IN THE MATTER OF

A. C. NIELSEN COMPANY

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

Docket C-613. Complaint, Oct. 23, 1963—Decision, Oct. 23, 1963

Consent order requiring the world's largest marketing and audience research organization—which in 1961 received over 90 percent of the gross billings of $4,532,000 derived from the national radio and television audience measurement market—to cease its efforts to monopolize and restrain trade in the reports and ratings measuring such audiences, including restrictive agreements with competitors, acquiring competitors' customers and trade names, interfering with the development and use of competing electronic and mechanical measuring devices through threats of patent proceedings, harassment, coercion and otherwise, and sabotaging competitors' financing of such efforts.

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 A. C. Nielsen Company, a corporation, hereinafter referred to as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C.A. Sec. 45) 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 A. C. Nielsen Company (hereinafter referred to as Nielsen) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 2101 Howard Street, Chicago 45, Illinois. It maintains four (4) operating subdivisions including Retail Index Service, Coupon Clearing House, Special Research Department and Broadcast. Annual sales are in excess of $27,000,000. Respondent through its Broadcast subdivision is now and for many years last past has been, engaged in the production and sale of market research and audience research analyses, ratings and reports. Respondent is, by far, the largest organization in the world in both marketing research and audience research.

PAR. 2. The audience research operations of respondent consist of two services: (1) The Nielsen Radio Index (NRI) and the Nielsen Television Index (NTI) which measure the audience for national (network) programs on radio and television; and (2) various local services to measure local radio and television audiences. National radio and television audience measurement services differ materially from local radio and television audience measurement services in terms of price, types of customers, sampling methods, what is measured, data collected and types of reports produced; these services are non-interchangeable. For the purpose of measuring national radio and television audiences, respondent employs, among other things, a patented electronic device known as an "Audimeter".

PAR. 3. The measurement of national audiences of network programs, which respondent has restrained and monopolized as hereinafter alleged, reflects and affects the listening and viewing habits of the 46 million homes in the United States with television sets and the 50 million homes in the United States with radios. Nielsen's reports and ratings of network programs significantly affect programming: they are an important factor in determining the way that an estimated $805,000,000 is spent on network television advertising and $47,000,000 on network radio advertising. Respondent's customers for its national radio and television audience measurement services include the principal broadcasting networks, advertising agencies, and advertisers.

PAR. 4. By means of the unlawful conduct hereinafter alleged, respondent has achieved a monopoly of the national radio and television audience measurement market. In 1961, the gross billings derived from that market were approximately $4,532,000; Nielsen's share of this market was in excess of 90%.

PAR. 5. Respondent causes, and has caused, the aforesaid national radio and television audience measurement reports and ratings, when sold, to be transported from its place of business in the State of Illinois to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein, has maintained a course of trade in said reports in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent's volume of business in such commerce is and has been substantial.

PAR. 6. In the course and conduct of its business in commerce, respondent has been and would now be, in active competition with other corporations, firms and individuals engaged in the production and sale of national radio and television audience measurement reports and ratings, except that respondent, by the acts and practices are herein alleged, has foreclosed virtually all competition in the sale of such reports and ratings.

PAR. 7. Since 1946 and continuing to the present time, respondent has engaged, and is now engaging in a program, the purpose or effect of which has been and is now to monopolize, attempt to monopolize and to restrain trade in the production and sale of reports and ratings measuring national radio and television audiences. As part of, pursuant to and in furtherance of the aforesaid program, respondent has entered into contracts and combinations in restraint of trade in both character and effect and has pursued and performed, and is now pursuing and performing, among other things, the following acts, policies and practices:

1. Entered into an agreement in 1950 with C. E. Hooper, Inc., then its principal competitor in the production and sale of national radio and television measurements, whereby it acquired all customers and tradenames used in connection with C. E. Hooper's production and sale of said measurements. As part of the aforesaid agreement C. E. Hooper agreed that it would not engage in the production and sale of national radio and television measurements for a substantial period of time.

2. Engrossed and aggregated and is now engrossing and aggregating patents and inventions of importance relating to the use of electronic and mechanical devices for measurement of national radio and television audiences with the effect of suppressing competition and restraining the use of any device designed to compete with the "Audimeter" and other Nielsen devices.

3. Systematically engaged in and threatened and is now systematically engaging in and threatening interferences, opposition, and other patent proceedings to harass and coerce and to discourage potential and actual competitors from developing and using electronic and mechanical devices for the purpose of measuring national radio and television audiences.

4. Disparaged and hindered and is now disparaging and hindering competitors' efforts to develop competitive electronic and mechanical devices for measuring national radio and television audiences and has attempted to impede and sabotage the financing of these competitive efforts.

PAR. 8. By reason of the aforesaid agreement with C. E. Hooper and the various other acts and practices hereinbefore alleged, respondent has:

1. Established and maintained and is now maintaining a monopoly in, and has unreasonably restrained and is now restraining, the production and sale of national radio and television audience measurement reports and ratings;

2. Eliminated and prevented and is now preventing its actual and potential competitors from engaging in the production and sale of national radio and television audience measurement reports and ratings;

3. Fixed and maintained and is now maintaining arbitrary, artificial and non-competitive prices for national radio and television audience measurement reports and ratings;

4. Excluded and is now excluding other persons from the opportunity of engaging in the business of producing and selling national radio and television audience measurement reports and ratings;

5. Established and maintained and is now maintaining a monopoly of patents in the United States covering various electronic and mechanical devices for use in the measurement of national radio and television audiences;

6. Discouraged and impeded and is now discouraging and impeding the progress of science and the useful arts by using the patent laws of the United States for purposes inconsistent with their constitutional basis and for the purpose or with the effect of monopolizing or attempting to monopolize the production and sales of national radio and television audience measurement reports and ratings;

7. Deprived and is now depriving users and the public of the benefits of the competition that would exist in the national radio and television audience measurement market but for the unlawful acts and practices of respondent alleged herein.

PAR. 9. The acts and practices of the respondent as herein alleged, are all to the prejudice and injury of the public, have a dangerous tendency unduly to hinder competition, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of, and 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 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 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 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, A. C. Nielsen 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 2101 Howard 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 respondent A. C. Nielsen Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the production and sale of radio and television audience measurement reports and ratings, data or information relating thereto, in commerce, as "Commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

1. Entering into, or continuing in effect, any contract, agreement, or understanding which operates to eliminate, lessen, suppress, or restrain a competitor or competitors, or which operates to cause or induce the withdrawal of any firm or individual from the production and sale of such reports and ratings.

2. For a period of ten (10) years from the date of service of this order upon respondent by the Federal Trade Commission, acquiring, directly or indirectly, by purchase, merger, consolidation or otherwise, ownership or control of, or financial interest in, the business, physical assets, or goodwill, or any part thereof, or any capital stock or securities of any other person engaged in the production and sale of such reports and ratings without prior approval of the Federal Trade Commission.

3. Hindering efforts of competitors to develop or use electronic or mechanical devices for measuring radio and television audiences by attempting in any way to impede or interfere with the financing of such competitive efforts.

It is further ordered, That respondent make available to any applicant who applies therefor, a nonexclusive royalty-free license extending for a period of four (4) years and thereafter for the remaining term of the patent, a nonexclusive license, on the basis of payment of reasonable and nondiscriminatory royalties, to make, use and vend any mechanical or electronic device for the measurement of radio and television audiences, under any, some or all patents and patent applications pertaining to such devices now owned or controlled by respondent, or which are issued or applied for within four (4) years from the date of service of this order upon respondent. Respondent is furthermore ordered, for a period of four (4) years from the date of service of this order upon it, to waive and relinquish all right to the collection of royalties from all outstanding licenses to make, use and vend any mechanical or electronic device for the measurement of radio and television audiences, under any, some or all patents and patent applications pertaining to such devices now owned or controlled by respondent. Respondent is furthermore ordered to cease and desist from making any disposition, whether by transfer or otherwise, of any of said patents which would deprive it of the power or authority to grant such licenses, unless it sells, transfers or assigns such patents, and requires, as a condition of such sale, transfer or assignment that the purchaser, transferee or assignee thereof shall observe the requirements of this provision of this order and the purchaser, transferee or assignee shall file with the Commission, prior to the consummation of said transaction, an undertaking to be bound by this provision of this order.

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

IN THE MATTER OF

DYESS FURNITURE COMPANY, INC., ET AL.

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

Docket 8555. Complaint, Mar. 4, 1963—Decision, Oct. 24, 1963

Order requiring the corporate operator of a warehouse and a chain of four retail stores in Mobile and Selma, Ala., Biloxi, Miss., and Pensacola, Fla., and the four chainstores, to cease representing falsely in newspaper advertisements and other promotional material distributed to prospective customers that the furniture and other merchandise they sold had been purchased from railroad companies after being damaged in transit or classified as "salvage" for some other reason; and that the selling price of their goods was "70%" less than the usual retail price in their trade areas.

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 Dyess Furniture

Company, Inc., a corporation, and Railroad Furniture Salvage of Biloxi, Inc., Railroad Furniture Salvage of Mobile, Inc., Railroad Furniture Salvage of Pensacola, Inc., Railroad Furniture Salvage of Selma, Inc., corporations, and Albert W. Dyess, individually and as an officer of each of said corporations, 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 Dyess Furniture Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at 73 Lipscomb Street, in the city of Mobile, State of Alabama.

Respondent Railroad Furniture Salvage of Biloxi, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its principal office and place of business located at 600 W. Railroad Avenue, in the city of Biloxi, State of Mississippi.

Respondent Railroad Furniture Salvage of Mobile, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at 73 Lipscomb Street, in the city of Mobile, State of Alabama.

Respondent Railroad Furniture Salvage of Pensacola, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 725 West Garden Street, in the city of Pensacola, State of Florida.

Respondent Railroad Furniture Salvage of Selma, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at 1505 Water Avenue, in the city of Selma, State of Alabama.

Respondent Albert W. Dyess is the President of all of the corporate respondents. He formulates, directs and controls the acts and practices of all of the corporate respondents, including the acts and practices herein set forth. His office and principal place of business is located at 73 Lipscomb Street, in the city of Mobile, State of Alabama.

PAR. 2. Respondents operate a warehouse and a chain of four retail stores and have been and are now engaged in the advertising, offering for sale, sale and distribution of furniture and other articles of merchandise to members of the purchasing public by and through newspaper advertisements and other kinds of promotional material.

Corporate respondents Railroad Furniture Salvage of Biloxi, Inc., Railroad Furniture Salvage of Mobile, Inc., Railroad Furniture Salvage of Pensacola, Inc., and Railroad Furniture Salvage of Selma, Inc., are the aforesaid four retail stores and will be sometimes hereinafter referred to collectively as the R.R.F.S. retail stores.

PAR. 3. In the course and conduct of its business, respondent Dyess Furniture Company, Inc., has been and does now formulate, direct and control the acts and practices of the R.R.F.S. retail stores, including but not limited to the formulation, direction and control of the purchasing, warehousing, pricing, advertising, personnel, accounting and financial activities of the R.R.F.S. retail stores.

In the further course and conduct of its business, respondent, Dyess Furniture Company, Inc., has been and is now transmitting and receiving, by the United States mails and by other means, newspaper advertising, mats, checks, sales memoranda and other written documents to and from respondents' various places of business in the United States.

In the further course and conduct of its business, respondent Dyess Furniture Company, Inc., has caused and now causes, the aforesaid articles of merchandise to be shipped from its aforesaid place of business in the State of Alabama, and from the various places of businesses of its suppliers located in other States of the United States, to the R.R.F.S. retail stores located in various States of the United States.

In the further course and conduct of their business, respondents R.R.F.S. retail stores have been and are now engaged in disseminating and causing to be disseminated in newspapers of interstate circulation, advertisements designed and intended to induce sales of their merchandise.

In the further course and conduct of their business, respondents R.R.F.S. retail stores have caused and now cause the aforesaid articles of merchandise to be shipped from their aforesaid places of business to members of the purchasing public located in various other States of the United States.

All of the respondents have been and are operated as a single economic enterprise; all of the aforesaid acts and practices have been engaged in in the course and conduct of respondents' business; all of the aforesaid acts and practices have a close and substantial relationship to the interstate flow of respondents' business and all respondents have been and are engaged in extensive commercial intercourse 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 various articles of merchandise offered for sale and sold by them, respondents have made and are now making numerous statements and representations with respect to the origin and character of said merchandise and the savings afforded to purchasers of said merchandise. Said statements and representations have been made in newspaper advertisements and other kinds of promotional material distributed to prospective customers. Among and typical of the statements and representations contained in said advertisements, but not all inclusive thereof, are the following:

RAILROAD FURNITURE SALVAGE
BRAND NEW—SLIGHTLY DAMAGED—CHEAP FOR CASH
121 Beauregard St.—Across from GM&O Terminal
SAVE ON ALL
FURNITURE
HERE . . . 30, 40,
EVEN 70%

PAR. 5. Through the use of the aforesaid corporate and trade names of the R.R.F.S. retail stores, and through the use of the aforesaid statements and representations and others similar thereto, but not specifically set forth, respondents have represented, directly or indirectly:

(a) That Railroad Furniture Salvage of Biloxi, Inc., Railroad Furniture Salvage of Mobile, Inc., Railroad Furniture Salvage of Pensacola, Inc., and Railroad Furniture Salvage of Selma, Inc., are companies which offer to sell and sell furniture and other articles of merchandise all of which has been purchased from railroad companies after such merchandise has been damaged while in transit or for some other reason classified as "salvage" by said railroad companies.

(b) That the price at which respondents sell a portion of the furniture and other articles of merchandise they sell is "70%" less than the price at which said merchandise is usually and customarily sold at retail in all respondents' trade areas; and that purchasers of respondents' said merchandise realize a saving of "70%" when they purchase said merchandise from the respondents.

PAR. 6. In truth and in fact:

(a) Railroad Furniture Salvage of Biloxi, Inc., Railroad Furniture Salvage of Mobile, Inc., Railroad Furniture Salvage of Pensacola, Inc., and Railroad Furniture Salvage of Selma, Inc., are not companies which offer to sell and sell furniture and other articles of merchandise all of which has been purchased from railroad companies after such merchandise has been damaged while in transit or for some other reason classified as "salvage" by said railroad companies. Such sales have not constituted and do not now constitute a significant portion of respondents' business.

(b) The price at which respondents sell a portion of the furniture and other articles of merchandise they sell is not "70%" less than the price at which said merchandise is usually and customarily sold at retail in all respondents' trade areas; and purchasers of respondents' said merchandise do not realize a saving of "70%" when they purchase said merchandise from the respondents.

Said statements and representations were, therefore, false, misleading and deceptive.

PAR. 7. 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 engaged in the sale of articles of merchandise of the same general kind and nature as those sold by respondents.

PAR. 8. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations, and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' articles of merchandise by reason of said erroneous and mistaken belief.

PAR. 9. 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, in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Mr. George J. Luberda and *Mr. Morton Nesmith* supporting the complaint.

Mr. Pierre Pelham, of Mobile, Ala., for respondents.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against respondents on March 4, 1963, charging them with having engaged in unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the Federal Trade Commission Act. The complaint alleges in effect that respondents have misrepresented the source or character of the furniture and other merchandise they sell, as well as the savings available to customers.

After being served with the complaint, respondents appeared by counsel and, following the denial of a motion for a more definite statement, filed answer denying any violation of law but admitting certain factual allegations concerning the nature of their business and their operations in "commerce", as that term is defined in the Federal Trade Commission Act.

A prehearing conference was held in Washington, D.C., May 17, 1963, and hearings were scheduled to begin July 16, 1963, in Mobile, Alabama. However, as a result of discussions initiated at the prehearing conference, counsel engaged in negotiations designed to obviate the necessity of hearings.

As a result of such negotiations, counsel filed, on July 8, 1963, a "Joint Motion to Accept Settlement Agreement", accompanied by a "Settlement Agreement." The agreement has been signed by all the respondents and their counsel and by counsel supporting the complaint. It has been approved by the Chief, Division of General Advertising, Bureau of Deceptive Practices, and by the Director of that Bureau.

In addition to setting forth an agreed statement of facts covering all the issues in the case, the agreement includes a waiver by respondents of any further procedural steps and of all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to the agreement. The agreement provides that if it is accepted by the hearing examiner, he may, without further notice to the respondents, issue an initial decision containing findings of fact and conclusions of law based upon this agreement, together with an order to cease and desist agreed upon by the parties.

Upon consideration of the agreement and the joint motion that it be accepted, the hearing examiner finds that it provides an appropriate basis for the disposition of this case. Although the agreed order to cease and desist involves some modification of the order set forth in the "Notice" section of the complaint, it appears that it is adequate to reach the practices found to be unlawful.

Accordingly, the joint motion is granted, and the agreement is accepted by the hearing examiner as a basis for this initial decision. On consideration of the agreement, together with the pleadings, the hearing examiner finds that this proceeding is in the interest of the public and, on the basis of the entire record, makes the following findings of fact and conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

1. Respondent Dyess Furniture Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the

laws of the State of Alabama, with its principal office and place of business located at 73 Lipscomb Street, in the city of Mobile, State of Alabama.

Respondent Railroad Furniture Salvage of Biloxi, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Mississippi, with its principal office and place of business located at 600 W. Railroad Avenue, in the city of Biloxi, State of Mississippi.

Respondent Railroad Furniture Salvage of Mobile, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at 73 Lipscomb Street, in the city of Mobile, State of Alabama.

Respondent Railroad Furniture Salvage of Pensacola, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 725 West Garden Street, in the city of Pensacola, State of Florida.

Respondent Railroad Furniture Salvage of Selma, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Alabama, with its principal office and place of business located at 1505 Water Avenue, in the city of Selma, State of Alabama.

Respondent Albert W. Dyess is the president of all of the corporate respondents. He formulates, directs and controls the acts and practices of all of the corporate respondents, including the acts and practices herein set forth. His office and principal place of business is located at 73 Lipscomb Street, in the city of Mobile, State of Alabama.

2. Respondents operate a warehouse and a chain of four retail stores and have been and are now engaged in the advertising, offering for sale, sale and distribution of furniture and other articles of merchandise to members of the purchasing public by and through newspaper advertisements and other kinds of promotional material. The chain comprises corporate respondents Railroad Furniture Salvage of Biloxi, Inc., Railroad Furniture Salvage of Mobile, Inc., Railroad Furniture Salvage of Pensacola, Inc., and Railroad Furniture Salvage of Selma, Inc., sometimes referred to collectively in this decision as the R.R.F.S. retail stores.

3. In the course and conduct of its business, respondent Dyess Furniture Company, Inc., has been and is now formulating, direct-

780-018—69——70

ing and controlling the acts and practices of the R.R.F.S. retail stores, including but not limited to the formulation, direction and control of the purchasing, warehousing, pricing, advertising, personnel, accounting and financial activities of the R.R.F.S. retail stores. In the further course and conduct of its business, respondent, Dyess Furniture Company, Inc., has been and is now transmitting and receiving, by the United States mails and by other means, newspaper advertising, mats, checks, sales memoranda and other written documents to and from respondents' various places of business in the United States. In the further course and conduct of its business, respondent Dyess Furniture Company, Inc., has caused, and now causes, furniture and other articles of merchandise to be shipped from its place of business in the State of Alabama, and from the various places of businesses of its suppliers located in other States of the United States, to the R.R.F.S. retail stores located in various States of the United States.

In the further course and conduct of their business, respondents R.R.F.S. retail stores have been and are now engaged in disseminating and causing to be disseminated in newspapers of interstate circulation, advertisements designed and intended to induce sales of their merchandise. In the further course and conduct of their business, respondents R.R.F.S. retail stores have caused and now cause such articles of merchandise to be shipped from their places of business to members of the purchasing public located in various other States of the United States.

All of the respondents have been and are operated as a single economic enterprise; all of the acts and practices here described have been engaged in in the course and conduct of respondents' business; all such acts and practices have a close and substantial relationship to the interstate flow of respondents' business; and all respondents have been and are engaged in extensive commercial intercourse in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of their business, and for the purpose of inducing the sale of the various articles of merchandise offered for sale and sold by them, respondents have made and are now making numerous statements and representations to prospective purchasers of their merchandise. Such statements and representations have been made in newspaper advertisements and other kinds of promotional material distributed to prospective customers. Among and typical of the statements and representations contained

in such advertisements, but not all inclusive thereof, are the following:

RAILROAD FURNITURE SALVAGE
BRAND NEW—SLIGHTLY DAMAGED—CHEAP FOR CASH
121 Beauregard St.—Across from GM&O Terminal
SAVE ON ALL
FURNITURE
HERE . . . 30, 40,
EVEN 70%

except that the respondents do not now make and have not for the past year made reference to a "70%" saving in advertisements. Respondents, however, are now and have been for some time last past using such advertisements direct or implied savings claims such as comparative price claims.

5. Through the use of the corporate and trade names of the R.R.F.S. retail stores, and through the use of the statements and representations set forth in Paragraph 4, and others similar thereto but not specifically set forth, respondents have represented, directly or indirectly:

(a) That Railroad Furniture Salvage of Biloxi, Inc., Railroad Furniture Salvage of Mobile, Inc., Railroad Furniture Salvage of Pensacola, Inc., and Railroad Furniture Salvage of Selma, Inc., are companies which offer to sell and sell furniture and other articles of merchandise all of which has been purchased from railroad companies after such merchandise has been damaged while in transit or for some other reason classified as "salvage" by such railroad companies.

(b) That the price at which respondents sell a portion of the furniture and other articles of merchandise they sell is "70%" less than the price at which such merchandise is usually and customarily sold at retail in all respondents' trade areas; and that purchasers of respondents' merchandise realize a saving of "70%" when they purchase such merchandise from the respondents.

6. In truth and in fact:

(a) Railroad Furniture Salvage of Biloxi, Inc., Railroad Furniture Salvage of Mobile, Inc., Railroad Furniture Salvage of Pensacola, Inc., and Railroad Furniture Salvage of Selma, Inc., are not companies which offer to sell and sell furniture and other articles of merchandise all of which has been purchased from railroad companies after such merchandise has been damaged while in transit or for some other reason classified as "salvage" by such railroad companies.

During the past 10 years respondents' sales of actual railroad salvage merchandise have been de minimis and such sales have not constituted and do not now constitute a significant portion of respondents' business.

(b) The price at which respondents sell a portion of the furniture and other articles of merchandise they sell is not "70%" less than the price at which such merchandise is usually and customarily sold at retail in all respondents' trade areas; and purchasers of respondents' merchandise do not realize a saving of "70%" when they purchase such merchandise from the respondents.

Such statements and representations were, therefore, false, misleading and deceptive.

7. "Railroad Furniture Salvage" are the principal words in the corporate and trade names of the R.R.F.S. furniture stores and constitute an asset of substantial value to respondents by virtue of respondents' long and unchallenged usage thereof and investment therein. Railroad Furniture Salvage was adopted by individual respondent Albert W. Dyess as the corporate and trade name of the Mobile, Alabama, furniture store in 1949, the Biloxi, Mississippi, furniture store in 1951, the Selma, Alabama, furniture store in 1952, and the Pensacola, Florida, furniture store in 1952, and the use of that trade name by respondents has been unchallenged and continuous since its adoption in each locale. Respondents have expended an average sum of $60,000 annually during the past 10 years in the advertisement and promotion of that trade name, and the investment of respondents therein is substantial.

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

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

CONCLUSIONS OF LAW

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

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

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

4. The agreed order is adequate to stop the practices found to be unlawful. Although it involves some modification of the form of order that the Commission stated, in the "Notice" section of the complaint, it had reason to believe should issue if the facts were found to be as alleged in the complaint, the examiner has concluded that the order being entered by agreement of the parties is equally effective in achieving the corrective action required.

Whereas Paragraph 1 of the proposed order prohibited use of the words "Railroad Furniture Salvage" as part of respondents' corporate or trade names, the agreed order runs only against use of the word "Salvage." The misrepresentation alleged in Paragraphs 5 (a) and 6(a) of the complaint, and found in Paragraphs 5(a) and 6(a) of the Findings of Fact, stems from use of the word "Salvage" in combination with the words "Railroad Furniture." Elimination of the word "Salvage" is sufficient to cure the misrepresentation thus charged and found. There is no basis in this record for a conclusion that the challenged misrepresentation would flow solely from use of the word "Railroad" in the corporate or trade name.

Subject to the restrictions contained in Paragraphs 2 and 3 of the order*, the agreed order thus permits nondeceptive use of the word "Railroad" in the corporate or trade names. The result is to preserve an asset of value to respondents**, while at the same time eliminating the misrepresentation stemming from use of the word "Salvage."

In the proposed order, the prohibition in Paragraph 2 was applicable "when such merchandise has not in fact been purchased from railroad companies after such merchandise has been damaged while in transit or for some other reason classified as 'salvage' by said railroad companies." In the agreed order, this clause is deleted,

*Paragraph 2 broadly prohibits any representation through the use of the words "Railroad Furniture Salvage" or otherwise, that respondents' merchandise has been purchased from railroad companies after being damaged while in transit or for some other reason classified as salvage by a railroad company. Paragraph 3 prohibits any misrepresentation of the "source or character" of respondents' merchandise.

**In addition to noting the obvious value of retaining part of a trade name familiar to the public by virtue of long usage (see Par. 7, Findings of Fact), respondents also take the position that the word "Railroad" serves to identify the location of the stores. See respondents' Answer, Par. 10(b), 11 and 15, and Tr. 13–14, 24 and 26 (Prehearing Conference).

and there is substituted therefor a proviso "that it shall be a defense in any enforcement proceeding for respondent[s] to establish the truth of such representation." In the opinion of the hearing examiner this change does not impair the effectiveness of the order in any way.

In summary, it is the conclusion of the hearing examiner that the agreed order is appropriate in all respects in the light of the facts found, and it is adopted as the order to be entered in disposition of this proceeding.

ORDER

It is ordered, That respondents Dyess Furniture Company, Inc., a corporation, and its officers, Railroad Furniture Salvage of Biloxi, Inc., a corporation, and its officers, Railroad Furniture Salvage of Mobile, Inc., a corporation, and its officers, Railroad Furniture Salvage of Pensacola, Inc., a corporation, and its officers, Railroad Furniture Salvage of Selma, Inc., a corporation, and its officers, and Albert W. Dyess, individually, and as an officer of each of said corporations, 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 furniture 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 "SALVAGE" or any other word or words of similar import or meaning as part of their respective corporate names or trade names.

2. Representing, directly or by implication, through the use of the words "RAILROAD FURNITURE SALVAGE", or any other word or words of similar import or meaning, in advertising or in any other manner, that said merchandise has been purchased from railroad companies after said merchandise has been damaged while in transit or for some other reason classified as "salvage" by said railroad companies: *Provided, however*, That it shall be a defense in any enforcement proceeding for respondents to establish the truth of such representation.

3. Misrepresenting, in any manner, directly or by implication, the source or character of any of said merchandise.

4. Representing, directly or by implication, through the use of the words "SAVE ON ALL FURNITURE HERE * * * EVEN 70%", or any other word or words of similar import or meaning, that any saving in a designated amount from a trade area price is afforded in the purchase of merchandise unless the price at which it is

offered is lower, in the amount or amounts claimed, than the generally prevailing price or prices at which said merchandise is sold in the trade area or areas in which the representation is made.

5. Misrepresenting, in any manner, directly or by implication, any savings available to purchasers of respondents' merchandise.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, effective August 1, 1963, the initial decision of the hearing examiner shall, on the 24th day of October 1963, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

RICH PLAN CORPORATION ET AL.

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

Docket C-614. Complaint, Oct. 31, 1963—Decision, Oct. 31, 1963

Consent order requiring Dallas, Tex., operators of their so-called "Rich Plan" for selling freezers and food through nine divisions in Texas, Louisiana, Florida, Oklahoma and Arizona, under which they licensed some 141 dealers to sell freezers and food under their supervision, to cease representing falsely—in advertising in newspapers and magazines, in circulars, brochures, canned sales talk furnished dealers and otherwise—that purchasers of their "Plan" could buy both food and freezer for what they had been paying for food alone, would save enough on food purchases to pay for the freezer and would receive the freezer free, and that they had representatives throughout the country who would give buyers continued service; and to cease inducing customers to sign negotiable instruments in connection with purchases without informing them when such instruments were to be sold to finance companies or other commercial institutions.

