude Overlapping In the Circulation of Their Publications?

9. As previously found, the regional magazines selected by the construction equipment advertisers to attend the first meeting which led to the organization of ACP were selected by reason of their being some of the better regional magazines and not by reason of the fact that there was no overlapping or duplication of circulation coverage between any of them. The reason for their selection according to the testimony of the advertisers who were responsible for the organization of ACP was the fact that these magazines were, in the opinion of these advertisers, the best regional magazines being published at that time from the standpoint of quality, and the raising of the quality and standards of these regional construction magazines was the primary purpose for the organization of ACP. So, the fact that the territorial coverage of some of the ACP magazines overlapped and duplicated coverage of some of the other ACP magazines is an indication that

ACP was not formed on the basis of one member magazine in a given area. The members today remain predominantly the original publications. The trade territories covered by each of the ACP regional construction magazines are controlled by and coincide with the trade territories of the construction equipment dealers in the particular area. This is also true of regional construction magazines generally, irrespective of membership in ACP. With some exceptions, one of the characteristics of most regional magazines is their intensive coverage of their circulation area. Their territorial coverage remains constant because the dealers' territories remain stable. The original individual magazines which became members of ACP had been in existence for many years prior to the organization of ACP in 1938 and, as has been found, there was overlapping and duplication of coverage between some of the ACP magazines at the time ACP was formed and continues today. The ACP brochure (CX–55), which was published and distributed to advertisers in 1958, shows circulation overlap in all of the following states:

State	*ACP members with advertised circulation in that area*	*Circulation in the area*
Arizona	Rocky Mountain Construction	705
	Southwest Builder and Contractor	258
Arkansas	Construction News	1,309
	Mississippi Valley Contractor	367
Illinois	Construction Digest	3,685
	Mississippi Valley Contractor	2,149
	Western Builder	214
Iowa	Mid-West Contractor	1,182
	Construction Bulletin	712
Michigan	Michigan Contractor and Builder	3,021
	Western Builder	224
Nevada	Rocky Mountain Construction	95
	Pacific Builder and Engineer	94
	Southwest Builder and Contractor	63
Mississippi	Construction News	861
	Mississippi Valley Contractor	462
Missouri	Mississippi Valley Contractor	1,790
	Mid-West Contractor	1,563
	Construction News	1,451
Tennessee	Construction News	894
	Mississippi Valley Contractor	419

10. The evidence shows that advertisers do not object to the present degree of overlapping existing between some of the ACP member magazines because a certain amount of overlapping is unavoidable. Of course, advertisers object to a large degree of overlapping, especially where the dealer is participating in the cost of advertising because it

means paying twice to reach the same potential customer in the overlapped area. The evidence discloses that ACP members have discussed the question of overlap between member publications at various meetings but it was "a lot of talk and no action." Mr. Roy Fellom, publisher of *Pacific Road Builder and Engineering Review*, testified that he discussed with several publishers, including Mr. Kenneth O. Dinsmore, whose magazine, *Construction*, is a member of ACP, on two occasions, the possibility of membership in ACP for his magazine; that he understood from these conversations he would have to "draw in" his twelve-state circulation from the Rocky Mountain and Southern California areas and limit his circulation to the Northern California area in order to be accepted as a member. Mr. Fellom did not apply for membership nor was he invited to become a member of ACP. However, on cross examination, Mr. Fellom further testified that in his conversation with Mr. Dinsmore in 1956, Mr. Dinsmore did not suggest that Mr. Fellom's magazine "draw in" or withdraw from the Rocky Mountain and Southern California areas so as not to compete with the ACP magazine in those areas nor did Mr. Dinsmore suggest or state that the ACP magazines in the Rocky Mountain or Southern California area would stay out of the Northern California area if Mr. Fellom's magazine became a member of ACP; that Dinsmore may have stated that Fellom's magazine, which covers eleven western states, Alaska and the Pacific basin was too sprawling to be effective as an advertising medium. A preponderance of the evidence demonstrates that the purpose of Mr. Dinsmore's conversation with Mr. Fellom was to find a suitable magazine to cover the then existing gap in ACP coverage in the Pacific Northwest and there was no demand or agreement, in the conversations between Mr. Fellom and Mr. Dinsmore or other members of ACP, expressed or implied, that Mr. Fellom's magazine could become a members of ACP on the condition that his magazine not duplicate or overlap the circulation of an ACP magazine.

Have the Respondents Used ACP As A Means of Securing Patronage of Advertisers and Diverting It From Competitive Publications?

11. The evidence shows that there are two categories or types of display advertising contained in ACP regional magazines. The first type is (1), construction equipment advertising and the second (2), advertising of general industrial products which are marketed to other industries than construction. The first type, construction equipment advertising, includes tractors, engines, earth moving equipment,

shovels, cranes, draglines and cement. Some of the manufacturers who advertise these products include Allis Chalmers, Caterpillar, International Harvester, The Oliver Corporation, J. I. Case, Northwest Engineering, Bucyrus-Erie, Manitowoc, Bay City, Harnischfeger, and Huron Portland Cement. These manufacturers direct their advertising toward the construction equipment industry exclusively. Many of these manufacturers employ advertising agencies to handle their construction equipment advertising. Revenue from construction equipment advertising accounts for 85% to 90% of all display advertising in regional construction magazines, including the ACP magazines. In other words, revenue from construction equipment advertising is their principal source of income, their "bread and butter," as characterized in the testimony. The second category, advertising of general industrial products, is a new field for ACP and for all regional construction magazines. Historically, advertisers in this second category, of general industrial products, have used national construction magazines exclusively for their advertising. They have not advertised in regional construction magazines. It was not until *Pacific Builder and Engineer* became a member of ACP in 1956 and ACP obtained nationwide circulation coverage for the first time that ACP began soliciting adevrtising for and on behalf of each of the member ACP magazines as a group from this second category of advertisers, that is, advertisers of general industrial products. Up to the present time, however, ACP has not been able to obtain very much of this class of advertising. This second category of display advertising that, of general industrial products, will be discussed more in detail later on in this decision. For the moment, the first category of advertising, advertisers of construction equipment, will be discussed.

12. Manufacturers of construction equipment sell their products through regional distributors or local dealers who sell locally to the users of construction equipment. Usually each distributor or dealer handles, distributes, and sells several lines of construction equipment. Within the State of Michigan, for instance, in its trade territory, each manufacturer of construction equipment ordinarily has one or two dealers in the lower peninsula and one in the upper peninsula. The number of construction dealers in that trade territory is approximately 34. Approximately five Michigan construction dealers testified at the hearing. Distributors and dealers of construction equipment are not interested in advertising in national construction magazines for the reason that their individual sales territory is limited to a local geographical area. Therefore, the dis-

tributors or dealers of construction equipment prefer to advertise in a regional construction magazine whose area of circulation is more heavily concentrated in the local area where the distributor or dealer sells his product. One of the advantages of a regional construction magazine as contrasted to a national magazine is dealer identification. This is of value to both the manufacturer and dealer in selling the product. Construction equipment dealers usually participate in the cost of the advertising of the manufacturers' product which they sell. Some of the manufacturers pay the entire cost of advertiseing in the regional construction magazines. Approximately 50% of the manufacturers share the advertising costs of their products on a 50–50 basis with their local dealer or distributor. Consequently, the dealer is usually influential with his manufacturer in determining where regional advertising will be placed as between two competing regional construction magazines. Contrary to the testimony of some of the publishers of non-ACP members regional construction magazines that, in some instances, the manufacturer or his advertising agency refused to follow the recommendation of the dealer in placing display advertising in a competing non-ACP member's regional construction magazine, a preponderance of the testimony and evidence demonstrates that the manufacturer generally follows the recommendation of his local dealer in placing advertising in a regional construction magazine. Of the five Michigan construction equipment dealers who testified at the hearing, only one witness testified that he had ever been overruled by a manufacturer or its advertising agency in his recommendation of a regional construction magazine and that was in favor of the non-ACP member regional construction magazine in Michigan over the dealer's recommendation of the ACP magazine.

13. Many of the manufacturers of construction equipment employ advertising agencies to handle their advertising and for the most part, these agencies are located in the Chicago-Milwaukee area. The plants of many of the construction equipment manufacturers are also located in this general area. However, some of the construction equipment manufacturers have an advertising staff in their own offices who assist the advertising agency in laying out and planning the manufacturer's advertising campaign. The manufacturers of construction equipment and their advertising departments and agencies are personally familiar with most of the regional ACP magazines. In fact, some of these advertising agencies were directly responsible for the organization of ACP. These advertising agencies pick and choose between the different regional construction magazines in each

area, ACP and non-ACP alike, on the basis of their specific advertising and sales needs and the quality of the regional construction magazine. Advertisers of construction equipment do not purchase so-called "package" advertising in all of the ACP regional construction magazines. One of the witnesses for respondents, Mr. Joseph L. Serkowich, vice president of Aubrey, Finlay, Marley & Hodgson, an advertising agency which handles the advertising account of International Harvester Co., Construction Equipment Division, testified that he selects the regional construction magazine in which he places advertising on the basis of the quality of the magazine, regardless of whether it is, or is not, a member of ACP. Mr. Serkowich sponsored RX–18 which is an advertising folder prepared by his agency each month for distribution to International Harvester Company's dealers of construction equipment to show its dealers the advertising International Harvester is doing each month for its products. The folder contains, among other things, a list of 74 trade publications in which advertising of International Harvester products appeared during the month of August, 1959. This list includes both regional and national construction magazines and corroborates the testimony of the advertisers that they select regional construction magazines on the basis of particular needs or object of the advertising program. In some instances, for specific purposes, Mr. Serkowich may select an ACP magazine over a competing non-member ACP magazine and, in another case, select a non-member magazine over an ACP magazine. As an example, Mr. Serkowich testified that, as shown in RX–18, on behalf of International Harvester, one advertisement was placed in four regional construction magazines, three ACP magazines, and one non-member magazine, *Kansas Construction* (Mr Weilepp's magazine). Mr. Serkowich further testified that the non-ACP regional construction magazine *Kansas Construction* was used in this advertisement instead of the ACP magazine *Mid-West Contractor* because the advertisement was a "rifle shot to a state", Kansas, and Mr. Serkowich was not interested in *Mid-West Contractor's* additional coverage of two or three more states for the purposes of the particular advertisement.

14. The evidence further shows that each individual ACP magazine confines its solicitation of advertising to the dealers of construction equipment in its own area. Of course, to be successful, it is generally necessary for a representative of the individual ACP magazine to also call on the advertising agency and the advertising department of the manufacturer, if the manufacturer has an advertising department. But the individual ACP magazine does not solicit construction

equipment advertising for any other ACP magazine. However, considerable construction equipment advertising accounts are obtained by regional construction magazines, ACP and non-ACP, through the recommendation of the local dealer alone. In other words, when a representative of an ACP magazine solicits construction equipment advertising he only solicits for his own magazine and does not go outside its own area of circulation and solicit construction equipment advertising either for his own magazine or for any other ACP magazine.

15. Proceeding to the field of general industrial advertising, which ACP began to solicit in 1955 or 1956, it is clear that these advertisers are not interested in spot coverage such as a regional magazine generally affords, but are interested only in nation-wide advertising coverage. Typical products in the general industrial category include trucks, wire rope, petroleum, logging, mining, metal working, elevators, etc. The evidence shows that the potential revenues from general industrial advertising are large. As an example, Mr. David Hyde, the advertising salesman for ACP, testified that he clipped out 106 full-page advertisements of general industrial products from *Engineering News Record* and *Construction Methods*, two of the leading national construction magazines published by McGraw-Hill Co., for the four month period October, 1958 to January, 1959, which represented a total revenue of approximately $1,500,000 annually. (RX–15.) Mr. Hyde also counted the pages of similar advertising which appeared in the other fifteen national construction magazines and estimated that the total revenue of the seventeen national construction magazines from advertisements from general industrial products approximates $3,000,000 a year. This would equal approximately two-thirds of the entire present billings of all fourteen ACP magazines. The advertisers of general industrial products do not use regional construction magazines because their advertising is not directed solely at construction equipment, but is aimed at a broader field and, consequently, they concentrate on a national advertising. They must cover the entire country with their advertising budget. They are not familiar with the regional construction magazines. Therefore, they ordinarily advertise in national magazines with circulation throughout the United States. Distributors who carry general industrial products do not sell just to the construction industry as construction equipment dealers do. Distributors of general industrial products handle all types of machinery, equipment and supplies used by the broad field of industry. The time and effort necessary for advertisers to analyze individual regional magazines is justified in construction equipment

advertising where the advertiser can cover the construction industry and particular territories in depth, but it is not justified in advertising general industrial products where only a fraction of the advertising budget is aimed at construction and the whole country must be covered with this fraction. Also, since advertising agents are generally compensated on the basis of 15% of the cost of advertising used, it is a natural tendency to advertise in one or two of the national magazines in preference to analyzing and choosing between a large number of regional publications in an effort to cover the entire United States. Since regional construction magazines work closely with the local construction equipment distributor or dealer, they not only obtain advertising from them but the distributor and dealer also assist the regional construction magazine in obtaining advertising from the manufacturer, whereas this is not possible with distributors and dealers of general industrial products. Since ACP began soliciting general industrial advertising accounts through Mr. Hyde, the ACP magazines as a group have obtained the national advertising accounts of American Chain and Cable, The John Roebling Co., B. F. Goodrich, and Mack Truck, who had theretofore used national construction magazines.

16. ACP had an advertising budget of $30,000 in 1958 and Mr. Robert Thomson of Thomson Advertising, Inc., Chicago, Illinois, handles the advertising for ACP. Mr. Thomson's company is also the advertising agency for Caterpillar Tractor Company. Approximately two-thirds of ACP's advertising budget is expended on advertisements in *Industrial Marketing*, *Construction Equipment News*, and *Standard Rate and Data*, which are magazines read by buyers of advertising generally. The aim of this advertising is to stress the advantages of regional magazines, local news coverage, bid news, and dealer identification so as to induce the advertiser to place advertising in the ACP regional magazines instead of national construction magazines. The evidence shows that ACP's budget of $30,000 is a modest one. Some of the competitor non-member ACP witnesses who testified in support of the complaint complained of the entertaining of advertisers by ACP magazines at cocktail parties. The evidence shows that the entertaining consists of a yearly cocktail party at a road convention in Chicago and possibly one other party annually attended by representatives of ACP magazines and invited advertising agencies and their accounts. Such entertaining is normal and does not appear unreasonable.

