It is further ordered, That the hearing examiner's initial decision as modified herein be, and it hereby is, adopted as the decision of the Commission.

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 the order to cease and desist.

By the Commission, Commissioner Elman did not participate in the consideration or decision of this case.

In the Matter of

JAMES M. DUDLEY trading as FIRE-PAK MANUFACTURING COMPANY

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

Docket 8542. Complaint, Nov. 5, 1962—Decision, Jan. 15, 1964

Order dismissing complaint charging a Jacksonville, Fla., seller of a shaker-type dry chemical fire extinguisher designated "Fire-Pak", with misrepresenting the effectiveness, purported tests, government approval, and superiority over competitive products.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that James M. Dudley, an individual trading as Fire-Pak Manufacturing Company, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Respondent James M. Dudley is an individual trading as Fire-Pak Manufacturing Company, with his principal office and place of business located at 2220 Southside Boulevard in the city of Jacksonville, State of Florida.

Par. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of a shaker-type dry chemical fire extinguisher designated "Fire-Pak" to the public.

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

PAR. 4. In the course and conduct of his business as aforesaid, and for the purpose of inducing the sale of his said fire extinguisher, respondent has made certain statements and representations in the advertising, packaging and labeling of his said fire extinguisher with respect to the safety, utility, and effectiveness thereof. Among and typical but not all-inclusive of the statements and representations so made are the following:

1. On the packaging:

> Excellent fire protection in automobiles, boats, buses, electrical equipment, farms, garages, homes, house trailers, industrial plants, institutions, service stations, schools, trucks, tractors.
>
> Safe * * * effective
>
> An approved extinguishing agent

2. On the label:

> Safe * * *
>
> Approved extinguishing agent

3. In a promotional advertising brochure, the aforementioned representations appear in the form of a reproduction of the package and label. In addition thereto, the said brochure contains the following statements and representations:

> Unequaled in * * * effectiveness
>
> Your best protection in * * * boats * * * homes * * * house trailers * * * automobiles * * * industry * * * farm equipment * * * heating systems * * * trucks * * *
>
> Safe * * *
>
> An approved extinguishing agent
>
> Instantly puts out flaming grease, fuel oil, electrical, or even a butane or propane fire.
>
> Fire-Paks are very practical as protection around the home, industry, boats, auto, and farms, because they are effective on grease, gasoline, over-heated stoves, electrical fires, butane and propane fires.
>
> Fire-Paks are more effective than most extinguishers costing up to six times as much.
>
> Fire-Paks are in use with: U. S. Department of Agriculture (Forest Div.) * * * U. S. Army Engineers * * *

Tests revealed that one Fire-Pak has more fire killing power than three one quart carbon tetrachloride extinguishers (at ⅓ the cost of only one C.T.C.) or two 5 lb. CO_2 extinguishers (at 1/7 the cost of one CO_2)

PAR. 5. Through the use of the aforesaid statements and others similar thereto not specifically set out herein, respondent has represented and is now representing, directly and by implication, that the "Fire-Pak" fire extinguisher:

1. Is excellent fire protection for use in boats, buses, trucks, schools, service stations, institutions, and other types of vehicles and establishments.

2. Will extinguish fires of all sizes and types and is safe and effective for use on butane and propane fires.

3. Has been approved by a recognized testing laboratory or by recognized regulatory authorities for use on boats, trucks, buses, and in schools, service stations, institutions, and other types of vehicles and establishments.

4. Is in regular and continuing use with, and hence is approved for use by, the United States Department of Agriculture and the United States Army Corps of Engineers.

5. Is unequaled in effectiveness, has greater fire extinguishing capability than other types of fire extinguishers and is more effective than extinguishers costing up to six times as much.

PAR. 6. In truth and in fact, the "Fire-Pak" fire extinguisher:

1. Is not adequate protection for boats, buses, trucks, schools, service stations, institutions, or many other types of vehicles and establishments.

2. Is not effective in extinguishing any fires except certain small fires in their initial stages and is not of any value for nor safe for use on butane or propane fires.

3. Has not been tested nor approved by any testing laboratory nor approved by any regulatory authority for use on boats, trucks, buses, schools, institutions, or any other type of vehicles or establishments.

4. Is not approved by or in continuing or regular use with agencies of the United States Government as represented.

5. Is not unequaled in effectiveness and does not have greater fire extinguishing capability than other types of fire extinguishers nor is it more effective than other types of fire extinguishers.

