(b) The debtor's wages attached;

(c) The debtor's wages garnisheed.

4. Using forms or any other items of printed or written matter which simulate legal process.

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.

By the Commission, Commissioner Anderson not participating.

IN THE MATTER OF

STANDARD MILLS, INC., ET AL.

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

Docket 8484. Complaint, May 2, 1962—Decision, Sept. 30, 1963

Order requiring New York City converter jobbers of upholstery fabric—buying from mills the raw, unbleached grey goods which they then contracted with finishing mills to color and pattern and finally sold to furniture manufacturers, department stores, decorators and upholsterers—to cease the unqualified use in their trade name of the word "Mills", and to accompany the name on letterheads, invoices and labels with the words "Converters, Jobbers, and Distributors of Fabrics—not Textile Manufacturers or Mill Owners" in type ¾ the size of that used in the trade name and immediately under the name; and with a choice of using the same qualification as a footnote, preceded by an *asterisk* on all other *printed* matter.

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 Standard Mills, Inc., a corporation, and Arthur J. Smith and Lloyd Smith, 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 Standard Mills, Inc., is a corporation, organized, existing and doing business under the laws of the State of New York, with its principal office and place of business located at 461 Park Avenue South, New York, New York.

Respondents Arthur J. Smith and Lloyd Smith are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of textile fabrics to the upholstery trade including decorators and retail stores.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof 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 in soliciting the sale of, and selling, textile fabrics, respondents do business under the name of Standard Mills, Inc., and use that name on letterheads, invoices, labels and tags and in various advertisements of their products.

PAR. 5. Through the use of the word "Mills" as part of the respondents' corporate name, respondents represent that they own or operate mills or factories in which the textile fabrics sold by them are manufactured.

PAR. 6. Said representation is false, misleading and deceptive. In truth and in fact respondents do not own or operate or control the mills or factories in which the textile fabrics sold by them are manufactured but they buy said textile fabrics from others.

PAR. 7. There is a preference on the part of the purchasers to buy products, including textile fabrics, direct from factories or mills, believing that by so doing lower prices and other advantages thereby accrue to them.

PAR. 8. 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 textile fabrics of the same general kind and nature as that sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices, has had, and now has, the capacity and tendency to mislead purchasers 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. 10. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Mr. Charles W. O'Connell for the Commission;
Mr. Lawrence G. Nusbaum, Jr., of New York, N.Y., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

OCTOBER 11, 1962

PRELIMINARY STATEMENT

The Federal Trade Commission seeks, in this proceeding under § 5 of the Federal Trade Commission Act [1] to compel respondents to abandon the name under which their business has been conducted since the year 1908 by deleting the word "Mills" from the corporate name "Standard Mills, Inc." The complaint, *inter alia*, alleges:

PARAGRAPH FIVE: Through the use of the word "Mills" as part of the respondents' corporate name, respondents represent that they own or operate mills or factories in which the textile fabrics sold by them are manufactured.

PARAGRAPH SIX: Said representation is false, misleading and deceptive. In truth and in fact respondents do not own or operate or control the mills or factories in which the textile fabrics sold by them are manufactured but they buy said textile fabrics from others.

PARAGRAPH SEVEN: There is a preference on the part of the purchasers to buy products, including textile fabrics, direct from factories or mills, believing that by so doing lower prices and other advantages thereby accrue to them * * *.

PARAGRAPH NINE: 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 purchasers * * *.

On June 26, 1962, complaint counsel requested that official notice [2] be taken:

1. That the use of the word "mills" in a corporate or trade name constitutes a representation that the user owns and operates mills or factories in which products sold by it are manufactured.

[1] 15 U.S.C. § 45.

[2] See Federal Trade Commission's Rules of Practice for Adjudicative Proceedings Rule 4.8(5); Rule 4.12(c): "*Official Notice of Fact.* When any decision of a hearing examiner or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor.

and

2. That a preference exists on the part of many purchasers to buy directly from mills or factories believing that by so doing lower prices and other advantages thereby accrue to them.

Complaint counsel relied upon a series of legal precedents commencing with *FTC* v. *Royal Milling Co.*, 288 U. S. 212 (1933); *FTC* v. *Mid West Mills, Inc.*, 90 F. 2d 723 (1937); *Bear Mill Mfg. Co.* v. *FTC*, 98 F. 2d 67 (1938); *Herzfeld* v. *FTC*, 140 F. 2d 207 (1944); *Rudin & Roth, et al.* v. *FTC*, 53 F.T.C. 207 (1956); *Dexter Thread Mills, Inc., et al.*, 53 F.T.C. 59 (1956); *Amity Mills, Inc.*, 53 F.T.C. 74 (1956); *Wool Novelty Co., Inc., et al.*, 54 F.T.C. 1723 (1958). These decisions are discussed later herein.

On July 5, 1962, the hearing examiner signed and issued his Notice of Intention to Take Official Notice in substantially the form requested by complaint counsel but provided that upon making a timely motion as required by the Rules of the Commission respondents would be afforded an opportunity to disprove the noticed facts at the hearing. Respondents timely notified complaint counsel and the hearing examiner of their intention at the hearing to rebut or disprove the facts of which official notice had been taken. Respondents' answer denied the legally operative allegations in the complaint and the facts which had been officially noticed. The issue here is whether complaint counsel has in this record sustained the burden of proof imposed upon him when his sole evidence to prove the allegations in the complaint is the official notice taken of facts by the examiner, and respondents have nevertheless introduced uncontradicted reliable, probative and substantial evidence contrary to the noticed facts. The hearing examiner's act in taking official notice served only to shift the "burden of going forward" from complaint counsel to respondents. The "burden of proof," as distinguished from the burden of going forward, is always upon the proponent of any factual proposition.[3] However, the facts which the examiner had officially noticed were not, by such official noticing, conclusively presumed to be true, but were subject to being contradicted by reliable, probative and substantial evidence. If respondents have contradicted the officially noticed facts by such evidence, and complaint

[3] Section 7(c) of the Administrative Procedure Act provides: "* * * except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof * * * But * * * no * * * order shall be issued except * * * in accordance with reliable, probative and substantial evidence."

Section 4.12(a) of the Rules of Practice for Adjudicative Proceedings of the Federal Trade Commission, effective June 1962, provides: "(a) *Burden of proof.* Counsel supporting the complaint shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with refernece thereto."

Section 4.19(b) provides: "* * * Initial decisions shall be based upon a consideration of the whole record and supported by reliable, probative and substantial evidence."

counsel has adduced no evidence other than the technical noticing by the hearing examiner, complaint counsel has not sustained the burden of proof imposed upon him by the Administrative Procedure Act and the Rules of Practice for Adjudicative Proceedings of the Federal Trade Commission. (See footnote 3.)

The record consists of the testimony of Arthur J. Smith, president of the corporate respondent, and its majority stockholder, who was the sole witness offered by complaint counsel, and Commission's Exhibits 1-A through 19. Respondents offered the testimony of Arthur Smith; Joseph Sanders, retired, who had been in the textile business for 60 years, and attested to Standard Mills' reputation for honesty and integrity; Morris Muster, a manufacturer of furniture who had been purchasing merchandise from the respondents for several years past and had been in the upholstery industry for 42 years; Sidney Kisner, for 13 years a buyer of upholstery goods for the upholstery department of Gimbels Department Store, 33rd and Broadway, New York City, and Lawrence G. Nusbaum, Jr., counsel for respondents.

This complaint issued May 2, 1962. A prehearing conference was held in New York City on July 9, 1962, and hearings were held in New York City also on July 11, 1962, and concluded on July 12, 1962. On the last day of the hearing, the hearing examiner suspended the proceedings for quite some time in order to afford complaint counsel an opportunity to offer evidence to rebut the proof offered by respondents. Complaint counsel did not offer any rebuttal evidence. The following colloquy appears in the record at page 213:

Hearing Examiner GROSS. It is now 12:15 p.m. The last witness was excused at 11:35 a.m., at which time the respondent indicated that they were about ready to close their case-in-chief.

Counsel supporting the complaint informs me that he wants to have the Hearing Examiner and all of the parties, including the Court Reporter, stand by even though he doesn't have any witnesses available.

Mr. O'CONNELL. Let me explain that. I have been making a determined effort to contact witnesses.

Hearing Examiner GROSS. But you cannot get anyone?

Mr. O'CONNELL. I have not gotten any so far, but I am still working on it.

Hearing Examiner GROSS. Must we not assume that you simply cannot get them?

Mr. O'CONNELL. It might turn out that way.

Hearing Examiner GROSS. We will come back here at 2 o'clock. We are recessed at this time until 2 p.m.

Proposed findings, conclusions and briefs have been filed. Based upon the entire record, including the exhibits, the examiner makes the findings and conclusions hereinafter set forth. Any finding proposed by the parties which is not hereinafter made in the form proposed, or in substantially that form, hereby is rejected. The fact that no finding summarizes the evidence in the exact manner which the parties have requested does not mean that such evidence has not been considered. It means merely that the examiner deems the evidence as summarized in his findings to be sufficiently relevant, probative, substantial and material to dispose of the issues presented. All motions which have not previously been ruled upon, and which are not herein specifically ruled upon, are hereby overruled and denied.

Based upon the entire record, the hearing examiner makes the following:

FINDINGS OF FACT AND CONCLUSIONS

1. Respondent Standard Mills, Inc. (a New York corporation), at 461 Park Avenue South, New York, New York, was incorporated under the laws of the State of New York on August 6, 1934. It sells textile fabrics to furniture manufacturers, upholsterers, department stores and interior decorators located throughout the United States. The business since its founding in 1908 by Morris Simon and Joseph Heller has been carried on under the name "Standard Mills". The act of incorporating the company in August 1934, insofar as it is relevant to the issue in this proceeding, served only to add "Inc." to "Standard Mills", the business name which had been in use for 26 years prior thereto. Standard Mills, Inc., has been continuously and uninterruptedly in business as a converter jobber or distributor of textiles for a period in excess of 54 years, and during that time has earned and enjoyed a reputation for honesty and fair dealings with the people with whom it has done business.

2. All of the issued and outstanding shares of stock of Standard Mills are owned by respondent Arthur J. Smith, its president, and Lloyd Smith, his son, is vice president, in a ratio of 75% to 25% respectively.

3. Arthur J. Smith and Lloyd Smith formulate, direct and control the acts and practices of the corporate respondent. Arthur J. Smith, Lloyd Smith and Arthur's wife, Irene Smith, constitute the corporation's Board of Directors. Irene Smith is secretary-treasurer of the corporation (Tr. 14). The address of Lloyd Smith is the same as that of the corporate respondent. Arthur J. Smith resides at 1500 Bay Road, Miami Beach, Florida.

4. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products when sold to be shipped from their place of business in New York

State to purchasers thereof in various other States of the United States. They also cause some fabrics to be drop-shipped from Neisler Mills, Inc., Kings Mountain, North Carolina, in interstate commerce with their return address as Kings Mountain, North Carolina, noted on the shipping labels.

5. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in their products in commerce as "commerce" is defined in the Federal Trade Commission Act.

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 textile fabrics of the same general kind and nature as that sold by the corporate respondent.

7. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding.

8. Arthur Smith, its president and majority stockholder, joined Standard Mills, Inc., in 1938 as a salesman at a starting salary of $35 per week, and has been with the corporation continuously since then. By dint of hard work, industry and application, Mr. Smith was able to become the sole stockholder. His son, Lloyd Smith, was discharged from the armed services in 1948 and became associated in the business.

9. As a result of the growth and progress of its business, Standard moved from its original location in a 1200 square foot dilapidated loft on Broome Street, New York City, to 18 West 30th Street, in the same city where it occupied 4,000 square feet. Commencing in May 1961, and since that time, Standard has rented for $12,000 per year, a two-story location in New York City at 461 Park Avenue South, with a decorated store front costing $5,000, display windows professionally trimmed at a cost of $1,600 per year, a walnut paneled, vinyl-floored sales room, a showroom for private exhibits, executive offices, administrative space, and bins on both floors to hold the inventory of textiles purveyed by it. Standard employs a total of sixteen persons including the Smith family. Its annual sales volume has increased from $50,000 per year in 1908 to almost $500,000 in 1961. Arthur J. Smith testified that he and his son had incurred a personal liability of $80,000 to raise sufficient capital to move the business to its present location.

10. The company keeps an average inventory of $100,000 on its premises. As converters and distributors, Standard Mills sells upholstery fabric to furniture manufacturers, department stores, decorators and upholsterers and does not sell to persons seeking to buy

upholstery fabric for other than business purposes. Mr. Smith testified (p. 91):

> * * * A converter is one that would contract for special woven goods, confined patterns, according to his own specifications style-wise and color-wise, and would be compelled to place a contract for a substantial quantity. That is on the so-called finished yarn dye goods.
>
> On the piece dry goods, which we also sell, we have to place contracts for quantity goods running to several thousands of yards, and then we send them to our dyers and have them dyed and processed and finished according to our own specifications.
>
> I would say we are a middleman. We are not a manufacturer, not a weaver of goods, but placing substantial contracts with manufacturers who only weave on special contract to converters.

In reply to questions from complaint counsel, Arthur Smith testified further (Tr. 93) that the following statement from the Wall Street Journal of March 31, 1961, is "a fair statement of what a converter does":

> The responsibility for this kaleidoscopic world of colors from year to year and season to season rests largely not with apparel designers or textile mills but with business men hardly known at all to the public. They are called textile converters.
>
> Basically, middlemen between the textile producers and the garment makers, converters are merchants and style specialists who do no manufacturing themselves. They buy from mills the raw, unbleached cloth called grey goods, which has no consumer appeal. The mills, however, prepare the grey goods to the converters' specifications, perhaps weaving a design into the cloth.
>
> The converters then contract to have other factories called finishing mills, color and pattern the cloth in styles they think will be popular months ahead.

11. Each year prior to bringing out the company's new sample books, Arthur J. Smith creates new designs and patterns for their fabrics. He causes Neisler Mills, Inc., of Kings Mountain, North Carolina (and to a much lesser extent Virginia Mills in Swepsonville, Georgia, and Sunbury Mills), to produce test patterns of the new designs on their looms. These test patterns may be rewoven as many as six times in order to comply with Mr. Smith's specifications. Neisler Mills and other Southern looms annually weave, under specific contract, approximately 200,000 yards of fabrics of varying and exclusive styles, colors and patterns for Standard Mills. These fabrics are cut into 50-yard lengths and wrapped around cardboard cylinders which are known in the trade as a "bolt." The bolts are shipped to respondents' place of business in New York City. Respondents sometimes buy only grey goods from a mill and thereafter the grey goods are dyed to specified colors. The fabrics are subjected to processes, Scotch guard or sylmerizing, under respondents' direction, which make them water proof and stain resistant. Thereafter the bolts are placed in Standard Mills' bins.

12. Each year respondents prepare and distribute to their customers and prospective customers at great cost approximately 25,000 professionally laid-out, sample books (of which CX-17 and RX-2 are specimens). The sample books show the patterns, colors and designs of the fabrics which respondents are offering to their customers. Exclusive of postage, shipping costs and labor, the cost of such sample books in 1961 was testified to have been $82,000. This method of advertising and promoting the sale of its merchandise has been utilized by Standard Mills at least since 1939. They also advertise and promote their name, services and fabrics by means other than sample books. The sample books are forwarded to furniture manufacturers, interior decorators, upholsterers and department stores who exhibit them to their customers. The customer makes his selection from the book and the order is then sent by the furniture manufacturer, interior decorator, upholsterer or department store to the corporate respondent. Standard Mills stocks sufficient inventory so that it is usually able to ship the fabric ordered in the exact yardage required in a matter of hours.

13. The corporate respondent's gross sales for the years indicated were stated to be: 1955, $264,000; 1956, $271,000; 1957, $243,000; 1958, $296,000; 1959, $428,000; 1960, $484,000; 1961, $427,000. It has approximately 2,500 active accounts on its books to whom it sells its merchandise.

14. In the course and conduct of their business in soliciting the sale of, and selling, textile fabrics, respondents do business under the name of "Standard Mills, Inc." and use that name on letterheads, invoices, labels and tags and various advertisements of their products. In immediate proximity and in juxtaposition to the words "Standard Mills, Inc." respondents have the following legends in clear type so as to be as easily readable as the name: On CX-8, a letterhead: "*Converters and distributors of upholstery fabric*"; on CX-9, a wholesale price list: "*Converters and distributors of upholstery fabrics*"; on CX-10, Arthur Smith's business card: "*Converters of upholstery fabrics*"; on CX-11, an order form: "*Converters and distributors of upholstery fabrics*"; on CX-18, a display card: "*Converters and distributors of decorative upholstery fabrics*"; on CX-19: "*Converters of Decorative Upholstery Fabrics*"; on CX-17, a red-backed sample books: "*Converters of Decorative Woven Fabrics*"; on RX-2, another sample book: "*Converters.*" RX-5, which is a report of the National Credit Office issued September 15, 1961, and is usually distributed nationally to the trade, refers to Standard Mills, Inc., as "Conv. & Job. Uphol. Fabrics"

meaning "Converter and Jobber of Upholstery Fabrics." RX-6, a May 2, 1958, report from the National Credit Office, has the same notation as RX-5. RX-7, a billing form, has: "*Converters and Distributors of Upholstery Fabrics*"; RX-8, an order form: "*Converters and Distributors of Upholstery Fabrics.*" By using these words juxtaposed to, and in close proximity with, the name "Standard Mills," respondents have prevented and now prevent any deception concerning the true nature of their business operations to any person buying or interested in buying their merchandise.

15. All the witnesses, Joseph Sanders, Morris Muster, Sidney Kisner, and Arthur J. Smith, testified, and are uncontradicted in this record, that respondents have not at any time and do not now, as alleged in the complaint, "represent that they own or operate mills or factories in which the textile fabrics sold by them are manufactured." The reliable, probative and substantial evidence in this record does not prove that respondents represent that they own or operate mills or factories in which the textile fabrics sold by them are manufactured.

16. The widely circulated trade and credit publications for the industry in which Standard Mills is engaged, *Lyons Mercantile Agency*, and *Dun & Bradstreet*, have at all times unequivocably negated the representation or any inference that Standard Mills, Inc., owns or operates mills or factories in which the textile fabrics sold by it are manufactured. Joseph Sanders, whose testimony appears at page 97, *et seq.;* Morris Muster, whose testimony appears at page 102, *et seq.;* and Sidney Kisner, whose testimony appears at page 188, *et seq.*, all testified unequivocably that during all the time they did business with Standard Mills they knew it was only a converter and distributor of decorative upholstery fabrics, and not a manufacturer. Respondents are generally known throughout the trade only as converters and distributors.

The examiner finds that complaint counsel has not sustained the burden imposed upon him to prove the allegations in Paragraph 5 of the complaint.

17. Witnesses Muster and Kisner testified (contrary to the allegations in Paragraph 7 of the complaint) that in purchasing textile fabrics for their business, they do not prefer to buy direct from mills but prefer to buy from a business house such as Standard Mills. They further testified that lower prices and other advantages do not accrue to them when they buy directly from mills for the following reasons, among others: (1) When they buy from mills which weave the fabrics they have to buy at least a whole bolt of one pattern

and color (40-50 yards), whereas when they buy from Standard Mills they can buy the exact yardage required; (2) When they buy from mills which weave the fabrics it may require from four to six weeks to obtain delivery of an order, but when they buy from Standard Mills, Inc., their orders are usually filled within one or two days; (3) They save considerable money purchasing from Standard Mills, Inc., instead of from mills which weave the fabrics because of (a) the prompt delivery; (b) being able to buy the exact yardage needed; (c) being able to avoid stocking a large number of bolts of yardgoods, warehousing them, and taking a loss on the unsold yardage at the end of the season; (d) being able to offer their customers the wide selection of differing patterns, fabrics and designs in respondents' sample books without stocking a single yard of the samples, and (e) being able to put to other uses in their business the large amount of money they would otherwise have to tie up in warehousing large inventories, if they did not have access to Standard Mills' merchandise and service. Witness Muster, who had been buying fabrics from Standard Mills for six years, testified, *inter alia* (Tr. 103):

A. Service, the type of cooperation they give you.

Q. What is the business that Standard Mills is in?

A. They supply us with fabrics.

Q. Do they manufacture any fabrics?

A. No.

Q. How do you know that?

A. Well, I knew it all the time. They never represented themselves as being a mill actually constructing the fabric. They were converters.