17. There is no evidence in the record that the ACP members exercise or have exercised any form of coercion on advertisers to place

advertising in the ACP magazines or that they have attempted to induce advertisers not to purchase advertising in non-member competing regional construction magazines. As previously found, Mr. Hyde does not solicit distributors or local dealers for construction equipment advertising. Mr. Hyde restricts his solicitation to advertisers of general industrial products exclusively for and on behalf of the ACP magazines as a package. The ACP magazines solicit construction equipment advertisers on an individual basis and do not use ACP as a selling agency for construction equipment advertising and ACP has not been used to divert business from competitors. In other words, the evidence shows that the individual ACP magazines solicit and obtain construction equipment advertising from advertisers who pick and choose between the regional construction magazines, without regard to ACP. Therefore, membership in ACP is not the determining factor in obtaining construction equipment advertising. Since construction equipment advertising is the only kind of display advertising in which ACP and non-ACP regional construction magazines have ever really competed for, it follows that ACP has not been used to divert business from non-ACP competitor magazines with respect to either construction equipment advertising or industrial products advertising. Even in the general industrial advertising field where Mr. Hyde solicits advertising for ACP, it cannot be said that the members use ACP to divert business from non-member regional construction magazines, for these non-member magazines have never had the general industrial advertising which Mr. Hyde began soliciting for the ACP members in 1956. These non-member magazines have not been nor are they now in position to compete for this business because the evidence shows that general industrial advertisers demand nationwide circulation coverage such as that afforded by the national construction magazines and, in recent years, by the ACP magazines. The evidence and testimony is overwhelming and is even corroborated by the testimony of some of the non-member regional publishers who testified in support of the complaint that ACP does not now nor would it in the future deprive non-member magazines of any opportunity to obtain national advertising from general industrial advertisers even if they were to become members of ACP for the reason that they do not have any of this advertising now and if all regional magazines who might apply were required to be admitted to membership in ACP, ACP's appeal to these general industrial advertisers would be rendered ineffective and injure the present members without aiding the new members. This is so because there would be duplication and overlapping of circulation coverage, rendering the group selling appeal

of ACP to national advertisers of general industrial products ineffective and less attractive. Furthermore, there is no evidence in the record that ACP has prevented or intended to prevent non-member regional construction magazines from forming a similar selling organization to ACP so as to compete for general industrial advertising. Under the doctrine announced in *Prairie Farmer Publishing Co.* v. *Indiana Farmer's Guide Publishing Co.*, 88 F. 2d 979 (7th Cir. 1937), *cert. denied*, 301 U.S. 696, 81 L. ed. 1351 (1937), group selling by a specific group of regional magazines to compete as a national medium with national publications is lawful, even if incidental injury to non-member regional publications may result from it.

Have the Respondents Agreed Upon Prices, Discounts, and Terms of Sale to be Charged or Applied for Advertising Space in Their Publications?

18. There is complete absence of any evidence or testimony of price-fixing on the part of any respondent. In fact, Commission counsel did not attempt to prove price-fixing. No witness who testified on behalf of the Commission complained about any price-fixing by respondents. The advertising rates and the circulation figures for each of the ACP magazines are available to the public and are published in *Standard Rate and Data Service*, a reliable publication and considered in advertising circles as the advertising man's "Bible". The advertising rates of the individual ACP magazines vary from magazine to magazine. Each individual ACP magazine solicits construction equipment advertising for its own account and not for any other ACP magazine. The only advertising which ACP solicits for the ACP magazines as a group is general industrial advertising. Mr. Hyde, the advertising salesman for ACP, solicits advertising of general industrial products for all of the ACP magazines as a "package". For convenience, Mr. Hyde carries a rate card showing the advertising rates for each individual ACP magazine. If the advertiser buys the "package," the advertiser pays the total of the individual rate for each of the ACP magazines making up the "package". The advertiser can purchase advertising in one or more of the individual ACP magazines as he may select. No discount is granted other than the usual 2% discount which is standard among all publications.

19. Paragraph 7 of the complaint alleges that the tendency and effect of the acts and practices of respondents have tended to unduly restrict and restrain competition and create a monopoly in the publication of regional construction magazines. These restraints are alleged to cause injury to competitors, stabilize advertising charges, and

impose a barrier to the establishment and development of new trade papers. The allegation in paragraph 4 of the complaint that "there are in the United States approximately 35 regional construction publications" and that "together, respondents enjoy approximately 90% of the nation's regional construction magazine advertising business" has not been established. It has been found in paragraph 4 above that there are at the very least 72 regional and local construction publications and 17 national construction publications circulated to the construction industry in the United States. All of the evidence, including the testimony of the non-ACP publishers who testified in support of the complaint, establishes the fact that each of these magazines compete with each other for construction advertising. The evidence in the record demonstrates beyond any question that the ACP magazines comprise a small fraction of the total number of publications in the construction advertising field and their total share of the construction equipment advertising market is similarly small compared to the total. As an example, Mr. Akers, publisher of *Arizona Builder and Contractor* testified that there are at least 15 national construction magazines with whom he must compete in each of the states covered by his magazine and there are approximately 30 construction publications with which he competes in the state of Utah alone.

20. The charge in the complaint that the respondents impose a barrier to the establishing and development of new trade papers has not been established. The evidence shows that, of the 64 non-ACP construction publications for which dates of first publication are available, 35 were established prior to the formation of ACP in 1938, while 29 were established during the 20-odd year period since 1938. Two of the construction magazines which have been established since 1938, when ACP was organized, are *Kansas Construction*, whose assistant publisher, Mr. Weilepp, testified in support of the complaint, and *Arizona Builder and Contractor*, published by Mr. Akers, who also testified in support of the complaint. Mr. G. D. Crain of Chicago, Illinois, publisher of *Industrial Marketing*, *Advertising Age*, and *Advertising Requirements*, testified concerning the increase in the number of construction publications established during the 20-odd year period since ACP was organized in 1938. Mr. Crain testified that the 1938 directory of business publications which his own firm publishes listed 33 publications "of primary interest to advertisers" in the "engineering construction" field, whereas the 1959 directory listed 47 such publications. This is an increase of approximately 42%. Mr. Scribner testified that there were more regional construction publications now than in 1938 when ACP was formed and that he knew of two regional

publications entering the field within "a few weeks" prior to the date of his testimony.

21. Counsel supporting the complaint seems to lay the greatest emphasis on his argument that ACP is a private and exclusive "club" which is injurious to nonmember regional construction magazines competing for national construction equipment advertising. As previously found, the ACP magazines contain two types of display advertising, (1) construction equipment advertising, and (2) general industrial advertising. Each individual ACP magazine solicits construction equipment advertising for itself and for its own individual account. The individual ACP magazines do not solicit this second category of advertising, general industrial advertising. General industrial advertising is solicited by Mr. Hyde, advertising salesman for the ACP magazines as a group. In spite of the general statements by three non-member publishers, Messrs. Baker, Weilepp and Akers that they were not able to obtain specific advertising accounts for their magazines because of ACP, the evidence shows that membership in ACP is not determinative in the eyes of the construction equipment advertising agencies as to which regional construction magazine they select in which to place advertising. These advertisers are familiar with most of the regional construction magazines and they pick and choose between them in selecting the magazine in which to place construction equipment advertising for their clients. Mr. Harvey Scribner, President of Russell T. Gray Agency, an industrial advertising agency handling some of the leading construction equipment accounts, testified that membership in ACP does not carry with it any competitive advantage over non-member magazines and that he buys advertising space from the best publication available in a given area, regardless of membership or non-membership in ACP. Mr. Howard Kenyon, President of Andrews Agency, Inc., another industrial advertising agency handling some of the leading construction equipment manufacturing accounts testified, like Mr. Scribner, that he picks and chooses between regional construction magazines, as do all construction equipment advertisers to his knowledge, and that membership or non-membership in ACP does not carry with it a competitive advantage or disadvantage. Mr. H. I. Orwig, Senior Vice-President of the Buchen Company, an advertising agency, handling construction equipment accounts, testified that he picks and chooses between competing regional magazines in placing advertising on the basis of their relative quality without reference to membership or non-membership in ACP. He further testified that a non-member regional magazine could not expect to obtain any more advertising

business from his agency simply by joining ACP and would have to justify itself strictly on an individual quality basis. Mr. Joseph Serkowich, an advertising agency executive handling the Construction Equipment Division account of International Harvester Company testified that, among other things, membership in ACP is "not at all" a factor in his consideration of which regional magazine should be selected to carry International Harvester advertising; his determination is based on such factors as the circulation of the magazine, its editorial quality and whether it is audited. Mr. Arthur E. Thode, Advertising Manager of the Construction Machinery Division of the Allis-Chalmers Company also testified that membership in ACP is in no way a factor in his selection of a regional magazine in which to place advertising. In addition to the advertising agencies, the construction equipment dealers who testified at the hearing, Messrs. Earle, Frost, McNutt, Clark, and Stewart, all testified that membership or non-membership in ACP was an immaterial factor to them in selecting a regional magazine in which to place advertising.

22. Counsel supporting the complaint offered the testimony of several publishers of non-member regional construction magazines, evidently for the purpose of showing injury to competitors,—that their magazines did not obtain advertising because their magazines were not members of ACP. These witnesses included Mr. Morris J. Baker, publisher of *Michigan Roads and Construction*, Lansing, Michigan, Edward Weilepp, Editor and Assistant Publisher of *Kansas Construction*, Topeka, Kansas, Mr. John Kelsey Akers, Phoenix, Arizona, publisher of *Arizona Builder and Contractor*, Mr. Roy Fellom, Jr., publisher of *Pacific Builder and Engineering Review*, San Francisco, California, and Mr. Arthur Franklin King, publisher of *Western Construction*, San Francisco, California, along with *Western Industry*. Messrs. Baker, Weilepp, Akers, and Fellom testified, in general, that they were not able to obtain construction equipment advertising by reason of the existence of ACP. Some of the specific construction equipment accounts which they testified they were not able to obtain by reason of ACP will now be discussed.

23. Mr. Baker testified that there are several large construction equipment manufacturers who will not accede to the local dealers' requests to place advertising in Mr. Baker's magazine. He named these construction equipment advertisers as being: Schield-Bantam, Pioneer Engineering, Gradall Division of Warner and Swazey Singley Co., Austin-Western, Clark Equipment, Allis-Chalmers, and Iowa Manufacturing Company. Mr. Baker testified that these are advertisers who were advertising regionally in the Michigan area in

Mr. Mertz' magazine, *Michigan Contractor and Builder*, and that, although their local dealers requested that they place advertising in Mr. Baker's magazine, *Michigan Roads and Construction*, they refused. During the presentation of testimony on behalf of respondents, representatives of five of the companies named by Mr. Baker testified and contradicted his testimony. These witnesses testified as follows:

(a) *Allis-Chalmers.* Mr. Sawyer Earle, President of Earle Equipment Company, dealer for Allis-Chalmers' products in the state of Michigan testified, among other things, that: He had not made any specific request that Allis-Chalmers place advertising in Mr. Baker's magazine, as Mr. Baker had testified; that any request he had ever made to Allis-Chalmers for the placing of advertising had never been denied; and that he personally prefers Mr. Mertz' magazine, *Michigan Contractor and Builder.* Mr. Arthur E. Thode, advertising manager of Allis-Chalmers, Milwaukee, Wisconsin, also testified concerning his choice of regional construction magazines in the State of Michigan as between *Michigan Contractor and Builder* and *Michigan Roads and Construction*, the latter being Mr. Baker's magazine. Mr. Thode testified, among other things, that: the reason he does not use Mr. Baker's magazine in his advertising program is because *Michigan Contractor and Builder* "does a better job" and denied that ACP had any influence in his selection of competing magazines.[2]

(b) *Schield-Bantam.* Mr. Earle, whose company is also the Michigan distributor for Schield-Bantam products, as well as for Allis-Chalmers, denied that his request to Schield-Bantam that its advertising be placed in any particular magazine had ever been refused by Schield-Bantam or its advertising agency. Mr. H. S. Orwig, an officer of the Buchen Company, an advertising agency which handles advertising for Schield-Bantam, Waverly, Iowa, denied that either he or his agency ever refused to comply with a dealer's request that advertising be placed in Mr. Baker's magazine.

(c) *Pioneer Engineering.* Mr. Alfred J. Swart, Vice-President and General Manager of Contractors Machinery Company, Michigan distributor for Pioneer Engineering, testified that Pioneer has never refused a request that advertising be placed in Mr. Baker's magazine. Mr. Swart testified that he prefers *Michigan Contractor and Builder* as an advertising medium in preference to *Michigan Roads and Construction.*

[2] It is significant in this connection that the remaining four of the five non-ACP member publishers who testified on behalf of the Commission, testified that they each carry the Allis-Chalmers' advertising account in their magazines, *Kansas Construction, Arizona Builder and Contractor, Pacific Road Builder and Engineering Review,* and *Western Construction.*

(d) *Clark Equipment Company.* Mr. Donald Clark, Vice-President and General Manager of Miller Equipment Company, Detroit, Michigan, dealer for the state of Michigan for Clark Equipment Company products contradicted the testimony of Mr. Baker. Mr. Clark testified that Clark Equipment had never denied his request that advertising be placed in a particular magazine. He also testified that he had never requested Clark Equipment Company to place its advertising with *Michigan Roads and Construction*, Mr. Baker's magazine. He further testified that he generally recommends that the advertising on his accounts be split between the two Michigan magazines, *Michigan Contractor and Builder* and Mr. Baker's magazine, *Michigan Roads and Construction.* Mr. Clark explained that he actually prefers *Michigan Contractor and Builder* but splits the advertising as a friendly gesture to Mr. Baker.

(e) *Iowa Manufacturing Company.* Mr. Harry A. Scribner (one of those who suggested the organization of ACP in 1938) President of Russell T. Gray Co., an industrial advertising agency which handles the advertising account of Iowa Manufacturing Company, testified that he did not use Mr. Baker's magazine, *Michigan Roads and Construction*, because *Michigan Contractor and Builder* is a superior magazine.[3]

24. Mr. Baker, to support his testimony that his magazine *Michigan Roads and Construction* had lost advertising business because of ACP, prepared and sponsored a graph (CX 60) which purports to compare the pages of display advertising in his magazine *Michigan Roads and Construction* with the pages in the competing ACP regional magazine *Michigan Contractor and Builder*, published by Mr. Richard Mertz. This graph (CX 60) indicates that *Michigan Contractor and Builder* has grown faster over the 1938–1956 period than Mr. Baker's magazine although Mr. Baker's magazine more than doubled its own annual volume of display advertising pages during this period. Mr. Baker attributed the slower rate of growth of his magazine primarily to the existence of ACP or the fact that he was not admitted to membership when he applied in 1947. He also testified that the difference in rate of growth which he attributed to ACP was represented in the named accounts heretofore discussed. It will be noted that Mr. Baker's graph (CX 60) begins with the year when ACP was formed, 1938. Mr. Mertz prepared an extension of Mr. Baker's graph back to the year 1931, the year Mr. Baker joined *Michigan Roads and Construction.*

[3] Mr. Arthur Franklin King, publisher of two non-ACP member publications, *Western Construction* and *Western Industry,* who testified in support of the complaint, also testified that his publication *Western Construction* carries the advertising account for Iowa Manufacturing Company and never had any difficulty in obtaining it.

Mr. Mertz' data and chart, RX 13 and 14, respectively, show that Mr. Mertz' ACP magazine *Michigan Contractor and Builder* grew faster than Mr. Baker's magazine prior to the organization of ACP as well as afterward. The chart shows that the ACP magazine carried fewer pages of display advertising than did Mr. Baker's magazine for some years, the faster rate of growth of the ACP magazine carried it ahead of Mr. Baker's magazine in 1937 and it has remained that way permanently. The projection of Mr. Baker's graph back to the year 1931 suggests that the faster rate of growth of the ACP magazine as contrasted to that of Mr. Baker's magazine began before ACP was organized. The evidence and testimony of the construction equipment advertisers and dealers, also heretofore discussed, shows that the rate of growth between the ACP magazine and Mr. Baker's magazine is attributable to factors other than ACP.