The representations referred to in Paragraph 4 are therefore false, misleading, and deceptive.

PAR. 7. In the course and conduct of his business, at all times mentioned herein, respondent has been and is in substantial competition in commerce with corporations, firms and individuals in the sale of fire extinguishers.

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

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

Mr. Charles J. Connolly for the Commission.
Mr. James M. Dudley, *pro se.*

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

ISSUED AUGUST 15, 1963

The complaint in this matter, issued November 5, 1962, charges respondent with violations of Section 5 of the Federal Trade Commission Act [1] through alleged misrepresentations "with respect to the safety, utility, and effectiveness" of a portable fire extinguisher sold and distributed by respondent under the trade name of "Fire-Pak."

Respondent's answer, filed December 17, 1962, generally takes issue with the charges of the complaint.

Pursuant to leave granted by the Commission to hold hearings herein at more than one place, hearings in this matter were held at Washington, D.C. and Jacksonville, Florida. The hearing at Washington took place on May 10, 1963, and that in Jacksonville on May 15 and 16, 1963. Respondent did not participate either in person or by counsel at the initial hearing of May 10, 1963, at Washington for reasons of alleged financial inability to come to Washington, hereinafter discussed. Complaint counsel presented his case-in-chief at the Washington hearing. Respondent, however, did appear and fully participate at the Jacksonville hearing where he presented his defense-in-chief and underwent cross-examination on much of the subject matter covered by the direct testimony offered by counsel supporting the complaint at the Washington hearing. The hearing set for rebuttal purposes on May 23, 1963, at Washington was waived by counsel supporting the complaint.

[1] Section 5(a)(1) of the Act, here pertinent, reads: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

Prior to the opening of the initial hearing herein at Washington, the undersigned received a long distance telephone call from respondent at Jacksonville advising, after some discussion, that he was prepared to settle the case by stipulating to accept the proposed cease and desist order set forth in the complaint, but by subsequent letter dated May 7, 1963, respondent notified the examiner that he was unable to go along with the proposed settlement because it called for a substitute answer admitting all the allegations of the complaint which he felt "* * * is not true." His May 7 letter reads as follows:

Dear Mr. Bush:

This will acknowledge receipt of the three separate documents requiring my signature from Mr. Charles J. Connolly, counsel in support of complaint Docket No. 8542.

I regret that I have troubled you so much in this matter but I am not in position to hire needed legal counsel; therefor, I have been very awkward in handling this matter.

One document entitled Substitute Answer requests that "He admits all material allegations of the complaint to be true."

I simply cannot sign this document knowing that it is not true.

I do not have the money to appear in Washington for my defense

Your courtesies and kindnesses in the past are most appreciated.

Yours truly,

James M. Dudley. (Tr. 55–62, 165–174.)

Under letter dated May 8, 1963, the examiner acknowledged receipt of respondent's aforementioned letter and notified respondent of his right to appear at the opening hearing of May 10, 1963, at Washington, D.C., notwithstanding his then present intention not to appear, but advised him that if he did not appear the undersigned would "* * * endeavor to protect your interest at the hearing to the extent possible." The examiner also advised respondent in his said letter that: "On May 15, 1963, hearing will open in your case at Jacksonville, Florida, pursuant to official notice heretofore served upon you, to give you opportunity to appear and testify in your own behalf and to call such witnesses as you may desire in your behalf." (Tr. 166–174.)

Prior to the initial hearing herein of May 10, 1963, at Washington, D.C., respondent personally participated in a prehearing conference held in this matter in Washington on January 31, 1963. (Tr. 1–54.) The record also shows that respondent came to Washington on at least three different prior occasions for purposes of discussing possible settlement of the matter with Commission personnel. (Tr. 172.) At the aforesaid prehearing conference of January 31, 1963, respondent gave no indication to the examiner that he would be unable, for financial reasons, to attend the then orally announced initial hearing to be held at Washington to hear six proposed witnesses for the Commission, all residents of the greater Washington, D.C., metropolitan area. At the same prehearing conference, the examiner also announced, subject to the approval of the Commission, that a hearing would also be held at a subsequent date at Jacksonville to take the testimony of numerous proposed witnesses for respondent who resided at Jacksonville. Respondent expressly acknowledged at the opening of the hearing in Jacksonville under questioning by the examiner that he had made no indication or claim at the prehearing conference that he would be unable for financial reasons to attend the initial hearing at Washington. (Tr. 171.)

The record as a whole, including respondent's financial statements (RX-3), establishes that respondent had the financial resources to come to Washington for the initial hearing. (Tr. 494.)