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 Rich Plan Corporation, a corporation, and Rich Plan of New Orleans, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Rich Plan Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its principal office and place of business located at 5307 East Mockingbird Lane in the city of Dallas, State of Texas.

Respondent Rich Plan of New Orleans, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana, with its principal office and place of business located at 3203 Metairie Road, in the city of Metairie, State of Louisiana.

PAR. 2. Respondent Rich Plan Corporation is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of freezers, food and a freezer-food plan through nine wholly owned divisions which are located in the following cities:

Austin, Texas.
Alexandria, Louisiana.
Dallas, Texas.
Longview, Texas.
Nashville, Tennessee.
Orlando, Florida.
Fort Lauderdale, Florida.
Oklahoma City, Oklahoma.
Phoenix, Arizona.

Additionally, respondent Rich Plan Corporation has licensed approximately 141 individuals, firms and corporations, hereinafter referred to as dealers, to promote, distribute and sell freezers and food under the trade name "Rich Plan". Said dealers agree to purchase their requirements of freezers and food from and through the respondent Rich Plan Corporation, and to sell freezers and food only in areas designated by respondent Rich Plan Corporation. The licensed dealers conduct their respective businesses under the supervision of and with the assistance and advice of respondent Rich Plan Corporation.

PAR. 3. Respondent Rich Plan of New Orleans, Inc., is a Rich Plan Corporation licensed dealer and is now, and for some time last past has been, engaged in the offering for sale, sale and distribution of freezers, food and a freezer-food plan, under the trade name "Rich Plan".

PAR. 4. In the course and conduct of its business, as aforesaid, respondent Rich Plan Corporation now causes, and for some time last past has caused, freezers and food to be shipped from its place of business in the State of Texas to its wholly owned divisions and to dealers, including respondents Rich Plan of New Oreans, Inc., located in various other States of the United States.

In the further course and conduct of their business, advertising material, canned sales talk, price lists, food recipes, invoices, contracts, letters, checks, and other written instruments and communications have been and are being, exchanged by and between the Respondent Rich Plan Corporation, located in the State of Texas, and Rich Plan of New Orleans, Inc., located in the State of Louisiana.

The activities of respondents as herein described constitute acts and practices in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and 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 freezers, food and freezer-food plans.

PAR. 6. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and other advertising media, and by means of circulars and brochures, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of food as the term "food" is defined in the Federal Trade Commission Act; and have disseminated, and caused the dissemination of, advertisements by various means, including those aforesaid, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of freezers and food in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. By means of advertisements disseminated as aforesaid, and by oral statements of respondents' sales representatives or agents, respondents have represented that:

1. Purchasers of respondents' freezer-food plan can purchase their food requirements and a freezer for the same or less money than such purchasers have been paying for food alone;

2. Purchasers of respondents' freezer-food plan can save enough money on the purchase of their food to pay for a freezer;

3. Purchasers will receive a freezer free if they purchase the food plan;

4. Respondent Rich Plan Corporation has representatives throughout the country and therefore purchasers of respondents' freezer-food plan will have continued service if they move to any other area of the country.

PAR. 8. In the promotion and sale of respondents' freezer-food plan, respondents' sales representatives or agents fail to reveal that the instruments signed by said purchasers are negotiable, that said instruments will be transferred to finance companies who will become holders in due course and as such can enforce payment without regard to any personal defense that such purchasers could assert as to respondents.

PAR. 9. In truth and in fact:

1. Respondents' food prices are not so low that purchasers of respondents' freezer-food plan can purchase their food requirements and a freezer for the same or less money than such purchasers have been paying for food alone.

2. Purchasers of respondents' freezer-food plan do not save enough money on the purchase of their food to pay for a freezer.

3. Purchasers of respondents' freezer-food plan do not receive a freezer free. They are required to pay for the freezer they receive.

4. Respondent Rich Plan Corporation does not have representatives everywhere in the United States and therefore purchasers of respondents' freezer-food plan will not have continued service if they move to certain other areas of the country.

Therefore, the advertisements referred to in Paragraph 6 were, and are, misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act, and the statements and representations referred to in Paragraph 7 were, and now are false misleading and deceptive.

PAR. 10. In the absence of advice that the instruments executed by them, for the purchase of the freezer or the food, are negotiable and will be sold to finance companies or other commercial institutions, and in the absence of being informed that they will have no personal defense against enforced collection by holders in due course, purchasers do not expect said executed instruments to be sold to finance companies or other commercial institutions, and said purchasers do not realize that they have no personal defense against collection by holders in due course. The failure of the respondents to disclose all of the foregoing has the tendency and capacity to deceive said purchasers and constitutes false, misleading and deceptive practices and unfair methods of competition.

PAR. 11. By distributing advertising, canned sales talk, and other materials to Rich Plan licensed dealers and by various other means, respondent Rich Plan Corporation has placed in the hands of its licensed dealers the means and instrumentalities by and through which they may mislead the public as aforesaid.

PAR. 12. The use by respondents' of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of freezers, food and freezer-food plans from the respondents' by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of the respondents, as herein alleged, including the dissemination by respondents of false advertisements as aforesaid, were, and are, all to the prejudice and injury of the public, and the respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act, and in violation of Sections 5 and 12 of said 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 Rich Plan Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 5307 East Mockingbird Lane, in the city of Dallas, State of Texas.

Respondent Rich Plan of New Orleans, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana, with its principal office and place of business located at 3203 Metairie Road, in the city of Metairie, State of Louisiana.

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

PART I

It is ordered, That respondent Rich Plan Corporation, a corporation, and its officers, and respondent Rich Plan of New Orleans, Inc., a corporation, and its officers, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of freezers, food or freezer-food plans in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication that:

   a. Purchasers of the freezer-food plan will receive the same amount of food and a freezer for the same or less money than the purchasers have been paying for food alone.

   b. Purchasers of the freezer-food plan will save enough money on the purchase of the food to pay for the freezer.

   c. Purchasers of the freezer-food plan will receive a freezer free if they subscribe to the freezer-food plan.

   d. Purchasers of the freezer-food plan of respondent Rich Plan Corporation will have continued service regardless of the area or part of the country to which such purchasers may move.

2. Misrepresenting in any manner the areas in which service under respondents' freezer-food plan is available.

3. Misrepresenting in any manner the savings realized by the purchasers of a freezer-food plan, freezer, or food.

4. Inducing individuals to sign any negotiable instrument in connection with a freezer or food plan if said instrument is to be sold to a finance company or other commercial institution unless it is clearly and conspicuously stated on the face of said instrument that it is to be sold to a finance company or other commercial institution and that the payer or payers thereof will be obligated to make full payment on said instrument without regard to any personal defense that said payer or payers could assert against respondents.

PART II

It is further ordered, That respondent Rich Plan Corporation, a corporation, and its officers, and respondent Rich Plan of New Orleans, Inc., a corporation, and its officers, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of food or any purchasing plan involving food do forthwith cease and desist from:

1. Disseminating, or causing to be disseminated, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations or misrepresentations prohibited in Paragraphs 1 through 3 of PART I of this Order.

2. Disseminating, or causing the dissemination of any advertisement, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any food, or any purchasing plan involving food, in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations or misrepresentations prohibited in Paragraphs 1 through 3 of PART I of this Order.

PART III

It is further ordered, That respondent Rich Plan Corporation, a corporation, and its officers, and respondent Rich Plan of New Orleans, Inc., a corporation, and its officers, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of freezers, food or freezer-food plans in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Furnishing or placing in the hands of others, advertising, canned sales talk, or other materials by and through which they

may mislead or deceive the public as prohibited in Paragraphs 1 through 3 of PART I of this Order.

2. Transmitting, orally or otherwise, any information to others containing any of the representations or misrepresentations prohibited by Paragraphs 1 through 3 of PART I of this Order.

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

IN THE MATTER OF

SEALY, INCORPORATED

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

Docket C-615. Complaint, Nov. 1, 1963—Decision, Nov. 1, 1963

Consent order requiring an association of 30 independent concerns licensed to manufacture and sell bedding products under the Sealy trade name and trade mark in exclusive territories throughout the United States, which conducted nationally advertised sales promotions of Sealy products through publications of national circulation and television broadcasts and by furnishing advertising material to said licensees for distribution to retail dealers, to cease representing falsely that in their "81st Anniversary Sale" their regular mattress and box spring combinations were reduced $20; that their "Posturepedic" mattress was specially designed to assure correct posture during sleep and would prevent or correct posture defects and specific body deformities and accorded with recommendations of orthopedic authorities as to design for such deformities; and that professional shoppers from Willmark Research Corporation compared the advertised mattress with competing products and found it to be the best buy at the price.

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 Sealy, Incorporated, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sealy, Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 666 North Lake Shore Drive in the city of Chicago, State of Illinois.

PAR. 2. Respondent Sealy, Incorporated, hereinafter referred to as Sealy, Inc., is an association of 30 independent persons, firms and corporations engaged in the business of manufacturing mattresses and other bedding products. Said manufacturers are franchised or licensed by Sealy, Inc., to manufacture and sell bedding products under the Sealy trade name and trademark in exclusive territories throughout the United States. Sealy, Inc., owns patents, trademarks, copyrights, processes, manufacturing methods and product designs for use in the manufacture of mattresses, box springs and other bedding products and originates and develops merchandising, sales and advertising programs for marketing said products. In return for the facilities and services furnished them by Sealy, Inc., the Sealy licensees pay an annual royalty based on a percentage of their sales. Under its merchandising program Sealy, Inc., conducts nationally advertised sales promotions of Sealy products through publications of national circulation, through television broadcasts and by furnishing advertising material to the said licensees for distribution to retail dealers for their use in inducing the sale of Sealy products.

PAR. 3. In the course and conduct of its business respondent now causes and for some time last past has caused advertising and promotional material to be shipped from its headquarters in Chicago, Illinois, to its licensees located in the various states of the United States. Respondent has further engaged in extensive commercial intercourse, in commerce, consisting of the transmission and receipt of letters, checks, reports, contracts, specifications and other documents of commercial nature between its headquarters and the licensees in the various states in furtherance of the sale and shipment of Sealy bedding products from the respective states in which they are manufactured to retail stores and other purchasers, in other states, for resale to consumers. Respondent maintains and at all times mentioned herein has maintained a substantial business in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Furthermore, each of the aforesaid licensees ships and transports the said bedding products from the state in which each of their several manufacturing plants is located into the various surrounding states located in their respective territories. Each of the said licensees maintains, and at all times mentioned herein has maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act. The aforesaid activities of respondent Sealy, Inc., are an intimate, integral part and extension of said licensees' trade in "commerce." Through the receipt of the said royalties, respondent Sealy, Inc., becomes an even more direct participant in said licensees' trade in "commerce."

PAR. 4. In the course and conduct of its business as aforesaid, and for the purpose of inducing the purchase of Sealy bedding products, respondent has made statements in advertising mats, display cards and other common advertising material supplied to its licensees who have in turn furnished the same to retailers, and in common advertisements placed by respondent in magazines of national circulation, and in television and radio broadcasts transmitted by television and radio stations located in various states of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines respecting the price, savings, manufacture and therapeutic properties of said mattresses. Typical but not all inclusive of such statements are the following:

In respect to the "81st Anniversary Sale":

FIRST TIME BELOW NATIONALLY
ADVERTISED $59.95 PRICE!
YOU GET FAMOUS FLEX GUARD QUALITY
$20.00 OFF!

FIRST TIME BELOW
NATIONALLY ADVERTISED
PRICE OF $59.95
WITH NO REDUCTION IN QUALITY
YOU SAVE $20.00

PAY ONLY
$39.95

FOR THE FIRST TIME (TO CELEBRATE
SEALY'S 81ST ANNIVERSARY)
THE QUALITY OF SEALY'S
FAMOUS FLEX GUARD MATTRESS
IS YOURS BELOW THE NATION-
ALLY ADVERTISED PRICE OF
$59.95. TWENTY DOLLARS
BELOW! THOUSANDS SOLD
AT $59.95. NOW ONLY $39.95!
MATCHING BOX SPRING ALSO $39.95.

SAVE $20.00 WITH NO REDUCTION
IN QUALITY.

REDUCED FIRST TIME EVER

In respect to the "Posturepedic" mattress:

CHOOSE THE COMFORT YOU PREFER * * *
EXTRA FIRM OR GENTLY FIRM IN THE NEW
SEALY POSTUREPEDIC

BOTH GIVE YOU THE SAME
"NO MORNING BACKACHE" SUPPORT

[Sealy trade mark showing female figure with her hand on the small of her back]

Everyone likes to be pampered; so indulge yourself on the posturepedic that's just right for you. If an added measure of firmness suits you best (or your doctor recommends it) choose the extra firm posturepedic. Like a gentler feel? Then try the gently firm Princess Posturepedic with a luxury layer of foam. Whatever your choice, rest assured that you're getting Posturepedic's famous healthful support—designed in cooperation with leading orthopedic surgeons.

SEALY POSTUREPEDIC * * * THE MATTRESS ORTHOPEDIC SURGEONS AND SLEEPY PEOPLE AGREE ON.

* * * THE SEALY POSTUREPEDIC, THE "NO MORNING BACKACHE MATTRESS". ORTHOPEDIC SURGEONS HELPED DESIGN IT AND THEY ARE THE ONES WHO KNOW THE MOST ABOUT PROPER SUPPORT FOR YOUR BODY WHEN YOU SLEEP.

THIS POSTUREPEDIC HAS THE EXTRA FIRMNESS THAT DOCTORS RECOMMEND AND MANY PEOPLE PREFER.

NO MORNING BACKACHE*; THEY SLEEP ON THE SEALY POSTUREPEDIC.

[The asterisk refers to an explanatory statement in the margin such as "No morning backache from a too-soft mattress."]

In respect to the "Willmark Survey":

You can't buy a better mattress at $39.95 than this Sealy Shopped for value * * * verified for quality.

"I am one of the staff of professional shoppers from Willmark Research Corporation * * *

"After shopping and checking competitive brands in a nationwide survey of mattresses selling for $39.95, we found that of all the brands checked none had all of these construction features that are incorporated in Sealy's 80th Anniversary Sale mattress:

DeLuxe decorator flocked ticking
Button-free surface * * * No Bumps—No Lumps
Sealy's exclusive Life Line Construction
Good Housekeeping Money-Back Guaranty Seal
Seal of Independent Testing Laboratory

After receiving shopping reports from all over the nation Sealy tabulated these and we are proud to report that this Sealy 80th Anniversary Mattress is

1961's BEST MATTRESS BUY AT $39.95. Your shopping has already been done for you.

Willmark shopped and checked competitive features. Willmark, the nation's oldest point-of-sale research corporation has shopped and checked

780-018—69——71

competitive mattress features. On the basis of these findings, compiled from numerous checks, Sealy rates this mattress:

"Your best value at $39.95"
Sealy—Rated
No. 1
Shopped—Tested—Verified
Rated No. 1 mattress

Par. 5. By and through the use of the aforesaid statements respondent has represented and has placed in the hands of licensees and others the means and instrumentalities of representing, directly or indirectly:

1. Through the use of the statements in the advertisement respecting the "81st Anniversary" sale that the said "81st Anniversary" sale mattress and matching box spring being offered for $39.95 apiece are the selfsame mattress and matching box spring theretofore offered for sale and sold under the brand name "Flex Guard" for $59.95 apiece, that the usual and customary retail selling price of said "Flex Guard" mattress and box spring had been reduced from $59.95 to $39.95 apiece, and that a saving of $20.00 was afforded to consumers in the purchase of each of said units at $39.95 apiece.

2. Through the use of the brand name "Posturepedic" in conjunction with the various statements above set forth, relating to said mattress, that said Posturepedic mattress has been specially designed and constructed to assure and does in fact assure correct posture during sleep or that said mattress is capable of preventing or correcting or of contributing materially to the prevention or correction of posture defects or that said mattress has been specially designed and constructed so as to prevent, correct or afford substantial relief with respect to a specific body deformity or deformities and accords with recommendations of orthopedic authorities respecting design and construction for such deformity or deformities.

3. Through the use of the statements in respect to the "Willmark Survey" that the Willmark Research Corporation inspected and checked the Sealy mattress referred to in said advertisement for quality and value, compared the said mattress with competing mattresses and found the said Sealy mattress to be the best buy at $39.95.

Par. 6. In truth and in fact:

1. The Sealy "81st Anniversary" sale mattress and matching box spring offered for $39.95 apiece were not the selfsame mattress and matching box spring theretofore offered for sale and sold under the brand name "Flex Guard" for $59.95. The "81st Anniversary" sale mattress and matching box spring manufactured and sold by certain Sealy, Incorporated, licensees contained substantial differ-

ences in design and construction, such as fewer coils in the innerspring unit, covers of a lighter weight material, and different kinds of padding. Therefore, consumers, in purchasing the "81st Anniversary" mattress and box spring, did not obtain the selfsame "Flex Guard" mattress and box spring as those "Flex Guard" units previously offered for sale and sold for $59.95 apiece but obtained different units which had not been previously sold at all. The usual and customary retail selling price of said "Flex Guard" mattress and box spring had not been reduced from $59.95 to $39.95 apiece, and the saving of $20.00 which was based on the previous sale of the "Flex Guard" units at $59.95 apiece was, therefore, not afforded to consumers in purchasing the "81st Anniversary" sale mattress at $39.95.

2. Respondent's said mattresses have not been specially designed and constructed to afford under all conditions and do not in fact afford under all conditions correct posture during sleep. Said mattresses are not capable of preventing or correcting or of contributing materially to the prevention or correction of posture defects. Said mattresses have not been specially designed and constructed so as to prevent, correct or afford substantial relief with respect to a specific body deformity or deformities and do not accord with recommendations of orthopedic authorities respecting design and construction for such deformity or deformities. Said "Posturepedic" mattresses are stock mattresses which are generally available and indiscriminately offered for sale and sold to the consuming public.

3. Willmark Research Corporation did not inspect or check the said Sealy mattress and made no evaluation of said mattress. It did not compare said Sealy mattress with mattresses of competitors and did not find the said Sealy mattress to be a better buy at $39.95.

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

PAR. 7. In referring to or describing its "Posturepedic" mattress as the "no morning backache" mattress or words to that effect respondent in a substantial number of cases has failed to state that reference is made only to backache resulting from the use of a too soft mattress. In other instances where an explanatory marginal note is used it is so far removed from the statement it purports to explain and is so inconspicuous that it does not constitute an adequate disclosure that reference is made only to backache caused from sleeping on a too soft mattress.

PAR. 8. Respondent, by furnishing licensees with advertising material who in turn furnish said advertising material to retailers, has thereby placed in the hands of licensees the means and instrumentalities by and through which they may mislead the public as to the quality, the usual and regular price, or the therapeutic properties of said products and the savings afforded to purchasers thereof.

PAR. 9. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of mattresses, box springs and other bedding products of the same general kind and nature as those sold by respondent.

PAR. 10. 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. 11. 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 Commision 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 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, Sealy, Incorporated, 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 666 North Lake Shore Drive, 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 respondent Sealy, Incorporated, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of mattresses, box springs, bedding products 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. Representing, directly or indirectly:

(a) That any savings from the usual and customary retail selling price of any of said products are afforded the purchasers thereof where the product offered for sale at a stated reduced price is not the selfsame product as that offered for sale at the higher retail price from which the saving is claimed; or misrepresenting, in any manner, the savings afforded purchasers of respondent's said products.

(b) That the usual and customary retail selling price of any of said products has been reduced where the product offered for sale at the purported reduced price is not the selfsame product as that which had been sold at said higher price.

(c) That any of said products is the selfsame product as any other product or is identical in any respect to any other product unless respondent establishes that such is the fact.

(d) That an independent research firm has evaluated or appraised any Sealy product, that said research firm has compared such product with competitors' products or that the said research firm has determined the Sealy product to be of a higher value or of better quality than competitors' products unless such services were performed by such research firm and such evaluations were actually afforded.

(e) That said products have been specially designed and constructed to afford and do in fact afford correct posture during sleep and are capable of preventing or correcting or of contributing materially to the prevention or correction of posture defects and have been specially designed and constructed so as to prevent or afford substantial relief with respect to a specific body deformity or deformities and accord with recommendations of orthopedic authorities respecting design and construction for such deformity or deformities, unless respondent establishes that such is the fact.

(f) That the use of their mattresses will relieve or prevent backaches unless it is clearly and conspicuously disclosed in immediate conjunction with such statement or representation that such relief or prevention will be afforded only to users whose backaches result from using a too soft mattress.

2. Using the brand name "Posturepedic" or any terms of similar import or meaning, in conjunction with any other words, expressions or illustrations implying preventive, corrective or curative properties for postural defects or any other body deformities, in connection with respondent's "Posturepedic" mattress or box spring or any mattress or box spring of similar construction and design or any other stock mattress or box spring.

3. Furnishing or otherwise placing in the hands of licensees, 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 it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

THE KIWI POLISH COMPANY, PROPRIETARY, LTD.

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

Docket C-616. Complaint, Nov. 5, 1693—Decision, Nov. 5, 1963

Consent order requiring the American Division of an Australian corporate manufacturer of a wide variety of shoe polishes and related products, to cease violating Sec. 2(d) of the Clayton Act by such practices as paying Walgreen Drug Company during a 5-year period in excess of $5,000 for cooperative advertising of its products and paying Cannon Shoe Company approximately $1,675 during a 2-year period to be passed on to Cannon's retail sales personnel as special incentives to promote sales of "Kiwi" products while not making comparable payments available to some 68 competitors of Walgreen in Chicago, and to all its customers competing with Cannon.

COMPLAINT

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

PARAGRAPH 1. Respondent, The Kiwi Polish Company, Proprietary, Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of Australia. Respondent's American Division has been and is now doing business in the United States pursuant to a license to do business granted by the State of Pennsylvania, and respondent's principal office and place of business in the United States is located at High Street, in the city of Pottstown, State of Pennsylvania. Respondent's American Division has been engaged and is now engaged in the business of manufacturing and marketing a wide variety of shoe polishes and related products including shoe shine kits, shoe brushes and shoe cloths.

PAR. 2. Respondent, through its American Division, sells the products it manufactures in the United States in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to customers located in every state of the United States and in the District of Columbia. During the fiscal year ended August 31, 1961, respondent's sales of its products in the United States exceeded $3,300,00. In the course of its business in the United States, respondent is now and has been in substantial competition with other persons, corporations, firms and partnerships engaged in the manufacture, sale and distribution of shoe polishes and related products, and respondent's purchasers are now and have been in substantial competition with each other in their respective trading areas.

PAR. 3. In the course and conduct of respondent's business in commerce, respondent sells its shoe polishes and related products to many customers who are in competition with each other in the resale of products purchased from respondent as well as in the resale of products purchased from many other suppliers. Respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of products sold to them by said respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondent competing in the distribution of such products.

PAR. 4. Specifically, respondent, during the past 5 years, has paid Walgreen Drug Company in excess of $5,000 for cooperative advertising of products purchased from respondent. Respondent sells its products to approximately sixty-eight other purchasers in the city of Chicago, Illinois, many of whom compete with the retail drug stores operated in that city by Walgreen Drug Company in the resale of products purchased from respondent. Such payments or allowances have not been made available on proportionally equal terms by respondent to all of its other customers competing with its favored customer Walgreen Drug Company in the resale of products purchased from respondent.

Specifically, respondent paid Cannon Shoe Company approximately $900 during the fiscal year ended August 31, 1962, and approximately $775 during the fiscal year ended August 31, 1961. These payments were made under the condition that they be passed on by Cannon Shoe Company to its retail sales personnel as special incentives to promote sales of respondent's products by retail outlets operated by Cannon Shoe Company. Payments or allowances in consideration for the furnishing of services or facilities in connection with the sale of respondent's products were not made available by respondent on proportionally equal terms to all of its other customers competing with Cannon Shoe Company in the distribution of respondent's products.

PAR. 5. The acts and practices of respondent as alleged above are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of subsection (d) of Section 2 of the Clayton Act, as amended, 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, The Kiwi Polish Company, Proprietary, Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of Australia. Respondent's American Division has been and is now doing business in the United States pursuant to a license to do business granted by the State of Pennsylvania, with its office and principal place of business in the United States located at High Street, in the City of Pottstown, State of Pennsylvania.

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

ORDER

It is ordered, That respondent The Kiwi Polish Company, Proprietary, Ltd., a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of shoe polish and related products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

> Paying or contracting for the payment of an allowance or anything of value to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of such products sold or offered for sale by respondent unless such payment or other consideration is made available on proportionally equal terms to all of respondent's other customers competing with such favored customer in the distribution of such products.

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

IN THE MATTER OF

PARENTS' MAGAZINE ENTERPRISES, INC., ET AL.

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

Docket C-617. Complaint, Nov. 5, 1963—Decision, Nov. 5, 1963

Consent order requiring New York City sellers of encyclopedia sets, research services, other books and magazines, to cease representing falsely, through their salesmen making house-to-house calls on prospective purchasers and using printed questionnaires, that such salesmen were teachers making educational surveys; that they offered encyclopedia sets at a special introductory price for a limited time; that the encyclopedia was offered to selected persons for a testimonial and a small introductory price and that if the customer bought now he would receive additional items free; and, through use of demonstration books with soft pliable backs, that books purchased would be bound accordingly.

COMPLAINT

Pursuant to the provsions 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 Parents' Magazine Enterprises, Inc., a corporation, and Parents' Magazine's Cultural Institute, Inc., a 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 Parents' Magazine Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 52 Vanderbilt Avenue in the City of New York, State of New York. Prior to July 1962, when its name was changed, said respondent was known as The Parents' Institute, Inc.

Respondent Parents' Magazine's Cultural Institute, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 52 Vanderbilt Avenue in the city of New York, State of New York. It is a wholly owned subsidiary of respondent Parents' Magazine Enterprises, Inc., and, since its organization in August 1962, has carried on and is still carrying on the agency for sales formerly conducted by a previously existing division of Parents' Magazine Enterprises, Inc., namely, The New Wonder World, and conducted still prior thereto by The New Wonder World, Inc., a previously existing and wholly owned corporate subsidiary of the corporation then known as The Parents' Institute, Inc., and now known as Parents' Enterprises, Inc.

PAR. 2. In the course and conduct of their business, as aforesaid, respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of encyclopedia sets, research services, other books and various magazines through the medium of house-to-house salesmen to the public.

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

PAR. 4. In the course and conduct of their business, as aforesaid, and for the purpose of inducing the purchase of their said products and services, respondents, through their salesmen and/or representatives, have made many statements and representations and employed various tactics concerning respondents' business methods and other matters. Among and typical of the tactics employed and the statements and representations made are the following:

1. That respondents' encyclopedia salesmen were engaged in conducting surveys for educational and other purposes;

2. Respondents used a printed questionnaire, purportedly in connection with their "surveys," in such a manner as to gain entrance into the prospective customer's home;

3. That the aforesaid salesmen or representatives were teachers or had some connection with a school or educational system and that his or her visit was being made in that capacity;

4. That the price at which certain encyclopedia sets were being offered was an introductory or reduced price and that in the near future the set could be purchased only at a greatly increased price;

5. That the New Wonder World encyclopedia set of books could be had by prospective customers in exchange for a testimonial and a small introductory price of the set;

6. That special offers were being made to certain selected persons;

7. That if the prospective customer would buy the encyclopedia set *now*, such purchaser would receive certain additional items free;

8. Used books with soft pliable backs for demonstration and sales purposes, implying thereby that the books received by the purchaser would be bound accordingly.

PAR. 5. In truth and in fact:

1. Respondents' encyclopedia salesmen are not now nor have they ever been engaged in making surveys of any kind.

2. The aforementioned printed questionnaire was not used in making a survey of any kind but was used solely for the purpose of gaining entrance into prospects' homes with the ultimate objective of making a sale of respondents' publications and services.

3. The aforesaid salesmen and/or representatives were not necessarily teachers or representatives of a school or educational system but were essentially and primarily salesmen whose sole objective was to sell respondents' publications and services.