25. Mr. Edward Weilepp was another non-ACP publisher who testified Mr. Weilepp's magazine, *Kansas Construction*, Topeka, Kansas, circulates in the State of Kansas and three counties in western Missouri. *Kansas Construction* is published monthly and its first issue came out on April 1, 1948. This magazine does not contain any listing of bid lettings and concentrates on matters of interest to the construction industry in Kansas and the three counties in western Missouri. Mr. Weilepp testified that: advertising carried by *Kansas Construction* falls into two large classifications, national advertising, which is the advertising of manufacturers of construction equipment, materials, supplies and services by companies who operate on a national basis such as Caterpillar Tractor Company, Allis-Chalmers, and International Harvester; the second classification is local advertising, which includes the advertisements of the local equipment distributors or dealers who sell products manufactured by companies such as Caterpillar, Allis-Chalmers and International Harvester; these distributors or dealers operate in certain geographical areas of the country such as a state or section of a state, usually, advertising paid for or placed by manufacturers is national advertising and local advertising is likely to be placed by the distributors or dealers; on the national advertising the manufacturer pays 100% of the cost and on some of the local advertising by distributors or dealers, the manufacturer pays one-half and the local distributor or dealer pays one-half; this is sometimes called co-operative advertising; these types of advertising exist throughout the industry; *Mid-West Contractor*, an ACP publication, and one of the respondents in this proceeding, is the nearest competitor of *Kansas Construction Magazine; Mid-West Contractor* circulates also in territories not covered by *Kansas Construction* magazine.

Mid-West circulates in four States, Kansas, Nebraska, parts of Iowa and Missouri; these two magazines compete for both national and local advertising.

26. Mr. Weilepp, like Mr. Baker, also testified, among other things, that: ACP was formed at the request of some of the national advertisers and agencies in an effort to raise the quality and standards of the regional construction magazines and, since its formation in 1938, the member magazines have raised the standards of regional construction magazines and ACP magazines have come to be regarded by national advertisers as good magazines. In the meanwhile, by necessity, other regional magazines raised their standards; some new regional magazines have been established; ACP member magazines have acquired a "hallmark of quality" and, since *Kansas Construction* is not a member of ACP, it is a suspect magazine and has difficulty in obtaining advertising with some of the national advertisers; there are some instances where Weilepp has been able to sell advertising space in *Kansas Construction* after an advertiser has selected an ACP magazine, but he, like Mr. Baker, testified that he has encountered situations where a dealer has requested the manufacturer to place advertising in *Kansas Construction* but the manufacturer refused to do so for a variety of reasons, the primary reason being that the budget or the money available for advertising in the area covered by *Kansas Construction* and *Mid-West Contractor* had been allotted to *Mid-West Contractor* as an ACP member magazine and no more money in the advertising budget for that year was available. In short, Mr. Weilepp, like Mr. Baker, claims that not being a member of ACP, his magazine does not obtain as much national advertising as it would if he were a member. Mr. Weilepp does not complain that the advertising revenue of his magazine is going down because of ACP. *Kansas Construction's* gross revenues are approximately $100,000 per year. The evidence shows that *Kansas Construction* has grown steadily since it began publication in 1948, ten years after the organization of ACP. Mr. Weilepp's complaint is not that his magazine's advertising and revenues are going down because of ACP but that he believes they would go higher if it were not for ACP; he does not claim that ACP has taken any business away from *Kansas Construction* or that *Mid-West* or any other ACP magazine has granted discounts or other inducements to advertisers to take advertising business away from *Kansas Construction*.

27. On cross-examination, Mr. Weilepp testified that, in estimating the damage which ACP has done *Kansas Construction* in depriving it of a greater share of national advertising, he was speculating on an

educated guess basis as to what he believes he would have otherwise obtained. On the other hand, Mr. Weilepp admitted that during the past ten years *Kansas Construction* has obtained a number of national accounts which *Mid-West Contractor* either never had or used to have and the accounts switched to *Kansas Construction*—among these were Clinton Welded Wire Division of Colorado Fuel and Iron, Quick-Way Truck Shovel Company, D. W. Onan & Sons, and Transport Trailers. Mr. Weilepp admitted that the following are factors in *Mid-West Contractor* having more pages of national advertising than *Kansas Construction:* (a) *Mid-West* has greater territorial coverage—covers four states and makes it more attractive to national advertisers, (b) *Mid-West* has been in business longer than *Kansas Construction*, (c) *Mid-West* has a larger aggregate readership than *Kansas Construction* and (d) the twelve-time advertising rate of *Mid-West* is lower than *Kansas Construction.* The twelve-time black and white rate for *Mid-West* is $130 as contrasted to $156 for *Kansas Construction. Kansas Construction* is a monthly magazine and *Mid-West Contractor* is a weekly magazine.

28. One of Mr. Weilepp's principal complaints seems to be that he has failed to obtain some national advertising accounts because national advertisers told Mr. Weilepp when he solicited their advertising that they had already allotted their budgeted advertising funds to the ACP publications and they had no more funds remaining for advertising in *Kansas Construction.* Northwest Engineering was the only advertising account Mr. Weilepp could specifically name that he was not able to obtain by reason of ACP. Mr. Weilepp had previously testified that he personally makes four or five hundred calls on advertising agencies and manufacturers during the course of a year. However, he was not very familiar with this one account he had named because his conclusion was based on only one conversation with a Mr. Gray or Mr. Scribner at an advertising agency in Chicago. Mr. Harry C. Scribner, President of Russell T. Gray, Inc., an industrial advertising agency, Chicago, Illinois, later called as a witness upon behalf of respondents, testified that he preferred *Mid-West Contractor* over Mr. Weilepp's publication, *Kansas Construction* for the reason that *Mid-West Contractor* is a superior publication and covers a larger area more effectively. Mr. Scribner testified, among other things, in regard to Mr. Weilepp's characterization of ACP magazines having acquired a "hallmark of quality," that ACP magazines have a "hallmark of quality" because they have created standards that made better publishing practices, but the fact that a magazine does or does not carry the ACP on its masthead would not make any

difference to him or to any one of his clients. Mr. Scribner denied that mere membership in ACP is a factor in his selection of a magazine for advertising purposes and that, even if Mr. Weilepp's magazine was a member of ACP, Mr. Weilepp's magazine would not get his business unless Mr. Weilepp's magazine demonstrated that it was a better magazine than *Mid-West Contractor*. Mr. Scribner stated that Mr. Weilepp had only called in person at his office soliciting advertising on one occasion and that Mr. Weilepp's magazine had only called on him twice since it began publication in 1948.

29. The fact that *Kansas Construction* has been able to grow during the past ten years in spite of its smaller circulation coverage, a higher page-rate than *Mid-West Contractor*, its rate per page per thousand being higher, a younger publication, does not publish construction reports of bids wanted and bids placed and type, indicates that *Kansas Construction* has been successful in competing with *Mid-West Contractor*, an ACP publication. A preponderance of the evidence shows that Mr. Weilepp's claims that his magazine is not able to obtain national construction equipment accounts are unfounded and not established by the evidence. Mr. Weilepp testified that he has never applied for membership in ACP for the reason that membership is by invitation and he has not been invited. Also, the initiation fee of $5,000 is rather high, in his opinion, and he cannot say whether his magazine would accept an invitation to join ACP, if asked, although it might have been different three, four or five years ago. Mr. Weilepp further testified that, if membership in ACP should be opened to all magazines, one of its advantages from an advertising standpoint would be defeated, because there would likely be too much duplication of circulation coverage and duplication would render the ACP magazine or magazines less attractive to advertisers.

30. Mr. Akers named eight or nine advertising accounts which he believed he was not able to obtain by reason of the existence of ACP. These accounts were J. I. Case Company, Koehring, Yale and Towne, Bucyrus-Erie and Eimco. With respect to J. I. Case and Koehring, Mr. Howard Kenyon, President of Andrews Agency, Inc., an industrial advertising agency, Milwaukee, Wisconsin, testified that he and his company handles the advertising accounts for J. I. Case and Koehring and contradicted the testimony given by Mr. Akers. Among other things Mr. Kenyon testified that: Mr Akers' magazine, *Arizona Builder and Contractor*, had never carried Case advertising and the reason Mr. Kenyon did not use Mr. Akers' magazine was certainly not attributable to ACP; it was just that the cost of using Mr. Akers' magazine could not be justified because of the limited area it covers.

With respect to Koehring, Mr. Kenyon testified that he chose the ACP magazine on the basis of quality and not circumstance that it was an ACP magazine. With respect to the other accounts named by Mr. Akers, Yale and Towne, Bucyrus-Erie and Eimco, the evidence shows that *Western Construction* the regional magazine published by Mr. Arthur Franklin King, San Francisco, California, carries each of these accounts and Mr. King's magazine covers the entire territory covered by Mr. Akers' magazine. Mr. King's magazine is not an ACP magazine and his magazine carries each of these accounts. He also testified that Eimco is a new account. It would appear that, if Mr. King's non-member magazine, *Western Construction* did not have any difficulty in obtaining these accounts by reason of non-membership in ACP, it strains credulity to believe that non-membership in ACP was the reason Mr. Akers was unable to obtain advertsing from these companies.

31. Mr. Roy Fellom refused to name any specific advertising accounts which he claimed he was not able to obtain by reason of ACP and stated that he did not hold this "injury" against ACP and did not believe that they had done anything unethical. With respect to Mr. King, he really did not attribute any loss of business to ACP. So, it is seen that the only advertising business Messrs. Baker, Weilepp, and Akers claimed to have lost by reason of the existence of ACP was construction equipment advertising. The advertisers and dealers who testified with respect to the accounts which Baker, Weilepp and Akers claimed to have lost by reason of ACP completely disputed their unsubstantiated charges. The reasons these advertisers gave for not advertising in Baker's Weilepp's and Akers' magazines were unrelated to ACP.

32. Counsel supporting the complaint, in his proposed findings of fact, proposes a finding that there are 10 or 12 national construction magazines of which 4 are the principal competitors of ACP for national advertising. To the contrary, the evidence shows that there are approximately 17 national construction magazines and these nationals compete with the ACP regional magazines for national advertising. Counsel also proposes a finding that the ACP magazines lead all national construction magazines in total circulation and advertising sales volume. As an example, counsel suggests that the national construction magazine *Engineering News-Record*, a McGraw-Hill publication, sold approximately 2,900 pages of advertising in 6 months of 1957, as against 29,257 pages of advertising for all of the ACP magazines, indicating that the *Engineering News-Record* sales are only 20% of the total ACP annual sales. The fallacy in this argument

is that counsel only compares the total pages of advertising and does not compare the total advertising revenue in dollars. The 12-time advertising rate of *Engineering News-Record* is approximately 5 to 10 times the rate of any of the individual ACP construction magazines.

33. The 12-time page rate of *Engineering News-Record* is $985, whereas, the comparable rates of the ACP magazines are many times lower, generally somewhere between $100 and $200. The total pages of advertising attributable by counsel to the ACP magazines are the aggregate of the pages sold by each individual ACP magazine at its individual page rate. It must also be kept in mind that the page rates of the individual ACP magazines vary from magazine to magazine and, when a general industrial advertiser places advertising in each of the ACP magazines simultaneously, that advertiser pays the total of the page rates of each individual magazine in which he advertises. It is not possible to compare sales volume or sales growth for any period of time between the ACP magazines as a group with any other construction magazines without first converting pages for the several magazines concerned into dollars. RX–10 contains page and rate data for the months of September and October, 1958 of the 17 national construction magazines and more than 100 regional and local construction magazines. In RX–11 a comparison is made between the ACP magazines as a group and the national magazines as a group. The average individual sales volume of the 16 national magazines for which complete data is available in RX–10 for the 2-month period was $129,465.94 as against $42,056.33 for the ACP publications for the same period. Thus, it is seen that these 16 national magazines have approximately three times the average individual sales volume of the ACP magazines. *Engineering News-Record* alone, with 777 pages at $985 per page had a larger advertising revenue for this period than all of the ACP magazines put together, $767,215 as against $630,845. This national magazine is one of the two national construction magazines published by McGraw-Hill Publications, the other being *Construction Methods*. In short, the national magazines are larger by any method of comparison, individually or collectively, than the ACP publications.

34. Counsel supporting the complaint also urges that ACP intends to limit membership in violation of the law and that the most important qualification has been that an applicant must not compete in an existing ACP member's territory. The minutes of practically all ACP membership meetings since its formation were offered and received in evidence. Counsel supporting the complaint relies on a letter dated September 10, 1947 from Mr. Anderson to Mr. Mertz,

ACP members at the time of Mr. Baker's application for membership, to show that ACP limits membership in violation of the law. In this letter, Mr. Anderson stated that he intended to offer several amendments to the by-laws at the next meeting of ACP, including an amendment limiting new members to magazines which do not duplicate the coverage of existing members. However, the minutes of the next meeting of ACP held in Chicago on September 26, 1947, which are in evidence, do not show that such an amendment was even offered. The minutes of the various meetings of ACP disclose that there was discussion at some of the meetings concerning the question of circulation duplication or overlapping, but the evidence is convincing that no affirmative steps were ever taken to reduce or remove the coverage duplication or overlap. Counsel supporting the complaint also urges that Mr. Dinsmore, in his report to ACP concerning his survey of the Pacific Northwest in an effort to complete ACP coverage of the United States showed his "thinking and the thinking of the group regarding duplication of territory". This alleged "thinking" on the part of Mr. Dinsmore and some of the ACP members, to the effect that ACP would not admit to membership any regional magazine unless it agreed to discontinue duplication coverage with an existing ACP magazine, was not ever put into action. Mere "thinking", not put into effect by affirmative or positive action, is not unlawful. Certainly, no unreasonable restraint on competition has been shown. On this particular subject, Mr. Fellom, publisher of *Pacific Builder & Engineering Review*, San Francisco, California, testified that, in 1957, during Mr. Dinsmore's trip to the West Coast he came to San Francisco and talked to Mr. Fellom concerning the possibility of Mr. Fellom's magazine becoming a member of ACP, so as to fill the gap which was principally in Northern California and possibly would include Oregon or parts of Oregon, but not Southern California or the Rocky Mountain Area. Mr. Fellom further testified that he told Mr. Dinsmore to have ACP make him a definite statement as to what they had in mind, but Mr. Fellom heard nothing further from Mr. Dinsmore or ACP. Mr. Fellom has never applied for membership in ACP nor has he or his magazine *Pacific Builder & Engineering Review* [4] been invited by ACP to file an application for membership. However, it cannot be argued that his application for his *California Supplement* was rejected on the grounds of duplication of coverage or overlap with an existing ACP member because his *California Supplement* did not duplicate the territory of any ACP member magazine.

[4] Mr. Fellon had previously filed an application for membership in ACP for his *California Supplement,* which was rejected.

35. Counsel supporting the complaint also claims that *Construction*, an ACP magazine, in September 1953, gave up circulation in 13 of its 16 states in order to comply with ACP requirements for membership. The evidence does not support this charge. The fact that the management of *Construction* decided to eliminate 13 states from a widely scattered circulation and concentrate its efforts in a more limited area of three States, Virginia, West Virginia, and North Carolina, does not establish the allegation that *Construction* reduced its circulation coverage by reason of demands made by ACP in this regard.