Q. Have you always known them to be a converter?

A. Yes.

Q. Have they ever represented to you that they are anything but a converter?

A. No, sir.

Q. Are they also a distributor?

A. That's right.

Q. Have they represented themselves to you as a distributor?

A. That's right.

Q. Do you have any preference with regard to whether you buy from a mill or a distributor-converter?

A. Very strong preferences.

Q. Would you state to the Court exactly what your preferences are and why?

A. When you buy from a mill, sir, you have to buy piece goods. No matter how acute a buyer you think you are, either in fabric selection or color selection, you are always pretty well stuck at the end of the season and you find your profits have been cut to the bone by having to sell off merchandise which is out of style and get it off your shelf because it dies on styles . New things come up all the time.

I have had very, very bad experiences where I have had to dispose of fabrics that cost me five, six and seven dollars a yard, for fifty cents a yard, from off my shelves when the season was over and the goods stopped running.

The difference in dealing with an outfit like Standard Mills is manyfold, sir. The books that I have watched being put on display—prior to that, when I bought my merchandise from the mills, I would have to buy fabrics and have them cut into swatches.

I would have the job of putting them together properly, tagging them, putting chains and hooks on them in order to present to my storekeepers a presentation of my line, outside of my actual furniture style, my fabric line. It was costly, time-consuming and pretty hard on a manufacturer's time element.

Another factor is, when I need fourteen and-a-half yards of goods to fulfill an order for a three-piece group, I get fourteen and-a-half yards of goods and no more. I have no waste. I have nothing on the shelf to eat into my profit. That, to me, is of the utmost importance, on top of which the variation that I can have.

The limitation of any manufacturer—if I go to two or three mills, how much of their inventory can I buy? How many colors can I hold? How many styles can I have? It is very limited. Whereas with an operation such as Standard Mills, I have the benefit of a book, a wonderful presentation.

Hearing Examiner GROSS. By "book," do you mean a sample book?

The WITNESS. Yes, a sample book.

Hearing Examiner GROSS. Such as has been displayed in the hearing room here today?

The WITNESS. Yes, sir. That opens a great many doors to me which I was never able to have before.

Hearing Examiner GROSS. What do you mean by that statement?

The WITNESS. Well, if I go to see a buyer of a store and if I don't have a complete line of fabrics to his way of thinking, a range either in color or style, no matter how well styled my product might be he might not buy from me because I don't bat myself up far enough; whereas, when I give him a presentation such as that book and others, I have a fabric story—as it is told in the trade, a fabric story.

By Mr. NUSBAUM:

Q. Do I understand your testimony to be, then, that you prefer to deal with a converter as opposed to a manufacturer?

A. Definitely.

Q. Do I understand also that you can buy from a converter what you want and when you want, but you cannot do that with the mill?

* * * * * * *

A. I get, at the utmost, twenty-four-hour service from a converter, whereas sometimes I wait six or eight weeks if I have to order from a mill. Occasionally, I do, because I have to.

18. Several witnesses testified and the examiner finds that the name "Standard Mills" and the continuing right to use it is a valuable property right of respondents. To deprive respondents of this property would cause great and irreparable injury to them. At pages 162 and 163, Arthur Smith tetstified:

I feel the loss of the name would be a tremendous handicap, with the good will that we built up and the sacrifices that we made all these years. Losing that name is bound to affect our credit status as well as our sales.

No evidence to the contrary is in the record.

19. The southern looms turn out a minimum of 200,000 yards of fabric per year for respondents. The goods are all woven by the mills owning the looms under specific contract with respondents. About 40 yards per day is the maximum production per loom. (Tr. 164 *et seq.*) This means that respondents' orders for fabrics preempt 5,000 loom days per year. To the extent that respondents' orders do preempt the 5,000 loom days per year, it is reasonable to find, and the examiner does find, that respondents do in fact "control" the looms which produce the fabrics for them.

20. Arthur J. Smith, Morris Muster, and Sidney Kisner testified (Tr. 177) that furniture manufacturers are tending more and more to buy their upholstery fabrics from converters (such as Standard Mills) rather than from manufacturers. This statement is uncontroverted in the record, and the examiner, therefore, finds that Standard Mills' customers do not have a preference to buy directly from mills as alleged in Paragraph 7 of the complaint.

21. At page 178, Mr. Smith testified: "There isn't any customer who purchases from us, that buys from us, thinking in any manner that we are a manufacturers [*sic*], because we have never represented ourselves as such." This statement is likewise uncontradicted in the record.

22. Between eight and ten years ago, the Federal Trade Commission inquired about respondents' use of the name "Standard Mills." The letter from the Commission was at that time turned over by Arthur Smith to respondents' accountant, Fred Sanders, and respondents had heard nothing further from the Commission since that time until the investigation which led up to these proceedings was started in the spring of 1961 (Tr. 180 *et seq.*).

The cases relied upon by complaint counsel were cited, *supra* (page 981). In the landmark case, *Royal Milling Co.*, a 1933 decision, respondents were engaged in preparing for the market self-rising flour and plain flour, and selling the same in interstate commerce. None of them ground from the wheat the flour which they prepared and sold, but only mixed and blended different kinds of flour purchased from others engaged in grinding. After being mixed and sifted, the flour, either plain or made self-rising, was packed into bags for the market. Most of the concerns grinding wheat into flour and selling it in the same market also made self-rising flour and blended plain flour ground from different sorts of wheat. In its opinion the Supreme Court found that the respondent had circulated written and printed circulars among the trade which either directly asserted, or were calculated to convey the impression, that the product was composed of flour manufactured by it from the wheat. The Supreme Court found that these statements and the use of the trade names under which the respondent did business induced many consumers and dealers to believe that respondent was engaged in grinding from the wheat the product which it put out. At page 217 the Court held:

Although we sustain the Commission in its findings and conclusions to the effect that the use of the trade names in question and the misstatements referred to constituted unfair methods of competition within the meaning of the act, and that its proceeding was in the interest of the public, we think under the circumstances the Commission went too far in ordering what amounts to a suppression of the trade names. These names have been long in use, in one instance beginning as early as 1902. They constitute valuable business assets in the nature of good will, the destruction of which probably would be highly injurious and should not be ordered if less drastic means will accomplish the same result. The orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; and this can be done, in the respect under consideration, by requiring proper qualifying words to be used in immediate connection with the names [citing cases] * * *. This is a matter which the commission has not considered but which, as the body having primary jurisdiction, it should, in the first instance, consider and determine. And in doing so it will be enough if each respondent be required by modified order to accompany each use of the name or names with an explicit representation that respondent is not a grinder of the grain from which the flour prepared and put out is made, such representation to be fixed as to form and manner by the commission, upon consideration of the present record and any further evidence which it may conclude to take * * *.

In *Mid West Mills*, there was involved, as in this case, a jobber and wholesaler of upholstery fabrics. Respondent in that case also sold wooden frames, padding, felt, springs, etc., and all materials used in construction of furniture. The Court stated (page 725):

We are convinced that respondent may avoid any false impressions and implications arising from the use of the word "Mills" if it uses on all of its stationery, garment labels, tickets, invoices, and other printed matter these words "Jobbers and Converters, Not Mill Owners or Mill Operators." There would then be no possibility of deception. Of course these are not the only words which might be adopted * * *.

In *Bear Mill Mfg.*, the Court, among other things, said (pages 68–69):

While a reading of the record fails to convince us that the prejudice, so far as it may have existed or may continue to exist, is of serious importance, yet we cannot say that the findings are not supported by substantial evidence, or that the order to cease and desist from the use of the words "mill" and "manufacturing" which the Commission issued in consequence of the findings was without foundation. Federal Trade Comm. v. Pure Silk Hosiery Mills, 7 Cir. 3 F.2d 105.

[3] The injury to the petitioner by the requirement of the order of the Commission that it should abandon a well known corporate and trade-name of many

years standing and of evidently excellent repute, seems to us a far too drastic method of remedying a slight and, we believe, unconscious infraction of proper trade practice when the inaccuracy can be cured by requiring the petitioner to append to and use in connection with its corporate name, stationery, folders, labels, cartons and any advertising the words "Converters, Not Manufacturers of Textiles" * * *. We accordingly hold that these words descriptive of the nature of the petitioner's business should be added to the corporate title on all stationery, folders, labels, cartons and advertising without the necessity of amending the certificate of incorporation.

In *Herzfeld*, a stipulation formed the basis for the finding. And the Court said (page 208):

Obviously the stipulation justified the Commission in finding that a substantial number of retailers were misled by the title, even with the legend added; and the Commission was also right in finding that the title gave an opportunity to retailers to represent to buyers that the petitioners manufactured rugs, and so to make the buyers believe that they were not paying a middleman's profit * * *.

The evidence in the instant case does not support a finding that a substantial number of purchasers from Standard Mills are misled by its title or that the title gives "an opportunity to retailers to represent to buyers that the petitioners manufactured * * * [the fabrics which they sell], and so to make the buyers believe that they were not paying a middleman's profit."

In *Rudin & Roth et al.*, there were two charges in the complaint, (1) a false representation as to the regular and usual retail prices for hosiery (which is not in any way involved in this case), and (2) the deceptiveness of the name "Superbilt Hosiery Mills, Inc.", *i.e.*, whether the use of the word "mills" constituted a misrepresentation. In *Rudin & Roth*, the price deception constituted a substantial portion of the case as tried before the hearing examiner and, therefore, the examiner was, of course, justified in finding as he did,

* * * where persons engaged in unfair and deceptive representations of their products in commerce, the Commission properly may infer that such representations mislead the public into the purchase of such products, thereby unfairly diverting trade from competitors and causing substantial injury to competition * * *.

Moreover, the examiner in *Rudin & Roth* stated:

* * * The Commission and the courts many times have found that a preference exists on the part of purchasers to buy directly from mills or factories, thereby eliminating the middleman and presumably effecting savings * * *.

In the instant record the evidence does not support such a finding and the evidence is to the contrary.

Dexter Thread Mills, *Amity Mills*, and *Wool Novelty Co.* were all disposed under old §§ 3.21 and 3.25, and the agreement containing a consent order to cease and desist provided that it was "for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint. *Georgia Mills, Inc.*, and *United States Mills, et al.*, also cited by complaint counsel, are the same sort of consent dispositions in the year 1962 under the Commission's current rules and do not rest upon adjudication after the introduction of evidence.

Siegel v. *FTC*, 327 U. S. 608 (1946), although loosely alluded to in connection with the specific issue involved, in this case is not relevant. It is true that the Supreme Court in the *Siegel* case cites *Rolay Milling, supra*, but the issue before the Supreme Court was whether the Commission's finding that the use of the word "Alpacuna" as a trade name was misleading and deceptive in representing or implying to prospective purchasers that respondents' coats contained a material which they did not in fact contain, was supported by the evidence. All that Siegel held was: since the Commission had not abused its discretion in concluding that any change "short of the excision" of the trade name would not give adequate protection, the Commission was not legally obligated to consider whether a less drastic remedy than complete excision would accomplish the desired results. Excising a label such as Alpacuna is totally different from compelling abandonment of a business name which has been used from the time a business was started, over half a century ago, and which has acquired irreplaceable business value as good will.

In *Elliot Knitwear, Inc.*, Docket No. 6637, the decision of the hearing examiner, upon remand by the Court of Appeals, refers also to *Royal Milling*, *Jacob Siegel*, and *Algoma Lumber Co.* (291 U. S. 67). Elliot involved an alleged violation of the Wool Products Labeling Act through the use of the word "Cashmore." Neither *Elliot* nor *Jacob Siegel* involved complete abandonment of the name under which a business had been conducted since its founding, as in this case. Neither the form nor the substance of the deceptions in the "mill" cases are the same as in the brand name cases.

See also the initial decision of June 19, 1962, in *Top Form Mills, Inc., et al.*, Docket No. 8454, in which the hearing examiner refused to excise the word "mills" in the corporate name.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding. Corporate respondent Standard Mills, Inc., is engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.

2. The corporate respondent Standard Mills, Inc., is and has been in substantial competition in commerce with corporations, firms and individuals which sell textile fabrics of the same general kind and nature as that sold by the corporate respondent.

3. Arthur J. Smith and Lloyd Smith formulate, direct and control the acts and practices of the corporate respondent.

4. Counsel supporting the complaint has not proven by reliable, probative and substantial evidence in this record the material allegations of the complaint which would support the issuance of a cease and desist order.

5. The continued use by respondents of the name "Standard Mills, Inc." in the manner and form in which it is currently being used does not now have nor will it have the capacity and tendency to mislead purchasers or textile fabrics from respondents in the manner alleged in the complaint.

6. The mere taking of official notice of facts by a hearing examiner does not constitute the proof required when such facts are contradicted by reliable, probative and substantial evidence in the record which is not rebutted.

7. On the basis of the evidence in this record, the hearing examiner hereby finds and concludes that this complaint and the proceedings thereunder ought to be dismissed. Therefore,

It is ordered, That this complaint and the proceedings thereunder be and hereby are dismissed.

Opinion of the Commission

By Higginbotham, *Commissioner*:

This is an appeal from an initial decision of the hearing examiner that respondent Standard's use of the word "mills", in its name, "Standard Mills, Inc.," and on its letterheads, invoices, tags, and in advertisements, was not misleading and deceptive. § 5(a) of the Act, 15 U.S.C. § 45(a). We have reversed the initial decision, entered our own findings and conclusions that a violation has been committed, and entered an order regarding the use of the word "Mills" in accordance with certain representations or stipulations counsel made during oral argument before us.

Since about 1907, respondent Standard and its predecessor have continuously been doing business as textile jobbers and converters under the name "Standard Mills".[1] It has built up, it asserts, substantial good will in the name, in part the result of "many millions of dollars in advertising its corporate identity". Respondent now

[1] In 1934 the company was incorporated under the laws of New York State and "Inc." was added to the firm name.

has a half million dollar annual business volume, which it is said, would be irreparably injured if respondent lost the right to use its trade name.[2]

On the other hand, we have little doubt that a false representation by respondent that it operates a mill violates § 5, to the prejudice both of purchasers who believe that they will receive lower prices by buying directly from the mill, and of competitors whose business may thus be diverted. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212 (1933); *Bear Mill Mfg. Co.* v. *Federal Trade Commission*, 98 F. 2d 67 (2d Cir., 1938); *Federal Trade Commission* v. *Mid West Mills, Inc.*, 90 F. 2d 723 (7th Cir., 1937). The examiner concluded from the testimony of certain witnesses for respondents, who stated that they had not been deceived and were aware that Standard was a jobber and converter rather than a mill, that no deception had occurred. We reverse this finding as unsupported by the evidence. Respondents' isolated evidence was insufficient to rebut the *prima facie* case made out by the showing of a false claim of source of origin of the goods in the corporate name. Although the sophisticated may be aware of the true nature of respondents' operations, that is no protection for the less wary. At the same time, the practice inevitably places an unfair burden upon respondents' more scrupulous competitors who must choose between adopting this practice and the risk of loss of business. *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U.S. 304, 312–313 (1934); *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 78–79 (1934); see *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483 (1922).

The hearing examiner also found that respondents' preemption of "5000 loom days per year" formed the basis for a conclusion that respondents did "in fact 'control' the looms which produce the fabrics for them." If this was intended to signify that respondents' representations that they operated a mill were in fact true, then we must categorically reject the proposition. Even if respondents pre-empted 100% of any mill's output (which they did not) by a requirements contract or any other integration arrangement than out-and-out ownership, or its substantial equivalent, they would still commit a deceptive practice by styling themselves a "mill."[3]

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[2] Thus, respondent Arthur J. Smith, an officer of Standard, testified that "without the name Standard Mills. Inc., I practically have to start a business going all over again."

[3] This does not mean that to call itself a "mill" a firm must own the mill, from which its goods come, in fee simple. For example, if a firm leases a mill and operates, manages, and controls it exclusively, then there is nothing deceptive and misleading in the firm's styling itself a "mill." We hold only that want of ownership or exclusive control over the mill disqualifies one who resells the total or partial output of the mill from doing business unqualifiedly under the mill name.

We find, then, that respondents' unqualified use of the term "Mill" in their name and other activities is false and misleading and deceives their purchasers, in violation of § 5. At the same time, we find a substantial probability of harm to respondents' business if they are forced to abandon their trade name. Respondents represent that since 1959, when they received inquiries from the Commission staff as to their practices, they have qualified their use of their trade name with phrases such as "converters of * * * fabrics." During oral argument of this appeal, respondents' counsel declared that an order requiring the use of certain language of qualification of "Mills," as compared with a requirement that respondents abandon it, would be acceptable. Tr. 21–22, 27–29. We find that the public interest will be adequately protected in this case if we accept counsel's proposal. We therefore enter an order requiring respondents not to use "Mills" in their trade name unless they also use the following language of qualification:

1. As to letterheads, invoices and labels: "Converters, Jobbers, and Distributors of Fabrics—Not Textile Manufacturers or Mill Owners" in type no smaller than ¾ the size of the type used in the trade name, and immediately under the trade name.

2. In all other printed matter, either the foregoing or in lieu thereof, preceded by an asterisk (*) or equivalent, the same qualification, at the foot of each sheet of printed matter upon which the trade name appears, said trade name being followed by an asterisk (*) or equivalent each time it appears in said printed matter, and said qualification being printed in type no smaller than ¾ the size of the type used in the trade name.[4]

The appeal of counsel supporting the complaint is allowed to the foregoing extent, and the initial decision will be modified to conform with this opinion.

Final Order

This matter having been heard by the Commission on exceptions to the hearing examiner's initial decision filed by counsel supporting the complaint and on briefs and oral argument in support thereof and in opposition thereto; and

The Commission having rendered its decision ruling on said exceptions, and having determined that the initial decision should be modified in accordance with the views expressed in the accompanying

[4] See *Federal Trade Commission* v. *Mid West Mills, Inc., supra,* 90 F. 2d at 725; *Bear Mill Mfg. Co.* v. *Federal Trade Commission, supra,* 98 F. 2d at 68. In permitting the use in this case of an asterisked disclaimer in lieu of a disclaimer in immediate conjunction with the name, we are not to be understood as indicating the general acceptability of such disclaimers in all contexts. In the particular circumstances of this case, including the fact that the respondent deals only with the trade, rather than the general public, we believe that this form of disclaimer is adequate to prevent deception.

opinion, and as so modified, adopted as the decision of the Commission:

It is ordered, That paragraphs 14 through 22 be stricken and that the following paragraphs, numbered 14 through 16, be inserted after paragraph 13:

14. Recently respondents have qualified their name with legends such as "Converters and distributors of upholstery fabrics" or "Converters of Decorative Upholstery Fabrics".

15. Respondents do not manufacture the goods they sell and distribute. Nor do they own or operate any mill.

16. Respondents' use of the word "Mills" in their trade name has the capacity to and does deceive others into the belief that respondents do own, operate, or control mills or factories in which their fabrics are made. That Standard Mills and other jobbers or converters have provided certain witnesses better service than manufacturers in terms of faster delivery, eliminating the need for stocking of a large inventory of yard goods, or even in terms of price, does not mean that other purchasers do not prefer to buy direct from factories or mills, believing that lower prices or other advantages may accrue.