4. The price of said encyclopedia sets, quoted to prospective purchasers was not an introductory or reduced price but was the price at which such sets had been regularly and customarily sold;

5. The New Wonder World encyclopedia sets of books were not obtainable in exchange for a testimonial in regard thereto, plus a small introductory price of the set, but were in fact obtainable only for the regular price thereof;

6. Special offers were not made to selected persons. On the contrary, the offers were made to all prospects indiscriminately;

7. The "free" items offered to prospective purchasers who would "buy *now*" were not free but were included in the purchase price of the publications and services offered.

8. The books purchased and received from respondents were not bound with soft pliable backs as were the samples used in making sales but were bound with rigid covers.

Therefore the statements, representations and tactics employed by respondents, as set forth in Paragraph Four hereof, were and are false, misleading and deceptive.

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 publications and services of the same general kind and nature as that sold by respondents.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

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, Parents' Magazine Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 52 Vanderbilt Avenue in the city of New York, State of New York.

Respondent, Parents' Magazine's Cultural Institute, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 52 Vanderbilt Avenue in the city of New York, State of New York. It is a wholly owned subsidiary of respondent Parents' Magazine Enterprises, Inc.

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 respondent Parents' Magazine Enterprises, Inc., a corporation, and its officers, and respondent Parents' Magazine's Cultural Institute, Inc., a corporation, and its officers, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of publications and services, or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication;

(a) That respondents' encyclopedia sales representatives are engaged in making surveys for any purpose or that the purpose of the call or interview by respondents' encyclopedia sales representatives relates to other than the sale of books, other merchandise or services; or that any other of respondents' sales representatives are engaged in making a survey for any purpose unless respondents establish that such is the fact;

(b) That respondents' salesmen or representatives are teachers or have any connection with a school or educational institution or system, when such is not the fact;

(c) That the price at which any of their merchandise or services is offered for sale or sold is an introductory price or offer;

(d) That the price at which respondents' merchandise or services are offered for sale is a reduced price unless such price is based on and is less than the price at which such books, merchandise or services are regularly and usually sold by respondents;

(e) That any of their merchandise or services are available in exchange for an endorsement, or for an endorsement plus some other consideration, unless such merchandise or service is in every instance furnished or made available as represented;

(f) That prospective purchasers of any merchandise or service sold by respondents are especially selected;

(g) That any item of merchandise or service is awarded or given free to purchasers.

2. Using fictitious questionnaires in connection with the sale of their publications and services.

3. Using book samples for demonstration purposes, the covers of which are unlike and superior to the books actually sold without clearly disclosing such fact to the purchasers of the publications and services.

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

INTERNATIONAL MILLING COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECS. 2(a) AND (e) OF THE CLAYTON ACT

Docket 7136. Complaint, Apr. 30, 1958—Decision, Nov. 6, 1963

Order dismissing, for lack of proof to sustain the allegations, complaint charging a Minneapolis miller and processor of flour, feed and cereal by-products—the third largest company in the industry—with discriminating in price and demonstration services in violation of Secs. 2(a) and (e) of the Clayton Act, between different purchasers of its "family flour" in an area comprising some 24 counties in eastern North Carolina.

COMPLAINT

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

COUNT I

Charging violation of subsection (a) of Section 2 of the Clayton Act, as amended, the Commission alleges:

PARAGRAPH 1. International Milling Company, respondent herein, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its general offices and principal place of business located in the Investors Building, Minneapolis, Minnesota.

PAR. 2. Respondent is engaged principally in the business of milling, processing, distributing and selling flour, feed and cereal by-products.

A substantial portion of respondent's business consists of the production, processing, distribution and sale of "family flour," both self-rising and plain phosphated.

The term "family flour," as used herein, denotes flour that is prepared for sale and sold generally in convenient size packages for domestic use in the home.

Respondent's family flour is marketed under a number of trade names, including "Robin Hood," "Silver Mist" and "Town Crier." Respondent sells family flour to wholesalers for resale to retailers and in some instances it sells through its own salesmen direct to retailers, including chain stores, making deliveries from its production mills or from warehouses.

Respondent's assets as of August 31, 1956, exceeded $86,000,000. Respondent owns and operates 17 flour mills located in nine states and has a production capacity in the United States of 7,170,000 pounds of flour daily. Between 1940 and 1957 the number of mills owned, operated and controlled by respondent, both in and outside the United States, increased from eight to twenty-nine. In 1947 respondent company was fourth in point of capacity among flour milling companies. In 1956 it became, and still is, the third largest company in said industry. The three largest milling companies now control in excess of 33 per cent of the combined daily production capacity of flour in this country. Respondent company, by reason thereof, has the capacity and is financially able to engage in the acts and practices hereinafter alleged, and to withstand losses or added costs incurred while planning and engaging in such acts and practices.

PAR. 3. International Milling Company, in the course and conduct of its business, has been and is now selling and distributing its family flour in a constant stream of commerce from the several states and places of manufacture to its customers and purchasers located in states other than the states of manufacture of said products, and there is now and has been for many years a constant current of trade in commerce, as "commerce" is defined in the Clayton Act, in said products between and among the various states of the United States.

PAR. 4. Respondent, in the course and conduct of its business, is now, and during the times mentioned herein has been, in substantial competition with others engaged in the manufacture, sale and distribution of family flour.

Many of respondent's customers are in competition with one another at their respective levels of trade.

PAR. 5. Respondent, in the course and conduct of its business, has discriminated in price between different purchasers of its family flour of like grade and quality by reducing its prices to its customers in certain geographical areas while at the same time maintaining and charging substantially higher prices to other of its customers outside such geographical areas.

One of the geographical areas utilized by respondent in its pattern of aggressive discrimination, and cited herein as being typical thereof, consists of substantially 24 counties in Eastern North Carolina. In this area, commencing in September 1956, and continuing for approximately two months thereafter, respondent substantially reduced its prices for Robin Hood self-rising family flour packaged in 5 and 25-pound bags. During this period, respondent reduced its wholesale price for the 5-pound package from 46.8¢ per bag, or $9.36 per cwt., to 31.5¢ per bag or $6.30 per cwt., or a reduction of 32.7 per cent. The wholesale price for the 25-pound bag was reduced from $1.84 per bag, or $7.36 per cwt. to $1.515 per bag or $6.06 per cwt., or a reduction of 17.7 per cent. During the entire time of this price reduction, respondent maintained in adjacent and other geographical areas the higher prices which had previously been charged in the price reduction area.

To make effective this reduction in price respondent caused the bags containing the said flour to be imprinted prominently with retail consumer prices, 39¢ for the 5-pound bag of Robin Hood family flour, and $1.79 for the 25-pound bag. The imprinting of the retail prices to consumers rendered impossible, from a practical standpoint, the retailer charging a higher price than that which had been imprinted by respondent on its family flour bags, and the retailer's margin of profit on said flour was such as to discourage said retailer from selling said flour at prices lower than those imprinted on the bags.

During the periods and throughout the areas wherein respondent discriminated in prices, and pursuant thereto reduced the prices of its family flour, purchasers thereof were encouraged to buy and stock, and in many instances did buy and stock, substantial quantities of such flour at respondent's reduced prices, thereby foreclosing such portion of the family flour market from respondent's competitors, including the local and regional millers, during and subsequent to the time of such price reduction. Said discriminations

780-018—69——72

in price have had a substantial tendency to cause respondent's competitors to lose flour business in these areas or to make sales therein at no profit or at a loss.

PAR. 6. Respondent, in the course and conduct of its business, has also discriminated and is now discriminating in price between different purchasers of its family flour of like grade and quality by selling said flour to some of its retail customers at higher prices than are charged to other competing retailers.

In a number of trading areas, of which the cities of Moultrie, Sylvester, Nashville and Fitzgerald, Georgia, are typical, respondent has discriminated in price in the sale of family flour of like grade and quality by granting to certain favored retailer customers discounts, rebates or free packages of flour with certain size purchases, while at the same time withholding, denying and refusing to grant such price concessions to other retailer customers who compete with the favored customers in the resale of said products. Thus, those retail customers who do not receive the benefit of said price concessions are required to pay higher and less favorable net prices than their competitors for family flour of like grade and quality.

PAR. 7. The effect of respondent's discriminations in price, as above alleged, has been, or may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged or in the line of commerce in which its customers are engaged or to injure, destroy, or prevent competition with respondent or to injure, destroy, or prevent competition with respondent's customers.

PAR. 8. The foregoing alleged discriminations in price by respondent International Milling Company are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

Charging violation of subsection (e) of Section 2 of the Clayton Act, as amended, the Commission alleges:

PAR. 9. Paragraphs One through Four of Count I hereof are hereby set forth by reference and made a part of this Count as fully and with the same effect as if contained herein verbatim.

PAR. 10. In the course and conduct of its business in commerce; respondent International Milling Company has discriminated in favor of some of its purchasers, and against other of its competing purchasers, who buy respondent's family flour for resale, by contracting to furnish or by furnishing or by contributing to the furnishing of services or facilities connected with the handling, sale or offering for sale of such flour so purchased upon terms not accorded to all competing purchasers on proportionally equal terms.

As illustrative of such practices, respondent, from time to time, has furnished certain of its retailer customers the services of one or more salesmen or demonstrators for the purpose of rendering assistance to favored retailers in the sale of respondent's brand of flour. Said salesmen or demonstrators carry out promotions in the stores of such favored retailers, in the course of which they hold contests or drawings or give away to consumers premiums, merchandise or gifts supplied for such occasions by respondent. The foregoing services and facilities have not been made available nor accorded to competing retailers on proportionally equal terms.

PAR. 11. The acts and practices as alleged in Paragraphs Nine and Ten above are in violation of subsection (e) of Section 2 of the aforesaid Clayton Act, as amended.

Mr. Peter J. Dias and *Mr. Stanley M. Lipnick*, for the Commission.

Donovan Leisure Newton & Irvine, New York, N.Y., by *Mr. Walter R. Mansfield* and *Mr. Donald L. Crowley*, for the respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

July 8, 1963

1. The respondent, International Milling Company, is charged in the Commission's complaint with violating Sections 2(a) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13). Hearings have been held at which evidence both in support of and in opposition to the complaint was received. Proposed findings and conclusions have been submitted by the parties, and the case is now before the hearing examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected as not material or as not warranted by the evidence.

2. Respondent is a Delaware corporation, with its general offices and principal place of business in Minneapolis, Minnesota. It is engaged in the business of milling, processing, and selling flour, feed, and cereals. It is a large enterprise, being probably the third largest in the industry. It owns, operates, or controls some 22 manufacturing plants located in some 9 states of the United States and in Canada.

3. There is no issue in the present proceeding as to jurisdiction. Respondent is engaged in commerce as that term is defined in the Clayton Act, and the particular transactions which constitute the subject matter of the proceeding were likewise in commerce within the meaning of the Act.

4. The specific commodity here involved is "family flour;" that is, flour manufactured, packaged, and sold for use in the home, as distinguished from flour used by commercial baking establishments. Family flour is usually packaged in 2, 5, 10, or 25-pound bags. The bags themselves are usually made of specially processed paper, although as will be seen later, not infrequently cloth bags are used. Almost invariably family flour reaches the consumer through retail grocery stores or supermarkets. The retail grocer usually obtains his flour from a wholesaler, except in the case of large retailers or chains which may buy from the manufacturer direct.

5. The Commission's complaint is in two counts. Count I charges "area" price discrimination by respondent in violation of Section 2(a) of the Clayton Act as amended. Count II charges that respondent has violated Section 2(e) of the Act by furnishing to some of its retailer customers salesmen or demonstrators for the purpose of conducting sales or promotions in the stores of such retailers, and that such services or facilities have not been made available by respondent to competing retailers on proportionally equal terms.

6. Upon motion of respondent at the conclusion of the Commission's case-in-chief, Count II of the complaint was dismissed by the hearing examiner by order dated December 5, 1960, on the ground that a prima facie case in support of that count had not been established.

7. In connection with Count I, attention should be called to the fact that there is no substantial evidence supporting Paragraph Six of that count, which charges price discrimination by respondent among certain of its competing retailer customers, with consequent injury to the nonfavored retailers. It was recognized by Commission counsel that this charge had not been sustained, and respondent was informed by the hearing examiner that no evidence need be offered in defense of the charge (Tr. 2310-11).

8. Thus the case resolves itself into an area price discrimination case in which the only competitive injury charged is in the "primary" line of commerce, the line in which respondent itself is engaged; that is, the only persons alleged to have been injured are respondent's own competitors.

9. The area involved is a part of North Carolina, comprising some 24 counties in the eastern part of that state. A map showing the area in detail appears in the record as Commission Exhibit 26. This area is a part of respondent's Southeastern Division, which has its headquarters in Atlanta, Georgia.

10. For some three years immediately preceding 1956, respondent's volume of business in the Southeastern Division, and particularly in eastern North Carolina, had been on the decline. In 1955 Mr. George W. Blair of respondent's home office organization in Minneapolis was appointed Sales Manager of the Southeastern Division. After conferences between Mr. Blair and Mr. John T. Lynch, the company's General Sales Manager, it was decided to make a major change in the company's method of distribution. Prior to that time it had been the policy of the company to sell to only one wholesaler in a given territory. This proved to be unsatisfactory for a number of reasons. One was that while respondent under its policy was bound to the wholesaler, the wholesaler was in no sense bound to respondent. The wholesaler frequently handled other flours which competed with respondent's, and also frequently the wholesaler pushed such competing flours to the neglect of respondent's. It was also found that many wholesalers were failing to realize the sales potential in their respective territories, making little or no effort to sell some of the more important retailers in the territory.

11. Under the new policy, which is still in effect, respondent sells as many wholesalers as it can, despite the fact that the sales territories of the wholesalers may overlap.

12. The brand of family flour sold by respondent in eastern North Carolina is "Robin Hood." This is what is known in the trade as a "premium" or high grade flour. During the spring and summer of 1956 respondent's sales of this flour in eastern North Carolina had declined, and there was a very sharp decline in June and July 1956 as compared with the same months in 1955. The exact figures are:

	1955	1956
June	4319 cwts.	2595 cwts.
July	4215 cwts.	2818 cwts.

(Tr. 868)

13. This decline in sales was attributed by respondent's executives not only to lower prices, as such, which were then prevailing on certain competing flours in that area, but also to the prevalence of special deals and promotions on competing flours throughout the area. These deals were almost innumerable and of almost unlimited variety.

They included "free goods" such as 5 pounds of flour or sugar free with each 25-pound bag of flour purchased; premiums given with or actually packed in the sack of flour, such as silverware, chinaware, mixing bowls, steak knives, etc.; "pillow case bags," that is, flour packed in cloth bags which could be used as pillow cases; television sets and charcoal grills given to a wholesaler or retailer who purchased a stated amount of flour.

14. In an effort to meet this competitive situation and regain its lost sales volume in the eastern North Carolina area, respondent decided to put on a special promotion of its Robin Hood flour in that area. In the latter part of September 1956 respondent reduced the wholesale price of its 5-pound bag from 46.8 cents per bag or $9.36 per hundredweight to 31.5 cents per bag or $6.30 per hundredweight. The wholesale price of the 25-pound bag was reduced from $1.84 per bag or $7.36 per hundredweight to $1.515 per bag or $6.06 per hundredweight.

15. The first shipments of the lower priced flour were made on September 22, 1956. As seven to ten days were required for the flour to move from respondent's mills at Greenville, Texas, or Salina, Kansas, to the wholesaler, the flour did not reach the retailer until at least October 1, 1956. The promotion was planned to last and did in fact last only about eight weeks. By December 1, 1956, the reduced prices were no longer in effect.

16. Respondent also limited the quantity of flour which would be sold at the reduced prices. The maximum amount contemplated was 20,000 hundredweights, and that was in fact the approximate amount shipped. The promotion appears not to have been accompanied by any special advertising campaign; during the period respondent kept within its customary advertising budget for that area.

17. The bags of flour were "pre-marked" or "pre-priced" by respondent to show the prices at which they would be sold by the retailer to the consumer. Allowing for the customary mark-up of the wholesaler and the retailer, respondent imprinted on the 5-pound bag a price of 39¢ and on the 25-pound bag a price of $1.79. The purpose in imprinting the retail prices on the bags was to make sure the consumer, rather than the wholesaler or the retailer, would receive the benefit of the price reduction.

18. At about the time respondent's pre-marked bags appeared in the grocery stores, similarly marked bags of competing flours also appeared. Harris Milling Company's "Cream" and "Famo" brands in 25-pound bags were priced at $1.79, and New Era Milling Company's "Polar Bear" was at $1.80. It appears that the 25-pound

bag was by far the most popular size in the eastern North Carolina area.

19. It is impossible to determine from the record whether respondent's or its competitors' pre-marked bags appeared on the market first. Actually it seems that all of them appeared practically simultaneously.

20. However, long before the appearance of any of the pre-marked bags, premium flours competitive with respondent's Robin Hood were being offered in the grocery stores in that area at $1.79 or lower for 25 pounds. This was a rather frequent occurrence during the spring and summer of 1956. And during this same period Valley City Milling Company, Portland, Michigan, was selling its "Roller Champion," a premium flour widely known in the eastern North Carolina area, under a free goods deal, giving 5 pounds of flour or sugar free with each 25-pound bag of flour purchased.

21. It is undisputed that during the period respondent's reduced prices were in effect in the eastern North Carolina area respondent was selling identical flour (Robin Hood) at substantially higher prices in other market areas in its Southeastern Division.

22. Two defenses are asserted by respondent to the proceeding. It is urged, first, that the record fails to establish any substantial injury to competition or any reasonable probability thereof; and, second, that respondent's lower prices in the eastern North Carolina area were made in good faith to meet equally low prices of competitors.

23. There is no doubt that respondent's sales in the area increased substantially during the price reduction period. The following table, submitted by Commission counsel, shows respondent's shipments of family flour, by months and by hundredweights, into eastern North Carolina during the years 1955-1959:

	1955	1956	1957	1958	1959
Jan	3, 394	4, 932	2, 804	7, 907	7, 401
Feb	4, 679	6, 312	6, 220	5, 278	5, 009
March	7, 138	2, 656	5, 331	4, 891	3, 229
April	2, 430	4, 402	8, 165	4, 192	4, 224
May	4, 059	4, 606	2, 800	7, 199	5, 385
June	4, 319	2, 595	8, 425	5, 051	3, 823
July	3, 400	2, 805	6, 672	4, 983	5, 025
Aug	6, 230	6, 400	3, 612	2, 087	4, 129
Sept	1, 800	9, 204	4, 828	3, 045	5, 141
Oct	3, 400	7, 112	4, 212	4, 057	4, 421
Nov	6, 833	6, 478	2, 000	2, 372	1, 180
Dec	4, 200	4, 401	3, 006	3, 100	4, 225
Total	51, 882	61, 903	58, 075	54, 162	53, 192

(Page 15, Commission Counsel's Proposed Findings.)

It will be observed that the shipments in the months of September and October 1956 were very much larger than in the corresponding months of 1955, and that the total shipments in 1956 exceeded by some 10,000 hundredweights, or approximately 20 per cent, the total for 1955.

24. The table, however, would seem to raise serious doubt as to whether any substantial permanent advantage accured to respondent as a result of the price reduction. After 1956, total sales in the area decreased steadily, those during 1958 and 1959 being only slightly in excess of the low year 1955.

25. Other figures, prepared from the above table and submitted by Commission counsel, show respondent's total sales, in hundredweights, in the area for the months of September, October, and November during the years 1955-1959:

1955	1956	1957	1958	1959
12,033	22,794	11,040	9,474	10,742

(Page 15, Commission Counsel's Proposed Findings.)

While this table shows a great increase in respondent's sales during the price reduction period in 1956, it also seems to cast even greater doubt than did the former table upon the question of any permanent gain to respondent. The totals for the three months in question in 1957, 1958, and 1959 are all below those for the same months in 1955.

26. All of the witnesses for both parties testifying on the point agree that during the last ten years or so there has been a decline in the sale of family flour in the eastern North Carolina area. The witnesses attribute the decline largely to the increasing popularity of "canned" biscuits, "brown and serve" rolls, cake mixes, etc.

27. As already indicated, the family flour market in eastern North Carolina is highly competitive. There are at least 28 millers selling in the area, their different brands of flour totaling some 120 brands. Some of the brands, such as those of General Mills and Pillsbury, are nationally advertised.

28. Data on sales in the area of the respective millers, or some of them, appear in the proposed findings filed by counsel. Some of the data, at the request of the various companies affected, were received in camera, and in such cases counsel have sought as best they could to preserve the confidential status of the figures. The hearing examiner will do likewise.

(The data appear on pages 14-31 of Commission counsel's proposed findings and pages 42-84, Volume I of respondent's proposed findings and particularly pages 1-19, Volume II of respondent's proposals, which includes, among other things, the in camera material.)

29. Respondent is not the leading seller in the area. Harris Milling Company, Owosso, Michigan, with its Cream and Famo brands sells about twice the amount of family flour sold by respondent in that area. While Harris sold less in 1956 than in 1955 the decrease was insubstantial in comparison with the total amounts for the years. (Pages 1, 4, Volume II, Respondent's Proposed Findings.)

30. Valley City Milling Company, Portland, Michigan, also sells much more family flour in eastern North Carolina than respondent. Valley City's principal brand, Roller Champion, is widely known in the area. Valley City's sales in the area appear to have increased slightly in 1956 over 1955 but to have declined in 1957 (Pages 1, 4-5, Volume II, Respondent's Proposed Findings).

31. In volume of total sales of all products throughout the country respondent is outranked by both General Mills and Pillsbury. However, both sold less family flour in eastern North Carolina in 1955 and 1956 than respondent. And both sold less in 1956 than in 1955 (Pages 1, 5-7, Volume II, Respondent's Proposed Findings).

32. Roanoke City Mills, Roanoke, Virginia, sells family flour in Virginia, West Virginia, North Carolina, and South Carolina. Its most important market in point of volume is the local market within 100 miles of Roanoke. In the market area here involved (eastern North Carolina), its approximate sales in 1955 and 1956, in hundredweights, were:

	1955	1956		1955	1956
Jan	5,265	4,786	Aug	6,093	5,134
Feb	4,756	5,101	Sept	5,755	2,902
March	5,677	4,487	Oct	4,232	3,885
April	7,018	5,564	Nov	4,344	3,333
May	6,290	5,183	Dec	4,975	1,728
June	5,872	3,802			
July	4,726	5,332	Total	65,003	51,237

(Page 17, Commission Counsel's Proposed Findings.)

It will be observed that Roanoke City's sales during September-December 1956 were much less than sales during the same months in 1955. However, during most of the earlier months in 1956 (before respondent's price reduction) sales were also below the same months in 1955.

33. Reference has already been made to a price reduction on "Polar Bear" flour during the same period respondent's price reduction was in effect. This flour is a product of New Era Milling Company, Arkansas City, Kansas. New Era's total sales of the flour in eastern North Carolina during the years 1954-1957 were:

1954	15, 564 cwts.
1955	17, 076 cwts.
1956	18, 084 cwts.
1957	17, 009 cwts.

(Pages 1, 7–8, Volume II, Respondent's Proposed Findings.)

It will be observed that sales in 1956 were slightly higher than in 1955, and that 1957 was about the same as 1955.

34. The sales of Piedmont Mills, Lynchburg, Virginia, in eastern North Carolina during the years 1955 and 1956 were:

1955	40, 182. 25 cwts.
1956	38, 466. 41 cwts.

(Page 9, Volume II, Respondent's Proposed Findings.)

35. Sales of Page Milling Company, Luray, Virginia, in eastern North Carolina during 1955 and 1956, in hundred-weights, were:

	1955	1956		1955	1956
Jan.	2, 452	1, 280	Aug.	1, 630	1, 192
Feb.	1, 514	1, 542	Sept.	1, 339	900
March	1, 822	1, 450	Oct.	1, 400	1, 092
April	1, 745	1, 412	Nov.	1, 396	742
May	1, 493	904	Dec.	1, 288	506
June	1, 622	1, 200			
July	1, 330	1, 620	Total	19, 031	13, 840

(Page 27, Commission Counsel's Proposed Findings.)

It will be noted that there was a sharp drop in total sales in 1956 as compared with 1955. Here again, however, it appears that during most of the months in 1956 preceding respondent's reduced prices, Page was selling less than in 1955.

36. The data as to sales in eastern North Carolina of Statesville Flour Mills, Statesville, North Carolina, are in camera and therefore will not be set out there. The sales in 1955 and 1956 were approximately the same. In 1957 there was a substantial increase. (Pages 2, 10–11, Volume II, Respondent's Proposed Findings.)

37. Stevens and Company, Broadway, North Carolina, sells to retailers in the lower half of eastern North Carolina.

Its total sales in that area for the years 1955–1958 were:

1955	9, 938 cwts.
1956	11, 744 cwts.
1957	10, 356 cwts.
1958	11, 286 cwts.

(Pages 2, 14, Volume II, Respondent's Proposed Findings.)

38. North State Milling Company, Greensboro, North Carolina, had sales in eastern North Carolina during the years 1954–1958 as follows:

1954	7, 300 cwts.
1955	11, 550 cwts.
1956	12, 100 cwts.
1957	11, 650 cwts.
1958	12, 800 cwts.

(Pages 3, 15, Volume II, Respondent's Proposed Findings.)

39. Sales of W. A. Davis Milling Company, High Point, North Carolina, during the years 1954–1958 in eastern North Carolina were:

1954	20, 562 cwts.
1955	20, 218 cwts.
1956	18, 880 cwts.
1957	14, 098 cwts.
1958	17, 228 cwts.

(Pages 3, 16, Volume II, Respondent's Proposed Findings.)

40. Sales of McLamb Flour Mill, Dunn, North Carolina, during the years 1955–1957 in the area in question were:

1955	23, 000 cwts.
1956	19, 000 cwts.
1957	15, 000 cwts.

(Pages 3, 16–17, Volume II, Respondent's Proposed Findings.)

41. Lillington Roller Mills, Lillington, North Carolina, also had sales in the area during the years 1954–1958. The figures are in camera. It appears, however, that there has been a substantial increase each year since 1954. (Pages 3, 17, Volume II, Respondent's Proposed Findings.)

42. Sales of Broadway Roller Mills, Sanford, North Carolina, in the area were:

1955	19,642 cwts.
1956	19,110 cwts.
1957	18,566 cwts.

(Pages 3, 17, Volume II, Respondent's Proposed Findings.)

43. Shawnee Milling Company, Shawnee, Oklahoma, appears to have had only one customer in eastern North Carolina. While the

sales figures are in camera, sales during each of the years 1956, 1957, and 1958 were slightly higher than in 1955. (Pages 3, 18, Volume II, Respondent's Proposed Findings.)

44. Sales of Crown Mills, Portland, Oregon, in eastern North Carolina during the period July 1952 through June 1958 were:

July 1952 through March 1953	27,629 cwts.
July 1953 through March 1954	24,030 cwts.
July 8, 1954 through June 23, 1955	24,577 cwts.
July 1955 through June 1956	19,210 cwts.
July 1956 through June 6, 1957	10,400 cwts.
July 3, 1957 through June 19, 1958	10,500 cwts.

(Pages 3, 18–19, Volume II, Respondent's Proposed Findings.)

45. King Milling Company, Lowell, Michigan, had sales in eastern North Carolina during the years 1954–1958 as follows:

1954	8,079 cwts.
1955	5,866 cwts.
1956	5,564 cwts.
1957	3,997 cwts.
1958	1,813 cwts.

(Pages 3, 19, Volume II, Respondent's Proposed Findings.)

46. Alabama Flour Mills, Decatur, Alabama, had sales in eastern North Carolina during the years 1954–1958 as follows:

1954	1,219 cwts.
1955	1,219 cwts.
1956	1,293 cwts.
1957	1,006 cwts.
1958	1,691 cwts.

(Pages 2, 14, Volume II, Respondent's Proposed Findings.)

47. The foregoing review covers all of the data on competitors' sales which in the hearing examiner's opinion are sufficiently complete to have substantial probative value.

48. Does the evidence establish substantial injury to competition or a reasonable probability of such injury? In the examiner's opinion it does not. In the case of some of the competitors there was actually an increase in sales rather than a decrease. In other cases, sales remained about the same as formerly. In still other cases, where there was a decrease in sales during the last three months of 1956, there had also been decreases during the earlier months of the year, long before respondent's price reductions went into effect.