36. Counsel supporting the complaint argues that membership in ACP is a substantial competitive advantage to its members, pointing to the $52,000 annual budget for national advertising, entertainment at cocktail parties and solicitation of advertising by each ACP member on behalf of all the other ACP magazines. As has previously been found, the $52,000 budget is not unreasonably large for 14 separate magazines and most of this advertising is directed toward a particular category of advertisers which regional magazines have not previously been able to reach; that is, general industrial advertisers. General industrial advertisers include a wide range of products and they prefer nationwide coverage. After obtaining nationwide circulation coverage in 1956, ACP, on behalf of the individual member magazines as a group, began to compete with the national construction magazines for this type of advertising. The individual ACP magazines do not solicit advertising for the other members of ACP. Each individual ACP magazine only solicits construction equipment advertising for its own individual magazine. With respect to counsel's assertion that ACP members receive a substantial volume of business simply because they are members of ACP is not borne out by the evidence and testimony. Messrs. Baker, Weilepp, Akers and Fellom did testify that ACP members receive construction equipment advertising business simply because they are members of ACP, but these were their own self-serving declarations and unsubstantiated conclusions. The advertisers and dealers of construction equipment who testified at the hearing contradicted their testimony and testified that they did not buy any ACP "package" and that membership in ACP is not the determining factor when choosing between regional construction magazines in placing advertising. The only competitive advantage which ACP members may have over non-members is in being able to compete with the national construction magazines for advertising from general industrial advertisers because a national advertiser can place advertising in each of the 14 ACP magazines and cover the entire United States.

37. Counsel supporting the complaint also says that the ACP magazines bring a united front in quoting prices by means of a composite rate card. This is not unlawful. This rate card is used by Mr. Hyde in soliciting advertising from general industrial advertisers in competition with the national construction magazines. This rate card merely lists the advertising rates charged by each individual ACP magazine, and the individual rates of each magazine are totaled at the bottom of the card, which is a quick and convenient way of quoting the total charge for placing national advertising in each of the ACP magazines. These are the regular rates for each individual magazine and no discount is granted to any advertiser by reason of his placing national advertising in each of the ACP magazines. The only discount is the usual 2% discount granted by all publishers.

38. Counsel supporting the complaint also states that the ACP magazines do not have any intrinsic qualities which make them superior to other regional magazines and that the ACP magazines have an advantage in their unity and the convenience of buying the ACP "package." This conclusion is not supported by the evidence and testimony. Numerous construction equipment dealers and advertisers testified at the hearing and contradicted the testimony of Messrs. Baker, Weilepp, Akers and Fellom. These advertisers, and there were eight or nine of them (local construction equipment dealers and advertisers), testified that they do not buy advertising in the ACP magazines as a "package" but do pick and choose between the individual regional construction magazines, ACP magazines and non-ACP magazines. These advertisers are personally familiar with each of the competing regional construction magazines, ACP magazines and non-member magazines. Construction equipment advertising comprises approximately 85% to 90% of the business of the ACP magazines. These construction equipment advertisers and dealers testified unanimously that the various ACP magazines are superior in quality to the non-ACP regional construction magazines.

39. The construction equipment dealers and advertisers also contradicted the testimony of Messrs. Baker, Weilepp and Akers with regard to their claims of injury by reason of the ACP magazines taking advertising business away from them and excluding them from business. With respect to the testimony of Messrs. Fellom and King on this phase of the allegations, Mr. Fellom refused on cross-examination to name any specific accounts that he had lost to an ACP magazine or was prevented from obtaining by reason of ACP, and flatly testified that he did not hold the "injury" in question against ACP and felt that they had done nothing unethical or wrong. Mr. King testified

that the business of his magazine, *Western Construction* was not as good in 1958 as it was for 1957 or 1956 and there were three reasons for the decline in business: (1) the general economic condition of the country, (2) our own capacity to obtain business, and (3) more vigorous competition than we had had hitherto. He further testified that "one or two of the nationals are stepping up the tempo of their selling activity. I think, in general, the ACP group of magazines, having a package to offer, may in a degree be a factor in this competition . . . . I, in fairness, cannot charge ACP with too much of the blame for this. I think at least an equal amount of blame, if not more, is chargeable perhaps to our own laxity in selling activity."

40. As has been found, construction equipment advertising constitutes 85% to 90% of the advertising of regional construction magazines, including the ACP magazines. These construction equipment advertisers are familiar with the quality of each of the regional construction magazines and these advertisers pick and choose between them in placing advertising. These advertisers of construction equipment are not influenced in any manner by the activities of ACP in its advertising efforts to obtain general industrial advertising for the ACP magazines as a group. All of the accounts named by Messrs. Baker, Weilepp and Akers to support their claims that they were losing advertising revenues by reason of ACP were *construction equipment advertisers*. Since the evidence is conclusive that ACP, as an organization, only solicits advertising from general industrial advertisers, this does not injure the non-member regional magazines because they have never had and do not have the advertising accounts of general industrial advertisers. Regional magazines have not been able to obtain this class of advertiser on the basis of individual solicitation. The evidence and testimony further shows that non-member regional construction magazines would not be able to obtain this class of advertising from general industrial advertisers simply by joining ACP because the addition of these non-member magazines to membership in ACP would destroy the attractiveness of the present nationwide coverage of ACP magazines with their present minimum amount of overlap which makes the so-called ACP "package" salable to this class of advertisers. In other words, if ACP should be required to open its membership to all regional construction magazines as requested by counsel supporting the complaint, this would destroy the present attractiveness of the ACP "package" to general industrial advertisers. Any increase in membership of ACP will add to the duplication of circulation coverage which already exists among the ACP magazines and impair the salability of the present ACP "pack-

age" to general industrial advertisers. It would further kill any opportunity for the new ACP magazines to obtain general industrial advertising accounts. This would be so because general industrial advertisers want nationwide circulation coverage with a minimum amount of circulation duplication. So what is the solution? There is testimony in the record that a second organization of regional construction magazines could be formed, similar to ACP. This new organization could then compete with the national and ACP magazines for general industrial advertising. As now constituted, the ACP magazines compete with the national construction magazines for general industrial advertising. This competition had not existed prior to 1956 when ACP obtained nationwide circulation coverage. Such competition is in the public interest. The effectiveness of ACP as a competitive factor in this field would be destroyed if its membership were unrestricted.

41. As stated in *Board of Trade* v. *U.S.*, 246 U.S. 231, 238, 62 R. ed. 683, 687 (1917): "But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable." Trade practices will not be held to be unfair under Section 5 of the Federal Trade Commission Act where "the record does not show that the probable effect of the practice will be unduly to lessen competition", *F.T.C.* v. *Sinclair Refining Co.*, 261 U.S. 463 [1 S. & D. 306]. In the present case, the evidence is clear that the respondents have not injured any of the competing non-ACP regional magazines in the construction equipment advertising market. With respect to the second category of advertising, general industrial advertising, which ACP began soliciting as a so-called "package" in 1956 on behalf of all of the ACP magazines as a group, this put the ACP magazines in competition for the first time with the national construction magazines for this category of advertising. General industrial products have wider uses than construction equipment and are sold to other industries in addition to the construction industry. The advertisers must spread their available advertising budgets over media going to each of these industries and cover the nation in each

industry. Consequently, this category of advertisers has used only national construction magazines and regional construction magazines have not been able to obtain this category of advertising by individual solicitation. This was one of the considerations in ACP accepting *Construction*, *Rocky Mountain Construction* and *Pacific Builder and Engineer* to membership in ACP. The addition of these three regional magazines closed several gaps in ACP regional magazine coverage and gave ACP magazines nationwide circulation coverage for the first time.[5] With nationwide coverage, the ACP magazines began to compete with the national construction magazines for general industrial advertising. This created competition between the ACP and national construction magazines for advertising of general industrial products where none had existed before. This group selling by ACP on behalf of the member regional magazines has not injured the non-member regional construction magazines because they have never had the accounts of general industrial advertisers. No business has been taken from them nor are they precluded from access to this market category by reason of ACP. Admission to ACP membership will not make the market accessible to them; rather, it will make it inaccessible to the present membership which is presently offering competition to the national construction magazines. There is nothing to prevent some of the non-member regional construction magazines from forming a competing organization of their own, including magazines in various regions of the country, so they can effectively solicit general industrial advertising.

42. Counsel supporting the complaint urges that *Associated Press* v. *United States*, 326 U.S. 1, is controlling here. In that case, the Supreme Court held, among other things, that the effect of the AP by-laws was (1) to block all newspaper non-members from any opportunity to buy news from AP or any of its publisher members, (2) admission to membership in AP was a prerequisite to obtain or buy AP news from any one of its more than 1200 publishers and, (3) admission of a new member who would compete with an old member was very difficult and burdensome. The court held, among other things, that, the by-laws on their face, were in restraint of trade and, by the restrictive by-laws, each of the publishers among the 1200 in the combination has, in effect, "surrendered himself completely to the control of the association," *Anderson* v. *Shipowners Ass'n.*, 272 U.S. 359,

[5] Contrary to the assertions by counsel supporting the complaint that a new magazine would not be admitted to membership in ACP if it overlapped the circulation coverage of a member, *Rocky Mountain Construction* overlapped member *Southwest Builder and Contractor* as to Arizona and part of Nevada, and *Pacific Builder and Engineer* overlapped member *Rocky Mountain Construction* in Montana, Wyoming, Utah and Idaho.

362, in respect to the disposition of news in interstate commerce. The *Associated Press* case is not analogous to the facts in the present case. The primary distinction between the facts in the two cases is that exclusion from membership in ACP is not tantamount to exclusion from the advertising business market of regional construction magazines. The evidence is undisputed that ACP has not retarded or prevented the establishment of new regional construction magazines. Since ACP was organized in 1938, 29 new regional construction magazines have begun publication. A preponderance of the evidence shows that most of the non-member regional construction magazines which began publication since 1938 are growing and prospering. A case more nearly in point is *Prairie Farmer Publishing Co.* v. *Indiana Farmer's Guide Publishing Co.*, 88 F. 2d 979 (7th Cir. 1937), *Cert. Denied*, 301 U.S. 696, 81 L. ed. 1351 (1937). In that case the U.S. Circuit Court of Appeals set aside a jury verdict for the plaintiff, a competitor non-member regional farm paper, and directed dismissal of the complaint against the defendant association of regional farm journals on the ground that even the demonstrated injury to such competitor from discriminatory package pricing by the association was not unreasonable and not in violation of the antitrust laws where the injury was only an incidental effect of the association's effort to compete with the national farm magazines on a package basis. The ACP magazines are now competing with the national construction magazines for general industrial advertising on a "package" basis. If the efforts of the ACP magazines as a group to compete with the national construction magazines for general industrial advertising has resulted in injury to Mr. Baker's magazine or any other non-member regional magazine, it was *damnum absque injuria.*

43. Counsel supporting the complaint also urges that, when measuring the effect on competition, the only real difference between this case and *Associated Press* is that the "blackball" provision written into AP's by-laws is not written into ACP's by-laws, but instead exists by *understanding among members.* (Italics supplied.) There is not even an iota of testimony in the record of such an understanding. This is counsel's conclusion. Much of the testimony of the non-member regional construction magazine publishers concerning pecuniary injury due to the alleged failure of their magazines to obtain certain advertising accounts by reason of the existence of ACP were their own mere conclusions. Later in the hearing respondents offered the testimony of advertisers and dealers of construction equipment who represented manufacturers and accounts which the non-member publishers had previously testified they were unable to obtain by rea-

son of ACP. These advertisers and dealers contradicted their testimony and testified that they advertised in ACP and non-ACP regional magazines alike; that, when they selected an ACP magazine for a particular account, it was the best quality magazine for the purpose, not because it belonged to ACP. In other words, membership in ACP was irrelevant.

44. The hearing examiner has carefully examined the record and discussed in this decision most of the questions raised by the pleadings and by counsel. The circumstance that one or more questions raised by counsel have not been specifically discussed does not mean that it has not been considered. Upon the basis of the entire record, the hearing examiner is of the opinion that the allegations of the complaint has not been established. The words of Justice Murphy in his dissenting opinion in *Associated Press* v. *United States*, supra, are appropriate here: "Competitive practices emerge as unreasonable restraints of trade only if they are infused with an additional element of unfairness, such as monopoly, domination, coercion, price fixing or an unreasonable stifling of competition. If there is such a factor in this instance, however, it lies deep in the unfathomed sea of conflicting or unproved facts." Accordingly,

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

ORDER DENYING APPEAL AND DISMISSING COMPLAINT

This matter is before the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision filed December 29, 1961, dismissing the complaint.

The complaint herein charged respondents, Associated Construction Publications, a non-stock membership corporation, named publisher members thereof and certain individuals, with violating Section 5 of the Federal Trade Commission Act by engaging in and carrying out an agreement, understanding and planned common course of action to eliminate and restrain competition among and between themselves and with others, and to monopolize in themselves the advertising business of those using regional trade papers designed for the construction industry as an advertising medium. Among the acts, practices and methods which it was charged that respondents engaged in pursuant to the alleged combination, agreement and planned common course of action were: limitation of membership to one publication in a given area, allocation of territories so as to exclude overlapping in circulation, securing of patronage of advertisers by unlawful means and

diverting it from competing publications and agreement upon prices, discounts and terms of sale for advertising space.

The Commission, upon review of the whole record, has determined that the allegations of the complaint have not been sustained. Respondents, however, have engaged in practices which under different circumstances could result in giving them an undue advantage over competitors. Since future practices of the respondents might be such as to constitute a violation of the Federal Trade Commission Act, the Commission, under such circumstances, should safeguard the public interest by continuing a close scrutiny of respondents' operations. Furthermore, as is inherent in all dismissals such as ordered here, the Commission is in no wise prejudiced in the future from reopening or from taking such other action in the future as may be warranted.

It is ordered, That the appeal of counsel supporting the complaint from the hearing examiner's initial decision be, and it hereby is, denied.

It is further ordered, That the complaint in this matter be, and it hereby is, dismissed.

IN THE MATTER OF

FEATURE FABRICS, INC., ET AL.

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

Docket 8075. Complaint, Aug. 10 1960—Decision, Apr. 26, 1962

Order requiring New York City sellers of wool fabrics to cease violating the Wool Products Labeling Act by such practices as labeling as "45% Rayon 40% Nylon 15% Reused Wool", fabrics which contained substantially less nylon and reused wool than thus represented; by failing to tag or label wool products as required; and by furnishing a false guaranty that their wool products were not misbranded.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Feature Fabrics, Inc., a corporation, and Isidor Kaplan and Benjamin Levine, individually and as officers of said corporation, and Isidor Kaplan, an individual, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products

Labeling 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 Feature Fabrics, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Respondents Isidor Kaplan and Benjamin Levine are officers of the corporate respondent. Said individual respondents cooperate in formulating, directing and controlling the acts, policies and practices of the corporate respondent, including the acts and practices hereinafter referred to. The respondent Isidor Kaplan is an individual trading under his own name. All of the respondents have their office and principal place of business at 222 West Fortieth Street, New York, N.Y.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939 and more especially since 1958, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment, and offered for sale, in commerce, as "commerce" is defined in said Act, wool products, as "wool products" are defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products were fabrics labeled or tagged by respondents as "45% Rayon 40% Nylon 15% Reused Wool." In truth and in fact, said fabrics contain substantially less than the amount of reused wool and nylon as represented on said labels.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged or labeled as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder.