It is further ordered, That the conclusions of law numbered 4 through 7 contained in the initial decision be stricken and replaced with the following paragraphs:

4. The facts which were officially noticed by the examiner—that many purchasers prefer to buy directly from mills rather than jobbers and converters, because they believe they will obtain a lower price or other benefits—were not contradicted by respondents. The use by respondents of the name "Standard Mills, Inc." alone or qualified with the legend "Converters and Distributors of Upholstery Fabrics" or other legends of similar import has had, and may have, the capacity and tendency to mislead and cause some purchasers erroneously to believe that respondents own and operate the mills or factories in which their products are manufactured and thus unfairly and deceptively induce said persons into the purchase of respondents' products by reason of said erroneous and mistaken belief.

5. The acts and practices of respondents, as found herein, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of § 5(a) of the Federal Trade Commission Act. The proceeding is in the public interest.

It is further ordered, That the initial decision be modified by striking therefrom the order dismissing the complaint and substituting therefor the following:

It is ordered, That Standard Mills, Inc., a corporation, and its officers, and Arthur J. Smith and Lloyd Smith, individually and as officers of said corporation, and their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of textile fabrics in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from the use of the name "Standard Mills, Inc.," unless and until there be used, the following language of qualification in the manner set out below:

1. As to letterheads, invoices, and labels: "Converters, Jobbers, and Distributors of Fabrics—Not Textile Manufacturers or Mill Owners" in type no smaller than ¾ the size of the type used in the trade name, and immediately under the trade name.

2. In all other printed matter, either the foregoing or in lieu thereof, preceded by an asterisk (*) or equivalent, the same qualification, at the foot of each sheet of printed matter upon which the trade name appears, said trade name being followed by an asterisk (*) or equivalent each time it appears in said printed matter, and said qualification being printed in type no smaller than ¾ the size of the type used in the trade name.

It is further ordered, That respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with order to cease and desist. Rule 3.26(a), 16 C.F.R. § 3.26(a).

IN THE MATTER OF

DRUG RESEARCH CORPORATION ET AL.

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

Docket 7179. Complaint, June 30, 1958—Decision, Oct. 3, 1963

Order dismissing complaint upon consideration *de novo* of matters concerned, after vacating the initial decision dismissing the complaint on staff counsel's motion as not within the hearing examiner's authority since there were involved administrative matters which could be decided only by the Commission itself.

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 Drug Research Corporation, a corporation, John Andre and Timoleon T. Andre, individually and as officers of said corporation, Harriet Andre, individually, Kastor, Farrell, Chesley & Clifford, Inc., a corporation, all 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 Drug Research Corporation is a corporation duly organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 369 Lexington Avenue, New York, New York. Respondents John Andre, also known as John Andreadis, and Timoleon T. Andre, also known as Timoleon T. Andreadis, are the officers of this corporate respondent. Harriet Andre, also known as Harriet Andreadis, is the wife of John Andre and a stockholder of the said corporate respondent. These individuals dominate, control and direct the policies, acts and practices of this corporate respondent, including the acts and practices hereinafter set out. The address of these individual respondents is the same as that of the said corporate respondent.

Par. 2. The respondents referred to in Paragraph 1, above, are now, and have been for some time, engaged in the sale and distribution of a preparation which is a drug as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by these respondents for their said preparation, the formula thereof and directions for use, according to its label, are as follows:

Designation: Regimen-Tablets

Formula: Each enteric-coated Pink tablet contains 0.648 gm. of Ammonium Chloride to aid loss of excess fluids.

Three Green tablets contain:

Benzocaine	22.5 mg.
together with	
Vitamin D (Irradiated Yeast)	400 U.S.P. Units
Vitamin B_1 (Thiamin Chloride)	1.0 mg.
Vitamin B_2 (Riboflavin)	2.0 mg.
Vitamin C (Ascorbic Acid)	30.0 mg.
Vitamin B_6 (Pyridoxine Hydrochloride)	0.1 mg.
Calcium Pantothenate	1.0 mg.
Niacinamide	10.0 mg.
Diastase of Malt	100.0 mg.

Three Yellow tablets contain:

Caffeine Alkaloid Anhydrous	90.0 mg.
and	
Phenyl-Propanolamine Hydrochloride	75.0 mg.
together with	
Iron (as Ferrous Sulfate)	10.0 mg.
Copper (as Cupric Sulfate)	0.1 mg.
Iodine (as Potassium Iodide)	0.1 mg.
Manganese (as Manganese Sulfate)	7.5 mg.

Directions: (Unless directed otherwise by physician)

1. For the first three days swallow two Pink, one Yellow tablets and allow one Green tablet to dissolve (do not chew) in your mouth, one-half hour before meals, three times daily.

2. After the first three days, and for a period of one week, swallow one Yellow tablet and allow one Green tablet to dissolve (do not chew) in your mouth, one-half hour before meals, three times daily.

3. When hungry, one additional Green tablet may be taken between meals.

Thereafter, to continue reducing program, repeat above dosage.

IMPORTANT: Individuals who suffer from heart disease, high blood pressure, diabetes or thyroid disease should omit Yellow tablet or take only upon advice of a physician. Do not exceed recommended dosage. Pink and Green tablets may be continued as directed. Avoid excessive use of salt.

PAR. 3. The respondents referred to in Paragraph 1, above, cause the said preparation when sold, to be transported from within the State of New York to purchasers thereof located in various States of the United States. These respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent Kastor, Farrell, Chesley & Clifford, Inc., is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business located at 400 Madison Avenue, New York, New York. This corporate respondent is the advertising agency of the respondents referred to in Paragraph 1, above, and prepares and places for publication advertising material as hereinafter set forth, to promote the sale of the aforesaid drug preparation.

PAR. 5. In the course and conduct of their said businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said preparation 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 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, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation; and have disseminated, and caused the dissemination of, advertisements concerning said preparation by various means, including, but not limited to, the aforesaid media for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Among the typical of the statements contained in said advertisements disseminated as hereinabove set forth are the following:

NO—DIET REDUCING

with New Wonder Drug for Fat People

No diet, no special eating, no giving up the kinds of food you like to eat—yet new wonder drug acts directly on the cause of your overweight—It's safe * * * automatic.

You must reduce up to 6 pounds in 3 days * * * up to 10 pounds the first week * * *.

YOU EAT WHAT THE FAMILY EATS * * * WHEN THEY EAT!

Now with complete confidence in their safety and effectiveness you can take REGIMEN TABLETS—a combination of wonder drugs never before available except perhaps in a doctor's prescription. But now this formula has been made so safe, so sure that no prescription is needed.

This was Lester Morris * * * tipping the scale at 270. And here I am today * * * just four weeks later. Look (pulls out collar). Now look at my weight. Only 242 pounds. A loss of 28 pounds. Verified by my doctor. I did it without dieting, food restrictions or super will power!

REGIMEN TABLETS * * * work on an amazingly new principle guaranteed to act in these 3 most important ways necessary to obtain * * * effective weight loss:

* * * * * * *

2. They force your body to lose weight automatically by removing "Fluid Weight", the excess bloat-like fluid that accounts for up to 70% of your fatty tissue. You'll benefit the very first day, and start to lose weight so fast that by the third day you will have lost pound after pound!

PAR. 7. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, and are representing, directly and by implication, that:

1. The preparation is safe to use by all obese persons;

2. Obese persons can lose weight by use of the preparation without dieting, that is, while consuming the same kinds and amounts of food they ordinarily consume;

3. Obese persons can expect the preparation to cause a weight loss of six (6) pounds in three (3) days, ten (10) pounds in one week and twenty-eight (28) pounds in four (4) weeks;

4. The preparation, by the removal of excess body fluids, causes significant weight loss of more than temporary duration.

PAR. 8. The said advertisements are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

1. The preparation is not safe to use by all persons having heart disease, high blood pressure, diabetes, or thyroid disease;

2. Obese persons will not lose weight through use of the preparation without dieting, that is, if they continue to consume the same kinds and amounts of food they ordinarily consume;

3. A weight loss of six (6) pounds in three (3) days, ten (10) pounds in one week, or twenty-eight (28) pounds in four (4) weeks through use of the preparation is substantially in excess of any loss that may result in a majority of instances, and no specific predetermined weight reduction can be achieved by using respondents' preparation for a prescribed period of time;

4. Any loss of weight resulting from increased excretion of body fluids will, in most cases, be of short duration.

PAR. 9. The dissemination by the respondents, as aforesaid, of said false advertisements constitutes an unfair and deceptive act and practice within the intent and meaning of the Federal Trade Commission Act.

Mr. Berryman Davis for the Commission.

Davies, Richber, Tydings, Landa and Duff by *Mr. James T. Welch* for respondents.

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

This matter is before the undersigned on motion of complaint counsel filed November 8, 1962, for a dismissal of the complaint herein. The motion is vigorously opposed by counsel for respondents in a 38 page answer duly filed on November 30, 1962. Counsel supporting the complaint has not sought leave to reply to the objections in respondents' answer to the motion. The motion and the answer thereto adequately set forth the grounds for and against the motion. The request of counsel for the respondents for leave to present oral argument is denied. Since the conclusion reached by the examiner on the motion to dismiss the complaint is dispositive of the matter, an initial decision is being entered in the case.

The complaint in this matter, issued on June 30, 1958, appears to be one of the oldest cases on the dockets of the Commission awaiting disposition on the hearing examiner level. The present examiner is the fourth successive hearing examiner to whom the matter has been assigned for handling. At one time it appeared that the case had been disposed of through consent procedure by an order of the Commission issued April 17, 1959, adopting an initial decision entered February 27, 1959, by a prior examiner, now deceased, under a consent agreement, but the Commission upon reconsideration in an order dated June 8, 1959, "concluded that the order contained in the aforesaid initial decision is not appropriate", and accordingly vacated its prior order adopting the initial decision and remanded the case to the hearing examiner for further proceedings. The case was reassigned to the present examiner on September 11, 1961.

The complaint herein, issued under the provisions of the Federal Trade Commission Act, charges the respondents with false advertisements in connection with the sale and distribution in commerce of a drug preparation sold under the name of "Regimen-Tablets". The crux of the charges, stated in summary form, is that respondents have falsely represented that the preparation has certain merits when taken internally for reducing the weight of obese individuals without dieting.

The complaint sets forth the formula for the preparation which the respondents in their answers admit is correctly stated. The preparation consists of pink, green and yellow tablets to be taken in accordance with printed directions on the label of the preparation. The pink tablet consists of a quantity of amonium chloride which according to the label is "to aid loss of excess fluids". The green tablets contain nine well known ingredients, including five different kinds of vitamin of which even the lay public has some knowledge. The yellow tablets similarly contain mostly well known ingredients such as iron, copper and iodine but also includes as one of its major ingredients a drug known as "phenylpropanolamine hydrochloride". Leaving out for the time being any reference to phenylpropanolamine hydrochloride, which appears to have been only recently tried as a weight reducing agent, it is not believed that there would be any dispute among well qualified physicians or other experts on such matters as to the value or lack of value of any of the other ingredients shown in the formula for each of the three colored tablets as agents for reducing human weight without dieting.

Specifically, the complaint charges the respondent with *falsely* representing that:

1. The preparation [Regimen-Tablets] is safe to use by all obese persons;

2. Obese persons can lose weight by use of the preparation without dieting, that is, while consuming the same kinds and amounts of food they ordinarily consume;

3. Obese persons can expect the preparation to cause a weight loss of six (6) pounds in three (3) days, ten (10) pounds in one week and twenty-eight (28) pounds in four (4) weeks;

4. The preparation, by the removal of excess body fluids, causes significant weight loss of more than temporary duration.

Respondents (except Harriet Andre, in an "Agreement Containing Consent Order To Cease and Desist" filed on February 20, 1959, agreed to forthwith cease and desist making the above representations, provided in effect that its said agreement is accepted by the Commission. The agreement carried the usual, standard paragraph incorporated in all such agreements that "This agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the amended complaint".

Based on the above agreement by respondents, the aforementioned initial decision by the hearing examiner then in charge of the case, was entered on February 27, 1959, which as seen was adopted by the Commission as its decision in the order dated April 17, 1959, but which the Commission upon reconsideration on June 8, 1959, vacated due to its conclusion that the cease and desist order contained in the decision was not appropriate, presumably because it was not inclusive enough to afford maximum protection to the public.

Following this action by the Commission, the case was in due course set down for hearing on October 5, 1959, by another hearing examiner to whom the case had been reassigned following the death of the preceding hearing examiner. On September 16, 1959, counsel supporting the complaint moved for a cancellation of the scheduled hearing and a suspension of further proceedings on the basis of newly discovered evidence on one of the major ingredients of the involved preparation, to wit, the above-mentioned phenylpropanolamine hydrochloride, "in order that this newly discovered evidence may be properly evaluated, with the possible undertaking of additional scientific studies of some duration of time, with a view to seeking amendment of the complaint in a material respect." The newly discovered evidence referred to was an article published in the Journal of American Medical Association about a year after the date of the issuance of the complaint herein. The motion quotes the article as reporting "on the results of clinical testing done with phenylpropanolamine hydrochloride for the purpose of appraising it as an agent for controlling the appetite and in the reduction of weight of obese subjects" and sets forth the conclusion reached therein that the drug does not "effect a statistically significant reduction in weight." In further support of his motion for a suspension of the hearing scheduled for October 5, 1959, counsel supporting the complaint stated:

This newly-discovered evidence, not available at the time the Commission issued its complaint, tends strongly to indicate that Regimen-Tablets may be completely worthless for the purposes for which it is extensively advertised to the general public.

The hearing examiner granted the motion of complaint counsel for a cancellation of the hearing scheduled for October 5, 1959.

As heretofore noted, the case was reassigned to the present examiner on September 11, 1961. The undersigned by an order dated September 26, 1961 scheduled a prehearing conference in the matter for November 13, 1961, later continued to January 15, 1962. On December 29, 1961, counsel supporting the complaint moved for cancellation of the scheduled prehearing conference and a suspension of further proceedings herein on the ground, among others, that the corporate respondent and two other respondents in the present matter were scheduled for trial as defendants in a criminal proceeding on January 22, 1962, in the State of New York under the laws of that State on criminal charges containing more than 130 counts involving issues of fact similar to those involved in the instant case.

The motion for the cancellation of the scheduled hearing for January 15, 1962, was granted. This action, one in the discretion of the examiner, was taken because it is the undersigned's settled belief that a criminal proceeding should be given precedence over a quasi-civil proceeding, such as the present case, where both matters involve similar issues of fact, in order that the persons charged with crime may not be prejudiced by possible adverse decisions against them in the quasi-civil proceedings. In granting the motion, the examiner was also mindful of the merits of complaint counsel's argument that he believed it important "that the Commission have the benefit of knowing what the evidence is that the State of New York allegedly has in its possession, and which evidence will be made public in the forthcoming trial, before participating in a prehearing conference."

Although the present examiner in his order of January 10, 1962, granting complaint counsel's motion for a cancellation of the scheduled prehearing conference stated that the motion was unopposed, it now appears that a timely answer in opposition to the motion had been duly filed on the same date as the examiner's said order of January 10, 1962. This answer, if it had been considered, would not have caused the examiner to change the conclusion stated in his order that the motion be granted. The objections raised in the said answer are also made in respondents' answer to complaint counsel's present motion for a dismissal of the complaint here under consideration.

One year later on September 26, 1962, the present examiner again scheduled the case for a prehearing conference, fixing December 10, 1962, for its commencement, and also set the case down for hearing proper on January 7, 1963. On November 8, 1962, complaint counsel filed his present motion to dismiss the complaint. Pending consideration of the motion, orders were issued cancelling the prehearing conference set for December 10, 1962, and the hearing scheduled for January 7, 1963.

In substance complaint counsel's motion for a dismissal of the complaint herein is based on the contention that (a) the heretofore mentioned New York criminal action against the principal respondents involving criminal charges arising out of alleged false representations with respect to the Regimen-Tablets similar to the false representations charged in the instant proceeding and (b) the subsequently inaugurated seizure and condemnation by the Federal Government of a number of boxes of Regimen-Tablets under the Federal Food, Drug and Cosmetic Act arising out of alleged false representations by misbranding with respect to such tablets similar to the misrepresentations charged in the instant proceeding—will effectually dispose of the issues present in the instant proceeding and effectually bar the alleged false and misleading representations charged by the complaint if they are found to be false by the indicated tribunals other than the Federal Trade Commission. For more complete detail, the full text of complaint counsel's motion is set forth below:

COMES NOW counsel supporting the complaint and respectfully moves that the Hearing Examiner dismiss the complaint in this matter for the reasons hereinbelow set out.

1. There is now pending in the State of New York a criminal case by the State against respondents Drug Research Corporation, its president John Andre, and the advertising agency Kastor, Hilton, Chesley, Clifford and Atherton, Inc.

On January 14, 1960, a Grand Jury of the Court of General Sessions of the County of New York, State of New York, returned an information against these corporations and individual charging them in 134 counts with the crime of conspiracy to commit crimes and with other crimes in violation of New York laws by disseminating advertisements for Regimen Tablets representing that the preparation effected loss of weight without dieting and that clinical tests proved the claimed effectiveness, and that the advertisements contained other assertions of fact which were untrue, deceptive and misleading as to the effectiveness of the preparation.

Trial was to have begun January 22, 1962, but there has been no trial because of the filing of a motion for dismissal of the criminal information on the ground that the State of New York could not assume jurisdiction over the accused because the matters involved were pre-empted by Federal legislation giving the Federal Trade Commission jurisdiction over the parties, and because of subsequent events.

The accused applied to the Supreme Court of New York for issuance of a Writ of Prohibition to the Court of Special Sessions which would prohibit the latter from going forward with trial. Argument on the application is to be heard this month of November 1962.

2. There is now pending, as the result of a filing of a Libel of Information on February 13, 1962, in the United States District Court for the District of Colorado a case (Civil No. 7450) in which Drug Research Corporation has come forward as claimant to resist the seizure and condemnation, by the United States of America, of several dozens of boxes of Regimen-Tablets alleged to be misbranded in violation of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301, et seq.) because of the use of advertisements in conjunction with the offering for sale of the preparation which, allegedly, resulted in a misbranding of the preparation.

Misbranding was alleged through use of numerous representations essentially the same as those alleged to be false or misleading in the complaint issued by the Commission, to wit, that Regimen Tablets "can help you reduce as much as 6½ pounds in 7 days—19 pounds in 6 weeks without planned dieting!"; and by use of such statements as: "Reduce with Regimen Plan * * *"; "New! Regimen-Tablets for Appetite Control * * *"; and "Leading Physicians show Regimen Tablets Can Help You Reduce As Much As 6½ Pounds in 7 Days—19 Pounds in 6 Weeks without Planned Dieting!"; and by use of other statements representing and suggesting that the preparation will satisfy hunger, control and inhibit appetite, shrink one's appetite causing pounds and inches to melt away, and was proved amazingly effective in clinical tests on overweight people, etc., etc., in similar vein.

The case has been removed to the Eastern District of New York and is to be tried in Brooklyn. Drug Research Corporation, we being informed, having filed an answer to the libel which places in issue all the alleged untruthfulness of the statements asserted by the Government to constitute misbranding. Interrogatories were, we also are informed, filed October 15, 1962, by the Assistant United States Attorney in Brooklyn.

3. Except for indication that the criminal proceeding by the State of New York and the seizure action by the United States Government do not accuse any respondent named in the Commission's complaint with a violation of law by reason of having represented Regimen-Tablets to be "safe", and do not accuse respondents Timoleon T. Andre and Harriet Andre with guilt, and the seizure action does not involve the advertising agency named in the Commission's complaint, all the essential parties and charges named and specified in the Commis-

sion's complaint are receiving the attention of, and the issues presented by advertising which the Commission stated it had reason to believe were questionable, will be completely treated with and disposed of by State and/or Federal action.