49. There is no indication here of any predatory intent on the part of respondent. Its price reductions were not directed at any

particular competitor. It was not seeking to cripple any competitor or drive him from the market. On the contrary, respondent appears merely to have been trying to regain lost sales volume, to protect itself in a highly competitive market.

50. Of particular significance is the complete absence of any indication that the "competitive health"—the ability to compete—of any competitor has been impaired. The most that can be said is that in the case of some competitors there was a temporary loss of sales. So far as the record discloses, all of respondent's competitors in the area are still in business and doing well.

The hearing examiner knows of no primary line case under the Robinson-Patman Act in which either the Commission or the courts have held that mere temporary diversion of sales from some competitors to another is sufficient to meet the criterion of competitive injury established by the statute. It is injury, and *substantial* injury, to competition with which the Act is concerned, not the mere temporary diversion of sales among competitors.

51. Another fatal deficiency in the record is its failure to establish any substantial causal relationship between respondent's price reductions and the loss of sales by competitors. Not only during the period of respondent's price reductions but for several months prior thereto there were many deals, promotions, and price reductions by various sellers throughout the eastern North Carolina market. There is no substantial basis for concluding that the loss of sales by some competitors was due to respondent's price reductions rather than to the deals and price reductions of other sellers.

52. It is therefore concluded that the complaint has not been sustained. First, because the record fails to establish substantial injury to competition or any reasonable probablity thereof; and second, because, assuming injury to competition, the record fails to establish that such injury was due to the acts of respondent.

53. The conclusions reached on these points render unnecessary any ruling on respondent's defense that its price reductions were made in good faith to meet equally low prices of competitors.

ORDER

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

Decision of the Commission

The hearing examiner on July 8, 1963 filed his initial decision and order dismissing the complaint. The effective date of the initial decision was stayed by the Commission's order of August 19, 1963; and

The Commission now having considered the matter and determined that the initial decision should be modified:

It is ordered, That the initial decision be modified by striking therefrom paragraphs 49 to 53 on pages 1136 and 1137 and substituting therefor the following:

49. The proof in the record is insufficient to sustain the allegations of the complaint.

It is further ordered, That the initial decision as modified be, and it hereby is, adopted as the decision of the Commission.

By the Commission. Commissioner Elman, being of the opinion that the case should not be placed on the Commission's own docket for review, concurs in the result.

IN THE MATTER OF

GADGET-OF-THE-MONTH CLUB, INC., ET AL.

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

Docket 7905. Complaint, May 20, 1960—Decision, Nov. 6, 1963

Order requiring a purported association and its promoters in North Hollywood, Calif., engaged in selling memberships and other ancillary services for members, including the evaluation of inventions (or "submissions") and the preparation of patent applications therefor, to cease—in lectures, through personal appearances on television and radio, promotional articles in newspapers and magazines, form letters and other promotional literature—use of numerous designations as to purported departments, functionaries and offices to create a false impression as to their nature and size and the benefits to be derived from membership; and making a variety of other false representations such as liaison with manufacturers, evaluation of members' submissions by an impartial body of experts, matching of members' cash outlays toward patenting submissions and otherwise underwriting the expense involved, maintenance of their own large patent department including a branch office in Washington, D. C., and their recognition as experts in the field of commercializing inventions by various associations of inventors and manufacturers.

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 Gadget-of-the-

Month Club, Inc., a corporation, and Don L. Davis and Mary Lou Moffitt Davis, 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 Gadget-of-the-Month Club, 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 11032 Magnolia Boulevard, North Hollywood, California. Respondents Don L. Davis and Mary Lou Moffitt Davis are President and Secretary-Treasurer, respectively, of corporate respondent. These individuals formulate, direct and control the policies, acts and practices of said corporation. The business address of the individual respondents is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for several years last past have been, engaged in the business of selling memberships in a purported association or organization owned and controlled by them and designated Gadget-of-the-Month Club, or "GMC", to members of the purchasing public located in various States of the United States and in various foreign countries. In the course and conduct of such business, respondents further offer for sale and sell certain other ancillary services for members of GMC, including the evaluation of members' inventions, hereinafter sometimes referred to as "submissions", and in preparing, or assisting their members in the preparation of, applications and other documents pertaining to the granting of letters patent on such submissions, by the United States Patent Office.

PAR. 3. The annual fee for membership in GMC has varied from time to time and is now $20. The registration fee for each submission by a member is now $5. With each submission the member must execute an instrument granting GMC an exclusive option, if it accepts and approves the submission, to represent the member in all matters relating to the invention, and further granting GMC a share of any royalties resulting from the commercial exploitation thereof. Respondents also require that membership be renewed or maintained upon their acceptance and approval of a submission until commercial exploitation has been achieved or, in some instances, until attempts to procure a patent thereon have been abandoned. Respondents also prepare and send without additional charge to their active members, and sell or distribute to non-members, certain publications containing articles of possible interest to inventors, including, but not necessarily limited to, a publication entitled "Inventor and Gadgeteer Newsletter".

PAR. 4. In the course and conduct of their business, advertising matter, contracts, publications, letters, checks, and other written or printed instruments and communications, including, but not limited to, legal documents prepared for the membership by or through respondents relating to the application and filing for the grant of letters patent by the United States Patent Office, models of inventions and drawings of inventions, and "progress reports" purporting to advise the members from time to time as to the status and prospects of their said applications, are, and have been, sent and received between respondents located in the State of California and members of the public located in various other States of the United States and in foreign countries. As a result of such transmission and receipt of said written or printed instruments, communications and other materials, respondents are, and have been, engaged in extensive commercial intercourse in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of the aforesaid business conducted by respondents has been, and is, substantial.

PAR. 5. Respondents' method of attracting the attention of the purchasing public to the fact of the existence of GMC, and to the manner in which it purports to be of service to the members thereof, is through the frequent appearance of one of the aforesaid officers of corporate respondent as a guest lecturer or entertainer before varied types of audiences; through personal appearances on television and radio; and through promotional articles in newspapers, magazines or other publications.

When inquiries from the public regarding GMC are received, respondents send various form letters, applications for membership, and pieces of promotional literature which purport to describe and explain the functions and services performed by GMC for the membership and the terms and conditions of membership. Other promotional literature is sent from time to time to the membership to induce them to maintain or renew their membership and to submit their ideas or inventions, together with registration fees, to respondents. On occasion, respondents or their employees have made oral statements to members or to prospective members of GMC, during which reference was made to GMC and its functions.

PAR. 6. Among and typical, but not necessarily limited to, the statements set forth in the form letters and other promotional material sent by respondents to members of the purchasing public, are the following:

(a) (signature) . . Chief, New Products Division; (signature) . . Director, Public Relations; (signature) . . Director, Membership Relations; (signature) . . Manufacturer's Service Division; (signature) . . Correspondence Coordinator; G.M.C. Board of Directors; Patent Department; Licensing Division; Patent Drafting Dept.; Chief of GMC's Washington Bureau; Technical Service Division; Manufacturers Licensing Division; Director of Operations; Executive Vice President.

(b) * * * Because manufacturers * * * are constantly communicating with GMC for new ideas * * * GMC acts as a screening agency for manufacturers * * * GMC works closely with prospective manufacturers * * *

(c) Accordingly GMC has been authorized by its Gadget Jury * * *. The Gadget Jury has recommended * * * Careful review and evaluation of your invention by the Gadget Jury finds that the submission meets GMC requirements. Accordingly, the Jury has voted * * *. Formal Gadget Jury Action * * * A Gadget Jury approval means that the * * * submission has been thoroughly evaluated and tested by the experts and found to be * * * possessing of strong commercial potential * * *

(d) GMC will pay * * * 50% of all patent costs * * *. In return for this, GMC requires that you pay it 10% of all money you receive from your patent. GMC is now offering financial assistance * * * by advancing up to one-half of the cost of the patent * * * GMC has an investment in your invention * * * GMC's participation in underwriting and advancing one-half of all patent preparation costs * * *

(e) * * * the Search Dispatch is then sent to GMC's Washington Bureau * * * and signed for only by the Chief of GMC's Washington Bureau * * * The Washington Search Report is then routed to GMC's patent experts * * * the report of GMC's patent experts is then routed to other major departments of GMC * * *

(f) GMC will pay * * * 100% of all promotion, publicity and exploitation costs * * *. Wherever and whenever possible, publicity through radio, television, newspapers and national magazines will be obtained * * *. Publicity services prepared by experts cost business organizations from $300 to $1,000 a month * * *. GMC's publicity service for its members is paid for by GMC * * *

(g) National Network of Manufacturers Representatives have just renewed their two-year agreement with GMC as their exclusive new product screening and evaluation consultants * * * GMC officials huddled with top executives of the National Association of Mail Order Companies * * * By special exclusive reciprocal arrangement, Inventor-Members of GMC are granted Associate Membership in: INVENTION INDUSTRY ASSOCIATION, INTERNATIONAL FEDERATION OF INVENTORS, ACADEMY OF INVENTION ARTS AND SCIENCES, NATIONAL ASSOCIATION OF INVENTORS * * * (the above is a partial list of organizations set forth on the GMC membership card).

PAR. 7. Through the use of the aforesaid statements, and others of the same import and meaning, including statements made orally by respondents, not set forth specifically herein, respondents have represented, directly or by implication:

(a) That their size, volume of business, capabilities, and the nature and extent of the services respondents perform for GMC members are such that the various designated departments and offices are bona fide organizational units or specialized divisions or functionaries of GMC.

(b) That GMC has and maintains such constant and extensive liaison with manufacturers as will assure the commercial exploitation of accepted submissions by such manufacturers, and to the pecuniary benefit of the members.

(c) That submissions by members will be objectively evaluated by an impartial body of experts in such fields as patenting, manufacturing, promoting and marketing and will be approved for acceptance by GMC only if there is a realistic prospect for the commercial exploitation of such submission by a manufacturer and to the pecuniary benefit of the member.

(d) That GMC makes a special and distinct cash outlay to match the contribution of the member toward the direct costs of patenting a submission, exclusive of the official filing fees which are to be borne entirely by the member.

(e) That GMC maintains a large departmentalized patent department, which includes a branch office in Washington, D.C., as a service to its members in getting their submissions patented.

(f) That GMC will underwrite the expense of paid advertising in all necessary forms of media in order to achieve the individual commercial exploitation of an accepted submission.

(g) That various bona fide, distinct organizations or associations of inventors or manufacturers have recognized GMC as expert in its field of commercializing inventions and that such groups and organizations accord privileges and prestige to GMC members or may be instrumental in achieving the commercial exploitation of inventions or ideas of the membership.

PAR. 8. Said statements and representations were and are false, misleading and deceptive. In truth and in fact:

(a) The use of the numerous designations as to purported departments, functionaries and offices of GMC are used by respondents to create a false impression as to the nature and size of GMC and as to the benefits to be derived from membership therein. Furthermore, such are not justified by respondents' size, volume of business, or capabilities; nor by the number or type of respondents' employees; nor by the nature of the work they perform for the members.

(b) Respondents neither have nor maintain any such degree of liaison with manufacturers as will assure the commercial exploitation of accepted submissions but, on the contrary, primarily attempt to interest certain manufacturers into paying a fee to respondents for locating or providing access to patented items with a commercial potential. Furthermore, such contracts as respondents have been able to develope have not resulted in the commercial exploitation, by such manufacturers, of accepted and approved submissions to the member's pecuniary benefit, in any appreciable number of instances, if at all.

(c) In the main, the submissions are approved by one of the officers of respondent corporation, sometimes assisted by one or more of respondents' employees, and not by an impartial body of experts; and whether there is or is not a realistic prospect for its commerical exploitation by a manufacturer. In most, if not all instances, such procedure has merely resulted in the payment to respondents of registration fees by the members with each submission, and is used to deter members from letting their memberships lapse since payment of the annual membership fee is required in order to keep the submission under purported consideration by GMC for commercial exploitation by manufacturers. Few, if any, of the submissions by the members have been commercially exploited by a manufacturer to the member's pecuniary benefit.

(d) Respondents make no special cash outlay for, and do not match, the financial investment of the members in the direct cost of patenting a submission. To the contrary, the member's contribution normally covers the entire estimated direct cost of patenting, whereas respondents merely absorb the indirect costs incidental to preparation of documents for procuring a patent, out of their usual general overhead expenses in the operation of their business, and, furthermore, some of respondents' contracts with members provide for the recoupment of amounts out of first royalties, in the event of commercial exploitation, to cover such expenditures by respondents.

(e) Much of the routine work in connection with applying for patents on the submissions of GMC members is performed by one of respondents' employees at their only office, or is done for respondents by outside firms on a contract basis.

Patent searches at the U.S. Patent Office are performed for respondents, when necessary, by an outside firm located in Washington, D.C. Respondents have no branch or regional offices.

(f) Respondents' promotional efforts for accepted submissions are frequently limited to prepared releases sent to newspapers in the member's locality, with no assurance of publication and with little realistic prospect that such, if published, would result in the commercial exploitation of such submission by prospective manufacturers. Furthermore, such prepared releases, if published, are designed by respondents to give additional publicity to GMC and to promote additional paid memberships therein.

(g) The various organizations and associations referred to by respondents are not bona fide or distinct groups or associations of inventors or manufacturers but are, to the contrary, the creatures of respondents or are subject to their domination or control. Accordingly, no realistic or valuable privileges or prestige results to GMC members by virtue of any purported recognition of GMC by such groups or associations, nor does the member have any additional opportunity for the commercial exploitation of his submission by virtue of such recognition by such organization or associations.

PAR. 9. In the conduct of their business, at all times mentioned herein, respondents have been and are in substantial competition in commerce with other corporations, firms and individuals likewise engaged in the sale of services to inventors, and in the sale and distribution of publications of interest to inventors, of the same general kind and nature as that sold by respondents.

PAR. 10. 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 and deceive 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 a substantial number of memberships in respondents' said Gadget-of-the-Month Club; into the renewal of paid memberships therein; into the payment of a substantial number of registration and other fees to respondents; and into the granting of substantial rights or interests, actual or prospective, and other forms of remuneration to respondents, by reason of such erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

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 and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. John J. McNally and *Mr. Dennis D. McFeely* for the Commission.

Mrs. Mary Lou Moffitt Davis, Hollywood, Calif., for hereself and the other respondents.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND PROPOSED ORDER*

JULY 31, 1963

The Federal Trade Commission issued its complaint against the above-named respondents on May 20, 1960, charging them with violating Section 5 of the Federal Trade Commission Act by means of a system of form letters and other promotional material distributed through the United States mails. The respondents are alleged to have deceived and misled the recipients of such communications as to Gadget-of-the-Month Club's size and internal organizational structure; its use of an impartial body of experts to objectively evaluate the commercial potential of inventions submitted; and their ability and capacity to achieve commercial success for inventions through contracts and association with manufacturers and others who would pay royalties to obtain the "Club members" discoveries.

In an initial decision filed July 13, 1962, the hearing examiner, although finding that the charges of the complaint had been sustained, ordered the complaint dismissed.

Counsel supporting the complaint filed an appeal from said initial decision and the Commission, after considering said appeal and the entire record, has determined that the appeal should be granted and that the initial decision should be set aside. The Commission now makes these findings as to the facts, conclusions drawn therefrom, and order to cease and desist, which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

*Proposed Final Order is omitted in printing since it was adopted as the Final Order of this Commission.

FINDINGS AS TO THE FACTS

1. Respondent Gadget-of-the-Month Club, also known as GMC, is a corporation organized under the laws of the State of California, with its principal office located in Los Angeles, California. The respondent corporation is currently operating and there is nothing contained in the record which indicates that it will be dissolved or that it will not continue to be a functioning entity.

2. Respondent Mary Lou Moffitt Davis is the president and majority stockholder of the respondent corporation and is and has been active in the day-to-day operations and management of the corporate respondent. Respondent, the late, Don L. Davis of whose death subsequent to the rendering of the initial decision we have been informed, was the president and a stockholder of the respondent corporation prior to his death.

3. By means of the use of the United States mails, in the course and conduct of their activities, respondents have been engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. GMC, according to a membership application it has used, describes itself as "the greatest gadget-gathering organization in the world, whose sole and exclusive business is the discovery, development, licensing, sampling, merchandising and marketing of new products of every nature, kind and description." (Commission Exhibit 4.)

5. GMC did no advertising in the formal sense but came to the attention of those who had dealings with it largely through the activities of Davis. He had made radio and television appearances extolling the vast sums of money waiting for those who could come up with the right gadgets. Several magazine articles had appeared concerning Davis and the Club's activities. He also did professional lecturing while traveling in different states, speaking before social and fraternal organizations. During these appearances no attempt was made to hide his affiliation with GMC. (Transcript 1259.) He was often introduced as its president or founder or chairman of the board; in his lectures, Davis would refer to the Club by way of introducing himself.

6. Persons who already were members were encouraged to bring in new members by the offer of prizes and awards. (Commission Exhibit 145.) In one instance, Davis took part in an inventor's show at which a booth was set up with signs that informed people that a drawing would be held, and all they need do to be eligible to

win was to fill in their name and address on a card and deposit it. In reality, all this was just another means for obtaining more prospects for Club membership. (Commission Exhibit 124.) Persons who had been members under a method of operation employed prior to 1955 were encouraged not to drop their memberships, but to continue under the Club's new method of operation. Davis' preoccupation with the subject of invention and gadgets was such as to cause him to use a business card identifying himself solely as "Mr. Gadgets." (Commission Exhibit 118.)

7. Once the initial contact was made the prospect would write a letter of inquiry to the Club or the Club would follow up on someone who had expressed some interest. There then would begin to flow a series of form letters between GMC and the member.

8. Applications for memberships were invariably accepted, the annual membership fee being $20. The next step was the submission of an invention or gadget. In making his submission, the member was required to fill out a printed form, which was in effect a contract. (Commission Exhibit 5.) One clause, particularly relevant to the Club's operation, recited:

> I * * * hereby give to GMC, Inc. in consideration of its expenditures of professional efforts, time, labor, funds and facilities in behalf of my invention without charges for such specialized services to me at this time, the exclusive option to my invention. If, as and when my product is accepted by GMC, Inc., I hereby give to them the exclusive right to represent me in all matters relating to my invention for the life of the patent or seventeen years, and agree to refer anyone interested in my invention to GMC, Inc.

No submission would be accepted without the completion of this contract form (Commission Exhibit 20) which also stated that, "I understand that my only financial obligation to GMC for its services in connection with the sale or license of my invention is the payment of 10% of the consideration I receive * * *." (Commission Exhibit 5.)

9. Once a submission had been received a form letter labeled a "Progress Report" informed the member that, "It is the majority opinion of the Gadget Jury that your submission has merit, has interesting possibilities, and warrants further consideration by GMC." (Commission Exhibits 65, 66; Respondents' Exhibits 23, 24.) There is testimony in the record that Davis told members that the Gadget Jury was composed of manufacturers, engineers, and other similar impartial experts who would objectively evaluate the merit of their submissions. The Gadget Jury was represented as being completely outside Davis' control in making its determinations. (Transcript

307–308.) However, Davis in his own testimony makes it perfectly clear that the jury never formally met; that he himself as the "foremost expert in the country on new ideas" looked the submission over; at times Mrs. Davis or someone else in the organization would be asked for an opinion, but nobody was ever engaged as an impartial technical consultant and requested to give an expert opinion. (Transcript 1436.) Mrs. Davis admitted that no written record was ever made of the determinations and decisions of this Gadget Jury. (Transcript 448.)

The record shows that the Gadget Jury was no more than Don L. Davis himself, who occasionally might request some special advice from some business contact. (Transcript 427–429.) However, in the sense that it had been represented to and understood by members, the Gadget Jury simply did not exist.

10. The form letter that brought the news that the Gadget Jury was of a favorable attitude also stated that, "This report must of necessity be a preliminary report at this time, because of the need of determining the patentability of your invention * * *. Accordingly, you are hereby requested to have a patent search made immediately * * *. P.S. If you wish to order the patent search thru GMC facilities at the special rate of $15, please advise * * *. Patent Attorneys generally run from $60. on up. Thus your GMC affiliation saves you $45 or more in patent search costs alone." (Respondents' Exhibit 23; see also Respondents' Exhibit 24; Commission Exhibits 67, 68.)

Members took advantage of this "bargain rate" when they were advised by a letter signed "Don L. Davis, Chairman of the Gadget Jury," that, "It is suggested that you authorize a patent search at once to determine the patentability of your submission." (Commission Exhibit 76.) It is relevant in connection with the patent search to point out that the Club in its letters represented that it had a Technical Services Division (Commission Exhibits 98, pp. 28, 31; 108, p. 22; Respondents' Exhibit 25), a Patent Department (Commission Exhibits 29, 79), and a Washington, D.C., bureau or office (Commission Exhibits 28, p. 2; 29; 108, p. 22).

11. Upon receiving authorization and the fee for the search, a form letter was sent to the member advising him:

This is what happens when you authorize a Patent Search on your invention:

1. GMC's New Product Division sends your complete file to GMC's Patent Department for checking.

2. The Patent Dept. checks your file and prepares a special Search Dispatch * * *.

* * * * * * *

4. A FINAL CHECK-OUT is made by the Technical Services Division to make certain that the SEARCH DISPATCH is in order and complete.

5. The Search Dispatch is then sent to GMC's Washington Bureau * * *.

6. The Search Dispatch is received and signed for ONLY by the Chief of GMC's Washington Bureau, who personally checks out and studies EACH and every individual search * * *.

7. The Chief of GMC's Washington Bureau then assigns each search to a member of his staff, briefs them on the invention and guides the investigation.

8. Each service is then individually reported on by the staff member to the Chief.

9. The Chief of the Washington Bureau, after carefully studying each report prepares a confidential report to GMC * * *. (Commission Exhibits 29, 150-B.)

All this was designed to create the impression that the Club maintained a full time staff of patent and technical experts. However, the record is clear that the fact was otherwise. Mrs. Davis testified that the patent searches ordered by members were carried out by firms who did such work on a fee basis for the Club, or anyone else who engaged their services. GMC never had a Washington Bureau, a Technical Services Department or a Patent Department. The patent searches were not ordered to be done on an individual basis; GMC waited until it had several authorizations from members; then it would forward them as a group to its contact in Washington, D.C. (Transcript 420–425.)

12. An examination of the many form letters and documents in the record that emanated from the Club leaves no doubt that they were designed to create the impression that GMC was a very large, multi-department organization, each with an individual designation and a sizable staff. (Commission Exhibit 26 "Membership Department"; *Id.* 44 "New Products Division"; *Id.* 45 "Manufacturers Service Division"; *Id.* 94, p. 6 "Public Relations Department"; *Id.* 111, p. 17 "Manufacturers Liaison"; Respondents' Exhibit 17–A "Research and Development Division"; *Id.* 17–B "Director of Client Relations".)

13. In one newsletter members were advised that GMC was comprised of 37 divisions and that they should "look for GMC to open a series of offices in Great Britain, Germany, France and Italy in 1958–59." (Commission Exhibit 156.) The Club's Los Angeles office was constantly referred to as its "world headquarters." (Commission Exhibits 4; 100, p. 21.) GMC's form letters were signed by different names, each purporting to be the head of the particular department from which the letter came. All this was designed to lead members to believe that many persons were serving their interests at GMC.

The record is quite clear as to the actual facts concerning GMC's internal organization and operations. Mrs. Davis testified that since

January 1, 1955, the Club has had only one to five employees at any given time. (Transcript 42–43.) One member stated that on a visit to Club headquarters he inquired after several of the persons who had signed letters that he had been receiving, only to be told that they were out of town; the only people he saw on his visit were Mr. and Mrs. Davis. (Transcript 681–682.)

Mrs. Davis testified that once a name had been established as being associated with a particular department, that name would continue to appear on all form letters purportedly sent by that department whether or not the name represented a GMC employee and whether or not the name even represented a living person. (Transcript 417–418.) Davis admitted that this method of conducting correspondence was his idea. (Transcript 1353.)

14. The next step in GMC's operation after the patent search was to notify the inventor that the Gadget Jury "has voted to approve the submission and has recommended that GMC elect to pick up its option and continue its efforts in behalf of the invention until it has been successfully commercialized." (Commission Exhibits 37; 39, p. 1; 99, p. 6.)

The Club then recommended that patent protection be applied for by the inventor, if this had not already been done. GMC represented that it would underwrite one-half the costs of preparing the patent applications. (Commission Exhibits 25, 31, 72, 79; Respondents' Exhibits 27, 28–A.) This was one of the things the Club had stressed as a chief advantage of membership in its original letters to prospective members. (Commission Exhibits 1, 2.)

15. To get the benefit of the Club's financial help in preparing the patent application, another form contract had to be executed (Respondents' Exhibits 28–B, 28–C; Commission Exhibit 50 is an earlier version of the same form.) To make clear this phase of the Club's operation some of the provisions of this contract are reproduced here:

> [I]t has been deemed advisable that the preparation and filing of a Utility Patent Application is desirable in order to protect my invention and to further the progress of the device towards attempted commercialization.
>
> * * * * * * *
>
> Progress Reports received from GMC advise me that we have arrived at the point in the processing of my invention where it is necessary to attempt to obtain patent protection. In order to expedite this phase of my invention, I hereby unconditionally agree to the following terms and conditions:
>
> (1) To expedite the preparation, filing and prosecution of my patent application, I hereby assign to GMC all of my rights in my invention with the specific understanding that this shall in no way interfere, alter, change or modify our existing basic agreement which provides for me to receive ninety percent

of all royalty revenue produced by the patent and GMC to receive ten percent of all royalty revenue produced by the patent.

(2) I agree to pay the sum of only $— to GMC in connection with the preparation of the initial patent application, * * * I agree that the full amount will be paid before the completed patent application is sent to me for approval and signature. I understand that GMC will pay all costs in excess of $—, in connection with the preparation of the initial patent application.

(3) I agree to pay to the U. S. Patent Office the official Filing Fee of $30.00 at the time my patent application is filed. Additionally, if, as and when my patent application is allowed, I agree to pay to the U.S. Patent Office the final filing fee of $30.00. I understand that these fees are paid directly to the U. S. Patent Office and that GMC will notify me when they are due and payable.

* * * * * * *

(6) I further agree that for GMC management services, technical and research assistance, and other valuable considerations given to me by GMC in connection with the appraisal, protection, promotion, exploitation and commercialization activities in behalf of my invention, I will pay and do by these present assign to GMC the first $— payable as royalties when, as and if my invention is licensed, sold or conveyed in any manner whereby royalties and/or revenue are received * * *. Thereafter, GMC shall receive only ten percent of the royalty revenue as per my original submission agreement, unless otherwise mutually agreed upon in writing.

(7) It is mutually agreed that all costs of any nature, kind or description relating to and incurred by GMC for the purpose of the sale, exploitation, licensing or promotion of my invention shall be paid for solely by GMC.

(8) It is mutually agreed that in addition to the specific charges hereinabove detailed, my only obligation to GMC in connection with my invention shall be to remain an Inventor-Client in good standing for the life of this agreement, which shall run concurrently with the life of any and all patents issued on this invention and/or its modifications or improvements." [Respondents' Exhibits 28B, 28C which bear the date 1960 and have the word "Member" eradicated and the word "Client" superimposed over it. The earlier version, Commission Exhibit 50, reads "Inventor-Member." It is noted that complaint issued against the respondents on May 20, 1960.]

The preparation of the patent applications was handled in the same manner as the patent searches already described. Transcript 425.)

The representation that the Club would pay 50 percent of the costs of preparing patent applications was a prime consideration in the minds of those who contemplated membership. GMC fully realized this for it reminded members who did not renew their annual memberships that "GMC regulations require that all members, who have inventions accepted on which GMC has advanced one-half of the patent costs, must be paid-up members in good standing." (Commission Exhibit 25; see also Commission Exhibits 3, 26.) One witness testified that he got the impression that if a membership was allowed to lapse, all inventions that had been submitted would be forfeited. (Transcript 631.)

17. Respondents submitted, during the course of the investigation of this case, a detailed statement of the amounts expended by the Club in three cases involving preparation of patent applications. (Commission Exhibit 119, pp. 1, 2.) A careful examination of these figures shows that the expenses covered by the Club were no more than clerical, administrative and mailing items that normally would be considered general office expenses.