PAR. 5. Respondents have furnished a false guaranty that their wool products were not misbranded, when they knew, or had reason to believe, that the said wool products so falsely guaranteed might be introduced, sold, transported, or distributed in commerce, in violation of Section 9 of the Wool Products Labeling Act.

PAR. 6. The respondents, in the course and conduct of their business, as aforesaid, were and are in substantial competition, in commerce,

with corporations, firms and individuals likewise engaged in the sale of wool products, including woolen fabrics.

PAR. 7. The acts and practices of the respondents, as set forth above, were and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted and now 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.

Mr. DeWitt T. Puckett for the Commission.

Guzik & Boukstein, of New York, N.Y., by *Mr. Leo Guzik*, for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

PRELIMINARY STATEMENT

The complaint in this matter, issued on August 10, 1960, charged the respondents with violation of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder and the Federal Trade Commission Act, in connection with the sale of wool fabrics. On October 31, 1960, an answer to the complaint was filed by the respondents and subsequently, at a hearing held on June 22, 1961, the answer was amended in certain respects. At a further hearing, held on November 20, 1961, respondents through their counsel admitted on the record all of the material allegations of fact in the complaint but denied the conclusions of law stated therein and denied that there had been any willful and intentional violation of law on the part of respondents.

In connection with such admission of facts, respondents' counsel stated that due to personal reasons respondents had decided not to press the denials and defenses set forth in their amended answer; that the charges against respondents involved a single purchase of wool fabric from an Italian wool fabric manufacturer; that the labeling on the merchandise sold by respondents was precisely the same as that received by them in good faith from their supplier; and that respondents acted in good faith and without knowledge that the warranties and representations made to them by their supplier and its agent in the United States were improper and not in accordance with the facts. This statement of counsel was in explanation, not in derogation, of the admission of the facts as alleged in the complaint.

Subsequently proposed findings and conclusions were submitted by Commission counsel and a memorandum in opposition to such proposals was filed by respondents' counsel. The case is now before the

hearing examiner for final consideration. Any proposed findings, conclusions or contentions not included herein have been rejected.

FINDINGS AS TO THE FACTS

1. Respondent Feature Fabrics, Inc., is a New York corporation. Respondents Isidor Kaplan and Benjamin Levine are officers of the corporation and cooperate in formulating, directing and controlling its acts, policies and practices.

Respondent Isidor Kaplan is an individual trading under his own name. All of the respondents have their office and principal place of business at 222 West Fortieth Street, New York, N.Y.

2. Subsequent to the effective date of the Wool Products Labeling Act of 1939 and more especially since 1958, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment, and offered for sale, in commerce, as "commerce" is defined in said Act, wool products, as "wool products" are defined therein.

3. Certain of such wool products were misbranded by respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products were fabrics labeled or tagged by respondents as 45% Rayon 40% Nylon 15% Reused Wool." In truth and in fact, such fabrics contained substantially less than the amount of reused wool and nylon as represented on such labels.

4. Certain of such wool products were further misbranded by respondents in that they were not stamped, tagged or labeled as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder.

5. Respondents have furnished a false guaranty that their wool products were not misbranded, when they knew, or had reason to believe, that such products might be introduced, sold, transported, or distributed in commerce, in violation of Section 9 of the Wool Products Labeling Act.

6. Respondents, in the course and conduct of their business are in substantial competition, in commerce, with corporations, firms and individuals likewise engaged in the sale of wool products, including woolen fabrics.

CONCLUSION

The acts and practices of respondents, as set forth above, were in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. The proceeding is in the public interest.

ORDER

It is ordered, That respondents Feature Fabrics, Inc., a corporation, and its officers, and Isidor Kaplan and Benjamin Levine, individually and as officers of said corporation, and Isidor Kaplan, an individual, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of wool fabrics or other "wool products", as such products are defined in and subject to the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

A. Misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers included therein;

2. Failing to affix labels to such products showing each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

B. Furnishing a false guaranty that their wool products are not misbranded under the provisions of the Wool Products Labeling Act, when there is reason to believe that the wool products so guaranteed may be introduced, sold, transported or distributed in commerce.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 4.19 of the Commission's Rules of Practice effective July 21, 1961, the initial decision of the hearing examiner shall, on the 26th day of April 1962, become the decision of the Commission; and, accordingly:

It is ordered, That 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.

Complaint

IN THE MATTER OF

IRVING SINGER TRADING AS DERNBURG-SINGER FUR COMPANY

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

Docket 8418. Complaint, June 1, 1961—Decision, Apr. 26, 2962

Consent order requiring a Chicago furrier to cease violating the Fur Products Labeling Act by invoicing and advertising which did not show the true animal name of the fur in a fur product and contained the names of other animals than those producing furs; by failing to show on invoices the country of origin of imported furs and to comply in other respects with invoicing requirements; and by failing to disclose in advertising when furs were dyed, and representing falsely that his stock was "Tremendous, every style, size and color on hand—ready for you" when he customarily filled orders by purchasing fur products from other wholesalers.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Irving Singer, an individual trading as Dernburg-Singer Fur Company, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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 Irving Singer is an individual trading as Dernburg-Singer Fur Company with his office and principal place of business located at 190 North State Street, Chicago, Ill.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been, and is now, engaged in the introduction into commerce, and in the sale, advertising, and offering for sale, in commerce, and in the transportation, and distribution, in commerce of fur products, and has sold, advertised, offered for sale, transported and distributed fur products which were made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively invoiced by respondent in that they were not invoiced as required

by Section 5(b)(1) and 5(b)(2) of the Fur Products Labeling Act, and in the manner and form prescribed by the Rules and Regulations promulgated thereunder. Among such falsely invoiced products, but not limited thereto, were fur products which:

(a) were not invoiced to show the true animal name of the fur used in the fur product;

(b) were not invoiced to show the country of origin of imported fur used in the fur product; and

(c) set forth on invoices the name of an animal other than the animal producing the fur contained in the fur product.

PAR. 4. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Item numbers required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder were not set out in accordance with Rule 40 of said Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that respondent caused the dissemination in commerce, as "commerce" is defined in said Act, of certain brochures or advertisements concerning said products, which brochures or advertisements were not in accordance with the provisions of Section 5(a) of the said Act and the Rules and Regulations promulgated thereunder; and which brochures and advertisements were intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

By means of said advertisements and others of similar import and meaning, not specifically referred to herein, respondent falsely and deceptively advertised fur products in that said advertisements:

(a) Failed to show the true animal name of the fur used in the fur product;

(b) Failed to disclose that fur contained in the fur products was dyed;

(c) Contained the name or names of an animal or animals other than those producing the fur contained in the fur product;

(d) Represented that the respondent's fur product stock was "Tremendous, every style, size and color on hand-ready for you" when, in truth and in fact, respondent maintained only a few items at a time and customarily filled his orders by purchasing fur products from other wholesale furriers.

PAR. 6. The aforesaid acts and practices by respondents, as herein alleged, were and are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

Counsel for respondent having filed a timely notice of respondent's desire to dispose of this proceeding by execution of an agreement containing a consent order, pursuant to the Commission's notice of July 14, 1961; and the respondent and counsel supporting the complaint having entered an agreement containing a consent order to cease and desist; and this agreement having been certified to the Commission by the hearing examiner with a statement that he is of the opinion that the agreement and the proposed order provide an appropriate basis for disposition of this proceeding as to all of the parties; and

The Commission, having considered the agreement, hereby accepts same, makes the following jurisdictional findings, and enters the following order:

1. Respondent Irving Singer is an individual trading as Dernburg-Singer Fur Company with his office and principal place of business located at 190 North State Street, in the city of Chicago, State of Illinois.

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

ORDER

It is ordered, That Irving Singer, an individual trading as Dernburg-Singer Fur Company, or under any other trade name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale, in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. Falsely or deceptively invoicing fur products by:

A. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to

be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

B. Setting forth on invoices pertaining to fur products the name or names of any animal or animals other than the name of the animal or animals producing the fur contained in the fur products as specified in the Fur Products Name Guide and as prescribed under the Rules and Regulations.

C. Failing to set forth on invoices the item number or mark assigned to each fur product.

2. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which:

A. Fails to disclose the name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide, and as prescribed under the Rules and Regulations.

B. Fails to disclose that the fur product contains or is composed of bleached, dyed, or otherwise artifically colored fur, when such is the fact.

C. Sets forth the name or names of any animal or animals other than the name or names of the animal or animals producing the fur contained in the fur product as specified in the Fur Products Name Guide, and as prescribed under the Rules and Regulations.

D. Represents, directly or by implication, the quantity of his regular inventory of new and used fur products, by use of terms which are not accurate as to the quantity of such inventory and that the fur products being offered for sale are from respondent's regular inventory or stocks, when such is contrary to the fact.

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

Complaint

IN THE MATTER OF

MAX KANDLER TRADING AS ART CRAFT LEATHER GOODS

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

Docket C-125. Complaint, Apr. 26, 1962—Decision, Apr. 26, 1962

Consent order requiring a New York City manufacturer of leather goods to cease describing his wallets and billfolds in promotional literature as "Genuine Top Grain Leather", "Hand Boarded English Morocco", and "Top Grain Cowhide" and stamping such legends on them when the interior sections were made of non-leather materials or of other leather than that claimed; and to cease giving with such wallets a deceptive statement of warranty.

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 Max Kandler, an individual trading as Art Craft Leather Goods, 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 Max Kandler is an individual trading as Art Craft Leather Goods, with his principal office and place of business located at 57 Prince Street, in the city of New York, State of New York. His former place of business was located at 47 Great Jones Street, New York, N.Y.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacturing, advertising, offering for sale, sale and distribution of wallets and other leather goods to distributors and jobbers who sell to retailers for resale to the public.

PAR. 3. In the course and conduct of his business, respondent now causes, and for some time last past has caused, his said products, when sold, to be shipped from his place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his business as aforesaid and for the purpose of inducing the sale of said products, respondent has engaged in certain acts and practices as follows:

1. In promotional literature distributed by respondent, wallets and other leather goods are pictured. Immediately under said pictures are descriptive words such as, "Genuine Top Grain Leather Men's Wallet", "Genuine Hand Boarded English Morocco Men's Wallet", "Top Grain Cowhide Ladies Billfold", etc.

2. Respondent's said wallets are conspicuously stamped with various legends which purport to be descriptive of the materials from which such wallets are made, such as, "Genuine Top Grain Leather", "Hand Boarded English Morocco", "Top Grain Cowhide", etc. Loosely inserted in one of the inner pockets of said wallets is a card which reads in part, "For the outside body—selected top grain leather of the type stamped on this article. For the partitions and linings—high quality material different from that used for the outside body, and not necessarily leather." Said cards are concealed from the purchaser's view, are not in close proximity to the aforestated legends and may be seen by the purchaser, if at all, only with considerable effort.

3. The aforesaid cards also bear the words, "WARRANTY. This product is Warranted to be made of high quality materials chosen for their appropriate durability and appearance".

PAR. 5. Through the use of the aforesaid statements and representations and materials in the manner aforesaid, respondent represents, directly or indirectly:

1. Through the use of the aforesaid statements in advertising, that said wallets are made in their entirety of the kind of leather so stated.

2. Through the use of the aforesaid statements imprinted on said wallets, that said wallets are made in their entirety of the kind of leather stamped thereon.

3. Through the use of the aforesaid alleged statement of warranty that said wallets are guaranteed or warranted.

PAR. 6. Said statements and representations are false, misleading and deceptive. In truth and in fact:

1. Said wallets are not made in their entirety of the kind of leather stated in said advertising. The dividers, interliners and various other interior sections of said wallets are made of non-leather materials or of leather other than the kind so stated.

2. Said wallets are not made in their entirety of the kind of leather stamped thereon as aforesaid. The dividers, interliners and various other interior sections of said wallets are made of non-leather materials or of leather other than the kind so stated. Not only is the afore-

said card inserted in such a manner as to be inadequate to advise or apprise purchasers of the fact that the dividers, interliners and various other interior sections of said wallets are not made of the kind of leather stamped thereon but said cards affirmatively imply that the said non-leather interior sections are leather. Moreover, said cards, loosely inserted as aforesaid, may also be removed, destroyed, or otherwise mutilated so as to be ineffective to advise or apprise purchasers at retail of the disclosures purported to be revealed thereon.

3. Said purported warranty or guarantee is wholly deficient in that it does not clearly and conspicuously disclose the nature and extent of the guarantee, the manner in which the guarantor will perform thereunder and the identity of the guarantor.

PAR. 7. By the aforesaid practices, respondent places in the hands of retailers and dealers the means and instrumentalities by and through which they may mislead and deceive the public as to the quality, leather content and the extent of the guarantee of said wallets.

PAR. 8. In the conduct of his business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of wallets and other leather goods of the same general kind and nature as those sold by respondent.

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

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

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Max Kandler is an individual trading as Art Craft Leather Goods, with his principal office and place of business located at 57 Prince Street, in the city of New York, State of New York.

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

ORDER

It is ordered, That respondent, Max Kandler, an individual trading and doing business as Art Craft Leather Goods, or under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of wallets, leather goods, or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the terms "Genuine Top Grain Leather", "Hand Boarded English Morocco", "Top Grain Cowhide", or any other words or terms of similar import or meaning to describe any of said products which are not made wholly of the kind of leather so stated and which contain non-leather parts having the appearance of leather or parts of leather other than the kind so stated without identifying such parts and revealing that such parts are not leather or are of a different kind of leather from that so stated. Said disclosure shall be clearly and conspicuously made in advertising and on or in immediate connection with such goods so as to remain affixed thereto until said products reach the ultimate purchaser.

2. Representing, directly or indirectly, that said products are guaranteed unless the nature and extent of the guarantee, the manner in which the guarantor will perform thereunder and the name and ad-

dress of the guarantor are clearly and conspicuously disclosed and respondent does in fact fulfill all of his requirements under the terms of said guarantee.

3. Furnishing or otherwise placing in the hands of retailers or dealers in said products the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinabove prohibited.

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

IN THE MATTER OF

CALVERT MANUFACTURING COMPANY ET AL.

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

Docket C-126. Complaint, Apr. 26, 1962—Decision, Apr. 26, 1962

Consent order requiring Baltimore distributors of a variety of advertising specialties to cease representing falsely, through use of the word "manufacturing" in their corporate name, on their letterheads, and in advertising and promotional literature, that they manufactured their merchandise in their own factories.

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 Calvert Manufacturing Company, a corporation, and High Hurwitz, Tad Lyon, and Armand Terl, 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 Calvert Manufacturing Company is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 1722 North Charles Street, in the city of Baltimore, State of Maryland.