At the conclusion of the hearing at Jacksonville, respondent waived the filing of proposed findings of fact, preferring to leave the matter entirely in the hands of the examiner for decision. Although the examiner nevertheless established a common due date for the filing of proposed findings of fact, conclusions of law, and order together with reasons therefor and briefs in support thereof, these have been filed only by counsel supporting the complaint. Complaint counsel's submissions have been carefully reviewed and considered and such proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

After the formal opening of the hearing in Jacksonville on the morning of May 15, 1963, the examiner made available to respondent for overnight use his personal copy of the transcript of testimony taken in the case at Washington and offered to recess the hearing until the following morning in order to give respondent opportunity to peruse the transcript and prepare his defense. The offer was declined because some of respondent's witnesses were present and he did not want to put them to the inconvenience of coming back a second time. (Tr. 172–173.) But respondent did avail himself of the use of the transcript of the Washington hearing and used it for the preparation of his defense. (Tr. 406, 449.) Similarly, complaint counsel also made available to respondent all of the Commission exhibits received in evidence at the Washington hearing. (Tr. 173.)

GENERAL BACKGROUND

Respondent James M. Dudley is an individual trading as Fire-Pak Manufacturing Company, with his principal office and place of business located at 2220 Southside Boulevard in the city of Jacksonville, State of Florida.

He has been engaged since 1955 in advertising, offering for sale, sale and distribution of a portable "shaker-type" dry chemical fire extinguisher sold under the trade name or designation of "Fire-Pak." The Fire-Pak extinguisher bears some resemblance in size and shape to a quart size thermos bottle, but is considerably smaller and gives the impression of being quite diminutive. It is made up of an aluminum cylindrical container, an iron bracket or handle attached to the cap of the container, and a dry chemical powder within the container. The container is 8½ inches in height and 3 inches in diameter. It holds two pounds of a dry chemical powder hereinafter described. The full weight of the loaded extinguisher, including its contents and the bracket attached to the outside of the container, is 2¾ pounds. (CX-2(a); Tr. 519.)

Each Fire-Pak is capped with a removable aluminum cap which functions very much like the metal pry caps used on glass jars of canned foods. (See CX-2B for physical exhibit.) A perforated disc, containing 45 evenly spaced quarter inch holes, is fitted into the top of the cylinder of each Fire-Pak directly beneath the extinguisher's removable cap. When the cap is removed from the extinguisher, it has the appearance of a huge salt shaker. Attached firmly to the center of each cap by means of a rivet is a 1¼ inch iron bracket or pry handle which extends down the side of the extinguisher and underneath its bottom. When attached to a wall, the bracket serves as a holder for the extinguisher but such use of the bracket is optional with the user. The primary purpose of the bracket is to serve as a lift or pry for the removal of the extinguisher's cap. The cap of the extinguisher is removed by a quick jerk of the bracket from the extinguisher or of the extinguisher away from the bracket. This exposes the dry chemical contents of the extinguisher for use through its perforated disc. Refilling of the extinguisher is accomplished by removing the perforated disc, pouring in the dry powder, and replacing the disc.

Respondent's recommended procedure for the use of the dry chemical in his Fire-Pak extinguisher is to grasp the extinguisher by its base and to cast its powder content at the base of flame with long repeated sideway motions of the arm, rather than to shake or pour the powder directly over a fire. The evidence shows that the casting method of applying the Fire-Pak extinguisher is the most effective way of using it. This method of application also enhances the safety of the user by permitting him to stand further back from the fire than if he were attempting to put out a fire by shaking or pouring the contents of the Fire-Pak directly over the fire which in many instances would in any event be impossible due to the intensity of the flame. (CX-2B, Tr. 191.)