The Club's alleged 50 percent contribution was arrived at by the respondents calculating their total costs of preparing the patent applications, allowing themselves a profit margin in so doing. This amount was then doubled and the member billed for half of the greater figure, the member being told the Club was absorbing the other half. Paragraph (6) of the contract contained a provision that the member agreed to pay all of his first royalties to the Club up to a certain amount; only thereafter would the Club get 10 percent as its commission. In testifying how the amount inserted in Paragraph (6) was arrived at, Mrs. Davis stated that it would be equal to the figure which was indicated in Paragraph (2) as the Club's contribution. (Transcript 1022.) Thus, the inventor was obligated to repay GMC its contribution, which in fact had never been expended, before he realized a penny by way of royalties. The respondents' representations were that GMC would bear all costs of promotion, publicity and commercial exploitation (Commission Exhibit 1); but Paragraph (6) of the contract recites these considerations as those for which the member assigns all his first royalties; thus what was represented to be free carried a high price tag.

18. In connection with its representations that GMC would assure members financial success by bringing their inventions to the attenion of manufacturers, the Club attemped to gain additional revenue from manufacturers while purporting to be operating solely in the interests of its inventor-members. A manufacturer was required to pay a $50 annual registration fee in order to become an "Associate Manufacturer Client"; this would entitle him to receive periodic reports of inventions members had submitted to GMC. (Commission Exhibit 112, p. 4.) Sometimes the manufacturer was told that "We believe that it is only fair to advise you that our principal business is screening new products of every nature, kind and description for manufacturers. Accordingly, there is a small service charge to cover our costs to compile and forward this information to you. Additionally, if we should be successful in submitting a new product that meets your approval, there is a finder's fee for our efforts. This fee is negotiable depending upon the individual circumstances." (Commission Exhibit 111, p. 10; see also *Id.* 111, p. 6.) Inventors were

never informed that the Club derived additional income from manufacturers. (Transcript 1300.)

The preeminent motivating factor leading an inventor to join GMC was the expectation of commercial success to be brought about by the Club being able to interest manufacturers in the inventions submitted. (See testimony of former Club members, Transcript 544, 594–B, 621, 649.) However, Mrs. Davis testified that it was the Club's position that GMC's total obligation was fulfilled as soon as the completed patent application was delivered to the member ready for filing in the Patent Office. (Transcript 1077, 1079.)

19. One of the Club's form letters that went out to members who had submissions pending stated that "the Manufacturers Licensing Division of GMC has your invention under sustained study and has presented the invention to a number of manufacturers, some of whom have indicated interest." (Commission Exhibit 39, p. 1; see also *Id.* 41, 42.) When members wrote to the Club inquiring as to the status of submissions, a form letter advised:

It is important to point out to you at this time that the task of licensing your submission is an expensive procedure. It requires countless man-hours in presentations, explanations, negotiations, to say nothing of the attendant expenses, which are substantial. It has been estimated that GMC's cost of obtaining a commitment from a manufacturer averages from two to five times the cost of obtaining patent protection. This cost is paid solely by GMC; not by the inventor * * *.

We are working conscientiously on your invention; *we will continue to do so, at our expense, until we succeed!* All we ask of you is patience and to keep your GMC membership on a current basis * * *. (Emphasis added.) (Commission Exhibit 57.)

20. Although GMC frequently advised members that, "As you know, nothing is ever going to happen to your invention unless we make it or cause it to happen." (Respondents' Exhibit 16.) Respondents nevertheless urged members to use their own efforts and contacts to secure manufacturing commitments. (Commission Exhibit 43.) In those cases in which an inventor did succeed in interesting a manufacturer, the Club demanded that it be compensated for the interest claimed in the invention before it would permit any agreement to be negotiated directly between the inventor and the manufacturer. Davis testified that once a submission was made, GMC became partners with the inventor. (Transcript 1311.)

21. The record is clear that GMC was not successful in achieving commercialization of a member's invention. There was only one instance of a licensing agreement signed by a manufacturer and in that case the respondents managed to convince the inventor that they had rendered such an extraordinary effort that the member agreed

that the Club's commission should be raised to 20 percent. (Commission Exhibit 107, pp. 20, 24.) Mrs. Davis testified that she was unable to state that any manufacturer had ever licensed an invention, ultimately produced it or paid a royalty. (Transcript 1065.) Davis, himself, admitted that the Club had not been successful in achieving licensing agreements for its members. (Transcript 1825.)

22. GMC informed its members that several allegedly bona fide organizations or associations of inventors or manufacturers bearing names such as "National Association of Mail Order Companies," "International Federation of Inventors" and "National Network of Manufacturers Representatives" recognized the Club as expert in the field of commercialization of inventions and that such groups and organizations accord membership privileges and other favors to GMC members and that they may be instrumental in achieving commercial exploitation of submissions. The record is clear that these groups existed in name only, having been created by Davis who was their head or executive director. They had no independence of Davis and seemed only to further the deception perpetrated by the Club upon its members.

23. The acts and practices of the respondents, as hereinabove set forth, have had and now have the tendency and capacity to mislead and deceive members of the public.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents. The aforesaid acts and practices of the respondents, as herein found, are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

OPINION OF THE COMMISSION

JULY 31, 1963

By ANDERSON, *Commissioner:*

The complaint in this case charging violations of Section 5 of the Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 52 Stat. 111 (1938), 15 U.S.C. § 45 (1958), was dismissed by the hearing examiner on the ground that the "* * * practices are *de minimis* and respondents' activities in commerce long prior to the complaint have been, and now are, so insubstantial that this proceeding is dismissed for lack of public interest." The matter is now before us for consideration of complaint counsel's appeal from the hearing examiner's initial decision. Rules of Practice §§ 4.20, 4.21, 4.22; 16 CFR. §§ 4.20, 4.21, 4.22 (Supp. 1963).

Respondent Gadget-of-the-Month Club, also known as GMC, is a California corporation, of which respondents the late Don L. Davis was and Mary Lou Moffitt Davis is a corporate officer and stockholder. GMC, according to a membership application it has used, describes itself as "the greatest gadget-gathering organization in the world, whose sole and exclusive business is the discovery, development, licensing, sampling, merchandising and marketing of new products of every nature, kind and description!"

Prior to 1955, GMC operated under a somewhat different format, but one which was much more literally described by the Club's name, *i.e.*, the selling of gadgets to members on a subscription basis. These activities caused the respondents to run afoul of the Federal Trade Commission Act with the result that a cease and desist order was entered by consent. *Gadget-of-the-Month Club, Inc.*, 52 F.T.C. 225 (1955). Subsequent to this order, GMC's sole declared function was to help inventors capitalize on their ideas.

The represented basic aim of the Club after 1955 was to cause inventors and people who had an idea for a gadget to become members with the ultimate goal being successful commercialization of their creations. In broad outline GMC was supposed to function as follows:

Upon payment of an Inventor-Membership fee of $20, the member became entitled to submit as many inventions as he wished provided that each such "submission" was accompanied by a $5 registration fee. The submission was then to be passed upon by the Club's impartial panel of experts, "The Gadget Jury," who were to render an objective opinion as to its commercial potential. If the invention was deemed to be of merit, then the Club was to get manufacturers interested in either using it or producing it for the market. As compensation for bringing inventor and manufacturer together, the Club was to receive 10 percent of the gross royalties received by the member.

The complaint alleges that by means of a system of form letters and other promotional material mailed to members and prospective members, the respondents have violated Section 5 by making representations that deceived and misled those to whom they were directed as to GMC's size and internal organizational structure; its use of an impartial body of experts to objectively evaluate the commercial potential of inventions submitted; and their ability and capacity to achieve commercial success for inventions through contacts and association with manufacturers and others who would pay royalties to obtain the rights to members' discoveries.

It is further alleged that the respondents made these representations to encourage the submission of applications for membership which required payment of the annual fee; and the submission of inventions, with the required registration fee; that members were encouraged to authorize patent searches to be instituted by the Club in connection with their invention submissions, which were conducted in a manner other than as represented; and that the Club falsely stated that they would put up half the cost of procuring patent protection and achieving the successful exploitation of members' inventions.

Counsel supporting the complaint in his brief argues that the hearing examiner erred in dismissing the complaint for lack of public interest, although the initial decision is quite clear that there has been a violation of the Act. Although respondents have not filed a cross-appeal, they have at all stages of these proceedings, including their appeal brief, made a two-pronged attack upon our jurisdiction, which we feel requires some discussion on our part.

Respondents urge first that GMC never engaged in "commerce" as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44 (1958), and additionally that all they ever did was to render "services" to those who engaged them. To convince us of this latter claim, respondents' correspondence forms were changed so that "inventor-members" became "inventor-clients", and "manufacturer-members" became "manufacturer-clients". The good faith of these changes in nomenclature is subject to doubt on our part since, as the hearing examiner points out, they were not instituted until four months after complaint had issued.

Over a half century has now expired since the Supreme Court of the United States first took the position that "[W]e cannot doubt that intercourse or communication between persons in different States, by means of correspondence through the mails, is commerce among the States within the meaning of the Constitution especially where, as here, such intercourse and communication really relates to matters of regular, continuous business and to the making of contracts and the transportation of books, papers, etc., appertaining to such business." *International Textbook Co.* v. *Pigg*, 217 U.S. 91, 107 (1910). The scope of federal power to regulate interstate commerce will never be such as to make it an easy matter to formulate and expound nice compact definitions into which all cases fit. See *United States* v. *South-Eastern Underwriters Association*, 322 U.S.

533, 550–551 (1944). In an economy such as ours with businessmen free to follow the dictates of their own ideas it is sure that new commercial practices unlike any that were known before are bound to make their presence felt. It is for just such unknown eventualities that the commerce power must be comprehensive enough to fit any new situation as it arises. *United States* v. *South-Eastern Underwriters Association*, *supra* at 551; *Wickard* v. *Filburn*, 317 U.S. 111, 120 (1942).

There is no question but that, "Interstate communication of a business nature, whatever the means of such communication is interstate commerce regulable by Congress under the Constitution." *Associated Press* v. *NLRB*, 301 U.S. 103, 128 (1937). In any case where, as here, "the mails and the instrumentalities of interstate commerce are vital to the functioning * * *" of a business enterprise, there can be no doubt of our jurisdiction under the Act. *North American Co.* v. *SEC*, 327 U.S. 686, 694–695 (1946).

In *Progress Tailoring Co.* v. *Federal Trade Commission*, 153 F. 2d 103 (7th Cir. 1946), circulars were sent by mail falsely representing that free clothing would be given to salesmen who accepted employment with the respondent. Our finding of jurisdiction was sustained, the court holding that the passage of information from one state to another was a transaction in interstate commerce. 153 F. 2d at 105. See also *Federal Trade Commission* v. *Civil Service Training Bureau*, 79 F. 2d 113, 114 (6th Cir. 1935). *Bernstein* v. *Federal Trade Commission*, 200 F. 2d 404 (9th Cir. 1952), involved a respondent in the business of seeking out absconding debtors. Solicitors traveled in several States seeking to get creditors to execute a contract assigning past due accounts for collection. These contracts were mailed to the respondent, who then used the mails to locate the defaulting debtors. The court had no trouble in reaching the conclusion that, "* * * The [respondent] regularly uses the channels of interstate communication. His activities, while not trade in the ordinary sense, are a species of commerce and constitute commerce within the meaning of that term as used in the Constitution and in the Federal Trade Commission Act." 200 F. 2d at 405. See *Rothschild* v. *Federal Trade Commission*, 200 F. 2d 39, 42 (7th Cir. 1952), *cert denied*, 345 U.S. 941 (1953), recognizing our jurisdiction when the mails are used as a conduit for deception.

The argument that all GMC was doing was rendering "services" has been urged upon this Commission many times. We rejected it in the case of physicians who maintained they were engaged only in the practice of medicine, *Frontier Asthma Company, Inc.*, 43 F.T.C. 117, 127 (1946); in the case of a travel agent who booked transportation, hotel accommodations and provided tourist services, *Century Travel Service, Inc.*, 43 F.T.C. 212 (1946); a cooperative marketing association, *Florida Citrus Mutual*, 53 F.T.C. 973, 1006–1007 (1957); and to complete a selection, which is by no means intended to be all-inclusive, a chain of dancing schools that sold lessons, *Arthur Murray, Inc.*, 57 F.T.C. 306 (1960).

We only find it necessary to say at this time that when the substantive components of a violation of the Federal Trade Commission Act are established before this Commission, respondents will not succeed in exculpating themselves by the simple expedient of attaching some particular label to their activities.

Turning to the initial decision, the complaint was, as we already have noted, dismissed by the hearing examiner. The initial decision is quite clear in its findings that the respondents are in violation of Section 5 and that we have jurisdiction; however, the hearing examiner finds that the respondents' practices are *de minimis* and that there is no present public interest to justify an order against them.

The maxim *De Minimis Non Curat Lex* as developed in the English common law and in our own jurisprudence has come to mean the law does not concern itself with trifles; that an injury is worthy of so little consideration that no action will lie; that an irregularity or infraction is so minor that the law will take no notice of it. Broom's Legal Maxims 100 (Byrne Ed. 1924); 1 Blackstone, Commentaries 1059 (Jones Ed. 1916).

As we have reviewed this record of over 1800 pages of testimony with its documentation of exhibits compiled in hearings held in three states, one cannot fail to get the impression that the activities of Gadget-of-the-Month Club were typified by deception, half-truths, innuendo, and unmistakable misrepresentation. Many of its members were led to believe that they could achieve riches from their inventions if only they would trust to GMC. Many of these people expended substantial amounts of money only to incur disappointment and disillusionment as a reward.

The hearing examiner relies on *Federal Trade Commission* v. *Klesner*, 280 U.S. 19 (1929), as authority for his finding that there is a lack of public interest. That case involved a controversy between two individuals as to who had the right to use a particular trade name; no greater public interest was involved than the possible confusion that might result from dealing with one firm when the business was intended to be given to the other. Mr. Justice Brandeis saw this as essentially a determination of private rights, commenting, "the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest." 280 U.S. at 28. Here we are not concerned with any two individuals, but with the entire public to whom GMC's representations appeal; thus *Klesner* is not controlling. There can be no question that a proceeding is in the public interest where that public may well have had nothing to do with the respondents if only they had not been deceived by their misrepresentations. *E.g., Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 217 (1933). Activities permeated with fraud and deception are exactly those that fall within the ambit of our responsibility. *Consolidated Book Publishers* v. *Federal Trade Commission*, 53 F. 2d 942, 945 (7th Cir. 1931), *cert. denied*, 286 U.S. 553 (1932); *International Art Co.* v. *Federal Trade Commission*, 109 F. 2d 393, 397 (7th Cir. 1940), *cert. denied*, 310 U.S. 632 (1940).

As additional indicia of the lack of public interest, the hearing examiner points out that GMC has experienced declining revenues, that the number of its members has fallen off and it cannot be considered a financial success. The Federal Trade Commission Act cannot be administered on a balance sheet bases. The respondent whose illegal activities result in great financial gain is no more in violation of the law than one whose perpetration of deceptive practices does not bring him as lucrative a reward.

What is in the public interest under the Act is in the final analysis for us to determine. *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 28 (1929). We cannot agree that the respondents' activities here were *de minimis*. *Cf. Baldwin Bracelet Corp.*, Docket No. 8316, p. 5 (October 2, 1962). To do so in the face of the Club's customer list comprised of well over 200 names and the Club's financial records showing receipts in 1957 and 1958 in the neighborhood of $20,000, would be to turn a blind eye to the statutory responsibility delegated to us by Congress. *Cf. Exposition Press, Inc.* v. *Federal Trade Commission*, 295 F. 2d 869, 873 (2d Cir. 1961).

We are informed of the death of the respondent Don L. Davis which occurred subsequent to the date of the handing down of the initial decision but prior to the date that this case was submitted to the Commission. We are not of the opinion that this factor requires us to dismiss this complaint. His death by no means destroys the viability of the corporate respondent. We have no way of knowing whether GMC will continue its operations. Mrs. Davis, subsequent to the death of her husband, filed a brief, as indeed she had every right to do, seeking to sustain the initial decision dismissing the complaint. We cannot characterize this as an empty gesture having no significance because the Club has now ceased to exist.

Examining the corporate structure of GMC we note that Mrs. Davis owns the controlling shares of stock and always did, her late husband having owned only a minority stock interest. She also testified she worked for GMC on a full-time basis and that she held the office of Secretary of the corporation. However, in signing her brief, Mrs. Davis indicates she is now President of GMC, thus replacing her husband in that capacity.

In the impersonal way the Club functioned by correspondence, it would be an easy matter to keep operating. In fact, if past procedures were followed, the signature of Don L. Davis would continue to appear on those letters which previously carried his signature. To predict Gadget-of-the-Month Club is now out of business in the face of all the indications we have just pointed out to the contrary requires an omniscience of which we are not possessed.

It is unnecessary for us to reach the question of whether GMC was engaged in competition with other organizations. Since the Wheeler-Lea Act, 52 Stat. 111 (1938), amended Section 5 of the Federal Trade Commission Act, whether or not such competition exists is irrelevant. *Wolf* v. *Federal Trade Commission*, 135 F. 2d 564, 567 (7th Cir. 1943); *Parke, Austin & Lipscomb* v. *Federal Trade Commission*, 142 F. 2d 437, 441 (2d Cir. 1944), *cert. denied*, 323 U.S. 753 (1944); *Progress Tailoring Co.* v. *Federal Trade Commission*, 153 F. 2d 103, 105 (7th Cir. 1946).

The hearing examiner, in determining that the allegations of the complaint had been completely established, made findings of fact which are not sufficient in the view that we take of this case. This, of course, is due to his conclusion that the complaint should be dismissed. Therefore, the initial decision will be set aside and we are entering our own findings of fact, conclusions and order to cease and desist in conformity with our opinion.

Commissioner Elman dissents.

Dissenting Opinion

JULY 31, 1963

By Elman, *Commissioner:*

The nub of this case, as I see it, is not whether the respondents are guilty or innocent of the violations charged, or whether a reviewing court would uphold the Commission's determination that issuance of the complaint was in the public interest, as required by Section 5(b) of the Federal Trade Commission Act, or whether the principle *de minimis non curat lex* is controlling here, but, rather, whether any useful purpose would be served by the entry of an order. The Commission ought not issue orders to cease and desist in cases which have, practically speaking, become moot. On the contrary, the Commission, in its dual role as complainant and adjudicator, can and should terminate a proceeding whenever it appears that an order would only be a paper statistic. See, e.g., *Argus Cameras, Inc.*, 51 F.T.C. 405; *Bell & Howell Co.*, 54 F.T.C. 108.

The only persons active in the management of the Gadget-of-the Month Club (GMC) have been Don L. Davis and his wife, Mary Lou Moffitt Davis. Mr. Davis' role in GMC was described by the hearing examiner as follows: "His past activities had been manifold, some political, but most of them utterly indispensable to the development and maintenance of the business of GMC. Throughout the history of GMC Davis has always been the driving force of the organization, but it was clearly evident at the hearings that while he still was an ambitious dreamer and planner, he had lost all physical capacity and reserve mental force to carry on his activities, such as extensive travel, public speaking, and conferences with manufacturers and other business people, to say nothing of the strain of dealing with the fixations and other peculiarities usually found in would-be inventors whom he would necessarily have to interview." Elsewhere the hearing examiner noted: "Respondent Don L. Davis, who has at times referred to himself as 'Lucky' Davis or 'Mr. Gadget', has, among many other activities, been the promoter of the corporation and its chief contact with those members of the public who dealt with the corporation as members, clients, or otherwise." Mrs. Davis, to be sure, owned all but one share of the stock of GMC, but her role, in the hearing examiner's view, was "as the clerical and office worker of this husband-and-wife team, keeping the records, conducting the correspondence, and the like."

In short, according to the uncontradicted conclusion of the hearing examiner, Mr. Davis was the indispensable member of the husband-and-wife team constituting GMC—and he had become physically incapacitated. The hearing examiner's prescience regarding Mr. Davis' health was confirmed by the latter's death three months after the initial decision. The possibility that, notwithstanding Mr. Davis' death, GMC remains a viable entity capable of engaging in the practices which gave rise to the complaint in this case, seems to me most remote. In this connection, it is noteworthy that due to Mr. Davis' increasing ill health, membership in GMC dropped between 1956 and 1958 to the "vanishing point", in the words of the hearing examiner, who predicted that Mr. Davis' incapacity would "shortly result in a complete cessation of all activities of GMC." The income of GMC had by 1958 shrunk to the point at which "it could no longer be considered substantial by any standard," and so far as appears GMC presently holds no interests in valuable inventions.

But the question of GMC's present situation need not be left to conjecture. In my opinion, the Commission, rather than entering a final order at this time, should (1) request Mrs. Davis to submit an affidavit describing the extent of GMC's current activities, and her intentions for the future, and (2) if it appears from this affidavit that GMC is now and is likely to remain defunct, direct the Commission's Los Angeles Field Office to verify the facts set out in the affidavit. The course I suggest would not run afoul of the requirement of Section 7(d) of the Administrative Procedure Act that the agency, in making its decision, not go outside the record. The additional information sought pertains not to the adjudication of respondents' alleged violations, but to the proper exercise of the discretion of the Commission, in light of the facts bearing on the public interest, to continue or terminate the proceeding.

Final Order

NOVEMBER 6, 1963

The Commission, on July 31, 1963, having issued and thereafter served on the respondents its order affording the respondents an opportunity to file objections to a final order proposed by the Commission; and

The respondents, on September 16, 1963, having filed exceptions to the said proposed order; and

The Commission having determined that the exceptions filed by the respondents should be disallowed and that its proposed order should be adopted as the final order of the Commission:

It is ordered, That the following order to cease and desist be adopted as the final order of the Commission:

It is ordered, That respondents, Gadget-of-the-Month Club, Inc., a corporation, and its officers, and Mary Lou Moffitt Davis, individually, and as an officer of said corporation, and said respondents' representatives, agents, or employees, directly or through any corporate or other device, in connection with the offering for sale, or the sale of memberships in or subscriptions to any organization or service for inventors; or in soliciting for the sale, or the sale of memberships in or subscriptions to any organization or service for inventors; or in soliciting for the sale of services in connection with the patenting or marketing of inventions, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using fictitious names, job titles, or organizational designations or descriptions in connection with their business; or otherwise misrepresenting, directly or by implication, the nature or size of the corporation and the benefits to be derived from membership therein.

2. Representing, directly or by implication:

a. That they have been successful in achieving commercial exploitation of ideas or inventions submitted by their customers; or that they maintain close relationships or contacts with manufacturers or other prospective licensees of such ideas or inventions.

b. That an impartial or expert individual or group objectively evaluates and approves an idea or invention submitted by a customer before respondents will take steps to get patent protection thereon or to commercialize or market it; or that acceptance or approval will result only where there has been an expert or informed determination that such invention or idea is patentable or possesses a potential for commercial exploitation.

c. That they defray 50 percent, or any other amount not in accord with the facts, of the costs of patenting an idea or invention submitted by a member.

d. That they maintain branches in other cities, a patent department in Washington, D.C., that the corporate respondent corporation has numerous operating departments or divisions or is greater in size and organization than it actually is.

e. That they will pay for the advertising, or bear the costs of promotion, necessary to achieve commercial exploitation of accepted inventions or that publicity and promotional services will be performed to any extent not in accord with the facts.

f. That any group, organization, or association of inventors, manufacturers, or others, has recognized respondents as expert or successful in the field of commercializing inventions, or that any such will accord privileges or prestige to respondents' customers, or may be instrumental in achieving commercial exploitation of inventions or ideas of respondents' customers.

It is further ordered, That the complaint be, and it hereby is, dismissed as to deceased respondent Don L. Davis.

It is further ordered, That the initial decision be, and it hereby is, set aside.

It is further ordered, That the respondents, Gadget-of-the-Month-Club, Inc., and Mary Lou Moffitt Davis, shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist as set forth herein.

By the Commission, Commissioner Elman dissenting.

IN THE MATTER OF

CORO, INC., ET AL.

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

Docket 8346. Complaint, Apr. 5, 1961—Decision, Nov. 6, 1963

Order requiring New York City manufacturer and importers of costume jewelry, watches and other products, to cease representing falsely that fictitious and exaggerated price figures—set forth on catalog sheets distributed for insertion in jobbers' and retailers' catalogs and in their own catalogs—were the regular retail prices for their products in the trade areas concerned, and—by statements on the catalog insert sheets and in other advertisements—that their watches were "guaranteed in writing for one full year", when the so-called guarantee provided for payment of a service charge.

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 Coro, Inc., a corporation, and Gerald E. Rosenberger, Royal Marcher and Jerome H. Oppenheimer, 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 as follows:

PARAGRAPH 1. Respondent Coro, 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 place of business located at 47 West 34th Street, New York, New York.

Individual respondents Gerald E. Rosenberger, Royal Marcher, and Jerome H. Oppenheimer are officers of said corporate respondent and of its wholly owned subsidiary corporations. They participate in the formulation, direction and control of the acts and practices of said corporate respondent and its wholly owned subsidiaries. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now and for some time last past have been engaged in the manufacture, sale and distribution of costume jewelry, watches, and other products to retail stores and jobbers for resale to the public.

In the regular course and conduct of their said business, respondents cause, and have caused, said products, when sold to be transported to purchasers thereof located in various states of the United States other than the state in which such shipments originate.

Respondents 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. 3. In the course and conduct of their business respondents have engaged in the practice of using fictitious retail prices for their said costume jewelry, watches, and other products of various types sold under several trade names including but not limited to the following method:

Respondents distribute to jobbers and retailers, who sell by catalog, catalog sheets to be inserted in the catalogs of said jobbers and retailers. Said catalog sheets contain thereon pictures and descriptions of various types of costume jewelry, watches and other products with prices listed in connection therewith as the retail prices thereof. Respondents also distribute their own catalogs to jobbers and retailers, in which retail prices are set out.

Respondents by the aforesaid practices represented, and now represent, directly or by implication that the price figures so set forth and so used are the regular and usual retail prices for said costume jewelry, watches and other products in the trade area or areas where the representations are made, when in truth and in fact, the said figures are not the usual retail prices for said costume jewelry, watches and other products in the trade area or areas where the representations are made, but are fictitious and exaggerated prices.

By such acts and practices respondents place in the hands of retailers and jobbers means and instrumentalities by and through which they may deceive and mislead the purchasing public as to the usual and customary retail prices of said costume jewelry, watches and other products.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their watches respondents have caused to be printed on the catalog insert sheets, and in various other advertisements, the following statements: "guaranteed in writing for one full year", and "guaranteed imported Swiss movement" thereby representing that the said watches are unconditionally guaranteed.

PAR. 5. Said representation was and is false, misleading and deceptive. In truth and in fact the said watches were not, and are not, unconditionally guaranteed in that the so-called guarantee provides for a payment of a service charge. The terms, conditions and extent to which the said guarantee applies and the manner in which the guarantor will perform thereunder are not disclosed in respondents' catalog insert sheets or other advertising matter.

PAR. 6. Respondents in the course and conduct of their business have been, and are, in substantial competition in commerce with other corporations, firms and individuals likewise engaged in the sale of costume jewelry and watches.

PAR. 7. The aforesaid acts and practices of the respondents had, and now have, the capacity and tendency to mislead and deceive members of the purchasing public with respect to the usual and customary retail prices of their costume jewelry, watches and other products, and to mislead and deceive said members of the purchasing public as to the guarantee provided by respondents on their watches, and into the purchase of their said products as a result thereof. As a consequence thereof, trade has been unfairly diverted to respondents from their competitors and substantial injury has thereby been done, and is being done, to competition in commerce.

PAR. 8. 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. Garland S. Ferguson supporting the complaint.