Counsel supporting the complaint states that no advertisement of Regimen-Tablets has come to his attention in over two years in which an improperly unqualified representation of safety in use of the preparation has been noted.

4. There is a multiplicity of actions involving the same essential issues.

WHEREFORE, counsel supporting the complaint moves that the Hearing Examiner dismiss the complaint without prejudice to the right of the Commission to initiate further proceedings against respondents, or any of them, should future events so warrant.

As heretofore noted, respondents oppose the motion to dismiss the complaint in their 38 page answer. Their opposition is essentially based on two grounds. In substance respondents take the position that the issues of fact arising out of the pleadings herein are triable before the Federal Trade Commission and not before any other forum.

Bearing in mind that complaint counsel contends that the involved issues of fact will be resolved in large part by the criminal action in New York under New York State law against the principal respondents herein, respondents contend and argue here, as well as before the Courts of New York, that the "Federal Trade Commission has exclusive jurisdiction of false and misleading advertisement in interstate commerce with respect to drug products and the Courts of New York are precluded from exercising jurisdiction over such subject matter". No less than 25 pages of respondents' 38 page answer to the motion to dismiss are devoted to this argument and it appears altogether likely that they were copied verbatim from briefs filed in the New York Courts in support of efforts to enjoin the New York State criminal action against respondents.

The gist of respondents' arguments are (1) that under the Constitution of the United States the Congress is vested with supreme legislative power to regulate commerce among the several states, (2) that the Congress has exercised this legislative power to regulate commerce in the matter of false and misleading advertisements by the enactment of the Federal Trade Commission Act; (3) that under the Federal Trade Commission Act the Federal Trade Commission has exclusive jurisdiction of false and misleading advertisements in interstate commerce; (4) that where there is a state statute with provisions similar to those in the Federal Trade Commission Act against false and misleading advertisements and action has been brought by the Federal Trade Commission under the Federal Trade Commission Act, the latter pre-empts the state statute;

and (5) that the "Federal Trade Commission has exercised jurisdiction with respect to the alleged false and misleading advertising of the drug product 'Regimen' and, hence, the State Courts have no jurisdiction with respect to false and misleading advertising of Regimen" in view of the admitted fact that the representations charged by the complaint were made in interstate commerce.

It should be noted at this point that the New York Statute referred to, Section 421 of the Penal Law of the State of New York, is not aimed at false and misleading advertisements made in interstate commerce but only at such false advertisements made "in this state".

Although respondents in their answer cite numerous cases in an endeavor to support their contention that the Federal Trade Commission has exclusive jurisdiction to act on all false and misleading advertisements to the exclusion of all state actions, it is significant that respondents have been unable to cite a single case by any court, state or federal, which so holds despite respondents' volunteer statement, based upon a law review article, that "there are statutes similar to Section 421 of the Penal Law of the State of New York in effect in some forty-four (44) States and in the District of Columbia."

The cases cited by respondents deal with state statutes which conflict with federal statutes where the national interest is so paramount—as in the matter of prescribing uniform national safety regulations for railroads or assuming jurisdiction over certain labor controversies—as to require pre-emption of the federal statute over the state statute in order to avoid the confusion, national havoc, or even national danger that might develop if concurrent jurisdiction with state legislation were allowed. This is obviously not the case in the instant matter. Respondents in their answer refer to three criteria cited by the Supreme Court in *Pennsylvania* v. *Nelson*, 350 U.S. 497, for determining whether a federal statute should supercede a state statute. These are

(1) Whether "the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it."

(2) Whether "the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject'."

(3) Whether the enforcement of a state statute, as in the *Pennsylvania* v. *Nelson* case, supra, a state sedition acts, "presents a serious danger of conflict with the administration of the federal program."

Respondents in their answer to the motion to dismiss quoted the first and third criteria shown above, or "tests" as the Supreme Court describes them, but neglected to quote or otherwise make reference to the second criteria. The answer to all three criteria in the instant case must be in the negative. On the matter of fighting false and misleading advertisements there can be no "dominant" interest as between the federal and state governments; the fight must go on all fronts; the federal government and the state governments can look benignly on each other's efforts to fight the evil. It's like the fight against cancer; help is welcome from all sides, although the Federal Government foots the major part of the bill for cancer research. There are many more instances of allowable concurrent federal and state legislation on the same subject matter than there are of cases in which the courts have held that a state statute must give way to federal legislation.

The second half of respondents' first ground for opposing the motion to dismiss the complaint relates to complaint counsel's contention that the issues of fact here involved will also receive judicial determination from a United States District Court on a Libel of Information action now pending before that court on misbranding charges under the Federal Food, Drug and Cosmetic Act, involving misrepresentations by misbranding essentially the same as the misrepresentations charged in the complaint herein.

Respondents in their answer admit that the Federal Trade Commission under the Federal Trade Commission Act and the Food and Drug Administration under the Federal Food, Drug and Cosmetic Act have concurrent jurisdiction as to misbranding but respondents appear to argue from their interpretation of the legislative history of the Wheeler-Lea Amendment to the Federal Trade Commission Act that it was the Congress' "intention to allow the Commission to exercise exclusive control over the advertising here involved". The difficulty with this argument, assuming arguendo it is correct, is that it does not squarely answer complaint counsel's contention that the *issues of fact as to the truthfulness of the involved representations* in the present proceeding are also involved in the libel action. This is apparent from the motion to dismiss which states that in the libel action "*Misbranding was alleged through numerous representations essentially the same as those alleged to be false or misleading in the complaint issued by the Commission*, to wit, that Regimen-Tablets 'can help you reduce as much as 6½ pounds in 7 days—19 pounds in 6 weeks without planned dieting!'" (Emphasis supplied.) It is also clear from a Supreme Court opinion cited by respondents in their answer, *Kordel* v. *United States*, 335 U.S. 345, that the Federal Food, Drug and Cosmetic Act gives the United States District Courts full authority to decide whether the "labels" of any drug contain false advertising *even though the pamphlets containing the advertisements are shipped separately and at different times.* In the *Kordel* case, as here, it was argued that the Federal Trade Commission had exclusive jurisdiction over false advertisements. The Supreme Court in that case disposed of the argument as follows: "Petitioner points out that in the evolution of the Act the ban of false advertising was eliminated, the control over it being transferred to the Federal Trade Commission. * * * We have searched the legislative history in vain, however, to find any indication that Congress had the purpose to eliminate from the Act advertising which performs the function of labeling. Every labeling is in a sense an advertisement. The advertising which we have here performs the same function as it would if it were on the article or on the containers or wrappers. As we have said, physical attachment or continuity is unnecessary under Section 201(m)(2)."

Thus we may state in summary that the issue of fact with respect to the alleged misrepresentations present in the instant case are also present in the libel action and that the United States District Court before whom the libel action is pending has concurrent jurisdiction with the Federal Trade Commission in its own proceeding to decide such issues of fact.

As an outgrowth of the arguments made by respondents that the Commission has "exclusive" jurisdiction of the issues of fact present under the pleadings in this case, they next argue that the Commission does not have the authority "to delegate this duty to any state" or "to the Food and Drug Administration, the Department of Justice or any other agency or department of the Federal Government."

The difficulty with this argument, aside from its erroneous assumption that the Commission has exclusive jurisdiction of the involved issues of fact, is that there is no proposal from complaint counsel or before this examiner for a "delegation" of the powers now residing in the Commission to decide these issues of fact; in fact there is no statutory authority for such delegation. All that complaint counsel is saying is that the issues of fact here present will be decided in the Courts of New York and in the United States District Court and that, therefore, the public interest would be adequately served without the necessity of having the same issues of fact decided for the third time in the instant proceeding. Just as the Federal Trade Commission Act gives the Commission wide discretion in the issuance of the complaints, by the same token and authority the Commission has wide discretion in the matter of dismissing complaints. Complaint counsel in his motion for a dismissal of the complaint is simply asking that the examiner dismiss the complaint under his authority to make an initial exercise of this discretion.

Based on their original erroneous premise that the Commission has exclusive jurisdiction of the involved issues of fact, respondents' second objection to the motion to dismiss is essentially a counter proposal not only for a denial of the motion to dismiss but for an early setting of the matter for hearing and prompt progression of the matter to final decision on the ground that respondents have been damaged by the delay in having the issues here involved determined. In respondents' answer of January 10, 1962, to complaint counsel's then motion to cancel the prehearing conference set for January 15, 1962, respondents state that the delay in going to trial before the Commission on the present matter "has greatly damaged Respondents in the conduct of their business, because some television networks have declined to disseminate Respondents' advertising material, such declination being based directly upon the mere issuance of the complaint, wholly irrespective of whether the charges therein set forth will ever be sustained." Similarly in their answer to the instant motion to dismiss the complaint, respondents claim that during the four years that the instant proceeding has been pending they "have been denied access to many radio and television channels previously available for its advertising." If business damage accrues to a respondent merely from the issuance of a complaint that cannot be avoided. The Commission under the statute issues complaints only where it has "reason to believe" that a person or corporation "is using any * * * unfair or deceptive act or practices in commerce" and then only if it deems that the issuance of a complaint is "in the interest of the public". Corroboration for the soundness of the Commission's judgment in issuing the complaint is seen in the criminal action brought by the State of New York against the principal respondents and by the proceedings commenced by the Food and Drug Administration, both arising out of the same misrepresentation of fact charged in the instant complaint.

Nor can it be seen that the delay in bringing this matter to trial has been the direct cause of any damage to respondent. If respondents have been denied access as claimed "to many radio and television channels previously available for its advertising", this may be properly ascribed to the formal agreement respondents filed with the Commission within eight months after the issuance of the complaint herein in which they agreed to an order requiring them to cease and desist from disseminating the misrepresentations charged by the complaint. It may also be ascribed to the criminal proceedings against the respondents by the State of New York and the action taken in the libel proceedings by the Food and Drug Administration.

Our analysis in summary shows that there is no merit to the objections raised by respondents to complaint counsel's motion to dismiss the complaint.

On the other hand it is our opinion that the motion to dismiss the complaint is meritorious. As indicated there is wide discretion in both the issuance and dismissal of complaints. The Commission has limited funds. A case such as this calling for expert medical witnesses is costly to try. If the New York criminal action against the respondents and the libel action in the federal courts had been pending in the precomplaint stage of this proceeding, it is doubtful that the complaint would have been issued as the Commission could have well come to the conclusion that the public interest would have been adequately protected in forums other than their own. For similar reasons, we believe that the present proceedings should be dismissed. We are not concerned by the fact that the New York action and the libel proceedings could not result in action as broad as would result from the present proceedings before the Federal Trade Commission if the case went to trial and all of the charges of the complaint were sustained. We believe that for all practical purposes the libel proceeding and the New York criminal action, if decided adversely to the respondents, would put a stop to the misrepresentations. An adverse decision in the New York criminal action would be particularly devastating to the respondents since both the corporate respondent and the advertising-company respondent have their principal places of business in New York City; such an adverse decision would be bound to have unfavorable economic reprecussions far beyond the geographical borders of the State of New York. If on the other hand, the New York State Courts and the United States District Court came to the conclusion that respondents' representations were not false as charged in their respective jurisdictions, it is not likely that the examiner or Commission would come to a different conclusion.

The motion to dismiss the complaint is granted. An order directing dismissal is entered below, subject to the initiation of further proceedings as may be warranted by future circumstances.

ORDER

It is ordered, That the complaint in this proceeding be, and the same hereby is, dismissed, without prejudice to the right of the Commission to initiate further proceedings against respondents, or any of them, should future events so warrant.

780-018—69——65

ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT

This matter is before the Commission on respondents' appeal from the hearing examiner's initial decision, filed January 22, 1963, dismissing the complaint on the ground that further proceedings herein would not be in the public interest.

The Commission issued its complaint on June 30, 1958. Thereafter, numerous actions of an interlocutory nature were taken, but, for various reasons which need not be elaborated, evidentiary hearings were not begun. On September 26, 1962, the examiner scheduled the prehearing conference for December 10, 1962, and the commencement of evidentiary hearings, for January 7, 1963. However, on November 8, 1962, complaint counsel filed a motion to dismiss the complaint. This motion was based not on grounds relating to the merits of the allegations of the complaint, but upon an alleged lack of public interest in the further prosecution of the case.

On January 22, 1963, the hearing examiner issued his initial decision, in which he found the motion to dismiss the complaint "meritorious" and dismissed the complaint accordingly. In support of his finding, the examiner made such observations as: "The Commission has limited funds. A case such as this calling for expert medical witnesses is costly to try". Referring to other proceedings pending in state and federal courts, proceedings in which respondents herein but not the Commission are parties, the examiner stated that if these cases "had been pending in the precomplaint stage of this proceeding, it is doubtful that the complaint would have been issued as the Commission could have well come to the conclusion that the public interest would have been adequately protected in forums other than their [*sic*] own".

The Commission agrees with respondents that the dismissal of the complaint on the grounds set forth in the initial decision was *ultra vires* the hearing examiner. Complaint counsel's motion to dismiss the complaint was addressed to the Commission in its administrative capacity, as the complainant in this proceeding, and not in its adjudicative capacity; no question going to the merits of the violations of law alleged in the complaint was raised by the motion. In considering such administrative matters as whether to issue a complaint, or, as here, whether to go on with further proceedings in a case that has already been commenced by issuance of a complaint, the Commission is required to take into account a broad range of considerations bearing upon the public interest. In order to discharge its responsibility to make the most effective possible allocation of its necessarily limited resources of funds and personnel, the Commission must consider—as a matter of administrative judgment and discretion—which of the various courses of action open to it should be followed.

Thus, the factors appropriate to the Commission's decision in such a matter are not within the authority and competence of the hearing examiner, whose duty it is, in such a case, to certify the motion to the Commission for its consideration and disposition rather than to act upon it himself. For, as stated in Section 8 of the Commission's Statement of Organization, "Hearing examiners are officials to whom the Commission, in accordance with law, delegates the initial performance of its *adjudicative fact-finding* functions to be exercised in conformity with Commission decisions and policy directives and with its rules of practice". (Emphasis added.) Disposition of a motion such as that filed by complaint counsel in this matter is not an "adjudicative fact-finding" function. Since the examiner had no authority to rule upon the motion, he should promptly have certified it to the Commission, pursuant to Section 3.6(a) of the Commission's Rules of Practice.

Although the initial decision must be vacated, the Commission has undertaken to consider *de novo* the motion to dismiss the complaint in this matter as if the motion had been properly certified to the Commission by the examiner. Upon consideration of all the relevant factors bearing upon the public interest in the further prosecution of this case, the Commission has concluded that there exist at this time special and unique circumstances requiring dismissal of the complaint. The factors weighed by the Commission in reaching this conclusion include, but are not necessarily limited to, the longevity of the case, the prospect that evidentiary hearings would have to be deferred for an indefinite period, and the necessity for amending the complaint should the case go forward to hearing. In the circumstances here presented, the Commission specifically does not rely, as a ground for dismissing the complaint, upon the pendency of related proceedings in other tribunals. Nor, in dismissing the complaint, does the Commission thereby intend to affect in any manner the jurisdiction of any other tribunal, in any other case, in respect to respondents or the subject-matter of this proceeding.

It is ordered, That the hearing examiner's initial decision, filed January 22, 1963, be, and it hereby is, vacated.

It is further ordered, That the complaint in this proceeding, issued by the Commission June 30, 1958, be, and it hereby is, dismissed.

IN THE MATTER OF

NATIONAL HOME FOOD SERVICE COMPANY, INC., ET AL.

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

Docket C-605. Complaint, Oct. 10, 1963—Decision, Oct. 10, 1963

Consent order requiring Wilkes-Barre, Pa., sellers of freezers, food and a freezer-food plan, operating at nine locations in New York and Pennsylvania, to cease making a variety of misrepresentations in advertising in newspapers, by radio and television and otherwise, to induce sale of their products, including false claims as to cost, services, quantities of food supplied, service warranty, food quality guarantee, free gifts, bait advertising, etc., as in the order below in detail set forth.

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 National Home Food Service Company, Inc., a corporation, and Andrew Carol and Marvin Rayfield, 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 National Home Food Service Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 61 East Market Street in the city of Wilkes-Barre, State of Pennsylvania.

Respondents Andrew Carol and Marvin Rayfield are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of freezers, food and a freezer-food plan under the aforesaid corporate name at the following locations:

61 East Market Street, Wilkes-Barre, Pennsylvania.
60 State Street, Binghamton, New York.
221 West Water Street, Elmira, New York.
746 West Fourth Street, Williamsport, Pennsylvania.

221 North Center Street, Pottsville, Pennsylvania.
132 Adams Avenue, Scranton, Pennsylvania.
104 North Second Street, Harrisburg, Pennsylvania.
336 West Broad Street, Hazelton, Pennsylvania.
164 East Market Street, York, Pennsylvania.

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

PAR. 4. 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. 5. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said food and freezer-food plan, 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 and other advertising media, and by means of brochures, circulars and letters, and by television and radio broadcasts transmitted by television and radio stations located in the States of New York and Pennsylvania, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which are 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 cause the dissemination of advertisements concerning the said food and freezer-food plan by various means, including but not limited to those aforesaid, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of food and freezer-food plans in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. By means of advertisements disseminated as aforesaid, and by the oral statements of sales representatives, respondents have represented, directly or by implication:

1. That a home economist will assist purchasers of the aforesaid freezer-food plan in planning their food orders;

2. That respondent corporation is a member of the Better Business Bureau in all areas where respondents do business;

3. That purchasers of the aforesaid freezer-food plan will receive the same amount of food and a freezer for the same amount of money that they have been paying for food alone;

4. That respondents will pay the moving expenses for the freezer and food if purchasers of the aforesaid freezer-food plan move to different locations or areas;

5. That purchasers of the freezer-food plan receive a three year free service warranty on the freezer;

6. That the flavor and quality of all food sold in connection with the freezer-food plan is unconditionally guaranteed;

7. That purchasers of the aforesaid freezer-food plan receive a free or bonus gift;

8. That for $15.95 a week purchasers of the aforesaid freezer-food plan will receive a four month supply of food for an average size family and a 21 cubic foot combination refrigerator-freezer or a 21 cubic foot freezer, plus metal shelving and a bonus gift;

9. That respondents will supply purchasers of the aforesaid freezer-food plan with all their food requirements;

10. That meat products sold in connection with the aforementioned freezer-food plan are processed at respondent corporation's meat processing plant.

Par. 7. In truth and in fact:

1. The individuals sent to help purchasers of the aforesaid freezer-food plan in planning their food orders are not home economists. They have not had sufficient or proper training to warrant being called home economists.

2. Respondent corporation is not a member of the Better Business Bureau in all the areas where respondents are engaged in the sale of freezers, food and freezer-food plans.

3. Purchasers of the aforementioned freezer-food plan do not receive the same amount of food and a freezer for the same amount of money that they have been paying for food alone. The price of the food and the freezer is more than the price purchasers previously paid for food alone.

4. Respondents do not pay for the moving expenses of the freezer of the food purchased in connection with the aforementioned freezer-food plan if purchasers move to different locations or areas.

5. Purchasers of the aforementioned freezer-food plan do not receive a three year free service warranty on the freezer. Purchasers receive only a one year manufacturer's warranty on the freezer.

6. Neither the flavor nor quality of the food sold in connection with the freezer-food plan is unconditionally guaranteed. Respond-

ents often do not promptly and scrupulously fulfill their obligations under this guarantee.

7. The purchasers of the aforementioned freezer-food plan do not receive a "free" or "bonus" gift. The price of the "free" or "bonus" gift has been added to the price of the freezer.