Respondent's portable shaker-type dry chemical extinguisher must be sharply distinguished from the portable pressure-type dry chemical fire extinguisher because, as hereinafter detailed, the pressure extinguisher is an "approved" extinguisher whereas the shaker-type is not. In "approved" extinguishers the dry chemical is expelled by gas kept under pressure in the extinguisher as released by the opening of a valve, whereas in the Fire-Pak the powder is expelled by means of the human energy used in casting the powder on a fire. The smallest pressure-type extinguisher holds 2½ pounds of dry chemical as against the 2 pounds held by Fire-Pak but the pressure-type extinguisher is made in sizes holding up to a maximum of 30 pounds of powder. The discharge from a pressure extinguisher has an effective range of approximately 5 to 20 feet, depending upon the size and design of the extinguisher. (CX-5 at page 43.) The discharge range from a Fire-Pak depends upon the dexterity, vigor and experience of its user. From the record as a whole, including the examiner's observation of respondents' films (RX-10) showing the application of Fire-Pak to fire, it is found that the minimum effective discharge range of the Fire-Pak in the hands of an average inexperienced user using respondent's recommended arm casting application of the dry chemical would be between 3 and 5 feet but in the hands of one trained and experienced in the technique the effective range would be about 10 feet. (Tr. 435, 444.) A pressure-type extinguisher, like the shaker-type Fire-Pak, also "must be operated in accordance with instructions which are prominent on the extinguisher" for maximum effective use. (CX-5 at page 43.) From the record as a whole it is further concluded that skill and experience is an important factor in the use of any fire extinguisher whether it be of the shaker or pressure type or any other type. (Tr. 76.) The use of any type of fire extinguisher is more effective in the hands of a professional fire fighter than those of an amateur.

The total weight of the smallest of pressure-type fire extinguishers including its dry chemical content is between 9 and 11 pounds, as compared with the 2¾ pound weight of the Fire-Pak. The height of a pressure extinguisher is about 16 inches as against the Fire-Pak's 8½ inch height. (Tr. 521-522.) The diameter of a pressure extinguisher is approximately 3 inches or about the same diameter as that of the Fire-Pak.

The retail list price on the Fire-Pak extinguisher is $6. (Tr. 52.) The list price of the lowest price pressure extinguisher put out by one of the leading fire-fighting equipment manufacturers is $19.50. (Tr. 287.)

The contents of any fire extinguisher, whether it be water, foam chemical, dry powder, or some other substance, is commonly referred to as the fire extinguishing agent. (Tr. 273.)

The fire extinguishing agent used in the Fire-Pak extinguisher is a specially treated sodium bicarbonate powder (about 91 percent) with components (about 9 percent) for producing free flow and repellancy.

The same chemical agent is also used in "approved" dry chemical pressure-type fire extinguishers. (Tr. 254–255, CX–3 A and B, CX–4, CX–5 at p. 43, RX–1 A.) To remove any mystery about this chemical agent, it may be stated that in its pure form it is the sole ingredient in the well known and widely used Arm and Hammer Soda Bicarbonate and that the chemical is also an old stand-by for certain types of gastric distress.

It is found from the testimony of one of the complaint counsel's expert witnesses and from the record as a whole that the powderized sodium bicarbonate used by respondent as an extinguishing agent in his Fire-Pak extinguisher "* * * is * * * widely used in fire extinguishment." (Tr. 154; see also CX–5 at pp. 43, CX–9 at pp. 17.)

The fire extinguishing agent here under discussion when used on a fire produces a cloud of finely dispersed dust over the fire. The dust separates the flame from the combustible material and thereby has the effect of smothering the fire. (Tr. 154, CX–5 at pp. 45, par. 4321.)

For all practical purposes, there are three recognized general classes of fires denominated as Class "A", "B", and "C" fires. The sodium bicarbonate dry powder fire extinguisher agent is designed for use primarily on Class "B" fires which are defined as fires in flammable petroleum products or other flammable liquids or greases, where the "blanketing-smothering" effect of oxygen-excluding media is most effective. Dry powderized sodium bicarbonate is effective on Class "B" fires involving small quantities of flammable liquids and greases in open vessels or on floors, sand, gravel, and other ground surfaces. (CX–5, pp. 4, 43, and 45, Tr. 215, 250.)

The dry chemical powder here under consideration is also suitable for Class "C" fires. Class "C" fires are defined as fires involving electrical equipment where the electrical nonconductivity of the extinguishing media is of first importance. Sodium bicarbonate, a nonconducting extinguishing agent, is effective on Class "C" incipient fires in electrical equipment. (CX–5, pp. 4, 43, 45, Tr. 215, 250.)

Powderized sodium bicarbonate also has some limited effect on some Class "A" fires. Class "A" fires are defined as fires in ordinary combustible materials such as wood, cloth and paper where the "quenching-cooling" effect of quantities of water or solutions containing large percentages of water is most effective in reducing the temperature and is, therefore of first importance. The involved dry chemical is not effective on deep-seated Class "A" fires in ordinary combustible material but may have some value on incipient surface fires in such materials. (CX–5, pp. 4, 43, 45; CX–9 at p. 17, Tr 215, 250.)