Weil, Gotshal and Manges, New York, N.Y., by *Mr. Ira M. Millstein* and *Mr. Marshall C. Berger*, for respondents.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

JUNE 1, 1962

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the respondents on April 5, 1961, charging them with having engaged in unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of the Federal Trade Commission Act, by using fictitious retail prices for costume jewelry, watches and other products, and by misrepresenting that their watches are unconditionally guaranteed. After being served with the complaint, respondents appeared by counsel and filed answer denying generally the allegations of the complaint, but admitting certain factual allegations. In addition, respondents advanced as "Affirmative Defenses" allegations to the effect that their pricing practices were in accord with industry-wide practices as to which the Federal Trade Commission had acquiesced, and that the practices complained of had been discontinued before issuance of the complaint.

Although there is evidence that the pricing practices challenged in this proceeding are widespread, this constitutes no defense. No evidence was adduced to support the claim of Federal Trade Commission acquiescence in the practices. The so-called defense of pre-complaint discontinuance has been considered and rejected as a basis for dismissal of the complaint.

Pursuant to notice duly given, hearings were held November 20–21, 1961, December 5, 1961, and February 20, 1962, in New York, New York; Philadelphia, Pennsylvania; and Washington, D.C., before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding. At these hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint, which testimony and evidence were duly recorded and filed in the office of the Commission.

Both sides were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues.

At the close of the evidence in support of the complaint, counsel for respondents moved to dismiss the complaint as to the individual respondents and, pursuant to leave granted, memoranda were filed in support of and in opposition to this motion. At the final hearing in this matter, on February 20, 1962, the hearing examiner ruled that the complaint should be dismissed as to Royal Marcher, both individually and as an officer of the corporation. As to Gerald E. Rosenberger and Jerome H. Oppenheimer, the examiner ruled that the complaint should be dismissed against them in their individual capacities but reserved decision as to dismissal in their capacities as officers of the respondent corporation.

The orders of dismissal entered on the record are hereby confirmed and taken into account in this initial decision. As more fully set forth below, the complaint is also being dismissed as to respondents Rosenberger and Oppenheimer in their official capacities, except to the extent that, as corporate officers, they are bound by the order being entered against respondent Coro.

Proposed findings of fact and conclusions of law and a proposed form of order, together with supporting briefs, were filed at the conclusion of all of the evidence by counsel supporting the complaint and counsel for respondents, and a reply brief also was filed on behalf of the respondents.

After carefully reviewing the entire record in this proceeding, and the proposed findings, conclusions and order [1] filed by the parties, together with the supporting briefs, the hearing examiner finds that this proceeding is in the interest of the public and, based on the entire record and his observation of the witnesses, makes the following findings of fact and conclusions drawn therefrom, and issues the following order.

FINDINGS OF FACT

1. Respondent Coro, Inc.[2], 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 place of business located at 47 West 34th Street, New York, New York.

Coro, Inc., conducts some of its operations through wholly-owned subsidiary corporations, including Coro Fashion Watches, Ltd., which manufactures, sells and distributes watches. At the time of hearing, that subsidiary was in the process of liquidating its inventory, and there is doubt whether Coro, either directly or through any subsidiary, will continue in the watch business.

Respondent Gerald E. Rosenberger is an officer and director of respondent Coro, Inc., as well as a substantial stockholder. He has been a director for more than 30 years, president for about 20 years, and chairman of the board for approximately 5 years.

Mr. Rosenberger referred to himself as having "the overall corporate responsibility"—"the responsibility of the acts and practices of the corporation." He disclaimed, however, any personal responsibilities or connection with the sale of Coro merchandise to catalog houses. He did not supervise directly the sale of merchandise to catalog houses. The supervision and direction of this phase of the business were in the hands of a Coro salesman, Edwin Oppenheimer, but Mr. Rosenberger participated in the decision to discontinue sales to the type of catalog houses described in the complaint.

---

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

[2] Sometimes hereafter referred to as Coro or Respondent.

At the time of hearing, respondent Royal Marcher was a stockholder, director and consultant, but was no longer an officer of the corporation. He had been executive vice president until 1958. He has been a director of the corporation for more than 40 years, and was an officer for about 25 years. Since his retirement, he has not been connected in any way with the selling of Coro merchandise to catalog houses.

For at least three years prior to issuance of the complaint in this matter, respondent Jerome H. Oppenheimer was vice president and secretary of the corporation. He has been a director since 1913; an officer for more than 20 years; and a stockholder for many years. The testimony was that Mr. Oppenheimer, who is more than 80 years old, is "not quite as active as he was." His duties had no relationship to the sale of merchandise to catalog houses.

Edwin Oppenheimer specifically stated that he never took any instructions, directions or orders from any of the individual respondents in connection with Coro's catalog business and did not report to them concerning that business.

Neither Mr. Marcher nor Mr. Jerome Oppenheimer controlled the acts and practices of respondent Coro, according to the uncontradicted testimony of Mr. Rosenberger.

Coro, Inc., is a publicly held corporation, with its stock listed on the American Stock Exchange since 1929.

The business address of each of the individual respondents is the same as that of the corporate respondent.

2. Respondent Coro is now, and for some time has been, engaged in the manufacture, sale and distribution of costume jewelry, watches, and other products to department and variety stores and to other resellers known as catalog houses.[3]

In the regular course and conduct of its business, respondent Coro, Inc., causes and had caused its products, when sold, to be transported to purchasers located in various States other than the State in which such shipments originate.

Respondent Coro maintains, and at all times mentioned herein has maintained, a substantial course of trade in such products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

---

[3] The complaint alleged sales to "retail stores and jobbers for resale to the public." Coro's answer denied that it sells to jobbers, and there was no proof in support of this allegation. In requesting a finding that respondents "have in the past, and until recently, sold costume jewelry and watches to jobbers," counsel supporting the complaint refers only to the fact that certain pricing sheets furnished to catalog houses contained a column designated "Jobber's Cost." This does not support the requested finding, except to the extent that catalog houses may be considered jobbers as to part of their business. See Tr. 18, 87. For a definition and description of a catalog house, see Pars. 8 and 9, *infra*.

Some of the costume jewelry distributed by the corporation is manufactured by it; some is imported.

Coro also manufactures and distributes watches for sale to the public. The company imports the movements and either buys or manufactures the ornamentation in which the movement is placed. Distribution of Coro watches has been effected through a separate, wholly-owned corporation, Coro Fashion Watches, Ltd.

3. In the course and conduct of its business, respondent Coro has been and is in substantial competition in commerce with other corporations, firms and individuals likewise engaged in the sale of costume jewelry and watches.

4. In connection with the sale of watches in commerce, through its wholly owned subsidiary, Coro Fashion Watches, Ltd., and for the purpose of inducing the purchase of such watches, Coro has published and caused to be published, in media having interstate circulation, representations concerning the guarantee covering its watches.

In an advertisement for Coro Fashion Watches, published in Life magazine, respondent Coro used such language as "Imported Swiss movement, guaranteed for one year." An advertisement in the New York Times magazine referred to Coro watches, "each with a guaranteed imported Swiss movement." Catalog insert sheets prepared and distributed in commerce by Coro bore the legend, "all watches guaranteed in writing for one year."

No language modified the quoted phrases, and Coro has thereby represented that its watches were and are unconditionally guaranteed.

5. The guarantee furnished with the advertised watches provides as follows:

> The Coro watch movement is guaranteed for one year from date of purchase against defect of material or workmanship. * * * The Coro watch movement returned for service within the one year guarantee period that does not show breakage or mishandling will be serviced and returned to you, prepaid, for $1.00. If, upon inspection, breakage or mishandling is found, an estimate will be sent for your approval before it is repaired.

6. Thus, respondent Coro's representations regarding its guarantee were and are false, misleading and deceptive. In truth and in fact, the watches were not, and are not, unconditionally guaranteed in that the so-called guarantee provides for payment of a service charge. The other terms and conditions, and the extent to which the guarantee applies, and the manner in which the guarantor will perform thereunder were not disclosed in respondent's catalog insert sheets or in other advertising matter.

7. In connection with the sale in commerce of its merchandise, including jewelry and watches, Coro had a catalog department that

prepared and distributed catalog pages for incorporation in catalogs published and distributed by a class of resellers known as "catalog houses."

8. Catalog houses publish and distribute, in commerce, catalogs listing and depicting a variety of merchandise for resale to various classes of customers.

As shown by this record, they send catalogs and sell to the following:

Retailers, primarily in small towns, for resale.

Industrial and commercial firms buying for their own use—i.e., for service and maintenance purposes—or for awards, prizes and gifts, but not for resale.

Organizations, such as fraternal groups, for awards, prizes, etc.

Individual consumers.

Individual consumers include employees of industrial and commercial firms who are given an opportunity, through their employer or an employee organization, to buy for themselves through use of a catalog house catalog.

There has been a trend in the last few years for catalog houses to sell to individual consumers to a greater extent than in the past.

9. Catalog houses, numbering approximately 50, generally sell to the same classes of customers. Their methods of operation, including the presentation of price information in their catalogs, are substantially similar.

Characteristically, the catalogs list two price figures for the merchandise depicted in their catalogs. One price figure is represented, directly or indirectly, as a "retail" or "list" price; the other, a lower figure represents the selling price of the catalog house. The actual selling price may be "hidden" in a code number—a so-called coded price—or it may be designated by such terms as "Your Cost" or simply "Cost."

Some catalog houses have show rooms where they display their merchandise for sale to retail customers who walk in "off the street," or who present identification from the company where they are employed. Such sales are made at the lower coded price or "Cost" price, not at the so-called "retail" or "list" price.

10. One of the catalog houses to which Coro sold and for which it prepared catalog insert sheets or color positives was L & C Mayers Co. of New York.

Circulation of the Mayers' catalog was about 500,000 in 1959 and 1960. Over the years, circulation had increased from something like 125,000 to over a half-million. The biggest increase in circulation has been within the past five years.

Those to whom the Mayers' catalog was distributed included dealers in small towns, who bought for resale, and also a number of industrial corporations that had occasion to buy merchandise for awards, prizes, gifts, etc. Although Mayers attemped to screen out individuals from its catalog mailing list, catalogs and merchandise were nevertheless shipped to "some" individuals.

Mayers maintained one or more showrooms or stores for display of catalog house merchandise, including one in New York City and another in Philadelphia. Articles were displayed for sale and sales were made in these showrooms, some to individuals—to "people who walked in off the street." However, the largest portion of its business came through as the result of mail orders originating from the catalog.

Mayers always sold to all customers—including individuals—at the coded price.

11. Another catalog house that resold Coro products, using catalog pages supplied by Coro, was Waldron and Company, Inc., of Philadelphia, Pennsylvania.

In the Waldron catalog, since 1960, pricing information is generally given by means of two figures. One figure is identified as "Retail" and the other lower figure as "Cost" or "Your Cost." In prior years, Waldron had used a coded price for its selling price.

Waldron sells at the same price to all customers, including individual consumers, except that its catalog states that "Additional discount is available on bulk lots of the same item."

There were 100,000 copies printed of the 1959–1960 catalog. The same number were printed for 1958–1959. The figure was 110,000 for 1961.

Waldron catalogs are distributed by mail to dealers in small towns, primarily under ten thousand population, and they are also distributed nationwide to industrial concerns and organizations for prizes, premiums, sales, etc. Waldron's sales to "industrial accounts" amount to about 50 percent of its total sales. The bulk of Waldron's merchandise has always been sold to small-town dealers and industrial concerns.

In the words of a Waldron official,

> * * * an industrial concern may be using merchandise for any number of reasons, either as a sales incentive or, for instance, as a safety award, and when they have need for merchandise which fits into the categories which we handle, we are interested in selling them at the cost prices.

Employees of such firms can buy through the catalog or through purchase orders.

Waldron has a showroom displaying the merchandise it handles. There, individuals may make purchases if they have identification from the company where they are employed. Over-the-counter sales account for approximately 35 or 40 percent of Waldron's business.

Coro merchandise was on display in the showroom in 1958, 1959 and 1960. There were showroom sales of Coro merchandise during those years at the coded price or the "Your Cost" figure.

The last time Coro jewelry appeared in a Waldron catalog was the 1960 catalog—prepared and published in September or October 1959. Coro products also appeared in Waldron's 1958 and 1959 catalogs.

12. Although the catalog houses make some sales that may be characterized as wholesale, they also make retail sales. The catalog houses do not sell at the prices represented or indicated as "retail" or "list." They sell to all customers—wholesale and retail— at the lower prices—the coded prices or those designated by such terms as "Your Cost" or "Cost."

Coro had knowledge of these selling and pricing practices of the catalog houses.

13. Coro sold to numerous catalog houses a line of merchandise, including costume jewelry and watches. This merchandise was not Coro's "regular line" of merchandise—i.e., that sold to department and variety stores—but a "special line" sold only to catalog houses (and to firms using such merchandise for "giveaways").

In 1960, Coro had 30 catalog house customers, located throughout the United States.

Gross sales (less discounts and returns) to catalog houses,[4] 1958–1960, were as follows:

1958	$227, 925. 00
1959	186, 209. 00
1960	172, 078. 00

14. For its catalog house customers, Coro prepared and printed catalog insert sheets for binding into their catalogs. These pages depict in color various items of Coro jewelry, including necklaces, bracelets, earrings and pins, as well as Coro watches. Each item or set bears an identifying letter, and the text at the bottom of the page is keyed to those letters, as well as the name of the set. Then, following language descriptive of the jewelry or watch, there is a catalog code number, together with a price.

[4] Total consolidated net sales of Coro, Inc., during the same period were:

1958	$29, 205, 185
1959	30, 910, 688
1960	33, 191, 895

In some instances, instead of furnishing printed sheets for insertion in catalogs, respondent Coro furnished color positives—photographic transparencies—of such sheets. These were used by catalog houses that printed their own catalogs. They were substantially similar to the insert sheets and contained the same illustrations and price information.

The insert sheets and color positives were printed and distributed at Coro's expense. Where color positives were furnished, a printing allowance was made by Coro.

The volume of catalog insert sheets produced and printed for Coro during the three-year period, 1958–1960, was as follows:

1958	2, 305, 850
1959	1, 251, 636
1960	986, 744

During the same period, Coro furnished color positives as follows:

1958	2 sets
1959	15 sets
1960	12 sets

15. In soliciting orders from catalog houses, Coro submitted sample catalog pages, or mock-ups, accompanied by a coding sheet for the use of the catalog house in adapting the pages, or portions thereof, to its particular catalog.

16. Typical of the product description and price data in the catalog insert sheets used by Coro in 1958 and 1959 is the following excerpt:

[B] NANCY * * * Irresistibly lovely, royally styled for the queen in your life!
Graceful MESH design.
Necklace and Earrings * * *

7483/02C825 2-Pc. Set	$16. 50
7483/26C525 Necklace only	10. 50
7483/16C525 Bracelet only	10. 50
7483/50C300 Earrings only	6. 00

The first part of the code number consisting of figures and one or more letters (e.g., 7483/02C) was Coro's style number identifying the merchandise. The last three or four figures represented the selling price of the catalog house.

For example, in the case of the "Nancy" jewelry set referred to above, the figures 825, 525 and 300 in the catalog code number, following the letter "C", were translatable into prices of $8.25, $5.25 and $3. Usually, if not invariably, the coded price for Coro jewelry is one-half the price set forth at the extreme right-hand side of the price line ($16.50, $10.50 and $6 in the "Nancy" example), which is the so-called "retail" or "list" price, and which was so characterized in some catalogs.

17. To its catalog customers, in 1958 and 1959, respondent Coro sent a coding sheet listing its catalog merchandise by style number and setting forth price information. The price data furnished on such coding sheets was under three column headings: "Jobber Cost", "Dealer Cost" and "Suggested Line." [5]

For example, the "Nancy" set was listed on the Coro coding sheet as follows:

Key	Number	Item	Jobber cost	Dealer cost	Suggested line	Your corresponding price line as it is to print
B	7483/02 Nancy	2 pc. set	5.50	8.25	16.50	
	7483/26	Necklace	3.50	5.25	10.50	
	7483/16	Bracelet	3.50	5.25	10.50	
	7483/50	Earrings	2.00	3.00	6.00	

The figure designated "Jobber Cost" was Coro's selling price to catalog houses. The "Dealer Cost" was the price at which it was assumed or suggested that the catalog house would sell. The "Suggested Line" was the suggested "list" or "retail" price.

In the blank lines under the heading, "Your corresponding price line as it is to print," the catalog house placed its own catalog code number, the coded price and the purported price, or equivalent information.

18. While there may have been occasional variations, catalog house customers generally utilized in their catalogs the price data furnished by respondent Coro on the coding sheet.

By way of illustration, Coro's price data relating to the "Nancy" set was utilized as follows by three different catalog houses:

L & C Mayers [6]

20 K 0168 TG 825	2 Pc. Set	$16.50
20 K 0169 TG 525	Necklace	10.50
20 K 0170 TG 525	Bracelet	10.50
20 K 1071 TG 300	Earrings	6.00

[5] Whether this was a misprint for "Suggested List" or an effort to avoid using that term was not explained However, that is what it was intended to represent, and that is how it was used.

[6] Although the purported price of the Coro merchandise is not specifically identified as "retail" in the Mayers' catalog, most of the other merchandise depicted in the book has the word "Retail" or the abbreviation "Ret." preceding the purported price. Furthermore, an insert in the Mayer catalog explaining the price coding system states: "The only prices shown are retail. Your cost is concealed in the catalog number." In transmitting its coding sheet to Coro, Mayers specified that "The suggested retail price for each item should be stated," and its coding sheet identified the purported prices as "Retail."

Service Exchange Distributors [7]

2 pc. set	17407CT825	Retail $16. 50
Necklace	17408CT525	Retail 10. 50
Bracelet	17409CT525	Retail 10. 50
Earrings	17410CT300	Retail 6. 00

Waldron and Company, Inc.

		Retail	*Your Cost*
3089JT	2 Pc. Set	$16. 50	$8. 25
3090JT	Necklace	10. 50	5. 25
3091JT	Bracelet	10. 50	5. 25
3092JT	Earrings	6. 00	3. 00

19. The price line information in the Coro catalog inserts was furnished initially by Coro to the catalog houses to which it sold. Utilizing the figures supplied by Coro, the catalog house specified the manner in which the price line information was to appear in the catalog pages furnished by Coro.

20. The figure described by Coro as "Suggested Line" on the coding sheet it sent to catalog houses appeared in some catalogs simply as a price figure bearing no characterization, except as it was explained elsewhere in the catalog. Others applied the term "retail" to it, while still others called it "List" or "List Price."

21. The price line used by Coro in its 1958 and 1959 insert sheets—including a purported retail price and a coded price—was based on a so-called "three times" formula. Under this formula, the price Coro charged the catalog house for an item was tripled (exactly or approximately) to arrive at the "retail" or "list" price. The coded price or "Dealer Cost"—at which the catalog houses actually sold to all customers—was exactly or approximately one-half the so-called "retail" or "list" price.

This "three times" formula has been in general use in catalog house sales of jewelry for many years. Coro adopted it when it began selling to catalog houses, about 1955 or 1956.

22. A change was made in the format of the coding sheet in 1960, following conferences with Coro counsel. The coding sheet used in that year contained only one price figure under a column headed "Your Cost." This was the cost to the catalog house customer.

---

[7] By respondent's own testimony, the coding sheet of this company is typical of the way catalog houses completed the coding sheet.

A typical listing was as follows:

Key	Number	Item	Your cost	Your corresponding price line as it is to print
C	077/02 Royal Elegance	2 pc. set	16.50	
	077/26	Necklace only	12.00	
	077/50	Earrings only	4.50	

However, the sample catalog pages and the "insert application sheet" [i.e., the coding sheet] used by Coro in 1960 were accompanied by a letter stating in part as follows:

The insert application sheet shows your cost for each set or item. You must indicate on the accompanying line exactly how your wish your price line to read. In making this out, *you must include the price at which you will offer it to your dealer and list price which you will suggest to him. On the basis of past experience, we can advise you that catalogs using our insert usually take a markup of 50% on their cost. Catalogs usually suggest a retail price of double this amount for their dealer.*[8] On watches a retail price allowing the dealers a 40% markup is usually suggested.

23. The manner in which Coro's 1960 price data was used is illustrated by the coding sheet executed by Leonard Krower & Son, Inc., of New Orleans, Louisiana.

Applying to the "Royal Elegance" set, for example, the formula suggested by Coro, Krower simply specified the price line as follows:

077/02 Royal Elegance	2 pc. set.	List $49.50
077/26	Necklace only.	List $36.00
077/50	Earrings only.	List $13.50

This was reflected accordingly in the catalog insert sheet as published.

24. The catalog insert sheets, color positives, coding sheets and related material were distributed in commerce by respondent Coro. Similarly, the catalogs containing the pages furnished by Coro, directly or indirectly, were in turn distributed in commerce by the catalog houses, with resulting sales in commerce.

25. By preparing and distributing in commerce the coding sheets, catalog insert sheets, color positives and related material setting forth price figures as "retail," "list" or "suggested line," or without specific designation, respondent Coro represented directly or by implication that such price figures, however, designated, were the usual and regu-

[8] Emphasis added. The markup and retail price formula here advised is simply another way of describing the "three times" formula.

lar retail prices for its costume jewelry, watches and other products in trade area or areas where the representations were made.

26. In truth and in fact, those price figures were not the usual and regular retail prices for Coro merchandise in the trade area or areas where the representations were made, but were fictitious and exaggerated prices, arrived at by the use of an arbitrary, inflexible formula. The usual and regular retail prices were those at which the catalog houses sold Coro merchandise—*i.e.*, prices approximately 50 percent less than the prices represented as retail.

27. By the acts and practices herein found, Coro placed in the hands of catalog houses the means and instrumentalities by and through which they might mislead and deceive the purchasing public as to the usual and regular prices of Coro merchandise.

28. Concerning the defense of discontinuance of the practices charged, the record shows that, although Coro has continued to sell watches and costume jewelry in commerce, it is liquidating the watch business and has withdrawn from the catalog house business. The latter decision was made before this complaint issued, but after the Commission instituted its investigation. Following conferences and communications with personnel of the Commission's New York branch office, the determination was made that Coro would not sell merchandise to the type of catalog houses described in the complaint. That decision was made at a conference attended by Gerald Rosenberger, Jerome Roberts, Edwin Oppenheimer and counsel.

Discontinuance was the subject of a memorandum dated December 14, 1960, from Jerome Roberts, a Coro vice president, to Edwin J. Oppenheimer and Morris Malkin, who operated the catalog department. It stated in part as follows:

We have just had a final conference with the lawyers on the catalog page. The following decisions are now company policy and they will be adhered to:

1—We are not going to print any catalog pages with or without prices.

2—No sales will be permitted of any merchandise to any concerns, with or without the Coro name, where discounting from a fictitious list price or discounting of any kind is the method of sale.

3—It is permissible to sell to catalog houses, provided that our goods are merchandised in the same way that Speigels presently merchandise their catalog.

Following receipt of this memorandum, Coro advised the catalog houses with which it did business, that it was no longer going to offer a line of jewelry for sale to catalogs, that it wasn't going to print any insert sheets or color positives in the future. No general statement to this effect was sent out, but Coro advised the catalog houses of this decision as it got in touch with them, beginning about December 1960 or January 1961.

Mr. Roberts was quoted as giving the following reasons for the adoption of the policy: "That the catalog department represented a very small fraction of Coro's overall business and regardless of whether we legally might be right or wrong, and regardless of the elements involved there, the fact that we may be right, the fact that it would be a subject of controversy, would be very bad for our company's reputation, and that, in itself, was a sufficient reason for abandoning it. Also, that it would become a matter of controversy, that it would mean that every step or action taken in the course of sales of the organization, would have to be subject to meeting, subject to scrutiny by counsel, and we didn't want to involve any branch of our company in any kind of business where we felt we would have to ask counsel if we could do this, that or the other thing. It was a question of business we wanted to have."

Since the decision, there has been no merchandise sold to any catalog customer, and it was stated that Coro has no intention of resuming the catalog business in the future.

Summary and Concluding Findings

1. There is little or no dispute as to the basic facts in this proceeding. As to the charge of deceptively advertising the Coro watch guarantee, the only questions raised by respondent relate to the necessity for an order, and its breadth if one is issued. These matters are considered *infra*. Thus, it is sufficient at this juncture to refer to *Parker Pen Co.* v. *F.T.C.*, 159 F. 2d 509 (7th Cir. 1946) as authority for an order terminating deceptive advertising of the guarantee.

2. Concerning the fictitious pricing charge, respondents' defense revolves primarily around these contentions:

(a.) That the fictitious prices alleged were established by the catalog houses, not by Coro.

(b.) That there is no proof that the public understands "list" or "retail" price to mean the regular and usual retail price.

(c.) That in any event, there is no proof that the prices so denominated were not the usual retail prices.

Each of these contentions will be considered in turn.

3. Respondents contend that Coro should be absolved here because

> * * * the prices contained on these insert sheets and color positives were not inserted at Coro's command, rather they were established by Coro's catalog house customers. Coro simply printed as the price line whatever the catalog house customer desired. (Respondents' Main Brief, p. 6.)

4. Respondent's contention that it cannot properly be held liable because it simply prints the price information designated by its cus-

tomers must be rejected. Actually, the price information furnished to Coro by the customer was simply a utilization of price data furnished and suggested by Coro. And this is true even of the modified practice of 1960. Furthermore, even if the fictitious prices were originated by the customer and printed by Coro on order of the customer, this would not mean that Coro could simply shrug and say, "We're simply a printer, following directions."

The mere fact that the deceptive information was furnished on request cannot be held to absolve the respondent. In *Rayex Corporation*, Docket 7346 (April 2, 1962) [60 F.T.C. 664], the evidence was that the questioned price stickers were affixed at the request of customers, but an order was issued prohibiting the practice.

Similarly, in *Orloff Company, Inc.*, 52 F.T.C. 709, Docket 6184 (1956), it was stipulated that the determination whether price tags affixed to respondents' watches should be attached at the time of resale to the ultimate consumer was made by respondents' customers, not by respondents. An order was nevertheless issued.

5. Although respondents' counsel has emphasized that this case does not involve "pre-ticketing" of merchandise with fictitious prices, it is clear that the same principles apply. The media or vehicle used for the dissemination of the fictitious prices is not controlling.

Whether the fictitious prices are printed on price tickets attached to merchandise or contained in catalog sheets, coding sheets, price lists, brochures, circular or other advertising material, the question is whether the price information has the capacity and tendency to deceive the purchasing public.

6. There is no difference in principle between the furnishing of fictitious prices through catalog sheets and the furnishing of fictitious prices through the device of pre-ticketing. This is pointed out in the Commission's opinion in *Rayex Corporation*, Docket 7346 (April 2, 1962) [60 F.T.C. 664, 675]. The Commission's opinion stated:

> There is, of course, no convention requiring manufacturers and distributors to use pre-ticketing as a means for "suggesting" resale prices to their dealers. They could as well simply enclose a list of suggested prices with each shipment. That procedure would involve no possibility of the sort of deception with which we are here concerned, assuming that the *price list information was not passed on to the public*. (Emphasis added.)

The opinion goes on to note that when resale prices supplied to dealers—whether through preticketing or some similar practice—*are* made public, and dealers in a trade area, or many of them, habitually market the product for substantially less, the tendency to deceive and hence its illegality are settled matters.

Thus, it is clear that it is the misrepresentation that is unlawful and not the particular form in which the misrepresentation is accomplished.

In *Helbros Watch Company, Inc.*, Docket 6807 (December 26, 1961) [59 F.T.C. 1377], for example, price lists furnished to dealers by a supplier and displayed by dealers to potential and actual customers were held to be deceptive instrumentalities.

Also overlooked by respondent in contending that this proceeding is novel is the fact that *The Clinton Watch Company* case, Docket 7434 (July 19, 1960) [57 F.T.C. 222], *aff'd* 291 F.2d 838 (7th Cir. 1961),* involved catalog inserts, brochures, circulars and other advertising material, as well as pre-ticketing.

7. Presentation in catalogs of a "suggested" "retail" or "list" price, whether so designated or not, in juxtaposition with the actual selling price, has the capacity and tendency to mislead and deceive purchasers into the mistaken belief that they are realizing a saving from the usual and regular price of the seller. Actually, there was no saving from the usual and regular prices of the catalog houses. Their coded or "Your Cost" prices were their usual and regular prices.