8. The offer of four months supply of food for an average size family and a 21 cubic foot combination refrigerator-freezer or a 21 cubic foot freezer, plus metal shelving and a bonus gift, all for \$15.95 a week is not a bona fide offer but, on the contrary, it is made for the purpose of inducing the public to contact respondents' place of business to obtain said \$15.95 per week freezer-food plan. When a customer responds to such advertisement, respondents' representative visits his home. Said representative disparages the \$15.95 offer in such a manner as to discourage acceptance of the offer, and attempts to, and frequently does, sell a much higher priced freezer-food plan to such customers.

9. Respondents do not supply purchasers of the aforesaid freezer-food plans with all their food requirements.

10. The meat products sold in connection with the aforementioned freezer-food plan are not processed at a processing plant owned and operated by respondent corporation.

Therefore, the advertisements referred to in Paragraph 5 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 6 were and now are false, misleading and deceptive.

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

PAR. 9. 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 of 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 National Home Food Service Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 61 East Market Street, in the city of Wilkes-Barre, State of Pennsylvania.

Respondents Andrew Carol and Marvin Rayfield are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

PART I

It is ordered, That respondent National Home Food Service Company, Inc., a corporation, and its officers, and Andrew Carol and Marvin Rayfield, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of freezers, food or a freezer-food plan 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. Home economists or other formally trained individuals will assist purchasers of the freezer-food plan in planning their food orders.

b. Respondent corporation is a member of the Better Business Bureau in all areas where respondents sell their freezer-food plan unless respondent corporation is so affiliated in all such areas; or representing, directly or by implication, that respondent corporation holds a membership in the Better Business Bureau in any designated area when corporate respondent is not so affiliated.

c. Purchasers of a freezer-food plan receive the same amount of food and a freezer for the same or less money than they previously paid for food alone.

d. Respondents will pay the moving expenses of the freezer or the food if a purchaser of respondents' freezer-food plan moves to a different location or area of the country.

e. Freezers or any parts thereof are guaranteed in any manner unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed in immediate conjunction with any such representation.

f. The flavor or quality of the food sold in connection with a freezer-food plan is guaranteed unless in every instance respondents promptly and scrupulously fulfill their obligation under the guarantee.

g. Any article of merchandise or product is being given free as a gift or bonus or without cost with the purchase of a freezer, food or a freezer-food plan.

2. Advertising or offering for sale any freezers, food or freezer-food plans at specific prices, or otherwise, for the purpose of obtaining leads or prospects for the sale of freezers, food or freezer-food plans at higher prices unless respondents maintain an adequate and readily available stock of said freezers, and food.

3. Disparaging in any manner or refusing to sell any advertised freezer, food or freezer-food plan.

4. Using any advertising, sales plan or procedure involving the use of false, deceptive or misleading statements or repre-

sentations which are designed to obtain leads or prospects for the sale of a freezer-food plan or merchandise other than that advertised.

5. Representing directly or by implication that any freezer-food plan is offered for sale at a specific price when such offer is not a bona fide offer to sell said freezer-food plan at the specified price.

6. Representing directly or by implication that respondents supply purchasers of the aforesaid freezer-food plan with all their food requirements.

7. Representing directly or by implication that purchasers of respondents' freezer-food plan receive food or other items which are not available under said plan.

8. Representing directly or by implication that meat is processed at respondent corporation's processing plant or that respondent corporation processes its own meat products.

9. Misrepresenting in any manner the savings realized by the purchasers of respondents' freezer-food plan, freezer or food.

PART II

It is further ordered, That respondent National Home Food Service Company, Inc., a corporation, and its officers and Andrew Carol and Marvin Rayfield, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any 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 representation or misrepresentation prohibited in Paragraphs 1 through 9 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 9 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

BRONDABROOKE PUBLISHERS, INC., ET AL.

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

Docket 8546. Complaint, Nov. 29, 1962—Decision, Oct. 11, 1963

Order issued in default requiring New York City publishers of a tabloid size bimonthly newspaper known as "United Labor Management Press", to cease representing falsely—through their agents contacting industrial and business concerns by telephone and seeking to induce them to purchase advertising space—that said paper was affiliated with, or an official publication of, a labor union.

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 Brondabrooke Publishers, Inc., a corporation, Joseph Harrow and Harry Brenner, individually and as officers of said corporation, and Max Strier, individually and as advertising manager 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 Brondabrooke Publishers, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 140 Nassau Street, New York City, New York.

Respondents Joseph Harrow and Harry Brenner are individuals and officers of the corporate respondent. Max Strier is the advertising manager of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the publication of a tabloid size newspaper known as United Labor Management Press. Said newspaper is published bi-monthly and is caused by respondents to be circulated from its point of publication to subscribers and purchasers located in various other states of the United States.

Further, respondents in the course and conduct of their business engage in extensive transactions involving the transmission of letters, advertising proofs, checks and other business instrumentalities and extensive transactions by long distance telephone, all between and among various States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said publication in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. A large part of the corporate respondents' income is derived from the sale of advertising space in "United Labor Management Press" to industrial and other business concerns. Respondents, through their duly authorized agents and representatives, contact said industrial and other business concerns by telephone and seek to induce them to purchase advertising space in said publication. In the course of said telephone solicitations, respondents' agents and representatives represent, and have represented, directly or by implication, to prospective advertisers that said publication was endorsed by, affiliated with or an official publication of a labor union.

PAR. 4. In truth and in fact, United Labor Management Press is not endorsed by, affiliated with or an official publication of a labor union, or in any manner connected with a labor union, but is independently organized and operated. Therefore, the statements and representations referred to in Paragraph 3 hereof are false, misleading and deceptive.

PAR. 5. In the course and conduct of their business respondents have also engaged in the unfair and deceptive practice of placing advertisements of various concerns in their paper without having received authorization therefor and then seeking to exact payment for said advertisements from said concerns.

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 likewise engaged in the publication of newspapers and other periodicals and in the selling of advertising to be inserted therein and particularly with the publishers of newspapers and other periodicals published or endorsed by labor unions.

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 prospective advertisers into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of advertising space by reason of said erroneous and mistaken belief. The unfair and deceptive practice engaged in by respondents of publishing unordered or unauthorized advertisements has subjected firms and individuals to harassment and unlawful demands for payment of nonexistent debts.

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.

Mr. William A. Arbitman supporting the complaint.
Mr. Spencer M. Beresford, Washington, D.C., for respondents.

INITIAL DECISION BY RAYMOND J. LYNCH, HEARING EXAMINER

AUGUST 7, 1963

The complaint herein, charging respondents with violation of Section 5 of the Federal Trade Commission Act, was issued November 29, 1962, and was duly served upon respondents.

On January 4, 1963, respondents filed their answer, denying generally the allegations of the complaint and admitting minor factual allegations. A prehearing conference was held on January 24, 1963, to consider the orderly disposition of the proceedings. At that time, a hearing date of March 5, 1963, was agreed upon by all parties.

On February 26, 1963, respondents filed a motion for cancellation of the hearing scheduled for March 5, 1963, and for leave to negotiate a consent order agreement, and requested that the question be certified to the Commission. The hearing was cancelled subject to rescheduling upon notice, and on March 15, 1963, the hearing examiner denied respondents' motion for leave to negotiate a consent agreement for the reasons that respondents had failed to show good cause why the Rules of Practice should be waived, and why the matter should be certified to the Commission.

Subsequently, several hearing dates were cancelled because of the unavailability of the respondents or respondents' counsel and the illness of one of the respondents.

On July 12, 1963, four days before the commencement of the most recently scheduled hearing, respondents filed a Motion to Withdraw Answer, which was not opposed by counsel supporting the complaint.

By order of July 18, 1963, the hearing examiner granted respondents' Motion to Withdraw Answer, ordered said Answer stricken from the record and declared the respondents in default.

Counsel supporting the complaint submitted proposed findings, conclusion, and order, and requested that the hearing examiner find the facts as alleged in the complaint.

Pursuant to § 3.5(c) of the Commission's Rules of Practice for Adjudicative Proceedings, effective August 1, 1963, the hearing examiner finds that facts to be as alleged in the complaint and issues such findings, conclusion, and order to cease and desist, as follows:

FINDINGS OF FACT

1. Respondent Brondabrooke Publishers, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 140 Nassau Street, New York City, New York.

2. Respondents Joseph Harrow and Harry Brenner are individuals and officers of the corporate respondent. Max Strier is the advertising manager of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

3. Respondents are now, and for some time last past have been engaged in the publication of a tabloid size newspaper known as United Labor Management Press. Said newspaper is published bimonthly and is caused by respondents to be circulated from its point of publication to subscribers and purchasers located in various other States of the United States.

Further, respondents in the course and conduct of their business engage in extensive transactions involving the transmission of letters, advertising proofs, checks and other business instrumentalities and extensive transactions by long distance telephone, all between and among various States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said publication in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. A large part of the corporate respondent's income is derived from the sale of advertising space in "United Labor Management

Press" to industrial and other business concerns. Respondents, through their duly authorized agents and representatives, contact said industrial and other business concerns by telephone and seek to induce them to purchase advertising space in said publication. In the course of said telephone solicitations, respondents' agents and representatives represent, and have represented, directly or by implication, to prospective advertisers that said publication was endorsed by, affiliated with or an official publication of a labor union.

5. In truth and in fact, United Labor Management Press is not endorsed by, affiliated with or an official publication of a labor union, or in any manner connected with a labor union, but is independently organized and operated.

6. In the course and conduct of their business respondents have also engaged in the unfair and deceptive practice of placing advertisements of various concerns in their paper without having received authorization therefor and then seeking to exact payment for said advertisements from said concerns.

7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals likewise engaged in the publication of newspapers and other periodicals and in the selling of advertising to be inserted therein and particularly with the publishers of newspapers and other periodicals published or endorsed by labor unions.

8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead prospective advertisers into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of advertising space by reason of said erroneous and mistaken belief. The unfair and deceptive practice engaged in by respondents of publishing unordered or unauthorized advertisements has subjected firms and individuals to harassment and unlawful demands for payment of nonexistent debts.

CONCLUSION

The aforesaid acts and practices of 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 of the Federal Trade Commission Act.

ORDER

Is is ordered, That respondents Brondabrooke Publishers, Inc., a corporation, and its officers and Joseph Harrow and Harry Brenner, individually and as officers of said corporation; and Max Strier, individually and as advertising manager of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the soliciting, offering for sale or sale in commerce of advertising space in the newspaper now designated as "United Labor Management Press," or any similar publication, whether published under that name, or any other name, and in connection with the offering for sale, sale, or distribution of said newspaper, 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 said newspaper is endorsed by, affiliated with, or an official publication of, or otherwise connected with a labor union.

2. Placing, printing or publishing any advertisement on behalf of any person or firm in said paper without a prior order or agreement to purchase said advertisement.

3. Sending bills, letters or notices to any person or firm with regard to an advertisement which has been or is to be printed, inserted or published on behalf of said person or firm, or in any other manner seeking to exact payment for any such advertisement, without a bona fide order or agreement to purchase said advertisement.

FINAL ORDER

The Commission on September 24, 1963, having issued an order staying the effective date of the decision herein, and the Commission now having determined that the case should not be placed on its own docket for review:

It is ordered, That the initial decision of the hearing examiner, filed August 7, 1963, be, and it hereby is, adopted as the decision of the Commission.

ORDER

It is ordered, That respondents Brondabrooke Publishers, Inc., a corporation, and its officers and Joseph Harrow and Harry Brenner, individually and as officers of said corporation; and Max Strier, individually and as advertising manager of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the soliciting, offering for sale or sale in commerce of advertising space in the newspaper now designated as "United Labor Management Press," or any similar publication, whether published under that name, or any other name, and in connection with the offering for sale, sale, or distribution of said newspaper, 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 said newspaper is endorsed by, affiliated with, or an official publication of, or otherwise connected with a labor union.

2. Placing, printing or publishing any advertisement on behalf of any person or firm in said paper without a prior order or agreement to purchase said advertisement.

3. Sending bills, letters or notices to any person or firm with regard to an advertisement which has been or is to be printed, inserted or published on behalf of said person or firm, or in any other manner seeking to exact payment for any such advertisement, without a bona fide order or agreement to purchase said advertisement.

It is further ordered, That respondents Brondabrooke Publishers, Inc., a corporation, and Joseph Harrow, Harry Brenner and Max Strier 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 set forth herein.

IN THE MATTER OF

LAMPUS COMPANY ET AL.

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

Docket C-606. Complaint, Oct. 11, 1963—Decision, Oct. 11, 1963

Consent order requiring a discount department store and retail furriers doing business at the same address in Portland, Ore., to cease violating the Fur Products Labeling Act by representing falsely on labels affixed to fur products that prices had been reduced from regular prices which were in fact fictitious; failing, in invoicing, to show required information and item numbers; failing, in newspaper advertising, to show the country of orgin of imported furs and representing falsely that certain fur products were available at a stated price; and failing to maintain adequate records as a basis for pricing claims.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Lampus Company, a corporation, and its officers, and Angelos G. Lampus, George H. Haralampus, and James C. Maletis, individually and as officers of said corporation, and Herbert Adler and David Holtzman, individually and as copartners trading as Adler's, hereinafter referred to as respondents, have violated the provisions of said Act and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Lampus Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 2600 N.E. Union Avenue, Portland, Oregon. Respondent Lampus Company is a discount department store engaged in retailing various commodities including fur products.

Individual respondents Angelos G. Lampus, George H. Haralampus and James C. Maletis are officers of the corporate respondent, and formulate, direct and control the acts, practices and policies of the corporate respondent, Lampus Company, including those hereinafter set forth. Their office and principal place of business is the same as that of the said corporate respondent.

Respondents Herbert Adler and David Holtzman, are individuals and copartners trading as Adler's at 2600 N.E. Union Avenue, % Lampus Company, Portland, Oregon. Said respondents are retailers of fur products with their office and principal place of business located at 409 Court Street N.E. Salem, Oregon.

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

PAR. 3. Certain of said fur products were misbranded in that labels affixed thereto represented that prices of fur products had been reduced from regular or usual prices of such fur products and that the amount of such reductions constituted savings to purchasers, when the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business and the represented savings were not thereby afforded to purchasers, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were falsely and deceptively invoiced by respondents in that they were not invoiced to show the information required by Section 5(b)(1) of the Fur Products Labeling Act, or in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in that required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 6. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the advertisements aforesaid, but not limited thereto, were advertisements of respondents which appeared in issues of The Oregonian, a newspaper published in the city of Portland, State of Oregon.

Among such false and deceptive advertisements of fur products, but not limited thereto, were advertisements which failed to show the country of origin of imported furs contained in fur products.

PAR. 7. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in that said advertisements represented, contrary to fact, that certain fur products were available to purchasers at a stated price, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 8. Respondents falsely and deceptively advertised fur products by affixing labels thereto which represented that prices of such fur products had been reduced from regular or usual prices of such products and that the amount of such reductions constituted savings to purchasers when the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business and the represented savings were not thereby afforded to purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations.

PAR. 9. In advertising fur products for sale as aforesaid respondents made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based, in violation of Rule 44(e) of said Rules and Regulations.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under 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 Fur Products Labeling 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, Lampus Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its office and principal place of business located at 2600 N.E. Union Avenue, in the city of Portland, State of Oregon.

Respondents Angelos G. Lampus, George H. Haralampus, and James C. Maletis are officers of said corporation and their address is the same as that of said corporation.

Respondents Herbert Adler and David Holtzman are individuals and copartners trading as Adler's with their office and principal place of business located at 409 Court Street, N.E., in the city of Salem, State of Oregon.

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

ORDER

It is ordered, That respondents Lampus Company, a corporation, and its officers, and Angelos G. Lampus, George H. Haralampus, and James C. Maletis, individually and as officers of the said corporation, and Herbert Adler and David Holtzman, individually and as copartners trading as Adler's, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Falsely or deceptively labeling or otherwise identifying such products by any representation that any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise so represented was usually and customarily sold at retail by the respondents unless such merchandise was in fact usually and customarily sold at retail at such price by the respondents in the recent past.

2. Misrepresenting in any manner on labels or other means of identification the savings available to purchasers of respondents' products.

3. Falsely or deceptively representing in any manner, directly or by implication, on labels or other means of identification that prices of respondents' fur products are reduced.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Failing to set forth on invoices the item number or mark assigned to a fur product.

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

1. Fails to set forth in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.

2. Represents directly or by implication that any such fur products are offered for sale at a stated price unless such advertised merchandise is in fact available in stock for purchasers at such stated prices.

3. Represents, directly or by implication, that any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise advertised was usually and customarily sold at retail by the respondents unless such advertised merchandise was in fact usually and customarily sold at retail at such price by respondents in the recent past.

4. Misrepresents in any manner the savings available to purchasers of respondents' fur products.

5. Falsely or deceptively represents in any manner that prices of respondents' fur products are reduced.

D. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

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

DEVCON CORPORATION ET AL.

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

Docket C-607. Complaint, Oct. 11, 1963—Decision, Oct. 11, 1963

Consent order requiring Danvers, Mass., distributors of repair materials to wholesalers, industrial plants and retail chainstores to cease representing falsely by means of the brand names and in pamphlets, display cards, bulletins, etc., that their said repair products—consisting principally of nonmetallic materials—had the composition and effectiveness of hardened metal or of rubber.

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 Devcon Corporation, a corporation, and Albert M. Creighton, Jr., and E. Leslie Hall, 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 Devcon Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its principal office and place of business located in Danvers, Massachusetts.

Respondents Albert M. Creighton, Jr., and E. Leslie Hall are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

Par. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of repair materials to wholesalers, for resale to retailers, and to industrial plants and retail chain stores.

Par. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the Commonwealth of Massachusetts 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 sale of their repair materials, respondents in their brand names and advertising have represented the materials of which their products are composed and the performance characteristics of their products by the following means:

1. Respondents designate by brand names or otherwise represent certain of their products as "Devcon Steel", "Devcon Liquid Aluminum" and "Devcon Rubber".

2. In pamphlets, display cards, circulars and bulletins, respondents represent certain of their products as follows:

(a) Plastic Steel—
* * * hardens to a tough durable metal in only 2 hours.
After two hours it is hard and tough as steel.
* * * heat and chemical resistant * * *.

(b) Devcon Steel:
Real steel in paste form
HARDENS TO A TOUGH METAL
FOR PERMANENT, QUICK REPAIRS

(c) Devcon Liquid Aluminum:
Real aluminum in paste form * * *
HARDENS TO METAL
PERMANENT

(d) Devcon "2 Ton," The Epoxy "Super Glue," so strong that a single drop will hold 2 tons.

PAR. 5. By and through the use of the aforementioned brand names, statements and representations and others of similar import and meaning not specifically set out herein, respondents represented, directly or by implication, that:

1. "Devcon Steel" and "Devcon Liquid Aluminum" are composed in whole or in principal part of metallic substances; "Devcon Rubber" is composed in whole or in principal part of rubber.

2. (a) "Plastic Steel" forms a hardened metal that has the effectiveness and intrinsic characteristics of steel and is not adversely affected by heat or chemicals.

(b) "Devcon Steel" and "Devcon Liquid Aluminum" are liquid metals and when used form hardened metals.

(c) One drop of "Devcon '2 Ton' The Epoxy 'Super Glue'" has an adhesive strength of at least 2 tons.

PAR. 6. In truth and in fact:

1. "Devcon Steel" and "Devcon Liquid Aluminum" consist principally of non-metallic materials with comparatively small amounts of metallic substances; "Devcon Rubber" consists principally of a solvent with a comparatively small amount of neoprene rubber.

2. (a) "Plastic Steel" does not form a hardened metal but, on the contrary, forms a substance that lacks the effectiveness and intrinsic characteristics of hardened metal and of steel and deteriorates when exposed to certain high temperatures or certain chemicals.

(b) "Devcon Steel" and "Devcon Liquid Aluminum" are not liquid metals and when used do not form hardened metals but, on the contrary, form substances that lack the effectiveness and intrinsic characteristics of hardened metals.