The fire extinguishing agent used in Fire-Pak is purchased by respondent from the Fyr-Fighter Company of Newark, New Jersey, a manufacturer and distributor of such well-known fire extinguishers as the trade-marked "Pyrene," "Fire-Fighter," and "C–O–Two." The company uses the same extinguishing agent in its own line of "Pyrene" dry chemical fire extinguishers. It designates the extinguishing agent as its "Patented Formula H" and describes it as consisting " * * * essentially of powdered sodium bicarbonate treated in inert, non-toxic dry additives and liquid synthetic resin." (Tr. 255–257, CX–3 A and B, CX–4, RX–1 A.)

The Fyr-Fighter Company manufactures and distributes only the *pressurized* type of dry chemical fire extinguishers. The company does not make or distribute any *shaker-type* fire extinguishers, such as the Fire-Pak. The firm manufactures and sells only "approved" fire extinguishers. (Tr. 269; CX–9, p. 6.)

An "approved" fire extinguisher is one which has been approved by one of two recognized laboratories for testing fire protection equipment. These are Underwriters' Laboratories, Inc., and Factory Mutual Laboratories. In at least one State and in some counties in another State there is legislation prohibiting the sale " * * * of any make, type or model or extinguisher * * * unless such make, type or model is approved and labeled by the Factory Mutual Laboratories, Underwriters' Laboratories, Inc., or other testing laboratory approved by the Fire Marshal as providing adequate and reliable tests and examination." (Tr. 121–125; CX–9, p. 2.)

Although the two mentioned fire protection testing laboratories recognize dry chemicals made from a base of sodium bicarbonate as a safe and effective fire extinguishing agent on Classes "A", "B", and "C" fires to the extent heretofore indicated, they have never approved the *shaker-type* fire extinguisher employing such extinguishing agent but do approve the *pressure-type* extinguisher using the same dry chemical. (Tr. 124.)

The National Auto Stock Racing Association of Daytona Beach, Florida, promoters of stock car races, selected some years ago the Fire-Pak as its exclusively approved fire extinguisher for use on each automobile engaged in racing at races it sponsors. No other fire extinguisher was thereafter allowed to be used at such car races.

This was done after extensive comparative tests were made with various types of fire extinguishers as to their relative merits for use on fuel fires in racing cars and on tire fires. Fire-Pak competed in such tests against pressurized extinguishers employing not only dry chemicals but also carbon dioxide and water with additives as extinguishing agents. (Tr. 338–442, 460.)

Respondent operates a one-man factory in the back of his home in Jacksonville where with the help of occasional day labor he manufactures the shells of the Fire-Pak extinguishers, fills them with the described dry chemical, and packages each loaded extinguisher in an individual carton. His wife assists him in the office work. (Tr. 189–190, 248, 416.)

Although respondent's sales of Fire-Paks and refills of dry chemicals have been increasing each year since he commenced operations in 1955, his business remains essentially a small operation. His total net sales for 1962 was $38,318 and his net profits from operations for the year was $10,080. His net worth as of December 31, 1962 was $15,386. (RX–3.)

Respondent sells between 12,000 and 14,000 Fire-Paks annually. Approximately 80 to 85 percent of the sales are to customers within the State of Florida. The remaining sales are principally to customers in North Carolina and Mississippi. It is found that respondent has maintained a substantial course of trade in Fire-Paks in commerce, as "commerce" is defined in the Federal Trade Commission Act. (Tr. 237–238, 241.)

Respondent operates principally through distributors and dealers. He has three such distributors, one in central Florida whose principal activity is commercial fishing, another in North Carolina who handles the Fire-Pak as part of his general line of fire appliances, and a third in Mississippi who sells insurance as well as Fire-Paks. Respondent has a total of perhaps 24 dealers who acquire their Fire-Paks almost entirely through respondent's distributors. The dealers for the most part are engaged in selling auto parts. (Tr. 237–238, 240–242; RX–3.)

Approximately 50 percent of respondent's total annual sales is repeat business. About 15 percent of the total sales are for refills of the extinguishing agent. (Tr. 241, 247.)

Respondent acknowledges that he is in competition with some 15 Jacksonville dealers of fire extinguishers who sell only the "approved" type of extinguisher but the evidence fails to show that the latter are engaged in the sale of fire extinguishers in "commerce." However, it can be inferred and is found from the record as a whole that respondent who sells annually somewhat more than 2,000 Fire-Paks to customers in States outside Florida out of total annual sales of up to 14,000 units per year is in "* * * substantial competition in commerce * * *," as alleged in the complaint, with numerous distributors of fire extinguishers engaged in interstate sales of such commodities. (Tr. 33, 178–182, 448.)