High Hurwitz, Tad Lyon, and Armand Terl are individuals and are officers of said corporate respondent. They formulate, direct and

control the acts and practices of the corporate respondent. Their address as individuals and as officers is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of advertising specialities, including thermometers, scrapers, key-tags, piggy-banks, tops, playing cards, ash trays, hats, feathers, fly swatters, rulers, plastic bags, pennants, combs, pencils, pens, balloons and knives, to members of the purchasing public.

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

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of the aforesaid articles of merchandise, respondents now use, and for some last past have used, the word "manufacturing" in their corporate name, on their letterheads, and in advertising and promotional literature.

PAR. 5. Through the use of the aforesaid word "manufacturing" in their corporate name, on their letterheads, and in advertising and promotional literature, respondents have represented and are now representing, that they own, operate or control a factory or factories wherein their said articles of merchandise are manufactured, and that they are the manufacturers of said articles of merchandise.

PAR. 6. Said statements and representations are false, misleading and deceptive. In truth and in fact, said respondents do not own, operate or control a factory or factories wherein said articles of merchandise are manufactured, and do not manufacture any of said products.

PAR. 7. There is a preference on the part of members of the purchasing public for dealing directly with manufacturers of products rather than with outlets, distributors, jobbers or other intermediaries, such preference being due in part to a belief that by dealing directly with the manufacturers, lower prices and other advantages may be obtained.

PAR. 8. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals en-

gaged in the sale of articles of merchandise of the same general kind and nature as those sold by respondents.

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

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

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form or order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Calvert Manufacturing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 1722 North Charles Street, in the city of Baltimore, State of Maryland.

Respondents High Hurwitz, Tad Lyon and Armand Terl are officers of said corporation, and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents, Calvert Manufacturing Company, a corporation, and its officers, and High Hurwitz, Tad Lyon, and Armand Terl, 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 advertising specialties, including thermometers, scrapers, key-tags, piggy banks, tops, playing cards, ash trays, hats, feathers, fly swatters, rules, plastic bags, pennants, combs, pencils, pens, balloons, and knives, or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "manufacturing" or any other word or term of similar import or meaning as a part of respondent's corporate or trade name, or otherwise representing that respondents manufacture the products sold by them.

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

---

IN THE MATTER OF

O.E.M. PRODUCTS COMPANY ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(c) OF THE CLAYTON ACT

Docket C-127. Complaint, Apr. 26, 1962—Decision, Apr. 26, 1962

Consent order requiring a Chicago distributor of automotive parts, supplies, and related products to cease violating Sec. 2(c) of the Clayton Act by accepting brokerage on substantial purchases for its own account for resale from suppliers—utilizing the services of its vice president and main stockholder who operated a sole proprietorship at the same address and functioned as a manufacturer's representative or selling agent—such as, for example, compensation of five percent on purchases of hose from the Acme-Hamilton Manufacturing Corporation of Trenton, N.J.

COMPLAINT

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

PARAGRAPH 1. Respondent O.E.M. Products Company 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 5296 Northwest Highway, Chicago 30, Ill. O.E.M. Products Company is engaged in the sale and distribution of automotive parts, supplies and related products, with a sales volume of approximately $500,000 annually. O.E.M. Products Company purchases the automotive parts, supplies and related products which it sells and distributes from various manufacturers located throughout the United States.

Respondent Robert C. Sanderson is vice president and secretary, and owns eighty percent of the corporate stock of respondent O.E.M. Products Company. In addition, respondent Robert C. Sanderson owns, controls and operates Robert C. Sanderson Company, a sole proprietorship, with offices and principal place of business also located at 5296 Northwest Highway, Chicago 30, Ill. Robert C. Anderson Company functions as a manufacturer's representative, or selling agent, or broker, for various manufacturers of automotive parts, supplies and related products. In the operation of Robert C. Sanderson Company, respondent Robert C. Sanderson negotiates the sale of automotive parts, supplies and related products for and on behalf of various manufacturer-sellers and in connection therewith receives a commission or brokerage fee paid by said manufacturer-sellers.

PAR. 2. In the course and conduct of its business respondent O.E.M. Products Company has purchased and is now purchasing automotive parts, supplies and related products in commerce, as "commerce" is defined in the aforesaid Clayton Act, from sellers located in various states of the United States other than the state in which respondent is located, and has resold such products to customers likewise located in various states other than that in which respondent is located. Said respondent transports or causes such products, when purchased or resold, to be transported from the places of business of its suppliers to its own place of business, or from its own place of business to the places of business of its customers, located in various other states of the United

States. Thus there has been a course of trade in commerce, and said products, across state lines between respondent O.E.M. Products Company and its suppliers, and between said respondent and its customers.

Respondent Robert C. Sanderson, operating under the name Robert C. Sanderson Company, as a selling agent or broker for various manufacturer-sellers located in various states of the United States other than, and including, the state of Illinois, negotiates the sale of automotive parts, supplies and related products, and causes said products, when sold, to be transported from the place of business of these sellers to buyers located elsewhere. Respondent Robert C. Sanderson, operating under the name Robert C. Sanderson Company, is engaged in commerce, as "commerce" is defined in the aforesaid Clayton Act.

PAR. 3. In the course and conduct of its business respondent O.E.M. Products Company has made substantial purchases of automotive parts, supplies and related products, for its own account for resale, from suppliers who utilize the services of respondent Robert C. Sanderson, operating under the name Robert C. Sanderson Company, as manufacturer's representative, selling agent or broker, and on such purchases respondent Robert C. Sanderson has received and accepted, and is now receiving and accepting, a commission, brokerage or other compensation. Thus respondent Robert C. Sanderson receives a commission, brokerage or other allowance on purchases of respondent O.E.M. Products Company, a corporation, eighty percent of the corporate stock of which is owned by respondent Robert C. Sanderson. Therefore, through the corporate device of respondent O.E.M. Products Company, respondent Robert C. Sanderson has received and accepted, and is now receiving and accepting, a commission, brokerage or other compensation, or an allowance or discount in lieu thereof, on purchases for his own account. For example, respondent O.E.M. Products Company purchases hose, through Robert C. Sanderson Company, from the Acme-Hamilton Manufacturing Corporation of Trenton, New Jersey. Robert C. Sanderson Company's compensation on sales negotiated on behalf of this supplier is five percent and on such sales respondent Robert C. Sanderson, through the Robert C. Sanderson Company, receives the aforesaid commission.

PAR. 4. The acts and practices of respondents in receiving and accepting a brokerage or a commission, or an allowance or discount in lieu thereof, on their own purchases, as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of subsection (c) of Section 2 of the Clayton Act, as amended, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent O.E.M. Products Company 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 5296 Northwest Highway, in the city of Chicago, State of Illinois.

Respondent Robert C. Sanderson is an officer of said corporation. He also does business as Robert C. Sanderson Company and his address is the same as that of the corporate respondent.

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

ORDER

It is ordered, That respondents O.E.M. Products Company, a corporation, and Robert C. Sanderson, individually and as an officer of said corporation, and also doing business as Robert C. Sanderson Company, a sole proprietorship, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase of automotive parts, supplies and related products in commerce, as "commerce" is defined in the 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 automotive parts, supplies and related products for respondents' own account, or where any of said respondents are the agent, representative, or other intermediary acting for or in behalf, or is subject to the direct or indirect control, of the buyer.

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

IN THE MATTER OF

B & P ASSOCIATES OF CONNECTICUT, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-128. Complaint, Apr. 26, 1962—Decision, Apr. 26, 1962

Consent order requiring importers and distributors of textile fiber products, with offices in Unionville, Conn., and New York City, to cease violating the Textile Fiber Products Identification Act by failing to label ladies' swimsuits with required information.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said acts, the Federal Trade Commission, having reason to believe that B & P Associates of Connecticut, Inc., a corporation, and Samuel R. Perman and Herbert A. Berk, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification 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 B & P Associates of Connecticut, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut with its office and principal place of business located in Myrtle Mills Factory Store, Unionville, Conn.

Individual respondents Samuel R. Perman and Herbert A. Berk are President, and Vice President—Secretary and Treasurer respectively, of corporate respondent. Said individual respondents formulate, direct and control the acts, practices and policies of said corporate respondent. Said individual respondents' business address is 17 John Street, New York, N.Y.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products, namely ladies' swimsuits, were misbranded by respondents in that they were not stamped, tagged or labeled with any of the information required under Section 4(b) of the Textile Fiber Products Identification Act, or in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

PAR. 4. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and Rules and Regulations promulgated thereunder and constituted, and now 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 AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, B & P Associates of Connecticut, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located in Myrtle Mills Factory Store, in the city of Unionville, State of Connecticut.

Respondents Samuel R. Perman and Herbert A. Berk are officers of said corporation, and their business address is 17 John Street, New York, N.Y.

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

ORDER

It is ordered, That respondents B & P Associates of Connecticut, Inc., a corporation, and its officers, and Samuel R. Perman and Herbert A. Berk, 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 introduction, delivery for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product, which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from misbranding

textile fiber products by failing to affix labels to such products showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

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

IN THE MATTER OF

FISHKIN KNITWEAR CO., INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-129. Complaint, Apr. 26, 1962—Decision, Apr. 26, 1962

Consent order requiring New York City importers and distributors of textile fiber products to cease violating the Textile Fiber Products Identification Act by failing to label ladies' swimsuits with required information, and removing required labels prior to ultimate sale.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Fishkin Knitwear Co., Inc., a corporation, and Herman Fishkin, Mordecai Fishkin, and Benjamin Thailer, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification 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 Fishkin Knitwear 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 73 Orchard Street, New York, N.Y.

Individual respondents Herman Fishkin, Mordecai Fishkin, and Benjamin Thailer are President, Treasurer, and Secretary, respectively, of the corporate respondent. Said individual respondents formulate, direct and control the acts, practices and policies of said

corporate respondent. Their address is the same as that of the corporate respondent.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported, and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products, namely ladies' swimsuits, were misbranded by respondents in that they were not stamped, tagged or labeled with any of the information required under Section 4(b) of the Textile Fiber Products Identification Act, or in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

PAR. 4. After certain textile fiber products were shipped in commerce, respondents have removed, or caused or participated in the removal of, the stamp, tag, label or other identification required by the Textile Fiber Products Identification Act to be affixed to such products, prior to the time such textile fiber products were sold and delivered to the ultimate consumer, in violation of Section 5(a) of said Act.

PAR. 5. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder and constituted, and now 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 AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and the respondents having been served with notice of said determination and with a copy of the complaint

the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Fishkin Knitwear 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 73 Orchard Street, in the city of New York, State of New York.

Respondents Herman Fishkin, Mordecai Fishkin and Benjamin Thailer are officers of said corporation and their business address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Fishkin Knitwear Co., Inc., a corporation, and its officers, and Herman Fishkin, Mordecai Fishkin, and Benjamin Thailer, 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 introduction, delivery for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product, which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "com-

merce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from misbranding textile fiber products by failing to affix labels to such products showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

It is further ordered, That respondents Fishkin Knitwear Co., Inc., a corporation, and its officers and Herman Fishkin, Mordecai Fishkin, and Benjamin Thailer, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from removing, or causing or participating in the removal of, the stamp, tag, label, or other identification required to be affixed to any textile fiber product, after such textile fiber product has been shipped in commerce, and prior to the time such textile fiber product is sold and delivered to the ultimate consumer.

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

IN THE MATTER OF

AMERICAN RAILWAY TELEGRAPHY SCHOOL, INC., ET AL.

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

Docket C-130. Complaint, Apr. 27, 1962—Decision, Apr. 27, 1962

Consent order requiring Fresno, Calif., sellers of a correspondence course intended to prepare students for employment by railroads as telegraph operators, station agents, etc., to cease representing falsely in advertisements in "Help Wanted" columns of newspapers and by their commission sales agents that they were affiliated with railroad companies, and offering and guaranteeing jobs at high salaries to their trainees.

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 American Railway Telegraphy School, Inc., a corporation, Terry H. Cross and Mrs. Jimmie C. Cross, individually and as officers of said corporation, here-

inafter 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. Repondent American Railway Telegraphy School, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 200 West Olive Avenue, Fresno, Calif.

Respondents Terry H. Cross and Mrs. Jimmie C. Cross (wife of Terry H. Cross) are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and have been for more than one year last past, engaged in the sale and distribution of a course of study and instruction intended to prepare students thereof for employment by telegraph operators, station agents and kindred employment by railroad companies, which said course is pursued by correspondence through the United States mail, as well as in residence training at the school.

PAR. 3. In the course and conduct of their business respondents have caused said course of study and instruction to be sent from their place of business in the State of California to, into and through states of the United States other than the State of California, to purchasers thereof located in such other states. There has been at all times mentioned herein a substantial course of trade in said course of study and instruction, so sold and distributed by respondents in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their said business, as aforesaid, respondents have published and caused to be published, advertisements in the "Help Wanted" and other columns of newspapers distributed through the United States mail, and by other means, to prospective enrollees and students in the several states in which said course is sold, of which the following is typical:

MEN 17-28

Urgently Needed To Train
For Railroad Positions
Work Days—Train Nights
We Prepare Men for Station
Agents, Telegrape (sic)
Operators, Communication
Positions

* * *

No experience necessary for
those willing to work days
and train nights while taking
short low cost training on live
equipment. Railroads offer
LIFETIME JOB SECURITY,
plus many other railroad
benefits. Starting salaries of
$415 and up with advancement
opportunities. High School
education required, no physical
defects. For personal interview,
Write Mr. Schreck, Box 3068
% Reporter-Times
Spencer, Iowa, giving age,
phone No. and complete address.

MEN 18–35. Good Health, High
School necessary. Train as Agent-
Operators for Nation-Wide Placement
with American's Railroads. Average
$420 month. Jobs waiting. Write name,
address, phone to Box 6171 % Litchfield
News-Herald.

Earn As You Learn

Men 18–35. High School Graduates.
Express—Freight—Teletype—Train orders.
W. Union—Operators—Agents. POSITIONS
OPEN IN RAILROAD COMMUNICATIONS. For
Confidential Interview write Mr. Hewitt,
Box 9525, The Lima News, giving name, age,
address and phone number. If RFD give
directions.

PAR. 5 By means of the statements appearing in said advertisements, as set out in paragraph 4 above, respondents have represented, and are representing, directly or by implication that:

1. The advertisement was an offer of employment;

2. Respondents were a railroad company or affiliated with one or more railroad companies;

3. Positions of employment as station agent or telegraph operator were open to graduates of respondents' school upon completion of respondents' course of training;

4. The starting salary would be $415 or more monthly.

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

1. The said advertisement was not an offer of employment, but was published for the purpose of obtaining purchasers of respondents' course of study and instruction;

2. The respondents are not a railroad company, nor are they affiliated with one or more such companies;

3. Employment as railroad station agents or telegraph operators is not open to persons accepted by respondents as trainees who complete said course without further training and experience.

4. The monthly salary of $415 greatly exceeds the starting salary of persons completing respondents' said course who are successful in obtaining employment with railroad companies.

PAR. 7. In the course and conduct of their business, as aforesaid, respondents employ commission sales agents or representatives who call upon prospective purchasers and solicit their purchase of said course of study and instruction.