(c) One drop of "Devcon '2 Ton' The Epoxy 'Super Glue'" will not hold 2 tons.

Therefore, the brand names, statements and representations as referred to in Paragraphs 4 and 5 were and are exaggerated, false, misleading and deceptive.

PAR. 7. By the aforesaid practices, respondents place in the hands of others means and instrumentalities by and through which they may mislead the public as to the nature, composition, effectiveness and characteristics of their repair materials.

PAR. 8. 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 products of the same general kind and nature as those hereinabove described and sold by respondents.

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

PAR. 10. 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 Devcon Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located in Danvers, Massachusetts.

Respondents Albert M. Creighton, Jr., and E. Leslie Hall are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondent Devcon Corporation a corporation, and its officers, and Albert M. Creighton, Jr., and E. Leslie Hall, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Plastic Steel", "Devcon Steel", "Devcon Liquid Aluminum", "Devcon Rubber", "Devcon '2 ton' The Epoxy 'Super Glue' " or any other products in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1.

(a) Using the words "steel" or "aluminum" or any other word or words denominating metallic substances in brand names to designate, describe or refer to a product that consists principally of non-metallic ingredients: *Provided, however*, That if a product contains a metallic substance in some form, the percentage thereof may be stated.

(b) Using the word "rubber" or any other word or words denominating rubber substances in brand names to designate, describe or refer to a product that consists principally of ingredients other than rubber: *Provided, however*, That if a product contains natural or synthetic rubber substances in some form, the percentage thereof may be stated.

2. Representing, directly or by implication, that

(a) the product designated "Plastic Steel" or any other product of similar composition or characteristics forms a hardened metal or a substance that has the effectiveness or intrinsic characteristics of a hardened metal or of steel or that is not adversely affected by heat or chemicals;

(b) the products designated "Devcon Steel" and "Devcon Liquid Aluminum" or any other product of similar composition or characteristics are liquid metals or that when used they form hardened metals or substances that have the effectiveness or intrinsic characteristics of hardened metals;

(c) one drop of the product designated "Devcon '2 Ton' The Epoxy 'Super Glue'" has an adhesive strength of 2 tons or an adhesive strength in any amount in excess of the true facts.

3. Misrepresenting in any manner the nature, composition, effectiveness or characteristics of their products.

4. Furnishing or otherwise placing in the hands of others means and instrumentalities by and through which they may mislead the public as to any of the matters and things hereinable prohibited.

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

LUCKY PRODUCTS, INC., ET AL.

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

Docket C-608. Complaint, Oct. 16, 1963—Decision, Oct. 16, 1963

Consent order requiring distributors of toys and related products in Westbury, Long Island, N.Y., to cease misrepresenting their products in advertising in newspapers and magazines and other media by such practices as representing falsely that toy soldiers were 4 inches in length, that they and toy "Knights" were of more than one color and three-dimensional; that cannons and rifles emitted smoke and blasts of fire, etc.; that an 8 inch "Aircraft Carrier" was a foot long; and that "Famous Automobiles" were three-dimensional models of their full-size counterparts.

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 Lucky Products, Inc., a corporation, and Joseph Shore, Nat Lewis and Beverly F. Shore, 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 Lucky Products, 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 3 Ovington Circle, in the city of Westbury, Long Island, State of New York.

Respondents Joseph Shore, Nat Lewis and Beverly F. Shore are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The address of respondents Joseph Shore and Beverly F. Shore is the same as that of the corporate respondent; the address of respondent Nat Lewis is 155 Friends Lane, in the city of Westbury, Long Island, State of New York.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of toys and related products, including toys designated "204 Revolutionary War Soldiers", "104 Kings Knights", "Aircraft Carrier" and "147 Famous Automobiles", to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said toys and related products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and 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 conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with other corporations, firms and individuals in the sale of toys and related products.

PAR. 5. In the course and conduct of their business and for the purpose of inducing the purchase in commerce of the said toys and related products, respondents have made certain statements, representations and pictorial presentations with respect thereto in advertisements inserted in newspapers and periodicals of general circulation and other advertising media.

PAR. 6. Among and typical of the statements and representations made and appearing in said advertisements disseminated as hereinabove set forth, are the following:

1. *204 Revolutionary War Soldiers*

2 COMPLETE ARMIES * * * every piece of pure molded plastic—each on its own base up to 4 inches long! Two complete armies—the British redcoats and the American bluecoats! Relive again the famous battles of the American Revolution! Form your own battle lines! Hours of fun for the whole family!

(The above statement appears in a multicolored advertisement depicting British troops charging American troops. The British troops are dressed in red jackets with yellow vests, white crossed-straps, yellow hats and white leggings; the Union Jack is red and blue; the horses are white and golden. The American troops are dressed in blue jackets with brown and yellow trim, white crossed-straps, yellow epaulets on officers' uniforms, blue hats and white leggings; the Flag is red, white and blue. The rifles and cannons of both armies are shown emitting smoke and blasts of fire; the cannons are pictured as single units, "brassy" and "leaden" in appearance. The troops, cannons, etc., appear to be three-dimensional.)

2. *104 Kings Knights*

A GLORIOUS SET OF PLASTIC TOYS EVERY CHILD WILL BE PLEASED TO OWN! Comes in two separate armies * * * the BLACK KNIGHTS and the WHITE KNIGHTS! Form your own battle lines! Every fight a delight! Fun for everyone in the family! Comes in Treasure Chest box in which to store your toys away! You must be satisfied or your money refunded in full!

(The above statement appears in a multicolored advertisement depicting knights on horseback engaged in combat. The Knights are pictured as being multicolored and three-dimensional. The "Treasure Chest box" is pictured as being plain, unmarked and made of wood with metal reinforcements.)

3. *Aircraft Carrier*

Almost a foot long, this carrier catapults, floats in water, runs on dry land. Comes equipped with 5 catapulting jets that zoom off the runway with the flick of a finger! We also send you at no extra cost, a small supporting fleet of real plastic molded warships, as shown at the right * * *.

4. *147 Famous Automobiles*

COMES PACKED IN THIS SPECIAL GARAGE BOX IN WHICH TO STORE YOUR MODELS!

KIDS! Here's the greatest assortment of famous cars from Grandpa's days to today! Yes, a model car for each year from 1915 thru 1963! And there's 3 each of each model so that you can trade them and save them! EACH MODEL HAS THE NAME OF THE AUTOMOBILE AND YEAR ON IT—each on its own base, 49 different models, 147 pieces to the set. Made of pure plastic styrene. Fun for you and the whole family. Comes in a garage box for storage when not in use! Send $2.49 money order or check with coupon.

Please send immediately full set of 147 auto models. I enclose $2.49. If not satisfied I may return for full refund.

(The above statements appear in an advertisement which also includes pictures of nineteen automobiles shown in various positions so that they appear to be three-dimensional and equipped with tires, wheels, chrome, headlights, radiator trim, license plate frames and sundry other features.)

PAR. 7. Through the use of the aforesaid advertisements, and others containing statements, representations and pictorial presentations of the same import not specifically set forth herein, respondents have represented, directly and by implication:

1. That the toy soldiers, cannons, and other pieces in the "204 Revolutionary War Soldiers" are 4 inches in length; that the soldiers are of more than one color and are three-dimensional; that the cannons and rifles emit smoke and blasts of fire, and that the cannons are "brassy" and "leaden" in appearance and are individual units.

2. That the "104 Kings Knights" are multicolored and three-dimensional; that the box in which the toys come is unmarked and made of wood with metal reinforcements and is large enough to hold the set of knights and other toys.

3. That the "Aircraft Carrier" is approximately one foot long.

4. That the "147 Famous Automobiles" are three-dimensional models, *i.e.*, miniature replicas, of their full-size counterparts.

PAR. 8. In truth and in fact:

1. The toy soldiers, cannons, and other pieces in the "204 Revolutionary War Soldiers" are less than 4 inches in length, are not multicolored but of one solid color, either blue or red, and are not three-dimensional; the cannons and rifles do not emit smoke or blasts of fire and are not of a "brassy" or "leaden" appearance but are either blue or red, and the cannons are not individual pieces but are two cannons molded into one piece.

2. The pieces in the "104 Kings Knights" are not multicolored but only black or white and are not three-dimensional; the so-called "Treasure Chest" box in which the toys are packed is not made of wood with metal reinforcements but is a paperboard box with printing and labeling thereon and is large enough to hold only those toys comprising this set.

3. The "Aircraft Carrier" is not a foot long, nor approximately a foot long; it is, in fact, only 8 inches long.

4. The "147 Famous Automobiles" are not three-dimensional nor are they models of their full-size counterparts.

Therefore, the statements, representations and pictorial presentations referred to in Paragraphs 5 and 6 are false, misleading and deceptive.

PAR. 9. Respondents' toys and related products are designed primarily for children, and are bought either by or for the benefit of children. Respondents' false, misleading and deceptive advertising claims thus unfairly exploit a consumer group unqualified by age or experience to anticipate or appreciate the possibility that the representations may be exaggerated or untrue. Further, respondents unfairly play upon the affection of adults, especially parents and other close relatives, for children, by inducing the purchase of toys and related produtcs through false, misleading and deceptive claims of their appearance, which claims appeal both to adults and to children who bring the toys to the attention of adults. As a consequence of respondents' exaggerated and untrue representations, toys are purchased in the expectation that they will have characteristics or perform in a manner not substantiated by the facts. Consumers are thus misled to their disappointment and competing advertisers who do not engage in false, misleading or deceptive advertising are unfairly prejudiced.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said representations were, and are, true and into the purchase of substantial quantities of the products of respondents, by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public 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 adimssion 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 Lucky Products, 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 3 Ovington Circle, in the city of Westbury, Long Island, State of New York.

Respondents Joseph Shore, Nat Lewis and Beverly F. Shore are officers of the corporate respondent. The address of respondents Joseph Shore and Beverly F. Shore is the same as that of the corporate respondent; the address of respondent Nat Lewis is 155 Friends Lane, in the city of Westbury, Long Island, State of New York.

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

ORDER

It is ordered, That respondents Lucky Products, Inc., a corporation, and its officers, and Joseph Shore, Nat Lewis and Beverly F. Shore, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of toys or related products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting, by use of any illustration or depiction, alone or accompanied by written statements, purporting to illustrate or depict any toy or related product, or misrepresenting in any other manner, directly or by implication, the color, size, shape, dimensions, composition, performance or any other physical characteristic of any toy or related product.

2. Using the word "model", either alone or in connection with another word or words, to designate, describe or refer to any toy or related product which is not in fact a miniature replica of that which it purports to represent.

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

COLORFORMS ET AL.

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

Docket C-609. Complaint, Oct. 16, 1963—Decision, O

Consent order requiring toy distributors in Norwood, N.J., tc falsely in television commercials that both $1.98 and $0 Dress-Up Kits" contained three Ballerina Dolls and tl Ballerina Doll clothes, when the cheaper kit containe fewer clothes than the higher priced one.

COMPLAINT

Pursuant to the provisions of the Federal Trade (and by virtue of the authority vested in it by said . Trade Commission, having reason to believe that C poration, and Harry Kislevitz and Patricia Kislev and as officers of said corporation, hereinafter re spondents, have violated the provisions of said Act ing to the Commission that a proceeding by it in would be in the public interest, hereby issues its com charges in that respect as follows:

PARAGRAPH 1. Respondent Colorforms is a corpor existing and doing business under and by virtue of State of New Jersey, with its principal office and p located on Walnut Street in the city of Norwood Jersey.

Respondents Harry Kislevitz and Patricia Kisle of the corporate respondent. They formulate, direct acts and practices of the corporate respondent, in and practices hereinafter set forth. Their addres Road, in the city of River Edge, State of New Jer

PAR. 2. Respondents are now, and for some tim been, engaged in the advertising, offering for sale, bution of toys and related products, including a "Miss Ballerina Dress-up Kit", to distributors and resale to the public.

PAR. 3. In the course and conduct of their busin now cause, and for some time last past have caused, uct, when sold, to be shipped from their place of State of New Jersey to purchasers thereof located i States of the United States and in the District of maintain, and at all times mentioned herein have ma stantial course of trade in said product in commerce, as is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of their business, at all tim herein, respondents have been in substantial competit merce, with other corporations, firms and individuals i toys and related products.

PAR. 5. In the course and conduct of their business purpose of inducing the purchase in commerce of th Ballerina Dress-up Kit", respondents have made certai representations and pictorial presentations with respe means of commercials transmitted by television statio various States of the United States and in the District

PAR. 6. Among and typical of the statements and re made and appearing in said commercials as hereinab are the following:

> You can have hours of fun. For here are three dainty little l with lots of ballerina clothes. * * *
>
> For a dollar ninety-eight * * * or ninety-eight cents in a sma

PAR. 7. Through the use of the aforesaid adverti others containing statements and representations of the not specifically set forth herein, respondents have re rectly and by implication:

That both the $1.98 and $0.98 "Miss Ballerina D contain three Ballerina Dolls and that both such kit same amount of Ballerina Doll clothes.

PAR. 8. In truth and in fact:

The "Miss Ballerina Dress-up Kit" that retails for but one doll and a smaller assortment of clothes than t in the kit retailing for $1.98.

Therefore, the statements, representations and depic to in Paragraphs 5 and 6 are false, misleading and

PAR. 9. Respondents' toys and related products, "Miss Ballerina Dress-up Kit", are designed primarily and are bought either by or for the benefit of childr ents' false, misleading and deceptive advertising claims exploit a consumer group unqualified by age or experi pate or appreicate the possibility that the represent exaggerated or untrue. Further, respondents unfair the affection of adults, especially parents and other for children, by inducing the purchase of toys and re through false, misleading and deceptive claims of the or performance, which claims appeal both to adults a who bring the toys to the attention of adults. As a respondents' exaggerated and untrue representations, toys are purchased in the expectation that they will have characteristics or perform in a manner not substantiated by the facts. Consumers are thus misled to their disappointment and competing advertisers who do not engage in false, misleading or deceptive advertising are unfairly prejudiced.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said representations were, and are, true and into the purchase of substantial quantities of the products of respondents, by reason of said erroneous and mistaken beliefs.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 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 Colorforms is a corporation organized, existing and doing bsuiness under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located on Walnut Street, in the city of Norwood, State of New Jersey.

Respondents Harry Kislevitz and Patricia Kislevitz are officers of said corporation and their address is 183 Valley Road, in the city of River Edge, State of New Jersey.

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

ORDER

It is ordered, That respondents Colorforms, a corporation, and its officers, and Harry Kislevitz and Patricia Kislevitz, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of toys or related products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, by use of any illustration, depiction or demonstration, alone or accompanied by oral or written statements, purporting to illustrate, depict or demonstrate any toy or related product, or the characteristics thereof, or representing in any other manner, directly or by implication, that any toy or related product contains or includes any pieces, parts or components not in accordance with fact.

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

THOMASVILLE CHAIR COMPANY

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

Docket 7273. Complaint, Oct. 7, 1958—Decision, Oct. 22, 1963

Order dismissing cease and desist order of March 15, 1961, 58 F.T.C. 441, after remand by Court of Appeals, Fifth Circuit, 306 F. 2d 541, 7 S.&D. 515, complaint charging a manufacturer of household furniture with discriminating in price in violation of Sec. 2(c) of the Clayton Act.

ORDER DISMISSING COMPLAINT

The United States Court of Appeals for the Fifth Circuit having, on August 14, 1962, entered its judgment setting aside the Commission's order to cease and desist and remanding the matter to the Commission for further proceedings not inconsistent with its opinion of the same date, and the Commission after full consideration having determined that the complaint should be dismissed for the reasons stated in an accompanying memorandum;

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

MEMORANDUM ACCOMPANYING FINAL ORDER

By the Commission:

This matter is before the Commission upon remand from the United States Court of Appeals for the Fifth Circuit. We read the Court of Appeals' decision as holding that the Commission, in a case in which it is alleged that a seller has violated Section 2(c) of the Clayton Act by passing on a reduction in brokerage to favored buyers in the form of a discriminatory price reduction, may not rely solely on the fact that the seller has paid less brokerage on the sales at the lower price, but must establish a causal relationship between the reduced brokerage and the reduced sales price. The Commission does not, however, acquiesce in the opinion of the Court of Appeals as such, which contains dicta with which the Commission does not necessarily agree. Since the Commission does not believe that the public interest would be advanced by a further proceeding to establish whether respondent has violated Section 2(c), the complaint must be dismissed.

IN THE MATTER OF

EARL SCHEIB, INC., ET AL.

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

Docket 8483. Complaint, May 2, 1962—Decision, Oct. 22, 1963

Order requiring Beverly Hills, Calif., operators of paint and body repair services for automobiles at various locations, to cease representing falsely in advertisements in newspapers, on television and through other advertising media, that their customary offer of $29.95 was a special, reduced price; that their $19.95 paint offer was of the same quality as that at $29.95, when in fact, it was a bait offer, made to attract customers who were then urged to take a much higher priced job; and that all their work carried a 3-year guarantee.

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 Earl Scheib, Inc., a corporation, and Earl A. Scheib, individually and as an officer 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 Earl Scheib, 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 8737 Wilshire Boulevard, Beverly Hills, California.

Respondent Earl A. Scheib is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His 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 advertising, offering for sale, sale and distribution of paint, and in performing an automobile paint and body repair service, to the public.

In connection with the performance of the paint and the body repair service to a customer's automobile, respondents own, operate and control (1) a factory in which the paint is manufactured, (2) area warehouses in which the paint is warehoused or stored and from which the paint is distributed to the various paint and body repair shops and (3) various paint and body repair shops at and in which the said paint and body repair services are performed. All of the manufacturing, storing and distribution of paint, and the performance of paint and body repair services, are done through separate corporations, not specifically designated herein, which are incorporated in the state or district in which said factory, warehouse distributor or paint and body repair shop is located.

Prior to the month of February 1962, the individual respondent owned all of the capital stock of the various corporations above mentioned and all of the capital stock of a corporation known as Earl Scheib, Inc., a California corporation which acted in a managerial capacity for said other corporations. In the month of February 1962, the corporate respondent was organized in the State of Delaware. Thereafter, the individual respondent transferred to the said Delaware corporation all of the stock owned by him in the various operating corporations as above set forth, and including the stock owned by him in Earl Scheib, Inc., the California corporation, to the corporate respondent herein, in exchange for approximately 95% of the capital stock of the corporate respondent. On February 28, 1962, Earl Scheib, Inc., the California corporation, was merged with the corporate respondent herein and thereby the said corporate respondent became the parent of all the various corporations operating the factory, warehouses and paint and body repair shops.

The individual respondent, through control of the corporate respondent, and formerly through control of the said California corporation, formulated, directed and controlled, and now formulates, directs and controls, the acts and practices of each of the said subsidiary corporations in conjunction with the corporate respondent, and formerly the said California corporation.

Whenever it is alleged hereafter that the respondents committed certain acts and practices which are claimed to be false, misleading and deceptive, it is intended to be alleged that the said acts and practices were committed by the individual respondent, Earl A. Scheib, in conjunction with Earl Scheib, Inc., the California corporation, or in conjunction with Earl Scheib, Inc., the Delaware corporation, as the case may be.