Ninety-nine percent of the sales of Fire-Pak are for commercial or industrial use. The remaining one percent is sold to individuals for use in their homes and boats and such individual buyers are persons who have had experience with the extinguisher in their occupations in industry or government. Respondent does not solicit orders on a house-to-house or boat-to-boat basis because he has found that this is not economically feasible. Respondent's sales are mainly in quantity case lots. (Tr. 52–53, 459, 557 A and B.)

In addition to sales to commercial or industrial users of his product, respondent has made substantial sales of his Fire-Pak to various Governmental agencies or subdivisions as hereinafter outlined. He has also sold thousands of his extinguishers to hundreds of fire departments. One of these is the Lakewood-San Jose Fire Department, near Jacksonville. (Tr. 205, 354, 362, 365, 367, 370, 388; RX–2 A and B; RX–4 A and B; RX–5 A and B.)

Over the years, respondent has sold his Fire-Pak extinguishers to various governmental departments or units, both at the federal, state, county, and municipal levels, including the following:

Government unit	Years of purchase	Total number of fire-paks sold or total amount of purchases.
Fla. State Road Comm. (Tr. 362–3).	April 1958–Nov. 1962	2,120 Units
Va. State Road Dept. (Tr. 365).	1962—March 1963	187 Units
Fla. Forest Service (Tr. 367–8).	Nov. 1956–Feb. 1963	Undetermined but for past 11 months, 72 Units.
U.S. Dept. of Ag., Forest Service (Tr. 370–5; RX 2A–C).	1956–1963	$2,036.00
U.S. Dept. of Ag., Fish & Wildlife Service (RX 2A & C).	1957 & 1963	$73.82
U.S. Army, Engineers Corps. (RX 5A–B; Tr. 389–90).	1959–1963	$2,097.00
U.S. Dept. of Interior (RX 5A).	One purchase—1962	$75.49
City of Fort Lauderdale, Fla. (Tr. 353).	1956–1961	253 Units
U.S. Dept. of Ag., Research Service (RX 2B).	1961	$20.05

Respondent has also sold Fire-Paks to the Mississippi Forest Service, the Texas Forest Service and the Georgia Forest Service. (Tr. 205, 244.)

The great bulk of respondent's sales, however, have been to private industrial users. The citrus industry is one of respondent's largest users of the Fire-Pak. His chief customers in this field are various citrus producing affiliates of the Minute Maid Corporation. Other of respondent's customers include various paper manufacturing companies, a brick firm, heavy construction companies, manufacturers of fertilizers, oil companies, truck lines, and liquefied petroleum (LP Gas) firms. (Tr. 242, 244, 245, 358–62, 383, 392, 393; RX–6C, RX–6–Z–21, RX–6–Z–32.)

Respondent's customers, both private and governmental, buy the Fire-Pak chiefly for use in extinguishing petroleum fires on mobile equipment, such as trucks, tractors, road machinery, and spraying equipment. In addition to gasolene, fuel used in a great deal of this equipment is butane and propane. It is inferred and found that the fire department purchasers of Fire-Pak use the extinguishers on petroleum fires. (Tr. 205, 245, 359, 360–62; RX–6A.)

The ultimate users of Fire-Pak extinguishers are employees of respondent's customers. They are employed almost entirely as operators of various types of mobile motorized equipment and as mechanics skilled in the care of such equipment. Such men are physically active and mechanically inclined individuals. It is found that men of these occupations would be far more adept and adroit in the effective use of respondent's shaker-type of fire extinguisher than office workers or housewives or the general public. Respondent caters almost exclusively to this type of ultimate user.

Respondent and his agents, all experts in the use of fire extinguishers, generally give demonstrations, instructions, and training in the use of the Fire-Pak extinguisher prior to sale. (Tr. 201–204, 334, 346, 355–356; RX–6B, RX–6T, RX–6X, RX–6Z11, RX–6Z24, RX–6Z41, RX–6Z45.)

Through the use of such demonstrations, instructions, and training, the effectiveness and personal safety of the users of respondent's Fire-Pak are enhanced.

The advertisement claims here under consideration consist of a brochure (CX–1), the printed matter on the carton (CX–2A) in which each Fire-Pak is packed, and the printed matter on the cylinder of the Fire-Pak extinguisher (CX–2B).