In the course of such solicitation, such sales agents or representatives have made directly or by implication many statements and representations to purchasers and prospective purchasers of said course of study and instruction. Typical, but not all inclusive of which, are the following:

1. Railroad station agents and telegraph operators were in great demand with the railroad companies;

2. They guarantee employment as railroad station agents or telegraph operators to persons completing respondents' course of study and instruction.

PAR. 8. The statements, representations and implications set out in paragraph 7 above were exaggerated, false, misleading and deceptive. In truth and in fact:

1. While there are opportunities for employment as railroad station agents and telegraph operators as a result of vacancies created by death, retirement and other reasons, such opportunities are decreasing due to technological and other changes in the railroad industry and there was not and is not, a great demand for persons to fill such positions. Furthermore, such demand as does occur is sporadic and varies from place to place.

2. Respondents do not guarantee employment in any position with railroads for their graduates let alone as station agents or as telegraph operators.

PAR. 9. Respondents at all times mentioned herein, have been, and are now, in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of like correspondence courses.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices, has had, and now has, the tendency and capacity to mislead and deceive a sub-

stantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and to induce a substantial number thereof to subscribe to, and purchase, respondents' said course of study and instruction.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurdisdictional findings, and enters the following order:

1. Respondent American Railway Telegraphy School, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 200 West Olive Avenue, in the city of Fresno, State of California.

Respondents Terry H. Cross and Mrs. Jimmie C. Cross are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents, American Railway Telegraphy School, Inc., a corporation, and its officers, and Terry H. Cross and Mrs. Jimmie C. Cross, 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 and distribution of courses of study, training and instruction in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

1. Employment is being offered when, in fact, the purpose is to obtain purchasers of such courses of study, training and instruction;

2. Respondents are a railroad company or are affiliated with a railroad company;

3. Positions of employment as a railroad station agent or telegraph operator are open to persons completing said course of study and instruction without further training or experience, or otherwise misrepresenting the opportunities for employment by persons completing said courses;

4. Persons completing respondents' course of study and instruction are qualified for positions of employment with starting salaries of $415 per month, or otherwise misrepresenting the earnings which such persons may expect to achieve;

5. Railroad station agents or telegraph operators are in great demand or otherwise misrepresenting the demand for persons to fill such positions of employment;

6. Respondents guarantee employment to persons completing said course of study and instruction.

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

IN THE MATTER OF

CHARLES M. LEVINSON ET AL. TRADING AS SURE-FIT SEAT COVER CENTER

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

Docket 8202.—Complaint, Dec. 6, 1960—Decision, Apr. 28, 1962

Order dismissing, for failure of proof, complaint charging Washington, D.C., retailers with misrepresentations in a so-called Washington's Birthday seat cover sale, consisting of use of the word "Reg." in advertising prices, and words "customized", "plastic fiber", and "vinyl plastic" in describing their seat covers.

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 Charles M. Levinson and Maurice Bernstein, individually and as copartners trading as Sure-Fit Seat Cover Center, 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 Charles M. Levinson and Maurice Bernstein are individuals and copartners trading as Sure-Fit Seat Cover Center, with their office and principal place of business located at 1601 14th Street, N.W., Washington, D.C.

PAR. 2. Respondents are now, and for some time last past have been, engaged in advertising, offering for sale, sale and distribution, among other things, of automobile seat covers, floor mats and convertible tops to the public through retail stores operated by respondents in the District of Columbia and in the States of Maryland and Virginia and maintain and at all times mentioned herein have maintained a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their business, and for the purpose of inducing the sale of their merchandise, respondents have made certain statements concerning such merchandise in advertisements in newspapers of general circulation. Among and typical but not all inclusive of the statements so made are the following:

WASHINGTON'S BIRTHDAY SEAT COVER SALE MONDAY, FEB. 22 ONLY

TREMENDOUS DISCOUNTS—SEAT COVERS & FLOOR MATS CLOSEOUT
REG. 14.95—FIBRE & PLASTIC SEAT COVERS
REG. 5.95 UP—FRONT OR REAR RUBBER FLOOR MATS
SALE PRICE ONLY 2.95—FULL SETS OR FULL MATS

TREMENDOUS SELECTIONS—MANY NEW PATTERNS—CLEAR PLASTIC, PLASTIC FIBRE, WOVEN PLASTIC, JETSPUN GARDLON
REG. 14.95 TO 24.95
YOUR CHOICE—ONLY 9.80—FULL SETS

VINYL FIBRE ALL VINYL TRIM

CUSTOMIZED CLEAR PLASTIC—FULL SETS
REG. 29.95 ONLY 22.55

CLEAR PLASTIC—FULL SETS
REG. 9.95 ONLY 6.86

PAR. 4. By means of the aforesaid statements respondents have represented, directly or by implication:

1. That the higher prices listed under the designation "Reg." were the prices at which the advertised merchandise had been usually and customarily sold by respondents at retail in the recent regular course of business and that savings amounting to the differences between these prices and the lower sales prices would result to purchasers.

2. Through the use of the word "customized" that their seat covers are made to order for the automobile of each purchaser.

3. Through the use of the terms "plastic fibre" and "vinyl fibre" that certain of their seat covers are made of such fibers.

PAR. 5. The aforesaid statements and representations were and are false, misleading and deceptive. In truth and in fact:

1. The higher prices listed under the designation "Reg." were not the prices at which the advertised merchandise had been usually and customarily sold by respondents at retail in the recent regular course of business but were in excess of such prices, and the savings amounting to the differences between such higher prices and the lower sales prices would not result to purchasers.

2. Respondents' said seat covers are not made to order for the automobile of each purchaser but are ready-made.

3. Respondents' seat covers which they designate as "plastic fibre" and "vinyl fibre" are not made of plastic and vinyl fibers but are made of plastic and vinyl coated fibers.

PAR. 6. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of automobile seat covers, floor mats and convertible tops of the same general kind and nature as those sold by respondents.

PAR. 7. Respondents fail to adequately disclose in their advertisements that the installation charge is included in the stated regular price of the merchandise but is not included in the stated reduced price of the merchandise thus representing that the reduction in price and the consequent savings resulting to purchasers is greater than is the fact.

PAR. 8. The use by the respondents of the aforesaid false, deceptive and misleading statements and representations and their failure to make disclosure as aforesaid has had and now has 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 and are true, and to induce the purchase of substantial quantities of respondents' seat covers, floor mats and convertible tops because of such erroneous and mistaken belief. As a result thereof trade in commerce has been unfairly diverted to respondents from their competitors and injury has been done thereby to competition in commerce.

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

Mr. Charles W. O'Connell supporting the complaint.
Mr. Nathan L. Silberberg, of Washington, D.C., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

Charles M. Levinson and Maurice Bernstein, individually and as copartners trading as Sure-Fit Seat Cover Center, are charged with false advertising in violation of the Federal Trade Commission Act. The alleged false advertising was one identical advertisement which appeared in *The Sunday Star* on February 21, 1960, and *Washington Post* on Monday, February 22, 1960, advertising a so-called Washing-

ton's Birthday seat cover sale to be held at individual respondents' stores on February 22, 1960. The advertisement listed merchandise in addition to seat covers, but the complaint is directed toward alleged misrepresentations in the advertisement relating to seat covers and rubber floor mats.

At the time the advertisement was published, the individual respondents above named were partners doing business as Sure-Fit Seat Cover Center, as alleged in the complaint. On July 1, 1960, the partnership ceased doing business and was incorporated under the name Seat Cover, Inc., a District of Columbia corporation. Five months later, on December 6, 1960, the complaint herein was issued against Charles M. Levinson and Maurice Bernstein, individually and as copartners trading as Sure-Fit Seat Cover Center. The complaint has not been amended to include the corporation as a respondent. The individual respondents answered and denied the material allegations of the complaint; they contended that: (1) they had previously entered into a stipulation with the Commission and agreed to cease and desist from the very practices which form the basis of the complaint herein, (2) the violations charged in the complaint are *de minimis*, (3) have been abandoned, and (4) the Federal Trade Commission is not concerned with advertising of Washington's Birthday sales in the Washington Metropolitan area as indicated by the remarks of the Hon. Earl W. Kintner, then Chairman of the Commission, in an address before the Rotary Club of Washington, D.C., on February 21, 1961.

Hearings have been completed and respective counsel have filed proposed findings of fact, conclusions of law and order. Counsel for the individual respondents has also filed a reply to the findings proposed by counsel supporting the complaint. All findings of fact and conclusions of law not specifically found or concluded herein are denied. Upon the basis of the entire record, the undersigned hearing examiner makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. On February 21, 1960, the individual respondents Charles M. Levinson and Maurice Bernstein were partners doing business as Sure-Fit Seat Cover Center, with an office and principal place of business located at 1601 14th Street, N.W., Washington, D.C., and stores also located at 1634 New Hampshire Avenue, Takoma Park, Md., and 3300 North Fairfax Drive, Arlington, Va. On July 1, 1960, the partnership ceased doing business and was incorporated under the laws of the District of Columbia with the name Seat Covers, Inc. The individual respondents were the incorporators.

2. Pursuant to Sections 1.54 and 1.55 of the Rules of Practice of the Federal Trade Commission then in effect, the individual respondents, on December 20, 1957, entered into and executed a "Stipulation As To The Facts And Agreement To Cease and Desist," which was approved by the Commission on January 23, 1958, with respect to certain practices, including representations as to "usual and regular prices of certain seat covers."

3. On and prior to February 21, 1960, the individual respondents were engaged in advertising, offering for sale, sale and distribution, among other things, of automobile seat covers, floor mats and convertible tops to the public through retail stores operated by respondents in the District of Columbia and in the States of Maryland and Virginia, and maintained a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act. Since July 1, 1960, the successor corporation, Seat Covers, Inc., has continued to maintain a substantial course of trade in said merchandise.

4. On February 21, 1960, at the instance of the individual respondents, then doing business as Sure-Fit Seat Cover Center, and for the purpose of inducing the sale of some of their merchandise, the complained of advertisement (CX–1) appeared in *The Sunday Star.*

The same advertisement (CX–1) also appeared in the *Washington Post* on February 22, 1960.

5. The complaint alleges that, in said advertisement (CX–1), respondents have represented:

1. The higher prices listed in said advertisement under the designation "Reg." were the prices at which the advertised merchandise had been usually and customarily sold by respondents at retail in the recent regular course of business, whereas, such higher prices were not the prices at which the advertised merchandise had been usually and customarily sold by respondents at retail in the recent regular course of business, but were excess of such prices.

2. Through use of the word "customized" respondents represented that their seat covers were made to order for the automobile of each purchaser, whereas, said seat covers were not made to order for the automobile of each purchaser but were ready-made.

3. Through use of the terms "plastic fibre" and "vinyl fibre" individual respondents represented that certain of their seat covers were made of such fibers, whereas, such designated seat covers were not made of plastic and vinyl fibre but were made of plastic and vinyl coated fibres.

6. The complaint also alleged that the advertisement (CX–1) did not adequately disclose that the installation charge was included in the stated regular price of the merchandise but was not included in the reduced sale price, thus representing that the reduction in price was greater than was actually the fact.

7. Prior to the hearings herein, counsel supporting the complaint requested and there was issued and served on the individual respondent Charles M. Levinson, a subpoena duces tecum, directing Mr. Levinson to appear at a hearing and produce all invoices or sale slips showing previous retail sales by individual respondents of specified merchandise sold during the period from February 23, 1958 to February 22, 1960, which had been advertised in CX–1 for sale on Washington's Birthday, February 22, 1960. Thus, at the instance of counsel supporting the complaint, Mr. Levinson was required to produce at the hearing invoices showing previous retail sales of specified merchandise for the two years immediately preceding the advertised (CX–1) Washington's Birthday Seat Cover Sale on February 22, 1960.[1] In obedience to the subpoena duces tecum, Mr. Levinson produced more than 2,200 invoices or sale slips showing previous retail sales during the period February 23, 1958 to February 22, 1960 of the seat covers and rubber floor mats called for in the subpoena duces tecum.

8. Mr. Levinson was the principal witness offered by counsel supporting the complaint to establish the allegations.[2] Counsel sought to establish the allegations of the complaint through his direct examination of Mr. Levinson concerning the Washington's Birthday sale advertisement (CX–1) and the invoices called for in the subpoena duces tecum. The principal allegations of the complaint and the largest part of the evidence received at the hearing have to do with the use of the abbreviation "Reg." in the advertisement (CX–1). Counsel supporting the complaint contends that, by use of the term "Reg." with a stated price figure, individual respondents thereby represented that the advertised merchandise had been usually and customarily sold at the stated price by individual respondents at retail in the recent regular course of business, and that said representation was false because said stated price was in excess of the price at which individual respond-

[1] Mr. Thomas J. Kerwan, then attorney-investigator for the Federal Trade Commission, made the investigation of individual respondent's Washington's Birthday Sale advertisement (CX–1) prior to issuance of the complaint herein and, presumably, examined all of these invoices and sales slips during the course of three days spent at the principal place of business of the individual respondents.

[2] Mr. Thomas J. Kerwan, the attorney-investigator who made the original investigation of the individual respondents' advertisement (CX–1) prior to issuance of the complaint herein, was also called as a witness by counsel supporting the complaint. However, Mr. Kerwan was not called to testify in support of the allegations of the complaint. His testimony related to another matter which is separately discussed in this initial decision.

ents usually sold said merchandise at retail in the recent regular course of business. The individual respondents denied that the advertisement (CX–1) was false. Each of the alleged misrepresentations will be discussed.

9. The first item in the advertisement (CX–1) alleged to be false concerns the "Reg. 14.95 Fibre & Plastic Seat Covers" for sale at only $2.94. (These are listed near the top of the advertisement (CX–1) under the heading "Tremendous Discounts".) In direct examination by counsel supporting the complaint, Mr. Levinson was asked if he could produce an invoice or sales slip in response to the subpoena duces tecum showing a previous retail sale at $14.95 of the "Fibre" seat cover advertised under this heading in CX–1 and reduced to $2.94 for the Washington's Birthday Sale. Mr. Levinson replied in the affirmative and produced and there was received in evidence CX–2, which was an invoice, dated June 25, 1958, representing the sale of a fibre seat cover at a retail price of $15.00 which Mr. Levinson identified as a "Fibre" seat cover listed in the advertisement (CX–1) under the heading "Tremendous Discounts." Counsel supporting the complaint contends that this "Fibre" seat cover had not been regularly sold at $14.95 as represented in the advertisement because the sale on June 25, 1958, was too remote and was not a sale in "the recent regular course of business", and, consequently, the "Fibre" seat cover had no usual and customary price and, therefore, the representation that $14.95 was the regular price was false; and the represented savings amounting to the difference between $14.95 and $2.94 was not afforded to purchasers.

10. With respect to the "Plastic" seat covers listed in the same part of the advertisement (CX–1) under the heading "Tremendous Discounts", Mr. Levinson, in response to questions by counsel supporting the complaint, produced and there were received in evidence approximately 24 invoices, marked CX–3–13 and CX–265–278, which Mr. Levinson testified represented prior retail sales of these plastic seat covers. On none of these invoices is the retail price of the seat cover listed at less than $15.00. The dates of these retail sales as shown by the invoices range between February, 1958 and October, 1959. It is the contention of counsel supporting the complaint that $14.95 was not the regular price of these plastic seat covers because Mr. Levinson did not produce any sales slips or invoices showing a sale of one of these plastic seat covers at $14.95 more recent than October, 1959. In other words, counsel contends that, since individual respondents did not produce an invoice showing a sale of this seat cover at $14.95 more recent than four months immediately prior to the Washington Birth-

day Sale on February 22, 1960, the advertised regular price of $14.95 was fictitious.