PAR. 3. In the course and the conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said paint to be shipped from their paint factory located in the State of California to their warehouses located in various other States of the United States, including the State of California. Thereafter shipments are made from the warehouses located in various States of the United States, including the State of California, to the locations of their auto paint and body repair shops located throughout the United States and in the District of Columbia. At said locations, paint is sold and painting and body repair service is performed on the customer's automobile. In the course and conduct of said business respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said automobile paint and in the automobile painting and body repair service 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 and purchase of their automobile paint and body repair service, respondents have made certain statements and representations with respect to the nature, extent, quality, workmanship, guarantees and prices of the same in advertisements in newspapers, publications and through other advertising media, all of which are circulated into various States of the United States other than, and including, the State of origin of the advertisement and in the District of Columbia; and by advertisements on television which are telecast across State lines into States, other than, and including, the State of origin of the advertisement, and in the District of Columbia. Typical, but not all inclusive, of such statements and representations are the following:

1. In connection with a $29.95 offer:

Special, $29.95.
Vacation Special, $29.95.
Winter Special, $29.95.
Fall Special, $29.95.
Special this week, $29.95.
Yet my price is still—for limited time—only $29.95.
Even with this costly new silicone, I will still paint any car—for limited time—for only $29.95.

2. In connection with a $19.95 offer:

7 more days, $19.95. Any car. Variety of colors.
19.95. That is the full price to paint any car.
That's right—that's the full price—just $19.95 this week. You save $10! Instead of $29.95 its only $19.95 whether you own an Austin or a Cadillac.

3. In connection with a guarantee:

Your three year written guarantee is honored at any Earl Scheib Paint Shop in over 100 cities against fading, peeling, crinkling.

PAR. 5. Through the use of the aforesaid statements and representations, and others of similar import and meaning, but not specifically set forth herein, the respondents have represented, and now represent, directly or indirectly:

1. In connection with the $29.95 offer, that $29.95 is a special, reduced or bargain price.

2. In connection with the $19.95 offer, that $19.95 is the full price to paint any automobile in a variety of colors with the same quality and workmanship, the same selection of colors and the same guarantee as in a $29.95 job.

3. In connection with the guarantee, that all paint work is guaranteed regardless of price, against fading, peeling and crinkling for three years.

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

1. The price of $29.95 is not a special, reduced or bargain price but, on the contrary, said price is respondents' customary, usual and regular price.

2. The offer to paint any automobile for $19.95 in a variety of colors with the same quality workmanship, selection of colors and

guarantee as in a $29.95 job is not a bona fide offer but, on the contrary, it is made for the purpose of inducing the public to come to respondents' place of business to obtain said $19.95 paint job. When a customer responds to such advertisement and goes to one of the various paint shops, employees and representatives of respondents disparage said $19.95 paint job in such a manner as to discourage the offer and attempt to, and frequently do, sell a much higher price paint job to said customer. In instances where the customer insists on the $19.95 paint job he is then informed by respondents' employees and representatives that such work is not guaranteed and is not of the same quality as the $29.95 job.

3. All of respondents' paint work is not guaranteed against fading, peeling and crinkling for three years regardless of the price, but, on the contrary, in order to obtain said guarantee, body repair work must be performed and no guarantee is issued for work performed for the price of $19.95.

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals, in the manufacture, sale and distribution of products of the same general kind and nature as that sold by respondents and also with those engaged in the business of painting and performing body repair work on automobiles.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' said paint and automobile paint and body repair services because of such erroneous and mistaken beliefs.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Roy B. Pope supporting the complaint.

Buchalter, Nemer, Fields & Savitch, by *Mr. Irwin R. Buchalter*, Los Angeles, Calif., for respondents.

INITIAL DECISION BY ANDREW C. GOODHOPE, HEARING EXAMINER

DECEMBER 4, 1962

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondents on May 2, 1962, charging them with engaging in unfair acts and practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act by the use of false and misleading advertising in connection with the respondents' business of repairing and repainting automobiles. A copy of said complaint with notice of hearing was duly served upon respondents. Respondents thereafter appeared by counsel and filed answer denying, in substance, having engaged in the illegal practices charged.

Hearings on the charges were thereafter held at which time testimony and other evidence were offered in support of, and in opposition to, the allegations of the complaint, said evidence being duly recorded and filed in the office of the Commission. At the close of all the evidence and pursuant to leave granted by the undersigned, proposed findings, conclusions of law, proposed order and briefs were filed on October 29, 1962, by counsel supporting the complaint and for the respondents.

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

After having reviewed the entire record in this proceeding and the proposed findings and conclusions and supporting briefs, the undersigned finds that this proceeding is in the interest of the public and, based on the entire record, makes the following:

FINDINGS OF FACT

1. Respondent, Earl Scheib, 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 8737 Wilshire Boulevard, Beverly Hills, California. Earl Scheib, Inc., was organized in the State of Delaware on December 22, 1961.

2. Earl A. Scheib is the President of Earl Scheib, Inc. The business address of Earl A. Scheib is 8737 Wilshire Boulevard, Beverly Hills, California.

3. Corporate respondent is now, and for some time last past has been engaged in the advertising, offering for sale, and through its subsidiaries, sales and distribution of paint, and in performing an

automobile paint and body repair service to the public. It is a nationwide automobile paint company with approximately 128 auto paint shops presently in operation through the United States.

4. In connection with the performance of the paint and body repair service to a customer's automobile, corporate respondent owns, operates and controls through its subsidiaries (1) two factories in which the paint is manufactured, (2) area warehouses in which the paint is warehoused or stored and from which the paint is distributed to the various paint and body repair shops, and (3) various paint and body repair shops in which the said paint and body repair services are performed. All of the manufacturing, storing and distribution of paint, and the performance of paint and body repair services, is done through separate corporations not specifically named herein, which are incorporated in the states or districts in which said factory, warehouse distributor, or paint and body repair shop is located.

5. Prior to the month of February 1962, the individual respondent owned all of the capital stock of the various corporations above mentioned and all of the capital stock of a corporation known as Earl Scheib, Inc., a California corporation, which acted in a managerial capacity for said other corporations. Thereafter, the individual respondent transferred to a new Delaware corporation (corporate respondent) all of the stock owned by him in the various operating corporations as above set forth, and including the stock owned by him in Earl Scheib, Inc., the California corporation, to the corporate respondent herein, in exchange for approximately 95% of the capital stock of the corporate respondent. On February 28, 1962, Earl Scheib, Inc., the California corporation, was merged with the Delaware corporate respondent herein, and thereby the corporate respondent became the parent of all the various corporations operating the paint factories, warehouses and paint and body repair shops.

6. The individual respondent, through control of the corporate respondent, and formerly through control of said California corporation, and otherwise, formulated, directed and controlled and now formulates, directs and controls the acts and practices of corporate respondent and of each of said subsidiary corporations in conjunction with the corporate respondent, and formerly the said California corporation. This direction and control includes all of respondents' advertising practices and materials involved in this proceeding.

7. In the course and conduct of their business, as aforesaid, respondents now cause and for some time last past have caused, paint to be shipped from the paint factories to the warehouses located in

various other States of the United States. Thereafter, shipments are made from the warehouses to the locations of the auto paint and body repair shops located throughout the United States and in the District of Columbia. At said locations, paint is sold and painting and body repair service is performed on the customer's automobile. In the course and conduct of said business, respondents maintain, and at all times herein have maintained, a substantial course of trade in said automobile paint and in automobile painting and body repair service in commerce, as "commerce" is defined in the Federal Trade Commission Act.

8. In the conduct of the business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals, in the manufacture, sale and distribution of products of the same general kind and nature as that sold by respondents and also with those engaged in the business of painting and performing body repair work on automobiles.

9. In the course and conduct of the business, and for the purpose of inducing the sale of purchase of the automobile paint and body repair service, the respondents have made certain statements and representations with respect to the nature, extent, quality, workmanship, guarantees and prices of the same in advertisements in newspapers, publications and through other advertising media, all of which are circulated into various States of the United States other than, and including, the State of origin of the advertisement and in the District of Columbia; and by advertisements on television which are telecast across State lines into States other than and including the State of origin of the advertisement, and in the District of Columbia. Typical, but not all inclusive, of such statements and representations are the following statements which are exactly as they appeared in the context of their advertising format in conjunction with other matters:

(1) In connection with a $29.95 offer:

Special, $29.95.
Vacation Special, $29.95.
Winter Special, $29.95.
Fall Special, $29.95.
Special this week, $29.95.
Yet my price is still—for limited time—only $29.95.

Even with this costly new silicone paint, I will still paint any car—for limited time—for only $29.95.

(2) In connection with a $19.95 offer:

7 more days. $19.95. Any car. Variety of colors.
$19.95. That is the full price to paint any car.

That's right—that's the full price—just $19.95 this week. You save $10. Instead of $29.95 its only $19.95 whether you own an Austin or a Cadillac.

That's the full price, just $19.95, and you select from a variety of beautiful colors, close out of 1960 colors.

(3) In connection with a guarantee:

Your three year written guarantee is honored at any Earl Scheib Paint Shop in over 100 cities against fading, peeling, crinkling.

10. The first charge of deception against the respondents is the use of the word "special" and words of similar import as set forth in part in subparagraph 1 of the Ninth Finding above. $29.95 is the price which respondents have consistently charged since they began business for the repainting of an automobile with the exception of the $19.95 price and the $24.95 price in California. The advertising indicates that the $29.95 price is a special reduction or bargain price from respondent's usual price. This is not true; consequently, it is false and misleading to so advertise the $29.95 offer.

Respondents urge that the meaning which they intended to give to the word "special" was that it was special when compared to the prices charged and services offered by respondents' competitors. But the advertising used by the respondents in this regard could very easily indicate that this was the meaning which they intended. However, it is clear from examining the advertising that it distinctly conveys the meaning that the $29.95 price is a reduction from respondents' normal and usual price. The word "special" is used in such close association with the price of $29.95 that it is impossible to separate the two as they appear in the advertisements. In fact, the theme of the advertisements is that the $29.95 price is a truly unusual offer definitely limited in duration. A true "special" offered by the respondents is the $19.95 paint job discussed in the next finding. Throughout the record, it is referred to as a "special", which it is since it is a temporary offer at $10.00 less than respondents usual and customary price. Consequently, the examiner finds that respondents' use of the word "special" and words of similar import in advertising its $29.95 paint job is false and misleading. *International Association of Photographers*, 52 F.T.C. 1450, 1461 (1956); *American Albums, Inc.*, 53 F.T.C. 913, 915 (1957).

11. The second charge of false and misleading advertising is that respondents' advertising of a special $19.95 paint job was no more than a sham to get prospective customers into the Earl Scheib shops and thereafter to disparage the $19.95 paint job and attempt to sell the customer up to the $29.95 paint job. In this connection, it is respondents' practice at about the time new models of automobiles are brought onto the market in the fall of each year to re-examine

their entire line of automobile paints, introduce new colors, and eliminate out-of-date or slow-moving colors. In addition, in the various paint shops the remnants of paint used to paint automobiles were saved in a drum during the year and were called "slop" paints. The respondents used these "slop" paints and the discontinued lines of paints in carrying out its $19.95 special offer.

The record establishes that the paint used in the $19.95 paint jobs was of the same quality as used for the $29.95 paint jobs. The record also establishes that the quality of workmanship in the preparation of the auto and applying of the paint was also the same.

The testimony of the witnesses called by complaint counsel dealt with statements made by Earl Scheib representatives pertaining to the differences between the $19.95 paint job and the $29.95 paint job and with the selections of colors available at the $19.95 price.

The record establishes that representatives of Earl Scheib, Inc., advised at least some prospective customers that the paint used in the $19.95 paint job was a flat enamel paint which required waxing and polishing and did not contain silicones as did the paint used in the $29.95 jobs. As a result, prospective customers purchased the $29.95 paint job. Commission Exhibit 28 A to F makes it clear that this manner of selling prospective customers up to the $29.95 paint job was discussed and planned by Earl Scheib representatives. It was emphasized in this document that the customer was to be advised that respondents' Diamond Gloss silicone paints were used in the $29.95 job. The impression left, without actually stating it, was that such was not the case in the lower-priced special paint jobs. Respondent Scheib and his representatives testified that this bulletin was suppressed as soon as it came to Mr. Schieb's attention; however, Commission Exhibits 29 and 30, which were published by respondents immediately after Commission Exhibit 28, do not direct that the approaches to prospective customers described in Commission Exhibit 28 be stopped. Consequently, it is found that the respondents, through their representatives, have practiced deception on prospective customers by disparaging the quality of the paint used in the $19.95 paint job in an effort to sell the $29.95 paint job. There is no substantial evidence that respondents' representatives stated that a different or poorer quality of workmanship is used in the $19.95 paint job than is used in the $29.95 job, or that the $19.95 paint job does not carry the same guarantee.

A number of witnesses were called by complaint counsel who testified that they, in response to advertisements for the $19.95 special, made appointments or went to Earl Scheib paint shops only to discover that the colors available were so limited in number (two to ten) and of such undesirable colors that they either refused to have their cars painted or purchased the $29.95 paint job to obtain a satisfactory color.

Respondents urge that their advertising in this regard is clear and indicates that only a very few colors were offered in the advertisements. This argument is based on the use of the words "close-out of 1959 (1960, 1961) colors" both on television and in the newspapers. Complaint counsel, however, urge that the use by the respondents in their television and newspaper advertising of the words "variety of colors" and "select from the beautiful variety of our close-out of 1960 colors" indicates that a wide variety of colors were available to prospective customers, and that the selection of a very few (two to ten) undesirable colors when they arrive for their paint jobs makes such advertising false and misleading. Respondents' advertising never indicated the actual number of colors available at any time during the $19.95 special deals. The record establishes that there is a very large number of paint colors for automobiles—estimates in the record range as high as 3,000

It is found, therefore, that the advertising by respondent that there was a variety of paints available during a close-out of a previous year's line of paints was false and deceptive in that respondent made available only a very few (two to ten) selections of undesirable colors. It is also found that one of the purposes of this advertising was to entice prospective customers into the Earl Scheib paint shops and sell them up to the $29.95 paint job.

12. The third principal charge of deceptive advertising was that involving respondents' three-year guarantee in connection with its paint jobs. At the close of the case-in-chief and before any defense evidence was offered, complaint counsel was permitted to amend the charges pertaining to respondents' representations concerning its guarantee to the following:

> All of respondents' paint work is not guaranteed against fading, peeling and crinkling for three years regardless of the price; but on the contrary, in order to obtain such guarantee body work must be performed; further, the guarantee which is given to the customers is not an unconditional guarantee but a pro rata guarantee, and when a customer seeks to have the guarantee complied with an additional charge is demanded.[1]

[1] The charge as it originally appeared in the complaint was as follows: "All of respondents' paint work is not guaranteed against fading, peeling and crinkling for three years regardless of the price, but, on the contrary, in order to obtain said guarantee, body repair work must be performed and no guarantee is issued for work performed for the price of $19.95."

However, in his proposed findings counsel in support of the complaint only requests a finding as follows:

Respondents' paint jobs are not guaranteed for three years without additional cost to the purchaser. On the contrary, the guarantee is pro-rated over a three year period.

Consequently, it appears that counsel in support of the complaint has dropped the charge that respondents require body work before a guarantee is given as well as the charge of failure to give guarantees on the $19.95 paint job dropped during the trial. In any event, there is no substantial or credible evidence in the record that respondents do require body work to be done before the three-year guarantee is given to customers for any of the paint jobs.

The respondents have, however, regularly advertised that a three-year guarantee is given on its paint jobs without disclosing that the guarantee is a *pro rata* guarantee whereby before the guarantee is honored the customer must pay a percentage of the original cost based on the number of the 36 months elapsed since the original paint job. The failure to reveal this fact in the advertising constitutes false and misleading advertising. *Parker Pen Co.* v. *Federal Trade Commission*, 159 F. 2d 509 (7th Cir., 1946), 4 S.&D. 597.

13. Respondents' counsel urges that respondents have at all times been willing to eliminate any of its advertising which the Commission feels is deceptive. In fact, counsel urges that promptly upon notice that the Commission was questioning its advertising, it stopped the use of the word "special" in advertising its $29.95 paint job and also changed its guarantee advertising to make it clear that the guarantee is *pro rata* when this was questioned. This change in the respondents' advertising practices did not occur until after respondents were being investigated and since respondents are still engaged in the same business and advertising extensively, the examiner does not feel that the discontinuance was of a nature which would warrant dismissal of these charges and feels that the protection of the public interest requires an order to cease and desist.

14. Respondents' counsel also urges that since respondents were willing to take a consent order prohibiting the use of the word "special" and requiring full disclosure of the nature of the guarantee before the complaint issued in this matter and so advised Commission representatives that the Commission is now foreclosed from issuing any order in these areas. This argument is rejected.

CONCLUSIONS

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

2. Complaint herein states cause of action and this proceeding is in the public interest.

3. 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' automobile paint and body repair services because of such erroneous and mistaken beliefs.

4. The aforesaid acts and practices of the respondents as found herein are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitutes, 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.

ORDER

It is ordered, That Earl Scheib, Inc., a corporation, and its officers, and Earl A. Scheib individually and as an officer of the said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of paint, or other products or in the painting and repairing of automobiles, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That merchandise is sold or services performed at a "special" price or words of similar import unless said price is a reduction from the customary, usual and regular price at which the merchandise has been sold, or the services performed by the respondents, in their recent regular course of business; or otherwise misrepresenting, in any manner, the amount of savings to purchasers of respondents' merchandise or services;

2. That any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or perform the services so offered at the stated price;

3. That any merchandise sold or services performed, or offered to be sold or performed, is guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and completely disclosed.

It is further ordered, That the charges in the complaint that respondents have failed to give three-year guarantees with their $19.95 paint job and that respondents have required that body work be done in order to obtain such three-year guarantee be dismissed.

780-018—69——68

Opinion of the Commission

MAY 24, 1963

By MacIntyre, *Commissioner*:

This matter is before the Commission for consideration of respondents' exception to Paragraph Two of the order to cease and desist contained in the hearing examiner's initial decision filed December 4, 1962. The provision which respondents find objectionable prohibits them from representing directly or by implication:

> That any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or perform the services so offered at the stated price.

The respondents claim that this order is too broad in its terms in that it goes beyond the scope of the facts upon which it is based and that it is vague and uncertain and does not apprise them of their obligation to comply.

The facts upon which this prohibition is based as revealed by the record can be briefly stated. The respondents operate a nationwide chain of automobile painting shops. While their regular and usual price of painting an automobile is $29.95, they on occasion advertise to paint "any car" in a "variety of colors" for a limited time for $19.95. The hearing examiner found upon reliable evidence that one of the purposes of this special advertising offer was to entice prospective customers into the respondents' paint shops, and to there try to sell them the $29.95 paint job. The evidence reveals that respondents used two techniques to switch customers to the more expensive job. Salesmen were instructed to advise prospective customers and did advise them that the paint used in the $19.95 job was inferior to that used in the higher priced job. They also disparaged it by advising customers that it was a flat paint and that it did not contain silicones. The other procedure used was to offer the prospective customer such a limited choice of colors that they would, upon their own volition, ask for the more expensive paint job. The record reveals that some of respondents' outlets offered the prospects only two colors, and apparently the maximum offered by any outlet was ten colors. The colors themselves were apparently not very desirable, for one witness described them as "off" colors, "flesh" colors, and colors you do not ordinarily see on cars. Another described the colors as "hideous."

It is the Commission's conclusion based upon its review of the facts in evidence, that the primary purpose of the $19.95 paint job advertising was to induce prospects to call at respondents' places of business where an attempt would be made to switch them to the higher priced $29.95 job. This is, in short, a typical "bait and switch" promotion scheme, and it does violate the Federal Trade Commission Act.

Respondents suggest an order which would merely "prohibit the use of any misrepresentation by advertising the availability of colors when such number of colors is not actually available." While this suggestion has merit in that it is specific, it is much too narrow to cope with the bait advertising practices utilized by respondents. It is the Commission's view that bait advertising orders should inveigh against failure to disclose any material facts in advertisements designed to lure prospects to the advertisers' places of business for the purpose of obtaining leads or prospects for the sale of merchandise higher in price than that advertised. To accomplish these ends, we shall enter an order in lieu of Paragraph Two of the hearing examiner's order which will direct respondents to cease and desist from:

> 2. Advertising or offering to paint an automobile at an attractively low price for the purpose of obtaining leads or prospects for the sale of a more expensive painting job, unless all material details of the low price job, including the colors and comparative quality of paints available, are clearly and conspicuously disclosed.