8. As in the pre-ticketing cases, respondent Coro, by supplying the catalog pages and other material setting forth fictitious retail prices, has furnished the means and instrumentalities whereby retail customers might be misled into the mistaken belief that they were obtaining bargain prices when, in fact, they were paying the regular catalog house price.

9. An order to cease and desist is warranted where, as here, a manufacturer or distributor, knowing that its catalog house customers sell to retail customers at less than the "retail" prices stated in their catalogs, supplies to such catalog houses, catalog sheets and other material aiding and abetting such misrepresentation.

10. Respondents also argue that the case must fail because there was no evidence of consumer understanding of such terms as "retail" and "list" prices.

11. It is sufficient answer to this contention—if any answer be needed—to cite the recent case of *George's Radio and Television Company, Inc.*, Docket 8134 (January 19, 1962) [60 F.T.C. 179, 192-193, 195], in which the Commission prohibited the use of the designation of prices in respondents' advertisements as "Mfr's Sug. List" and "Manufacturer's Suggested List." The Commission held:

> The representation "Mfr's. Sug. List" creates the impression that there is a usual and customary retail price for the product in the trade area, and that

* *Cert. denied* 368 U.S. 952.

that price is the specified "Mfr's. Sug. List" price. The soundness of this interpretation is settled law. * * *

The Commission also found:

The use with the designation "Mfr's. Sug. List" or "Manufacturer's Suggested List" price in advertising in juxtaposition with a lower price represents and tends to lead readers of such advertising to believe that the higher price is the price at which the merchandise is usually and customarily sold in the * * * trade area and that a saving will be made of the difference between the two prices.

12. When the word "list," qualified by the word "suggested," is held to constitute a representation of the usual and customary retail price, it follows that the unqualified terms "list" and "retail" must be likewise construed. There is no need for a consumer poll or testimony of public witnesses as to the meaning of those terms.

13. The *George's* case also stands for the proposition that:

The use, without designation as such, of the manufacturer's suggested retail price in advertising in juxtaposition with a lower price, represents and tends to lead readers of such advertising to believe that the higher price is the price at which the merchandise is usually and customarily sold by the advertiser in the recent regular course of business and that a saving will be made of the difference between the two prices.

14. The application of those principles to the instant matter is clear.

15. The argument that respondent mainly relies on is that there has been a failure to prove that the figures denominated as retail prices in the catalog sheets distributed by Coro to catalog houses were not the usual retail prices for the products. It takes the position that there is no proof as to what the customary retail prices were for the Coro merchandise described in the catalog insert sheets.

16. In focusing attention on the lack of evidence as to the prices at which retailer customers of the catalog houses may have resold the Coro catalog line, respondent overlooks or minimizes the fact that the catalog houses themselves were selling at retail.

17. The record does not permit a definitive analysis of the nature and scope of the sales transactions of Coro's catalog house customers. But, as indicated in the findings of fact, although some of their sales may be wholesale, there is no doubt that they also sell as retailers.

18. Sales to individual consumers are clearly retail sales, whether made in a showroom or through mail-order, and regardless of their possession of company credentials. And there is no doubt from the evidence that catalog houses generally—and L & C Mayers

Company and Waldron and Company, Inc., in particular—did and do make sales to individual consumers.

19. Despite respondents' intimations to the contrary, there is specific evidence that Waldron and Company made showroom sales of Coro jewelry in 1958, 1959, 1960 at the coded or "Your Cost" price.

20. In addition to individual consumers, certain other catagories of catalog house sales, on the facts of record and in the light of court and Commission precedents, may be denominated as retail.

21. The so-called industrial account sales may be wholesale or retail, depending on whether sales are made in bulk. This record supports the inference that some—perhaps most—of those sales were retail.

22. In *Plaza Luggage & Supply Co., Inc.*, 44 F.T.C. 443, Docket 4857 (1948), customers and prospective customers included "business concerns for their use and the use of their employees" and "groups of associated individuals, all of whom buy for their own use or the use of their employees and not for resale * * *." The Commission held that respondents were retailers.

23. Very much in point here is *L. & C. Mayers Co., Inc.*, 21 F.T.C. 434, Docket 2038 (1935), *aff'd.* 97 F. 2d 365 (2d Cir. 1938). Mayers' catalogs were sent chiefly to industrial concerns, cooperative buying bureaus, state governments, municipal governments and purchasing clubs. The Commission held that Mayers was not a wholesaler but a mail order house engaged chiefly in selling to the purchasing public. The Commission further held that sales to the following were "retail business":

> (1) industrial concerns, public utilities, banks and other similar organizations to which merchandise was sold and shipped by the respondent, not for resale, but for use by such organizations. The sales to this group include various articles, but do not include purchases in quantity lots.
>
> (2) industrial concerns, public utilities, banks and other similar organizations, which buy merchandise from the respondent, not for resale but for the benefit of their employees * * *.
>
> (3) mutual buying clubs maintained by fraternities, colleges and universities and the employees of some large industrial, public utility or similar organizations * * *. Merchandise * * * not resold by the vendees, but is applied to their own use or the use of the members of such organizations.

The hearing examiner does not understand this decision to conflict with *Roland Electric Co.* v. *Walling*, 326 U.S. 657 (1946), cited in respondents' brief.

24. Reference also should be made to *Helbros Watch Company, Inc.*, Docket 6807 (December 26, 1961) [59 F.T.C. 1377, 1405]. There the Commission found catalog houses "were selling respond-

ents' watches to the ultimate consumer and were, therefore, selling at retail."

25. It is not necessary, however, for purposes of this proceeding, to examine any nice distinctions between sales at wholesale and sales at retail. It is sufficient that Coro's catalog customers made retail sales at prices below what they, aided and abetted by Coro, represented to be the retail price.

26. The absence of any evidence in this record of the prices charged for Coro catalog merchandise by retailers who bought from catalog houses for resale does not result in a failure of proof that the prices represented by Coro as "retail" were not the usual retail prices. There *is* ample evidence that the purported "retail" prices were not the prices at which the catalog houses sold at retail. That is sufficient to support the allegations of the complaint.

27. The validity of this conclusion finds support in *Art National Manufacturers Distributing Co., Inc.*, Docket 7286 (May 10, 1961) [58 F.T.C. 719], *aff'd.*, 298 F. 2d 476 (2d Cir. 1962). In that case, there was evidence of sales *below* the suggested resale or pre-ticketed prices by some retailers, including a large catalog house, but also evidence of sales *at* the suggested resale or pre-ticketed prices by other retailers. In these circumstances, the hearing examiner held the fictitious pricing charge was not sustained.

Reversing on appeal, the Commission based its finding of fictitious pricing on the sales of the catalog house at prices below what it represented to be "retail prices" (corresponding to the suggested resale and pre-ticketed prices of its supplier).

The Commission's decision turned on the fact that the supplier had knowledge of substantial sales by the catalog house at prices below the pre-ticketed prices. The fact that the supplier and the catalog house were affiliated corporations does not detract from the principle that fictitious pricing may exist even in the presence of some sales at the suggested or pre-ticketed prices if there is a representation that regular retail prices are substantially higher than they actually are.

28. Similarly in *The Baltimore Luggage Company*, Docket 7683 (March 15, 1961) [58 F.T.C. 451], *aff'd.* 296 F. 2d 608 (4th Cir. 1961),* there was a finding of fictitious pricing through pre-ticketing although 70 percent of respondents' customers, representing 62.5 percent of respondents' dollar volume of sales, sold at the pre-ticketed prices. The order to cease and desist was upheld on a

* *Cert. denied* April 23, 1962, 30 L.W. 3333.

showing of sales in three trade areas at prices below pre-ticketed prices.

29. The charge that the purported retail prices were "fictitious and exaggerated" also finds support in the fact that respondent Coro fixed the so-called retail price pursuant to a rigid formula resulting in an arbitrary amount bearing no discernible relationship to the realities of the market where the representations were being made.

30. In fixing the so-called "retail" prices of their products pursuant to the "three times" formula, respondent obviously did not base them on any actual prices in any particular trade area.

The catalog "retail" price for a particular Coro product was identical, regardless of the location of the catalog house or its sales area.

31. The hearing examiner has considered respondents' contentions that the complaint should be dismissed on the ground that the challenged practices have been discontinued, with no intent to resume.

The facts and circumstances here are more persuasive than in many cases where such a plea has been made. Nevertheless, discontinuance took place only after the Commission began looking into the matter, and the Commission has held that dismissal is rarely warranted under those circumstances. Other factors impelling denial of the dismissal plea include the nature of the practices and their duration.

Although respondent has withdrawn from the catalog house field and apparently is liquidating its watch business, it remains substantially engaged in the sale of the same products. In the absence of a legally binding order, there exists some cognizable danger of recurrent violation. The rationale of the *Bell & Howell* dismissal, 54 F.T.C. 108, Docket 6729 (1957) is not controlling here, and the other cases cited by respondents are likewise distinguishable.

After consideration of the facts in the light of Commission and court precedent [9], the examiner concludes that dismissal on the ground of discontinuance is not warranted. There are "no unusual circumstances which in the interest of justice require" dismissal. *Argus Cameras, Inc.*, 51 F.T.C. 405, Docket 6199 (1954). The public interest calls for an order.

[9] *E.g., Art National Manufacturers Distributing Co., Inc.,* Docket 7286 (May 10, 1961) [58 F.T.C. 719], 298 F. 2d 476 (2d Cir. 1962); *Cannon Mills, Inc.,* 55 F.T.C. 1448, 1457–58, Docket 7115 (1959); *Ward Baking Co.,* 54 F.T.C. 1919, Docket 6833 (1958); and cases there cited.

32. Although the individual respondents, as officers and directors, doubtless participated generally in the formulation, direction and control of the acts and practices of respondent Coro, the evidence does not show such involvement in the acts and practices challenged by the complaint as to necessitate or warrant their being personally named in the order to cease and desist. Nor are there other circumstances to require or justify their being named in the order, individually or as officers.

33. The inclusion of named individuals in an order to cease and desist is a question of discretion on the part of the hearing examiner and the Commission.

The basic question is whether an order against the corporation (and its officers and agents generally) will be adequate to prevent continuation or resumption of the challenged practices. In the circumstances here, the hearing examiner concludes that it will. Accordngly, the order provides for qualified dismissal as to all the individual respondents—that is, except as they are bound as corporate officers or agents.

34. It is true that respondent Gerald E. Rosenberger, as president and chairman of the board, has the over-all responsibility for the acts and practices of the corporation. This is not enough, however, to show individual responsibility warranting the stigmatization attendant upon an order naming him personally. There is no showing of "active personal participation" in the acts and practices here found unlawful; of domination of the corporation by him; or of any special circumstances suggesting the likelihood that omission of his name from the order would result in any evasion by the corporation of the prohibitions here imposed.

Although recognizing that such precedents as *Standard Distributors, Inc.*, v. *F.T.C.*, 211 F. 2d 7 (2d Cir. 1954) and *Seborne Company* v. *F.T.C.*, 135 F. 2d 676 (7th Cir. 1943), support the levying of an order against Mr. Rosenberger, and perhaps the other two individuals as well, nevertheless, the examiner relies on *Maryland Baking Company*, 52 F.T.C. 1679, 1691, Docket 6327 (1956), 243 F. 2d 716 (4th Cir. 1957), as authority for dismissal here. And see *The Clinton Watch Company* v. *F.T.C.*, 291 F. 2d 838 (7th Cir. 1961); dissenting opinion in *Standard Distributors, supra*, 211 F. 2d at 13-14; *cf. Kay Jewelry Stores, Inc.*, 54 F.T.C. 548, Docket 6445 (1957); *Wilson Tobacco Board of Trade, Inc.*, 53 F.T.C. 141, Docket 6262 (1956); *Neuville, Inc.*, 53 F.T.C. 436, Docket 6405 (1956); *Jewel Radio & Television Corp. of America*, 49 F.T.C. 781, Docket 5683 (1953).

The fact that Mr. Rosenberger participated in the decision to discontinue the catalog house operation of respondent Coro was cited by counsel supporting the complaint in urging his inclusion in the order. On the record here, it would be anomalous indeed to rely on that fact as ground for assessing personal liability.

35. As for respondent Royal Marcher, he is no longer an officer, and even as to the time when he was, there is no showing of any participation in the practices challenged by the complaint. *Browning King & Company, Inc.*, Docket 7060 (August 2, 1961) [59 F.T.C. 155], supports dismissal in these circumstances.

36. Respondent Jerome H. Oppenheimer is an officer and director, but beyond the inferences to be drawn from his holding of those positions, there is no evidence that he was responsible for or participated in the formulation, directon or control of the acts and practices of the corporation; nor did he have any connection with the practices challenged by the complaint.

37. The roles of respondents Marcher and Oppenheimer are analagous to those of the individuals dismissed as respondents in *Standard Distributors, Inc.*, 48 F.T.C. 1435, 1441-2, Docket 5580 (1952), 211 F. 2d 7 (2d. Cir. 1954).

38. Respondent Coro is a large, responsible, publicly-held corporation, and the fictitious pricing charge is applicable only to a small segment of its business. These circumstances distinguish this case from those in which corporate officers were held personally because of their domination of closely-held or family corporations; their active, direct and personal participation in unlawful practices; or the existence of circumstances suggesting a likelihood of the order's evasion.

39. Here we do not have, as in *Reliance Wool & Quilting Products, Inc.*, Docket 7165 (November 20, 1959), facts and circumstances supporting "inferences of roles of prime responsibility and active personal participation in the acts and practices found unlawful."

We do not have as to any of the respondents, corporate or individual, the circumstances that led the Supreme Court to uphold the Commission's attachment of individual liability in *F.T.C.* v. *Standard Education Society*, 302 U.S. 112 (1937).

40. The order proposed by respondents would limit the covarage of the fictitious pricing prohibitions to costume jewelry and watches, and that of the guarantee claim prohibition to watches. Counsel supporting the complaint, however, has proposed that the order specifically apply to those products and, in addition, cover "any other merchandise."

41. The complaint alleged, and the answer admitted, that Coro is "engaged in the manufacture, sale and distribution of costume jewelry, watches, and other products."

42. It is true that the evidence in this proceeding has been limited to jewelry and watches. However, the practices found unlawful do not have any peculiar connection with the products specifically named and are susceptible of being extended to such "other products" as respondent may sell now or in the future.

If, as contended, respondent has discontinued the practices without intent to resume, it suffers no burden by virtue of the broad product coverage.

On the other hand, if there should be continuance or resumption of the unlawful practices, but with respect to products other than those named in a narrow order, the public interest would be prejudiced by the necessity of relitigating as to those.

43. Where a deceptive practice has been found in the sale of specific products, it is proper for an order to prohibit a respondent from selling different merchandise using the same practice. *Consumer Sales Corp.* v. *F.T.C.*, 198 F. 2d 404 (2d Cir. 1952).

44. There appear to be no special circumstances requiring or warranting any narrowing of the product coverage to the merchandise specifically involved in this proceeding.

45. As to the other objections to the breadth and alleged vagueness of the order, similar prohibitions were approved in *The Baltimore Luggage Company* v. *F.T.C.*, 296 F. 2d 608 (4th Cir. 1961).* The Court found "no substance" in the contention that the order was "ambiguous and indefinite." The decisions in *Grand Union Co.* v. *F.T.C.*, 300 F. 2d 92 (2d Cir. 1962) and *Swanee Paper Corp.* v. *F.T.C.*, 291 F. 2d 833 (2d Cir. 1961), rely on circumstances not present here and, in the examiner's opinion, do not require narrowing of this order.

CONCLUSIONS OF LAW

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

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

3. The acts and practies of respondent Coro, as found herein, have had, and may have, the capacity and tendency to mislead and deceive members of the purchasing public with respect to the usual and customary retail prices of its costume jewelry, watches and

**Cert. denied* April 23, 1962, 30 L.W. 3333.

other products, and to mislead and deceive members of the purchasing public as to the guarantee provided by respondent on its watches, and into the purchase of such products as a result. As a consequence, trade has been unfairly diverted to respondent from its competitors and substantial injury has thereby been done to competition in commerce.

4. By its acts and practices respondent placed in the hands of catalog houses means and instrumentalities by and through which they might deceive and mislead the purchasing public as to the usual and customary retail prices of respondent's merchandise.

5. The acts and practices of respondent Coro, as found herein, were, and are, all to the prejudice and injury of the public and of respondent's 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.

ORDER

It is ordered, That respondent Coro, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of costume jewelry, watches or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication, on catalog insert sheets, on color positives for the printing of such catalog sheets, or on price lists, or in any other manner, that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which such merchandise is usually and customarily sold at retail in the trade area or areas where the representations are made.

2. Putting into operation any plan whereby retailers or others may misrepresent the usual and regular prices of such merchandise.

3. Representing directly or by implication that any product is guaranteed unless the terms and conditions of such guarantee and the manner and form in which the guarantor will perform are clearly and conspicuously set forth.

4. Representing that any product is guaranteed when a service or other charge is imposed, unless the amount thereof is clearly and conspicuously set forth.

It is further ordered, That the complaint be, and it hereby is, dismissed as to Gerald E. Rosenberger, Royal Marcher and Jerome

H. Oppenheimer, individually, except to the extent that they are bound by the order against respondent Coro, Inc., as officers, agents or representatives.

Opinion of the Commission

JULY 9, 1963

By DIXON, *Commissioner:*

Respondent Coro, Inc., appeals from a hearing examiner's initial decision holding that respondent, in the sale of its costume jewelry and watches, has engaged in the unfair practice of "fictitious pricing" in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.[1] Respondent does not except, however, to the examiner's further finding that respondent has also violated that statute by representing that its watches were unconditionally guaranteed when, in fact, a charge was imposed on persons seeking to avail themselves of the "guarantee."

The examiner dismissed the complaint as to the three individual respondents. Counsel supporting the complaint does not appeal that dismissal but the Commission, *sua sponte*, has placed that aspect of the matter on its docket for review.[2]

Coro, Inc., the corporate respondent, is a New York corporation with its principal office and place of business in New York City. It is engaged in manufacturing and importing watches, costume jewelry, and other products, with factories in Providence, Rhode Island; Toronto, Canada; and Crawley, England. Its annual sales are approximately $30 million. These are made primarily to such retailers as department and variety stores, through Coro's own sales staff. Apparently no sales are made to wholesalers or jobbers.

The three individual respondents named in the complaint are officers, directors, and stockholders of the corporate respondent. Gerald E. Rosenberger is its Chairman of the Board, President, one of its Directors, and its largest single stockholder. Royal Marcher is a Director and Consultant. Jerome H. Oppenheimer is its Vice President and Secretary. The complaint charges, in substance, that they control the acts and practices of the corporate respondent, and are thus responsible for the unlawful acts involved herein.

Respondent presents seven exceptions to the examiner's findings and order on the "fictitious pricing" issue. Three of these go to the

---

[1] This section provides in pertinent part that: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

[2] Order Placing Case on Commission's Docket for Review as to Certain Respondents (June 29, 1962).

"substantive" question of whether the evidence establishes that respondent has in fact engaged in the unfair practice of fictitious pricing. The other four exceptions, including its challenge to the scope of the order, are all related, in one way or another, to respondent's alleged "abandonment" of the practice.

I

In 1955 or 1956,[3] Coro began selling watches and costume jewelry to a class of customers called "catalog houses." It sold them, however, not its "regular" line (that is, the line that it sold to department and variety stores) but a "special" line manufactured solely for sale to, and resale by, the "catalog houses." This special line of merchandise made exclusively for the catalog houses was never sold by Coro to any other class of customers, or through any other channels of trade.

Respondent's method of soliciting and selling to the catalog houses can be summarized as follows: First, by means of photography and art work, Coro prepared mock-ups of catalog pages, in color, each page picturing several items of Coro merchandise.[4] At the bottom of each page, the items pictured thereon are described in words, identified by "order number," and priced. For example, one such mock-up page prepared by respondent pictured, among other Coro items, its "Nancy" necklace and earring set. The text at the bottom of the page described and priced that set in part as follows:

NANCY * * * Irresistibly lovely, royally styled for the queen in your life! Graceful mesh design.
Necklace and Earrings * * *
7483/02C825 2-Pc. Set-- $16.50[5]

Respondent prepared this particular page for the catalog houses that use what is called the "coded" method of pricing. Here, the actual selling price of the item—that is, the price the catalog houses actually charge their mail-order and other customers—is "hidden" or "coded" into the order number.[6] In the order number ("7483/

---

[3] Respondent's officials were unable to fix the date with any greater precision. Tr. 68, 85.

[4] See CX 8–A through 10–D.

[5] CX 9C.

[6] The catalogs carry an instruction sheet that tells their readers how to find the actual selling price, that is, the amount of money they are to forward with their order. See e.g. p. 4 of the "insert" just inside the front cover of the catalog included in the record as CX 59. A portion of this page is entitled "How To Read Your Low Confidential Cost! CONFIDENTIAL The only prices shown are retail. Your cost is concealed in the catalog number. EXAMPLE: Catalog Number 65 M 1201 G 1450 Order Number of Article 65 M 1201G Your Cost $14.50." In other words, the reader is to pay the "coded" price, and ignore the higher price appearing beside it. This latter price is almost always exactly *double* the *actual* selling (or "coded") price. See Coro's jewelry on pp. 28–31 of CX 59.

02C825"), the last three numbers ("825") constitute the "coded" price at which the catalogs actually sell, namely, $8.25. The other "price" figure set out above ($16.50) purports to be the "retail" price of the item.[7] In fact, however, that price was derived by respondent Coro not from its understanding of the price at which its goods were actually being sold at retail, but by a simple mathematical computation that employs what is known as the "three-times formula."

The working of this "three-times formula" is illustrated by another document employed by respondent in soliciting and selling to its catalog house customers. This one, which is called the "coding sheet," is sent along with the catalog page mock-ups and thus forms a part of respondent's presentation to the catalog house customer (or potential customer). On this "coding sheet," respondent lists by names and order numbers the items in the "line" it is offering. In addition, it lists three separate price figures. Thus, the "Nancy" necklace and earring set noted above, in addition to the appropriate order numbers, was further described on the "coding sheet" sent by Coro to the catalog houses as follows: [8]

Jobber cost	Dealer cost	Suggested line	Your corresponding price line as it is to print
5.50	8.25	16.50	

The "jobber cost" ($5.50) was the price at which Coro was offering to sell to the catalog houses themselves. The "dealer cost" ($8.25) was the price Coro suggested the catalog houses should *actually* resell the item. And the "suggested line" ($16.50) was the price figure respondent suggested the catalog houses should "direct" or "instruct" respondent to print in the finished catalog pages as the "suggested retail" price. The $5.50 price—the one respondent charged the catalog houses themselves—was the base figure from which the other two "suggested" figures were derived. Applying the "three-times formula" to $5.50, that is, multiplying it by three, gives the "suggested retail" price of $16.50. No catalog house has ever sold this item or any other item at these "three-times" prices, *i.e.*, at this 200% markup. The catalog houses *always* sell at exactly

[7] Some of the catalog houses preface these purported retail price figures with such words as "retail," "list," "list price," etc. Whether so described or not, it is plain that the higher of the two price figures is designed to, and does, convey to the reader the idea that it is the usual and regular "retail" price of the item.

[8] CX 55-B, at "Page 3."

(or approximately) one-half that amount (in the example given here, at the $8.25 price suggested by respondent).[9]

The "blank" line appearing on the "coding sheets" sent by respondent to the catalog houses, *i.e.*, the line appearing beneath the heading "Your corresponding price line as it is to print," set out above, forms the basis for one of respondent's arguments herein. In addition to its other functions (*e.g.*, price list), the "coding sheet" serves as something of an "order blank," in that the catalog houses who accept respondent's offer to sell (and thus to have respondent's merchandise pictured in their catalogs), indicate their acceptance by returning to respondent its "coding sheet," with appropriate notations. Thus, Service Exchange Distributors, a catalog house located in San Francisco, accepted respondent's offer by returning Coro's "coding sheet" with the notation that, among other things, Service Exchange Distributors wanted Coro to print, for insertion in Service's catalog, 36,000 copies of respondent's "mock-up" catalog pages. In addition, Service indicated, in the blank spaces beneath the heading "Your corresponding price line as it is to print," its acceptance of respondent's suggestions as to both the *actual* price at which it would resell and the purported "retail" price. For example, Service returned respondent's "coding sheet" with the following notation inserted in the blank space noted above in connection with Coro's "Nancy" necklace and earring set:[10]

17407CT825------------------------------------ Retail $16.50

As previously noted, "825" is the "code" for a price of $8.25, the price respondent suggested as the *actual* resale price of the catalog houses, and the "Retail $16.50" is the purported retail price computed by Coro under the "three-times formula."

Apparently aware of the illegality of supplying its customers with these blatantly fictitious prices, respondent, in 1960, made a rather transparent attempt to transfer "responsibility" for the publication of those prices to its catalog house customers. It eliminated from its "coding sheets" both the actual and the fictitious "suggested" retail prices, leaving only one price figure on those sheets—the price charged to the catalog houses themselves. For example, Coro's new 1960 coding sheet contained the following "price entries" for its "Riviera" jewelry set:[11]

Your cost	*Your corresponding price line as it is to print*
7.00	________________________

[9] Representatives of two of respondent's catalog house customers testified herein. Tr. 128 and 177. Both testified that they had only one price to all customers—the "coded" or otherwise designated *actual* retail price, and that this was invariably one-half the "retail" price "suggested" to them by their manufacturers including Coro. Tr. 144-146; and 180, 191, 206, 214.

[10] RX 2, p. 2.

[11] RX 3.

When this coding sheet came back from the catalog house customer, the blank space contained the notation, by that customer, "List $21.00."[12]

Respondent contends, therefore, that in printing 16,000 "insert sheets" containing the fictitious "list" or retail price of $21, it, Coro, was merely following the instructions or directions of the catalog house, and was thus no more responsible for the publication and dissemination of that fictitious price than "the printer who actually set the type for the price line. Both were merely following the directions of the Catalog Houses."[13]

The first answer to this argument is that it lacks factual support. True, respondent's 1960 "coding sheet" itself contained no "suggestions" as to the catalog houses' resale prices, but a letter that accompanied that "coding sheet" served the same purpose.[14]

Secondly, respondent's claim here is insufficient as a matter of law. Even if we assumed that respondent had no part in the *formulation* of the fictitious "retail" price figure—that Coro simply followed the "instructions" of its catalog house customers and printed what they told it to—respondent would still be responsible. It is settled law that "one who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act," notwithstanding the fact that, in doing so, he is merely "acting on instructions from [his] customer." *C. Howard Hunt Pen Co.* v. *Federal Trade Commission*, 197 F. 2d 273, 281 (3d Cir. 1952). See also, *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922); *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F. 2d 838, 840 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962); *Baltimore Luggage Co.* v. *Federal Trade Commission*, 296 F. 2d 608, 610 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962).

---

[12] *Ibid.*

[13] Respondent's brief, p. 26.

[14] Respondent's revised coding sheets were accompanied by a letter (CX 58-A, 58-B) that stated in part as follows:

Inserts will be available on a *formula basis* as previously * * *

The insert application sheet shows your cost for each set or item. You must indicate on the accompanying line exactly how you wish your price line to read. In making this out, you must include the price at which you will offer it to your dealer and list price which you will suggest to him. *On the basis of past experience, we can advise you that catalogs using our insert usually take a markup of 50% on their cost. Catalogs usually suggest a retail price of double this amount for their dealer.* (Emphasis added.)

As the hearing examiner observed, Initial Decision, p. 1177, n. 8, the "markup and retail price formula here advised is simply another way of describing the 'three times' formula."

Nor is there any merit in respondent's contentions that the record fails to support the examiner's findings (1) that the prices represented by respondent to be the usual and regular retail prices of its merchandise in the areas where the catalogs were distributed and used by the public were, in fact, fictitious, and (2) that the public understands the terms "retail," "list price," etc., to mean "usual and regular retail price."