11. The evidence shows that, for many years, it has been the custom and practice of merchants in the Washington, D.C., area to advertise, along with other merchandise, soiled, shopworn and outdated merchandise for sale at reduced prices on Washington's Birthday, especially when the stock on hand of the particular merchandise is limited in amount. On some articles of merchandise, the price may be drastically reduced. As an example, a man's shirt which might ordinarily sell for $5.00 but which was soiled, was shown to have been reduced to 99 cents for clearance at a Washington's Birthday sale. The evidence shows that the "Fibre & Plastic Seat Covers" advertised in CX–1 under the heading "Tremendous Discounts" were old and outdated and would fit 1935–1958 model automobiles, and were limited in amount as stock on hand. The advertisement specifically stated that the seat covers and floor mats advertised for sale at $2.94 under the heading "Tremendous Discounts" would fit automobiles from models 1935–1958. The purpose of offering these articles of merchandise at the reduced price of $2.94 was to clear the individual respondents' remaining stock of this old merchandise. Mr. Levinson produced numerous invoices to establish the representation in CX–1 that the seat covers advertised had been sold on numerous occasions during the years 1958 and 1959 at prices of $14.95 and above. The circumstance that respondents did not produce sales slips showing sales of these very types of seat covers up to a few days immediately prior to the date of the Washington's Birthday sale on February 22, 1960 does not constitute a misrepresentation as to the so-called "regular" price of these seat covers. The advertisement (CX–1) referred to a Washington's Birthday sale and individual respondents wished to dispose of their limited stock in some of these particular items of merchandise. The general public in the Washington, D.C., area understands that merchandise advertised for sale at Washington's Birthday sales may be limited in amount or number, age, style, color, etc., and may be soiled, old, and outdated. Naturally, several months might intervene between retail sales of some of the merchandise. Under the circumstances and facts of record in this proceeding it cannot be held that respondents misrepresented the regular price of these seat covers by reason of the absence of invoices showing retail sales of the particular seat covers more recent than October, 1959. In the opinion of this hearing examiner, the interpretation of the meaning of the phrase "in the recent regular course of business" should depend upon the facts and circumstances of each particular case. The time element

alone (the period intervening between sales), as urged by counsel supporting the complaint, is not a fair and reasonable test in the case here under consideration. Counsel supporting the complaint did not show or even claim that individual respondents had ever sold said seat covers at a retail price *less* (underscoring mine) than $14.95 prior to the date of the advertised Washington's Birthday sale of February 22, 1960. On the other hand, the invoices of record show retail sales at more than $14.95 in every instance.

12. It is significant that the subpoenas duces tecum were not limited in scope to the three or four month period immediately preceding the Washington's Birthday sale on February 22, 1960. Instead, counsel supporting the complaint called upon Mr. Levinson to produce invoices showing retail sales of the seat covers and other merchandise advertised in CX–1 during the period February 23, 1958 to February 22, 1960. This is a period of approximately two years. Evidently, at the time of counsel's request for the issuance of the subpoenas, it was the theory of counsel supporting the complaint that a sale or sales of the specified seat covers at the advertised "regular" price during the two year period included within the subpoenas would satisfy counsel's interpretation of the phrase as having been sold in "the recent regular course of respondents business." Now, however, counsel seems to have changed his theory after examining the invoices produced by Mr. Levinson in obedience to the subpoenas duces tecum. This hearing examiner finds that $14.95 was the "regular" price of the "Fibre & Plastic Seat Covers" advertised in CX–1 and they had been sold in the "recent regular course" of individual respondents' business at or above that price.

13. Counsel supporting the complaint also contends that the language "Reg. 5.95 Up Front or Rear Rubber Floor Mats" advertised in (CX–1) under the same heading "Tremendous Discounts," for sale at "2.94", was fictitious because Mr. Levinson did not produce invoices or sales slips showing a previous sale of rubber floor mats later than three months immediately preceding the date of the advertisement (CX–1), namely, February 22, 1960. Mr. Levinson produced almost 100 invoices showing sales of these rubber floor mats at prices ranging from $5.95 and above, CX–14–16, CX–18–41, CX–279–290, and CX–292–348. The retail prices shown on these invoices range from $6.95 to $16.95. Counsel supporting the complaint did not offer even one sales slip showing a retail sale by individual respondents of one of these rubber floor mats at less than $5.95. The latest and most recent invoice showing a retail sale of the advertised rubber floor mats prior to the Washington's Birthday sale on February 22,

1960, was November, 1959, approximately three months prior to the Washington's Birthday sale. Commission counsel contends that, for this reason, a regular price had not been established in the recent course of individual respondents' business and the claimed regular price of "5.95 Up" was false. Such an interpretation is arbitrary and unrealistic. The evidence shows that the floor mats, like the seat covers, were old and shop-worn, the supply was limited in amount, and individual respondents reduced the price to close out the stock. For these reasons and those set out in paragraphs 11 and 12 above, the circumstance that Mr. Levinson failed to produce an invoice showing a sale of one of these floor mats subsequent to November, 1959, does not make individual respondents' advertised price "Reg. 5.95 Up" any less the "regular" price for the floor mats.

14. The next misrepresentation claimed by counsel supporting the complaint relates to the "Clear Plastic" seat covers listed in the second section of the advertisement (CX–1) under the heading "Tremendous Selections." Under this heading respondents advertised "Reg. 14.95 to 24.95" Clear Plastic seat covers for sale at "Only 9.80." Previous retail sales of these Clear Plastic seat covers are shown in invoices CX–42–48 and CX–349–366. These invoices show previous retail sales of this particular type of Clear Plastic seat covers at prices ranging mostly from $16.95 to $29.95. The invoices show at least ten sales at $24.95. Again, it is the contention of counsel supporting the complaint that, since these invoices do not show a retail sale of this particular type of seat cover within eight months immediately preceding the advertisement, (CX–1), there were "in fact no sales in the recent course of respondents' business upon which to base a regular price and, therefore, the claim of any regular price was unjustified. This hearing examiner does not agree with such a strained and unrealistic interpretation of "recent regular course of business." For the reasons stated in paragraphs 11 and 12 above, it is found that the advertised "Reg. 14.95 to 24.95" in CX–1 was the "regular" price for the Clear Plastic seat covers advertised for sale at "Only 9.80," under the heading "Tremendous Selections."

15. Counsel supporting the complaint makes a similar claim of fictitious pricing with respect to the "Woven Plastic" seat covers advertised under the same heading "Tremendous Selections." Sales invoices covering this type of seat cover are shown in CX–50–258 and CX–380–485. Counsel contends, *inter alia*, that, the statement "Reg. 14.95 to 24.95" in the same section of the advertisement under the heading "Tremendous Selections" can be reasonably interpreted as applying to each of the four kinds of seat covers listed therein, and that,

since the invoices showed only two sales of the "Woven Plastic" seat covers at $24.95 on dates prior to the Washington's Birthday sale, and the last sale prior to the Washington's Birthday was for $19.95, therefore, $24.95 was not the individual respondents' regular price for this type of seat cover, but $19.95 was the "regular" price. This is an unwarranted and unreasonable interpretation. For the reasons heretofore stated with respect to the other items, it is found that individual respondents' representation in CX–1 of a regular price of $14.95 to $24.95 for the "Woven Plastic" seat covers was not fictitious. Counsel also argues that, even admitting that the "reg." price is the usual and customary price of the items in the recent regular course of individual respondents' business, the amount of savings represented is false because "it compares a regular price which has been increased by the amount of the installation charge with the offering price which does not include that charge." The hearing examiner finds no merit in this contention. The advertisement (CX–1) plainly states that the "Regular" prices quoted in the advertisement (CX–1) includes a charge for installation, whereas the sale price does not.

16. The complaint also alleges that the designation of certain seat covers in the advertisement as "Plastic Fibre" and "Vinyl Fibre" were false and misleading for the reason that said seat covers are not made of plastic and vinyl fibers but are made of plastic and vinyl coated fibers. The only evidence in the record concerning the content of a "plastic" or "vinyl" fiber is the testimony of the individual respondent Levinson. Mr. Levinson testified that the "Plastic Fibre" seat cover listed in the advertisement (CX–1) is made of a fibrous material, with paper as its basic content, coated with a plastic, making it more resistant to wear. In reply to a question as to what kind of plastic the fiber was coated with, Mr. Levinson replied: "I am afraid that I would just be using general terms. They use the term 'vinyl resin'. However, vinyl and plastic in connection with coating are used interchangeably." Under the evidence of record, it cannot be found that these designations are false and misleading.

17. Counsel supporting the complaint contends that individual respondents' use of the term "Customized" in describing the "Clear Plastic" seat covers in the advertisement amounted to a representation that said seat covers were made-to-order for the automobile of each purchaser, whereas the seat covers were not made to order but were ready-made. The dictionary does not give a definition of the term "customized." The only evidence in the record as to the meaning of the term is the testimony of the individual respondent Charles M. Levinson. In answer to a question by counsel supporting the com-

plaint, Mr. Levinson testified that a "customized" seat cover is a common terminology in the seat cover business defining a set of seat covers that are made in advance to fit a specific model automobile. In connection with this charge, counsel supporting the complaint offered, and there was received in evidence, a size specification chart (CX–262) of the Howard Zink Corporation, manufacturer of the seat covers which individual respondents characterized in the advertisement as being "customized." This particular seat cover was designated in the Howard Zink catalog or size specification chart (CX–262) as "tailored". Mr. Levinson testified that he substituted the word "customized" to describe in the advertisement the same seat cover which the Howard Zink Corporation described as "tailored" in order to detract from the impact the use of such a description as "tailored" might have in the advertisement. The burden of proof is upon the Commission to establish the allegations set forth in the complaint by a preponderance of the evidence. Under the evidence of record, it cannot be found that, individual respondents' use of the word "customized" was false or misleading.

18. Counsel supporting the complaint also contends that individual respondents failed to adequately disclose in said advertisement that the installation charge is included in the stated regular price of the merchandise but is not included in the stated reduced or sale price of the merchandise, thus representing that the reduction in price and the consequent savings resulting to purchasers, is greater than is the fact. Counsel supporting the complaint contends that the statment at the bottom of the advertisement (CX–1) : "Regular Prices Quoted Includes Installation, Installation Available At Nominal Charge" is not adequate notice of the "things therein stated" to persons reading the individual offering in the advertisement (CX–1). Counsel supporting the complaint says that "the tendency would be to compare the high 'regular' price and the lower offering price of each item, since there is no indication in respect to the individual item that the reader should do otherwise." The advertisement (CX–1) should be read in its entirety. In the opinion of this examiner the notice with respect to the installation charge is adequate. The advertisement plainly states that the regular prices include installation and the advertised sale prices do not include installation. The interpretation advanced by counsel supporting the complaint draws too fine a line of technical distinction. It is found, therefore, that this allegation had not been sustained.

19. As previously stated herein, the individual respondent Charles M. Levinson was called as the principal Commission witness by coun-

sel supporting the complaint. Counsel examined Mr. Levinson exhaustively with respect to approximately 475 invoices which had been progressively marked for identification at the request of counsel supporting the complaint. However, after examining Mr. Levinson concerning many of these invoices, counsel did not offer the invoices in evidence. It was only after repeated objections by counsel for individual respondents to Commission counsel's failure to offer the invoices in evidence that counsel finally offered the invoices and they were received in evidence. After lengthy questioning by Commission counsel of Mr. Levinson concerning the invoices, and noting that the retail price listed on each invoice was at least equal to or above the "reg." price of the particular item of merchandise advertised in CX–1, counsel supporting the complaint often announced that he did not intend to offer the particular invoice exhibit. After many objections by counsel for individual respondents to Commission counsel's failure to offer the invoices after having them marked for identification and examining Mr. Levinson concerning them, Commission counsel finally offered and there were received in evidence the approximately 475 invoices. During the presentation of testimony on behalf of the individual respondents, there were received in evidence an additional 1,728 invoices on behalf of individual respondents. Approximately 933 of these invoices related to the "Jetspun Gardlon" and 795 to the "Woven Plastic" seat covers advertised in CX–1 as "Reg. 14.95 to 24.95" on sale for "9.80" under the heading "Tremendous Selections." In none of these invoice exhibits was the retail price of the seat cover listed at less than the minimum 14.95 advertised in CX–1. It might be stated, in this connection, that counsel supporting the complaint did not offer any testimony to refute the advertised "Reg. 14.95 to 24.95" price with respect to the Jetspun Gardlon seat covers. The 795 invoices relating to the "Woven Plastic" seat covers received in evidence on behalf of individual respondents were in addition to the approximately 313 invoices marked CX–50–258 and CX–380–485.

20. During the course of the hearing, counsel for individual respondents objected to certain testimony in support of the complaint. The grounds for the objections were that individual respondents had not been advised with respect to the purpose and scope of the Commission's investigation of individual respondents' advertising of the Washington's Birthday sale prior to requiring individual respondents to furnish information as required by Section 1.33 of the Commission's procedures. To rebut this contention, counsel supporting the complaint called Mr. Thomas J. Kerwan, an attorney with the Federal Trade Commission Washington Field Office, who made the inves-

tigation of the Washington's Birthday sale advertisement (CX–1) prior to issuance of the complaint herein, as a witness for the Commission. Mr. Kerwan testified, among other things, that, he visited individual respondents' place of business the first time on or about June 2, 1960 and advised Mr. Levinson that he (Mr. Kerwan) had been instructed to investigate the individual respondents' advertising, specifically, the Washington's birthday sale of 1960 and any other advertising that had not been submitted to the Commission. Individual respondents had previously entered into a stipulation with the Federal Trade Commission dated December 20, 1957, with respect to certain past advertising practices and, pursuant to the stipulation agreement, individual respondents, on or about January 23, 1960, submitted a draft or proof of an advertisement which they proposed to publish in the Washington, D.C., newspapers advertising the Washington's Birthday sale to be held on February 22, 1960. Representatives of the Commission examined the draft of the proposed advertisement and replied in writing with certain comments and suggestions with respect thereto. Individual respondents made certain changes in the proposed advertisement and, with such suggested changes, the advertisement (CX–1) appeared in *The Evening Star* on February 21, 1960 and *Washington Post* on February 22, 1960. Under date of February 23, 1960, individual respondents forwarded to the Commission a copy of the advertisement (CX–1) as it had appeared. The hearing examiner overruled the objections made by counsel for individual respondents and held that, in his opinion, Mr. Kerwan, the Commission attorney who originally investigated individual respondents' advertising, complied with Section 1.33 of the Commission's procedures.

CONCLUSION

It having been found that the allegations of the complaint have not been established by a preponderance of the evidence, it is concluded that the complaint should be dismissed.

ORDER

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

DECISION OF THE COMMISSION

Pursuant to Section 4.19 of the Commission's Rules of Practice, effective July 21, 1961, the initial decision of the hearing examiner shall, on the 28th day of April 1962, become the decision of the Commission.