While respondents have not excepted to Paragraph One of the initial decision's order to cease and desist, we note the meaning of this provision is clouded by its uncertain construction. To correct this deficiency and without intending thereby to affect in any manner its scope, the Commission has modified Paragraph One and will set aside the hearing examiner's version.

With the exception of Paragraphs One and Two of the order to cease and desist, the initial decision of the hearing examiner is adopted as the decision of the Commission.

Final Order

OCTOBER 22, 1963

Pursuant to § 4.22(c) of the Commission's Rules of Practice, published May 16, 1962, 27 Fed. Reg. 4600, 4621 (superseded August 1, 1963), respondents were duly served with the Commission's decision on respondents' exception to the hearing examiner's initial decision and with an order affording them the opportunity to file within twenty (20) days any exceptions they may have to the terms of the Commission's Proposed Final Order; and

Respondents having filed no exceptions to said Proposed Final Order within the twenty (20) day time allotted therefor, the Proposed Final Order becomes, and is hereby issued as, the Final Order of the Commission:

It is ordered, That Earl Scheib, Inc., a corporation, and its officers, and Earl A. Scheib, individually and as an officer of the said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of paint, or other products or in the painting and repairing of automobiles, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "special" or any word or words of similar import, in advertising or sales literature, to refer to any price charged for any merchandise or services, unless such price constitutes a reduction from the customary, usual and regular price at which the merchandise has been sold, or the services performed by the respondents, in their recent regular course of business; or otherwise misrepresenting, in any manner, the amount of savings to purchasers of respondents' merchandise or services.

2. Advertising or offering to paint an automobile at an attractively low price for the purpose of obtaining leads or prospects for the sale of a more expensive painting job, unless all material details of the low price job, including the colors and comparative quality of paints available, are clearly and conspicuously disclosed.

3. Representing, directly or by implication, that any merchandise sold or services performed, or offered to be sold or performed, is guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and completely disclosed.

It is further ordered, That the charges in the complaint that respondents have failed to give three-year guarantees with their $19.95 paint job and that respondents have required that body work be done in order to obtain such three-year guarantee be dismissed.

It is further ordered, That the hearing examiner's initial decision, excepting Paragraphs One and Two of the order to cease and desist which are set aside, be, and it hereby is, adopted as the decision of the Commission.

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

IN THE MATTER OF

THE KRISTEE PRODUCTS COMPANY ET AL.

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

Docket C-610. Complaint, Oct. 22, 1963—Decision, Oct. 22, 1963

Consent order requiring Akron, Ohio, distributors of household and automotive merchandise to cease making a variety of misrepresentations by brand names and advertising, including false claims that their nonmetallic so-called "PLASTIC ALUMINUM" products were composed principally of aluminum; and false representations in catalogs, display outfits and circulars that aforesaid products were a plastic metal and formed a hardened metal when used; that "MIRACLE WALL CLEANER" cleaned wallpaper, painted walls, etc. "LIKE MAGIC * * * Instantly * * *"; and that their "NEW BATTERY LIFE" eliminated recharging or buying new batteries and was "Absolutely guaranteed."

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Kristee Products Company, a corporation, and William C. Krisher, Oliver W. Lutes, Harold L. Zimmerman and Rose O. Muck, 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 The Kristee Products Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 44 North Summit Street in the city of Akron, State of Ohio.

Respondents William C. Krisher, Oliver W. Lutes, Harold L. Zimmerman and Rose O. Muck are officers of the corporate respondent. They formulate, direct and control the policies, acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of household merchandise and automotive merchandise, including products designated "KRISTEE PLASTIC ALUMINUM" or "DURO PLASTIC

ALUMINUM", "MIRACLE WALL CLEANER" and "NEW BATTERY LIFE", to the purchasing public and to distributors and retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of Ohio 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 sale of the aforesaid products, the respondents in brand names and advertising having made certain statements and representations, of which the following are typical but not all inclusive:

1. Respondents designate by brand names or otherwise represent certain of their merchandise as "KRISTEE PLASTIC ALUMINUM" or "DURO PLASTIC ALUMINUM".

2. In catalogs, display cards, display outfits and circulars, respondents represent certain of their merchandise as follows:

(a) KRISTEE PLASTIC ALUMINUM or DURO PLASTIC ALUMINUM

* * * METAL IN PUTTY FORM!

HARDENS INTO METAL

(b) MIRACLE WALL CLEANER

* * * cleans Wall Paper, Painted Walls, Ceilings, Window Shades LIKE MAGIC * * * Instantly grips accumulated * * * grit, grime and soot and "erases" them right off the walls, leaving a clean, dirt-free surface.

Chemically treated Sponge Rubber Filler is reversible. Easily washed and used over and over again * * * Lasts indefinitely.

(c) NEW BATTERY LIFE

Eliminates expensive, inconvenient, battery charging.

Saves buying new batteries.

Absolutely guaranteed!

PAR. 5. By and through the use of the aforementioned brand names, statements and representations and others of similar import and meaning not specifically set out herein, respondents represented directly or by implication that:

1. "KRISTEE PLASTIC ALUMINUM" or "DURO PLASTIC ALUMINUM" is composed in whole or in principal part of aluminum.

2. (a) "KRISTEE PLASTIC ALUMINUM" or "DURO PLASTIC ALUMINUM" is a plastic metal and when used forms a hardened metal.

(b) "MIRACLE WALL CLEANER" effectively cleans the surface exteriors of a room including the removal of oily or greasy stains or grimy deposits, instantly removes grit, grime and soot, and retains its usefulness for an indefinite number of applications.

(c) "NEW BATTERY LIFE" obviates recharging or replacing batteries and is unconditionally guaranteed.

PAR. 6. In truth and in fact:

1. "KRISTEE PLASTIC ALUMINUM" or "DURO PLASTIC ALUMINUM" is not composed in whole or in principal part of aluminum but, on the contrary, consists principally of nonmetallic substances with a comparatively small amount of aluminum.

2. (a) "KRISTEE PLASTIC ALUMINUM" or "DURO PLASTIC ALUMINUM" is not a plastic metal but, on the contrary, consists of a powdered metal dispersed in a predominantly nonmetallic medium and when used does not form a hardened metal but, on the contrary, forms a substance that lacks the effectiveness and intrinsic characteristics of hardened metal.

(b) "MIRACLE WALL CLEANER" is ineffective for removing oily or greasy stains or grimy deposits, does not instantly remove grit or soot and its usefulness deteriorates after a limited number of applications.

(c) "NEW BATTERY LIFE" does not remove the necessity of recharging or replacing batteries and respondents' guarantee of the product is subject to limitations and conditions which are not revealed in their advertising of said guarantee.

Therefore, the brand names, statements and representations referred to in Paragraphs 4 and 5 were and are false, misleading and deceptive.

PAR. 7. By the aforesaid practices, respondents place in the hands of others means and instrumentalities by and through which they may mislead the public as to the nature, composition, effectiveness, characteristics and guarantees of their products.

PAR. 8. 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 products of the same general kind and nature as those hereinabove described and sold by respondents.

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

PAR. 10. 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, 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 The Kristee Products Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 44 North Summit Street, in the city of Akron, State of Ohio.

Respondents William C. Krisher, Oliver W. Lutes, Harold L. Zimmerman and Rose O. Muck, are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents The Kristee Products Company, a corporation, and its officers, and William C. Krisher, Oliver W. Lutes, Harold L. Zimmerman and Rose O. Muck, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "KRISTEE PLASTIC ALUMINUM" or "DURO PLASTIC ALUMINUM", "MIRACLE WALL CLEANER", "NEW BATTERY LIFE" or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "aluminum" or any other word or words denominating metallic substances in brand names to designate, describe or refer to a product that consists principally of non-metallic ingredients; provided, however, that if a product contains a metallic substance in some form, the percentage thereof may be stated.

2. Representing, directly or by implication, that:

(a) The product designated "KRISTEE PLASTIC ALUMINUM" or "DURO PLASTIC ALUMINUM" or any other product of similar composition or characteristics is a plastic metal or that such product when used forms a hardened metal or a substance that has the effectiveness or intrinsic characteristics of hardened metal;

(b) The product designated "MIRACLE WALL CLEANER" or any other product of similar composition or characteristics is effective for removing oily or greasy stains or grimy deposits or instantly removes grit, grime or soot, or retains its usefulness for an indefinite number of applications;

(c) The product designated "NEW BATTERY LIFE" or any other product of similar composition or characteristics obviates recharging or replacing batteries;

(d) Any of respondents' products are guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

3. Misrepresenting, in any manner, the nature, composition, characteristics or effectiveness of any of their products.

4. Furnishing or otherwise placing in the hands of others means and instrumentalities by and through which they may mislead the public as to any of the matters and things hereinabove prohibited.

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

THE PULSE, INC.

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

Docket C-291. Modified order, Oct. 23, 1963

Order reopening proceeding and modifying order of Dec. 28, 1962, 61 F.T.C. 1480—to conform its prohibitions more closely to those in orders issued against two of respondent's competitors—by striking paragraphs 2 and 7 therefrom and substituting more specific requirements.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER TO CEASE AND DESIST

Respondent, by motion filed July 5, 1963, having requested that the order to cease and desist, issued to it December 28, 1962, be modified to more closely conform its prohibitions to those in orders issued against two of respondent's competitors; and subsequent thereto pursuant to Commission direction, respondent and members of the Commission's staff entered negotiations with respect to respondent's request which resulted in the submittal of a stipulation signed October 3, 1963, providing, *inter alia*, for certain modifications in the outstanding order to cease and desist; and

The Commission having considered the pleadings and papers filed by the parties and having determined that the public interest requires reopening of this proceeding for the purpose of receiving the said stipulation as a part of the record and for modification of the order to cease and desist in accordance therewith:

It is ordered, That this proceeding be, and it hereby is, reopened and that the stipulation signed October 3, 1963, by representatives of respondent and Commission counsel be, and it hereby is, received as a part of the record herein.

It is further ordered, That the order to cease and desist issued December 28, 1962 [61 F.T.C. 1480], be, and it hereby is, modified by striking paragraphs 2 and 7 therefrom and substituting in their place the following:

2. Using data based upon general listening or viewing preferences as opposed to actual listening or viewing without clearly disclosing in each report that such data may have been based upon general listening or viewing preferences as opposed to actual listening or viewing.

7. Using data based upon hearsay reports, estimates or guesses without clearly disclosing in each report that such data may have been based upon hearsay reports, estimates or guesses.

It is further ordered, That with the exception of paragraphs 2 and 7 the order of December 28, 1962, shall in all respects and for all purposes remain final and unaffected by this reopening.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with paragraphs 2 and 7 of the order to cease and desist as set out above.

IN THE MATTER OF

PUZZLERS RESEARCH BUREAU, INC., ET AL.

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

Docket C-611. Complaint, Oct. 23, 1963—Decision, Oct. 23, 1963

Consent order requiring New York City distributors of contest aids to the public to cease representing falsely in pamphlets, brochures and other advertising matter that they could increase customers' "solving effectiveness at least 500%", that "Winners' lists are studded with names of our subscribers", etc., when they failed to advise customers that the rules of such contests commonly provide that all award-winning entries must be the original creation of the person submitting them and that certification is required that he had no assistance.

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 Puzzlers Research Bureau, Inc., a corporation, and Jules Leopold and Minna Leopold, 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, Puzzlers Research Bureau, 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 8 West 40th Street in the city of New York, State of New York.

Respondents Jules Leopold and Minna Leopold are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of contest aids to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York 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 aforesaid business and for the purpose of inducing the purchase of their contest aids, the respondents have made numerous statements in pamphlets, brochures and other advertising matter sent through the mails to the public.

Typical and illustrative of the aforesaid statements are the following:

> You can save at least 100 hours in solving time. By reducing drudgery, you increase your solving effectiveness at least 500%.
>
> Winners' lists are studded with names of our subscribers.
>
> Twenty-five years of intensive experience are hard to beat.

Moreover, when lists of winners in various contests are published, in various media, respondents immediately contact such winners and offer assistance by means of word lists, comparison answers and rules interpretations for impending contests.

PAR. 5. The rules of all such contests provide, as a rule, that all prize or award-winning entries must be the original creation of the person submitting the entries and, as set forth in said rules, no award or prize is awarded to an entrant until proper certification and proof have been submitted that such person was not assisted in any manner or by anyone in the preparation or composition of his or her entry.

At no time and in no manner do respondents notify or advise their customers or prospective customers of these facts. Therefore, said statements, representations and offers are false, misleading and deceptive.

PAR. 6. In the conduct of their buiness, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of contest aids 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' contest aids 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 Trades Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commissioner 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, and 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, Puzzlers Research Bureau, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 8 West 40th Street in the city of New York, State of New York.

Respondents Jules Leopold and Minna Leopold are officers of said corporation, and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Puzzlers Research Bureau, Inc., a corporation, and its officers, and Jules Leopold and Minna Leopold, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of contest aids or other materials or services designed to assist entrants in competitive contests in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to disclose in a clear and conspicuous manner in all advertising and promotional material, that the use of such contest aids, materials, or services, as entries in competitive contests, may subject such entries to invalidation under contest rules and practices which require all entries to be the original creation of the entrant;

2. Representing that such contest aids, materials, or services may be used as entries in competitive contests where inconsistent with the rules of such contests.

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

ANNE STARR, INC., ET AL.

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

Docket C-612. Complaint, Oct. 23, 1963—Decision, Oct. 23, 1963

Consent order requiring operators of a ladies' specialty shop in Quincy, Mass., to cease violating the Textile Fiber Products Identification and Wool Products Labeling Acts by failing to label textile fiber products with required information and by removing identifying labels prior to final sale; to cease violating the Fur Products Labeling Act by failing to show on labels the true animal name of furs, when furs were artificially colored and when they were "Natural", and to comply with other labeling requirements; substituting nonconforming labels for those originally affixed to fur products; and failing to keep required records.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, the Textile Fiber Products Identification Act, the Wool Products Labeling Act of 1939 and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Anne Starr, Inc., a corporation, and Anne Starr, individually and as an officer of said corporation, and Sol Ross, individually and as General Manager of said corporation, hereinafter referred to as respondents have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification Act, the Wool Products Labeling Act of 1939 and the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Respondent Anne Starr, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts.

Respondent Anne Starr is the President of the corporate respondent and respondent Sol Ross is the General Manager of the corporate respondent. They formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

The respondents operate a ladies' specialty shop and retail textile fiber products, wool products and fur products with their office and principal place of business located at Parkingway, Quincy, Massachusetts.

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

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

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

PAR. 5. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 6. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment, and offered for sale in commerce, wool products, as "commerce" and "wool products" are defined in said Act.

PAR. 7. Certain of said wool products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified with the information required under Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as required by the Rules and Regulations promulgated under said Act.

PAR. 8. Respondents with the intent of violating the provisions of the Wool Products Labeling Act of 1939 have removed or caused or participated in the removal of the stamp, tag, label or other identification required by the Wool Products Labeling Act of 1939 to be affixed to wool products subject to the provisions of such Act, prior to the time such wool products were sold and delivered to the ultimate consumer, in violation of Section 5 of said Act.

PAR. 9. The acts and practices of the respondents as set forth above in Paragraphs 6, 7 and 8 were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 10. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 11. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto were fur products without labels and fur products with labels which failed:

1. To show the true animal name of the fur used in the fur products.

2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored when such was the fact.

PAR. 12. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Labels affixed to fur products did not comply with the minimum size requirements of one and three-quarter inches by two and three-quarter inches, in violation of Rule 27 of said Rules and Regulations.

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in handwriting on labels, in violation of Rule 29(b) of said Rules and Regulations.

(c) The term "Natural" was not used on labels to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(d) Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 13. Respondents in introducing, selling, advertising, and offering for sale, in commerce, and in processing for commerce, fur products; and in selling, advertising, offering for sale and processing fur products which have been shipped and received in commerce, have misbranded such fur products by substituting thereon, labels which did not conform to the requirements of Section 4 of the Fur Products Labeling Act, for the labels affixed to said fur products by the manufacturer or distributor pursuant to Section 4 of said Act, in violation of Section 3(e) of said Act.

PAR. 14. Respondents in substituting labels as provided for in Section 3(e) of the Fur Products Labeling Act, have failed to keep and preserve the records required, in violation of said Section 3(e) and Rule 41 of the Rules and Regulations promulgated under the said Act.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under 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, the Textile Fiber Products Identification Act, the Wool Products Labeling Act of 1939 and the Fur Products Labeling 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, Anne Starr, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place

of business located at Parkingway, in the city of Quincy, Commonwealth of Massachusetts.

Respondents Anne Starr and Sol Ross are officers of said corporation, and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Anne Starr, Inc., a corporation, and its officers, and Anne Starr, individually and as an officer of the said corporation, and Sol Ross, individually and as General Manager of the said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising or offering for sale, in commerce, or in the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act do forthwith cease and desist from misbranding textile fiber products by failing to affix labels to such products showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

It is further ordered, That respondents Anne Starr, Inc., a corporation, and its officers, and Anne Starr, individually and as an officer of the said corporation, and Sol Ross, individually and as General Manager of the said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, do forthwith cease and desist from removing, or causing or participating in the removal of, the stamp, tag, label, or other identification required by the Textile Fiber Products Identification Act to be affixed to any textile fiber product, after such textile fiber product has been shipped in commerce and prior to the time such textile fiber product is sold and delivered to the ultimate consumer unless a substitute stamp, tag, label, or other means of identification is affixed thereto in accordance with the provisions of Section 5(b) of said Act.

It is further ordered, That respondents Anne Starr, Inc., a corporation, and its officers, and Anne Starr, individually and as an officer of the said corporation, and Sol Ross, individually and as General Manager of the said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with the introduction into commerce, or the offering for sale, sale, transportation or delivery for shipment, in commerce, of any wool product, as "wool product" and "commerce" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from failing to securely affix to or place on each product, a stamp, tag, label or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents Anne Starr, Inc., a corporation, and its officers, and Anne Starr, individually and as an officer of the said corporation, and Sol Ross, individually and as General Manager of the said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, do forthwith cease and desist from removing, or causing or participating in the removal of any stamp, tag, label or other means of identification affixed to any wool product subject to the provisions of the Wool Products Labeling Act of 1939 with intent to violate the provisions of the said Act.

It is further ordered, That respondents Anne Starr, Inc., a corporation, and its officers, and Anne Starr, individually and as an officer of the said corporation, and Sol Ross, individually and as General Manager of the said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

Misbranding fur products by:

1. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required

to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

2. Affixing to fur products labels that do not comply with the minimum size requirements of one and three-quarter inches by two and three-quarter inches.

3. Setting forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting on labels affixed to fur products.

4. Failing to set forth the term "Natural" as part of the information required to be disclosed on labels under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products, which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

5. Failing to set forth on labels the item number or mark assigned to fur products.

It is further ordered, That respondents Anne Starr, Inc., a corporation, and its officers, and Anne Starr, individually and as an officer of the said corporation, and Sol Ross, individually and as General Manager of the said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the introduction, sale, advertising or offering for sale, in commerce, or the processing for commerce, of fur products; or in connection with the selling, advertising, offering for sale, or processing of fur products which have been shipped and received in commerce, do forthwith cease and desist from:

A. Misbranding fur products by substituting for the labels affixed to such fur products pursuant to Section 4 of the Fur Products Labeling Act, labels which do not conform to the requirements of the aforesaid Act and the Rules and Regulations promulgated thereunder.

B. Failing to keep and preserve the records required by the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in substituting labels as permitted by Section 3(e) of the said Act.

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