This latter contention is based on the argument that only "consumer testimony" can establish the meaning ascribed to these terms by the public. This is not the law. "That the Commission may itself, without the benefit of consumer testimony, find an ad to be misleading is not open to serious question." *Gimbel Brothers, Inc.*, Dkt. 7834 (July 26, 1962) [61 F.T.C. 1051, 1071], and cases cited there. We find here, as we have found many times before,[15] that the terms "list price," "retail price," and words of similar import[16] convey to the consumer the impression that the price figures quoted in conjunction with those terms are the "normal," the "going," the "generally prevailing," or the "usual and customary" price at which the product is being sold in the area where the representation is made.[17] If respondent's representations in this regard are false, they constitute fictitious pricing, an unfair practice within the meaning of Section 5 of the Federal Trade Commission Act. *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F. 2d 838, 840 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962); *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337, 340 (7th Cir. 1960), *cert. denied*, 364 U.S. 883; *Baltimore Luggage Co.* v. *Federal Trade Commission*, 296 F. 2d 608, 610 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962).

We think this respondent has grossly misrepresented the "retail" prices of its merchandise. First, it is undisputed that this merchandise was a "special line" marketed by respondent solely through its catalog house customers, and that, therefore, the prices charged in this line of distribution are the *only* prices we can look to in determining the truth or falsity of respondent's "retail" price representa-

---

[15] See, *e.g.*, *Giant Food, Inc.*, Dkt. 7773 (July 31, 1962) [61 F.T.C. 326]; *George's Radio and Television Co., Inc.*, Dkt. 8134 (January 19, 1962) [60 F.T.C. 179], civil penalties imposed, *United States* v. *George's Radio and Television Co., Inc.*, 1962 Trade Cases Par. 70,281 (D.C. Cir. 1962); *The Regina Corp.*, Dkt. 8323 (June 13, 1962).

[16] Some of the catalogs omit all adjectives before the purported retail price, that is, instead of setting out side by side a "coded" or "your cost" price of $8.25 and a "Retail $16.50" they omit from the latter the word "Retail," leaving it to the reader to draw his own inferences as to what the unexplained figure "$16.50" purports to be. The consumer-reader could only infer that, when two prices are set forth together, and the lower of the two is the price he is required to pay, the higher price purports to be the "regular, retail price," and that he is being given a "discount" therefrom.

[17] See, *e.g.*, Guides Against Deceptive Pricing, Section I(b) (Adopted October 2, 1958), 2 CCH Trade Reg. Rep. Par. 7897 at p. 12,907.

tions.[18] Secondly, it is also undisputed that the catalog houses *themselves* resell to all of their customers, regardless of classification, at a single price—namely, at *one-half* the amount printed by respondent in the catalogs as the purported "retail" price.[19] The catalogs have never sold at those exaggerated prices, and respondent has known it all along.[20]

The record indicates that these catalog houses have resold to three general classes of customers: to "organizations" (industrial, commercial, fraternal, etc.) that *use* the merchandise—and hence do not resell it—as gifts, prizes, or awards (to its employees, customers, etc.); in some instances, at least in the past, to small-town retailers who *do* resell the goods; and to "individual" consumers who buy for their own use and consumption, purchasing either by the mail-order method, or by "over-the-counter" buying in the various "show-room" stores operated by the catalog houses.

Representatives of two of respondent's catalog house customers, as noted, testified herein. One of them stated that "better than fifty per cent" of his company's total sales were made to "industrial accounts," [21] and that sales to individual consumers who bought over-the-counter in his Philadelphia show-room store accounted for another 35% to 40%.[22]

We agree with the examiner that, at least for the purposes of this case, all of these sales are "retail" in character.

We conclude that respondent has misrepresented the retail price of its goods in every city and town—in every "market area"—in which non-retailers, whether "organizations" or "individual" employees of such organizations, purchased from the catalog houses.[23] The number of such areas is undoubtedly very large. Respondent had as many as 30 different catalog house customers in a single year,[24]

---

[18] Respondent's counsel conceded this in oral argument before us. "I have no other retail price to look to. My client testified at the hearing that this was a special line restricted only to the catalogue houses. Accordingly, such retail prices that exist with respect to this merchandise exist because of the practice of the catalogue houses alone." Transcript of oral argument, p. 5.

[19] See tr. 144–151, 179–180, 191, 214.

[20] Respondent's officials were told about "the price structure in which the catalog industry operates" before they entered the field in 1955 or 1956, tr. 89, and, of course, respondent had to know the "coding" technique (see "instructions" quoted in note 6, *supra*) in order to print their own "pages" for insertion in the catalogs (see CX 59, pp. 28–31).

[21] Tr. 219. It is not clear whether the term "industrial accounts," as used by this witness, includes purchases by "individual" consumers who are *employed* by industrial firms or whether it refers solely to purchases by these "organizations" for their own use as gifts, prizes, etc.

[22] Tr. 188–189.

[23] See, *e.g., George's Radio and Television Co., Inc.*, Dkt. 8134 (January 19, 1962) [60 F.T.C. 179], civil penalties imposed, *United States v. George's Radio and Television Co., Inc.*, 1962 Trade Cases Par. 70,281 (D.C. Cir. 1962).

[24] CX 11-A, 11-B

some of which distributed as many as 100,000 and 500,000 copies of their catalogs to cities and towns throughout the 50 States.[25] And the volume of sales generated by those misrepresentations were substantial. (As noted, the catalog houses bought—and, of course, resold— approximately $200,000 worth of Coro's merchandise per year, for a period of five or six years.)

Respondent points, however, to the third class of catalog house customer mentioned above—the "retailers" who buy from the catalog houses and then resell.

Because there are, apparently, a few such customers, and because there is some indication in the record that these customers have, at least occasionally, resold catalog house merchandise at the full "suggested retail" price, respondent contends that the latter prices. although derived from the mathematical "three-times formula" rather than market experience, might actually be true.

While it appears that the proliferation of the catalogs in recent years and the growing sophistication of consumers as to the pricing "codes"[26] has all but eliminated the possibility that any but the most rustic of buyers could be induced to purchase at this 200% markup over the manufacturer's selling price, the affirmative burden in a fictitious pricing case is not to prove that no one, at any place, has ever succeeded in "retailing" the merchandise at the allegedly "fictitious" price. Counsel supporting the complaint need only prove that "the product involved [has been] sold at retail in a *substantial segment* of *a* market area at less than the [fictitious] price * * *." *Rayex Corp.* v. *Federal Trade Commission*, CCH 1963 Trade Cases Par. 70,774, at p. 78, 124 (2d Cir., May 7, 1963) (emphasis added). Thus, if a substantial part of the total volume of a particular manufacturer's merchandise flowing into each of these thousands of cities and towns across the country was sold in each such local area by the catalog houses to non-retailers (*i.e.*, to those who do not resell) at one-half the purported "retail" price, the latter would still be

---

[25] The two catalog house representatives who testified herein estimated their respective "circulations" at 100,000 and 500,000. See tr. 139–140, 186.

[26] The retailers used the catalogs as "countersalesmen," that is, they displayed the catalogs on their counters and invited customers to look through them and make purchases on the basis of the pictures and representations appearing in the catalogs. The retailer could conceal the fact that he was paying the "coded" price (one-half the "suggested retail" price) by simply tearing out of the catalog the "confidential" or "code" instructions that appear there as an insert. See CX 59, insert inside front cover, p. 4. Now, however, according to one of the catalog house representatives, the public's familiarity with the "coding" systems, tr. 200, has lessened its effectiveness and caused the catalog house to abandon it and simply designate the lower of the two prices as "Your Cost." Tr. 204. This precludes the use of the catalog as a "countersalesman," because "the customer [of the retailer] could see what the dealer was paying" for the goods. Tr. 204. This change occurred in 1960, the last year respondent's merchandise appeared in the catalogs.

false even if it should appear that there was *also* a local retailer in that area who had, in fact, bought the same item from the catalog houses and resold it at the full "suggested retail" price. Thus, if an item has been retailed in a particular town at both $16.50 *and* $8.25, the manufacturer may not ignore the latter figure and claim that $16.50 is "the" retail price of the item in that area. It is true, of course, that manufacturers and distributors have no control over the prices charged by retailers, and that the retailers in a particular area, by reselling at different prices, might make it difficult or even impossible for the manufacturer to determine "the" local retail price. But this ignores the fact that, by the act of printing a specific price figure as "the" retail price, the manufacturer has affirmatively represented to the reading public that there *is* a "usual and regular" or "going" retail price in each and every market area where the representation is made (*e.g.*, in each town where the catalogs are received by the public); that the manufacturer *knows* what that single price is; and that the quoted "retail" price is, in fact, that "going" retail price.[27] If one cannot give the buying public an honest and accurate retail price figure, then he should give it no figure at all.

II

Respondent's other four exceptions relate principally to its "abandonment" argument. Boldly asserting that it had effected an "irrevocable"[28] abandonment of its fictitious pricing some five months prior to the filing of the complaint in this matter,[29] respondent contends, in effect, that this fact alone established its "right" (1) to have the entire matter disposed of by an informal "stipulation," rather than by the formal procedure of complaint, adjudication, and order to cease and desist (and thus that the Commission was acting contrary to "the public interest" when it issued this complaint in the first place), (2) to have a dismissal of the charge now, or (3) at the very least, to have a very "narrow" cease-and-desist order. It also argues that the examiner erred in restricting its "proof" on these points. He refused to let respondent "prove" its alleged abandonment by means of a letter he regarded as fatally self-serving, and refused to subpoena the Commission's records and personnel (including our Secretary and "project attorneys") in aid of respondent's effort to prove that the Commission, in not offering respondent a "stipulation," had failed to adhere to its own "policies."

---

27 *George's Radio and Television Co., Inc.*, n. 23, *supra*.

28 Respondent's brief, p. 1e.

29 The abandonment allegedly occurred in December of 1960, and the complaint was filed in April of 1961.

All of these contentions are patently without merit. Our "policy" records are, by their very nature, confidential in character, and will only be released, as plainly stated in our Rules of Practice, upon application to the Commission itself, *Postal Life and Casualty Insurance Co.*, Dkt. 6276, 52 F.T.C. 651, 652–653 (1956), *L. G. Balfour Co.*, Dkt. 8435 (May 10, 1963, p. 6), and a showing of "good cause" for their release.[30] At the time this complaint was issued (April, 1961), our Rules did provide for a "stipulation" procedure.[31] But that stipulation policy gave no one any "rights." Indeed, the pertinent provision of that former Rule expressly provided that: "The Commission reserves the right *in all cases* to withhold the privilege of disposition by voluntary agreement."[32] Hence, respondent's desire to search through the Commission's papers and interrogate its staff in regard to our stipulation "policies" was an attempt to go beyond the issues before the examiner, and launch a probe into the mental processes of the Commission itself.

Respondent's argument misconceives the nature of the "public interest" requirement in our statute. This issue ultimately turns upon, and is bound up in, the "merits" of the case, *i.e.*, whether, in fact, there "has been," *C. Howard Hunt Pen Co.* v. *Federal Trade Commission*, 197 F. 2d 273, 281 (3d Cir. 1952), a violation of law. *Hill Bros.* v. *Federal Trade Commission*, 9 F. 2d 481, 484 (9th Cir. 1926), *cert. denied*, 270 U.S. 662; *Parke, Austin & Lipscomb, Inc.*, v. *Federal Trade Commission*, 142 F. 2d 437, 441 (2d Cir. 1944). Thus, if the evidence received at the hearing fails to disclose a practice that is "prohibited by this Act," then there is obviously no "public interest" in the proceeding. *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 427, 428 (1920). But "[i]f the practice is unfair within the meaning of the Act, it is equally clear that [a] proceeding, aimed at suppressing it, is brought, as § 5 of the Act requires, 'to the interest of the public.'" *Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 308 (1934). And it has long been settled that it is "in the interest of the public to prevent the sale of commodities by the use of false and misleading statements and representations." *L. & C. Mayers Co., Inc.* v. *Federal Trade Commission*, 97 F. 2d 365, 367 (2d Cir. 1938).

It is true, of course, that there have been cases where, because of the total and permanent character of the abandonment, it was concluded that resumption, because it would be economically unprofit-

---

[30] Rules of Practice, Procedures and Organization (1961), Sections 1.61–1.64. Our 1955 Rules contained similar provisions. See Rules of Practice (1955), Sections 1.131–1.134.

[31] 1955 Rules, *supra*, Section 1.51.

[32] *Ibid.* (Emphasis added.)

able, was highly improbable. The leading case, and one this respondent relies heavily upon, is *National Lead Co.* v. *Federal Trade Commission*, 227 F. 2d 825 (7th Cir. 1955), *rev'd in part*, 352 U.S. 419 (1957). There, however, the court's dismissal of the complaint as to one of the respondents was based upon the facts that it had ceased all production of the product in question, had sold its plant and facilities, and had discharged its technicians and sales personnel. 227 F. 2d at 839.

Here, respondent concedes that its "abandonment" was prompted *solely* by the commencement of the investigation by this Commission, and makes no attempt to show that it was forced upon it by business and economic conditions in its field. From respondent's silence on this point, we must conclude (1) that its $200,000 worth of annual sales to the catalog houses was still yielding profits when our investigation caused it to stop those sales in December, 1960, and (2) that re-entry into the business of selling to those catalog houses would today be just as easy, if not more so, as its initial entry in 1955 or 1956. While the testimony of its officials intimated that the manufacture of this "special line" of goods for exclusive sale to the catalog houses had required special "parts, tools, or dies," [33] we were not told whether respondent's "irrevocable abandonment" of the entire catalog house "industry" included a *disposal* of that equipment.

In any event, however, abandonment of sales to catalog houses does not, as respondent contends, render it "impossible" for it to continue the practice in issue. That practice, as discussed hereafter in connection with the scope of the order, is not fictitious pricing "by means of mail-order catalogs," but simply fictitious pricing. Respondent does not claim that it has stopped manufacturing and selling *costume jewelry*. It says only that it has stopped selling costume jewelry *to catalog houses*. The practice of fictitiously pricing costume jewelry could be continued by this respondent through a host of other media.

It has long been settled that an "abandonment," as such, is not enough to warrant dismissal of a proceeding. As we said in *Giant Food, Inc.*, Dkt. 7773, (July 31, 1962), [61 F.T.C. 326, 356]:

> That discontinuance of an unlawful practice, of itself, does not necessarily preclude the issuance of a cease and desist order is so well settled as to preclude further argument. *Marlene's, Inc.* v. *Federal Trade Commission*, 216 F.2d 556, 559 (C.A. 7). This being so, it was incumbent upon respondent to show something more.

These respondents have completely failed to show us this "something more." Their testimony indicates that they stopped fictitiously pricing their merchandise in December, 1960, only because they had

[33] Tr. 84-86.

been visited in the preceding month—November, 1960—by our attorneys, and thus advised that the Commission was investigating the matter. In their testimony, they explained that the Commission's proceedings "would be very bad for our company's reputation" and that, after the "controversy" with the Commission ends—

> * * * every step or action taken in the course of sales of the organization, would have to be subject to meeting, subject to scrutiny by counsel, and we didn't want to involve any branch of our company in any kind of business where we felt that we would have to ask counsel if we could do this, that, or the other thing.[34]

In other words, respondent stopped violating the law when it learned that the law's hand was already on its shoulder, and it stopped then because it wished to avoid the embarrassment of having its violations exposed to the public view, and the inconvenience of having to comply with the law's requirements in the future.

III

Respondent finds no fault with that part of the examiner's order which prohibits misrepresentation of its watch "guarantees," thus conceding that it has violated the law in this respect and that the order is appropriate in scope. Respondent objects strenuously, however, to the scope of the fictitious pricing prohibitions. The examiner's order would require respondent to cease and desist from:

> 1. Representing directly or by implication, on catalog insert sheets, on color positives for the printing of such catalog sheets, or on price lists, *or in any other manner*, that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which such merchandise is usually and customarily sold at retail in the trade area or areas where the representations are made.
>
> 2. Putting into operation any plan whereby retailers or others may misrepresent the usual and regular prices of such merchandise. (Emphasis added.)

The only defect we see in this order is that it fails to include two provisions that we included in the order entered in *Leeds Travelwear, Inc.*, Dkt. 8140 (July 20, 1962) [61 F.T.C. 152], a case that, like this one, involved the use of catalog sheets to place in the hands of resellers fictitious prices that can be used to deceive the public. Those provisions, paragraphs (2) and (3) of the *Leeds* order, will be added here. As to paragraph (2) of the examiner's order here, the meaning of the phrase "putting into operation any *plan*" (emphasis added) is sufficiently clear that respondent need have no fear of being blamed for any fictitious prices that its customers might create on their own. A similar provision was included in the *Leeds* order,

---

[34] Tr. 111–112.

and was expressly approved by the Court in *Baltimore Luggage Co.* v. *Federal Trade Commission*, 296 F. 2d 608 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962).

Respondent contends that it is entitled to a narrow order because of its "abandonment" of the practice; because only a small percentage of its over-all volume of business was involved in the fictitious pricing violation; and because here, "as in the *Grand Union* case,[35] there was only a single violation and that in a highly uncertain area of the law."[36]

We have already noted that respondent's abandonment, having been prompted solely by the commencement of this proceeding, and thus undertaken "in the apparent hope that it [would] thereby avoid the issuance of an order to cease and desist," *Ward Baking Co.*, Dkt. 6833, 54 F.T.C. 1919, 1921 (1958), entitles it to no special consideration.

The contention that fictitious pricing involves a "highly uncertain area of the law" is similarly without merit. This practice—"falsely representing that the regular price" of a product is greater than it is in fact—was condemned by the Supreme Court as "contrary to decent business standards" as early as 1937. *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112, 116 (1937). Communicating fictitious prices to the public by the particular *medium* employed here—mail-order "catalogs"—was held unlawful as long ago as 1938, *L. & C. Mayers Co., Inc.* v. *Federal Trade Commission*, 97 F. 2d 365 (2d Cir. 1938), and as recently as July 1962, *Leeds Travelwear, Inc.*, *Dkt.* 8140. (See also *The Clinton Watch Co.*, Dkt. 7434, 57 F.T.C. 222, 223, 226 (decided by the Commission in July, 1960, several months *before* the investigation in this case began), *affirmed*, 291 F. 2d 838 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962).)

Nor do we understand that the printing, year after year, of many thousands of catalog pages, each of which contained several separate and distinct misrepresentations as to prices, can be translated into "only a single violation." As we have already noted, respondent had as many as 30 different catalog house customers in a single year; two of these catalog houses "circulated" as many as 100,000 to 500,000 separate catalogs containing the fictitious prices printed up by respondent (thus placing respondent's false representations in the hands of consumers located in thousands of cities and towns throughout the 50 States); and the fruits of these thousands of violations

[35] *Grand Union Co.* v. *Federal Trade Commission*, 300 F. 2d 92 (2d Cir. 1962).
[36] Respondent's brief, p. 20.

were reflected in respondent's sales of some $200,000 of its merchandise each year.

Respondent's other argument—that these amounts, while not *de minimis*,[37] call for a narrow order because they amount to only a fraction of its over-all business—is principally a challenge to the "product coverage" of the order. In effect, respondent contends that we have no right to prohibit it from fictitiously pricing any and *all* of its goods in the future, when its past offenses have all occurred in connection with its sales of a "special line" of watches and costume jewelry sold to only one—and a relatively minor one—of its several *classes* of customers. We must, respondent argues, leave it free to fictitiously price its "regular" line of watches and costume jewelry, a line it sells to department and variety stores.

It has long been settled that, since the Federal Trade Commission Act prohibits not only unfair "acts" but unfair "methods of competition" and unfair "practices," a violation that involves the sale of only a single product is sufficient basis for an order covering repetitions of the "practice" in future sales of *all* of the offender's products. *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883. As we said in *Colgate-Palmolive Co.*, Dkt. 7736 (December 27, 1961) [59 F.T.C. 1452, 1473] *remanded*, 310 F. 2d 89 (1st Cir. 1962), (new order issued by the Commission May 7, 1963): "The language of the cases, like the statute, has always employed the *generic term* 'practices,' and it has frequently been made clear that the Commission's authority—indeed, its obligation—in framing an order extends to the prevention of unfair *types* or *forms* of conduct rather than merely isolated acts." (Emphasis added.)

That fictitious pricing, in all of its myriad forms, is but a single "practice" is well illustrated by the case of *Baltimore Luggage Co.* v. *Federal Trade Commission*, *supra*, 296 F. 2d 608 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962). There, the order approved by the Court prohibited that respondent from "[r]epresenting, directly or by implication, by means of *preticketing* or *in any other manner*, that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which said merchandise is usually and regularly sold at retail in the trade area or areas where the representations are made." 296 F. 2d at 610. The *Baltimore Luggage* order's prohibition of fictitious pricing accomplished "by means of preticketing or in any other manner" has precisely the same

[37] Respondent concedes that $200,000 is not *de minimis*. Transcript of oral argument, p. 32.

coverage as the instant order's prohibition of fictitious pricing accomplished by "catalog insert sheets * * * or in any other manner." Both of these orders prohibit fictitious pricing, regardless of the means by which it might be accomplished. For us to enter an order that prohibits only one of several means of engaging in a particular unlawful practice is to invite ingenious attempts to circumvent it. If this respondent is honestly resolved to eschew fictitious pricing of all kinds in the future, then it should be wholly unconcerned with whether our order prohibits all or only one of the *methods* of doing it.[38]

IV

While we agree with the examiner that the record fails to disclose enough about the activities of two of the individual respondents to hold them personally liable for obedience to our order,[39] we believe he erred in dismissing the complaint as to one of them, Gerald E. Rosenberger. The examiner noted the testimony that Rosenberger, as President and Chairman of the Board, "has the over-all responsibility for the acts and practices of the corporation." But the examiner felt that: "This is not enough, however, to show individual responsibility warranting the stigmatization attendant upon an order naming him personally. There is no showing of 'active personal participation' in the acts and practices here found unlawful * * *."

In *United States* v. *Wise*, 370 U.S. 405 (1962), the Supreme Court held that "a corporate officer is subject to prosecution under § 1 of the Sherman Act whenever he knowingly participates in effecting the illegal contract, combination, or conspiracy—be he one who *authorizes*, *orders* or *helps perpetrate* the crime—regardless of whether he is acting in a representative capacity." 370 U.S. at 416 (emphasis added). We think the Federal Trade Commission Act,[40] like the Sherman Act, should also be construed "in its common-sense meaning to apply to *all officers* who have a *responsible share* in the proscribed transaction." *Id.*, at 409 (emphasis added).

---

[38] See p. 1188 of the examiner's initial decision.

[39] There is very little information in the record as to the exact area of responsibility occupied by Royal Marcher (Director and Consultant) and Jerome H. Oppenheimer (Vice President and Secretary). Therefore, although we are satisfied that the executive approval of these unlawful acts ran from the President down through one or more of the subordinate officers, we cannot say that either of these were the one or ones that formed the " 'link' in the 'chain' of events constituting" those violations. *United States* v. *Wise*, 370 U.S. 405, 414 (1962).

In addition, however, it is appropriate to note that Marcher's participation in the affairs of the corporation has apparently been very limited since 1958, and that Jerome Oppenheimer is over 80 years old.

[40] "Persons" are liable under both statutes. See Section 5(a)(6) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(6), and Sections 1, 2, and 8 of the Sherman Act, 15 U.S.C. §§ 1, 2, and 7.

Rosenberger was not merely a "link" in the "chain" of events that effected the violations—he was the apex of the responsibility pyramid. Subordinate officers, in the absence of proof to the contrary, can claim that their particular responsibilities lie in an entirely different segment of the company's operations, and that they were therefore by-passed by the "chain" that ran downward from the top to the employees at the bottom who physically performed the unlawful acts. But all of these separate "lines" of responsibility converge on the man at the top. Rosenberger, President of Coro for 20 years, and Chairman of the Board for the past four or five years, is that man here, and he admits—as indeed he must—that he bears the "over-all responsibility for the acts and practices of the corporation."

He is also the company's largest single stockholder. Of the firm's 476,520 outstanding shares of common voting stock, he owns 53,916 (11.31%); he holds, as Co-Trustee under various trusts for the benefit of his grandchildren, another 11,957 shares; he is one of three Executors of, and has a beneficial interest in, the Estate of Carl Rosenberger, which owns another 51,776 shares (10.87%); [41] and Mrs. Rosenberger owns still another 5,982 shares.

While he insisted that he did not "directly" supervise "the sale of this merchandise to catalog houses," claiming that this "supervision and direction" was in "someone else's hands," his testimony shows plainly that he personally participated in the decision to *enter* the business of selling to catalog houses. And while he testified that his "catalog department" or division was headed by a gentleman who identified himself as a "salesman," [42] and that the "advertising goes through" still another official,[43] it strains our credulity to suppose that the President of the corporation permitted it to begin production of a "special line" of merchandise,[44] set up a division to sell it to an entirely new class of customers, and pay for the printing of millions of catalog sheets per year over a period of some five or six years without ever discovering that the "retail" prices being quoted for his merchandise by his own employees were twice their actual retail price. In short, we do not think that this operation, which brought the company additional sales of $200,000 per year, was so insignificant that the President of the company did not bother to notice it, or that the false and deceptive nature of the claims being made in the name of

[41] RX 1, pp. 3, 4.
[42] Tr. 24.
[43] Mr. Adolph Katz, Executive Vice President, tr. 13.
[44] Tr. 84-86.

his company could have been concealed from him by subordinates. We have no doubt that Rosenberger, at the very least, "authorized" his juniors to make these false claims, and thus had "a responsible share in the proscribed transaction."

As we said in *Fred Meyer, Inc.*, Dkt. 7492 (March 29, 1963) [p. 72 herein]: "This is not a question of something that could have been concealed by subordinates; if [the general public has been] apprised of the details of these programs, we think it a fair inference that the Chairman of the Board also knew about them. High corporate officials who pass upon and approve illegal practices are no less liable than the subordinates who actually do the work. Since these [individual respondents] are the ones with the actual power to see that our order is obeyed, we think they should be given every incentive to exercise it."

Respondent's exceptions are denied. The initial decision and order as supplemented and modified to conform to the views expressed in this opinion will be adopted as the decision of the Commission.

Commissioner Elman dissented.

Final Order

NOVEMBER 6, 1963

Pursuant to the Commission's order of July 9, 1963, respondents having filed objections to the proposed order to cease and desist in this proceeding, including an objection based on the Commission's alleged failure to specifically rule upon respondents' exception to the hearing examiner's refusal to admit into evidence respondents' exhibit 4 for identification, a proposed alternative order, and reasons in support thereof; and counsel in support of the complaint having filed a reply in opposition thereto; and

It appearing that the Commission, in its opinion of July 9, 1963, made specific reference at page 1199 thereof to, *inter alia*, respondents' exception to the hearing examiner's rejection of respondents' exhibit 4 for identification, and concluded that all of the noted exceptions were without merit; and

The Commission having determined that respondents' objections to the proposed final order of July 9, 1963, are without merit and that said order should be entered as the final order of the Commission:

It is ordered, That respondent Coro, Inc., a corporation, and its officers, and respondent Gerald E. Rosenberger, individually and as an officer of the corporate respondent, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of costume jewelry, watches or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication, on catalog insert sheets, on color positives for the printing of such catalog sheets, or on price lists, or in any other manner, that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which such merchandise is usually and customarily sold at retail in the trade area or areas where the representations are made.

2. Supplying to, or placing in the hands of, any distributor, dealer or other purchaser, catalog sheets or other materials which are displayed to the purchasing public and which contain an indicated retail price for respondents' merchandise when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area or when there is no generally prevailing retail price for such merchandise in the trade area.

3. Furnishing to others any means or instrumentality by or through which the public may be misled as to the generally prevailing retail prices of respondents' merchandise.

4. Putting into operation any plan whereby retailers or others may misrepresent the usual and regular prices of such merchandise.

5. Representing directly or by implication that any product is guaranteed unless the terms and conditions of such guarantee and the manner and form in which the guarantor will perform are clearly and conspicuously set forth.

6. Representing that any product is guaranteed when a service or other charge is imposed, unless the amount thereof is clearly and conspicuously set forth.

It is further ordered, That respondents' objections to the proposed order be, and they hereby are, denied.

It is further ordered, That the hearing examiner's initial decision, as supplemented and modified by the Commission's opinion of July 9, 1963, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent Coro, Inc., a corporation, and its officers, and respondent Gerald E. Rosenberger, individually and as an officer of the corporate respondent, 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.

By the Commission, Commissioner Elman dissenting.