FULL TEXT OF ABBREVIATED ADS CHARGED TO RESPONDENT

The complaint sets out a number of respondent's advertisements in abbreviated form and in some instances does not set forth additional statements in the advertisements which bear a relationship to the alleged advertisement claims. This has resulted in the opinion of the examiner in the omission of certain words, phrases and sentences which are necessary for a full understanding of the representations made by respondent in his advertisements.

The complaint alleges that respondent has made certain representations on the "packaging" of the Fire-Pak extinguisher. The "packaging" is the carton (CX–2A) in which extinguisher is packed. The carton is printed with reading matter in both black and red ink. One of the panels of the carton contains the following representations, as alleged in the complaint:

Excellent fire protection in automobile, boats, buses, electrical equipment, farms, garages, homes, house trailers, industrial plants, institutions, service stations, schools, trucks, tractors.

The above is arranged in the panel in vertical fashion and the first three words "Excellent fire protection" are in more prominent type than the words that follow.

Respondent in his answer admits that the above representation is made on the packaging of his product but the evidence also shows that there is printed conspicuously at the bottom of the panel the following statement:

ALL FIRES START SMALL

The above is printed in larger, blacker and more attention-arresting type than are the listings of the properties on the panel (*i.e.* automobiles, boats, buses, etc.) for which the Fire-Pak is recommended as the fire extinguisher in the event of fire.

The complaint charges a further representation on the "packaging" of the Fire-Pak extinguisher. This representation appears on a second panel of the Fire-Pak's carton and reads as follows:

Safe * * * effective

Respondent in his answer admits that the above representation is made on the packaging of his product but the evidence also shows that there is printed directly beneath each of the aforesaid words certain matter which are pertinent to the context in which the said words "Safe" and "effective" are used in the panel. The full pertinent text of the panel is printed vertically thereon as follows:

SAFE
Non Toxic

Non Corrosive
Non Abrasive
Non Conductor
of Electricity
EFFECTIVE
on
Flammable Liquids
Electrical Fires and
will control flame in
ordinary combustibles
(Smothers fire instantly)

* * * * * * *

Finally, with respect to the "packaging" of the Fire-Pak extinguisher, the complaint alleges that there is printed thereon a representation reading as follows:

An approved extinguishing agent

Respondent's answer admits that the foregoing representation is made on the packaging of his product but the evidence also shows that the full related text of the printed panel which contains the said representation reads as follows:

HOW TO USE

Grasp at base and cast contents at base of flame
(Drawing depicting a Fire-Pak in use by recommended casting method.)

After Use

Remove perforated disc and refill with Fire-Pak
dry chemical (No annual recharge necessary).
SAFE—CLEAN—Odorless
An Approved Extinguishing Agent
Non Toxic—Non Corrosive
Non Abrasive—Non Conductor of Electricity
Will not Freeze Deteriorate or Evaporate

The complaint also charges respondent with making certain representations "on the label" of the Fire-Pak extinguisher. (For physical exhibit of Fire-Pak, see CX-2B). Such "label" representations refer to reading matter affixed to the cylinder of the extinguisher. (Tr. 248.)

The complaint alleges that the label on the Fire-Pak extinguisher carries the following representations:

(a) Safe * * *
(b) Approved extinguishing agent

Respondent in his answer admits that the above representation appears "on the label" of the extinguisher but the evidence also shows that the full related text of the label which contains the said representation reads the same as the text shown on the top of this page.

The complaint further charges respondent with making certain representations about the Fire-Pak extinguisher in a "promotional advertising brochure" (CX–1). The complaint alleges and respondent admits that he made the following statement in the brochure:

> Safe * * *
> An approved extinguishing agent.

But the evidence also shows that the full text of the above advertising is as follows:

SAFE—CLEAN—ODORLESS An Approved Extinguishing Agent
SAFE
Because it is
Non-Toxic
Non-Corrosive
Non-Abrasive
Non-Conductor of Electricity
Will Not Deteriorate, Freeze, or Evaporate

The complaint also alleges and respondent admits that representation is made in the brochure that the Fire-Pak extinguisher is:

UNEQUALED IN . . . EFFECTIVENESS

But the evidence also shows that the full text of the above representation is as follows:

UNEQUALED in SPEED
SIMPLICITY
EFFECTIVENESS

(The above is set up as nearly as possible as it appears in the brochure; the word "Unequaled" in the brochure is some two or three times the height of the words—speed, simplicity and effectiveness.)

Respondent contends that the above statement does not represent that the Fire-Pak is unequaled in effectiveness by any other extinguisher but represents only that in the combination of the factors of speed, simplicity, and effectiveness the Fire-Pak is unequaled and that he sincerely believes this to be true. Consideration will be given later to the appropriate interpretation to be given to the full text of the representation.

DECEPTIVE REPRESENTATIONS CHARGED TO RESPONDENT AND CONCLUSIONS REACHED THEREON

The complaint charges that respondent through the advertisements in question made five separate representations with respect to the Fire-Pak extinguisher which it alleges are false, misleading and deceptive. For evidence that these representations were in fact made, complaint counsel relies on the advertisements shown in the complaint and requests the examiner "* * * to use his expertise in interpreting the meaning of the advertisements which are supported by the ads themselves," asserting that "there is no need of consumer testimony to interpret the meanings of the advertisements."

In *Zenith Radio Corp.* v. *Federal Trade Commission*, 143 F. 2d 29 (7th Cir. 1944), it was held that the Commission "* * * has a right to look at the advertisements in question, consider the relevant evidence in the record that would aid * * * in interpreting the advertisements, and then decide * * * whether the practices engaged in by petitioner were unfair or deceptive, as charged in the complaint."

Consideration must necessarily be first given to the question of whether the advertisements in question do in fact constitute the representations charged in the complaint. Obviously, if the conclusion is drawn that the advertisements do not in fact spell out the charged representations, then the evidence presented to show whether these representations are true or not is no longer relevant because a cease and desist order can be issued only with respect to representations *actually made by a respondent* which are also found to be false, misleading, and deceptive. Attention is again directed to the fact that the record is barren of any consumer testimony as to the meanings of the involved advertisements and that their interpretation must therefore be based on the advertisements and *other* "* * * relevant evidence in the record that would aid * * * in interpreting the advertisements * * *." *Zenith Radio Corp.* v. *Federal Trade Commission*, *supra.*

Taking up the five representations charged by the complaint in the order in which they are presented therein, the first charge is that respondent through the above-described advertisements has represented, directly and by implication, that the Fire-Pak extinguisher "is excellent fire protection for use in boats, buses, trucks, schools, service stations, institutions, and other types of vehicles and establishments."

The record shows that respondent did in fact make substantially the above statement on one of the panels of the carton (CX–2A) of the Fire-Pak extinguisher and that the brochure (CX–1) on the Fire-Pak makes a similar statement under the heading "Your Best Protection For."

But the record also shows that the very panel of the carton on which the statement in question is made also carries a conspicuous warning that "All Fires Start Small." The same conspicuous warning is also repeated on two of the other panels of the carton and is likewise conspicuously painted on the label of the Fire-Pak extinguisher itself preceded by the exhortation "Remember." Similarly the aforementioned brochure statement under the caption "Your Best Protection For" is preceded by another heading conspicuously warning that "To Wait Can Be Too Late" and this warning, by way of illustration, shows at its side a picture of a house aflame, presumably because a fire extinguisher was not used on the fire when it was in its incipient stage. Another page of the brochure carries pictures of the Fire-Pak extinguisher and its carton with their respective markings "Remember All Fires Start Small" and "All Fires Start Small." Even in the illustrations, these warnings stand out prominently and conspicuously.

The diminutive size of the Fire-Pak extinguisher must also be taken in consideration in construing the meaning conveyed by the advertisement in question. It is difficult to imagine that anyone, even a child of twelve, would be deceived by the wording in question into believing that the Fire-Pak, not much larger than a quart size carton of milk, was being recommended for use on anything other than *small incipient fires* on the properties mentioned in the advertisements.

It is found that the statement in the involved advertisement that the Fire-Pak extinguisher "Is Excellent Fire Protection in Automobiles, Boats, Buses, Electrical Equipment, Farms, Garages, Homes," etc., when *considered in conjunction with* (a) the conspicuous warnings on the advertisement that "All Fires Start Small" and (b) the tiny size and appearance of the Fire-Pak extinguisher, constitutes an advertisement only to the fact that the Fire-Pak is effective on *small incipient fires* in such properties. Conversely, it is found that the advertisement in question is not a representation that the Fire-Pak fire extinguisher is "* * * adequate protection for boats, buses, trucks, schools, service stations, institutions, or many other types of vehicles and establishments." (See Par. SIX of complaint.) The proposed cease and desist order set forth in the complaint does not seek to prohibit respondent from advertising that the Fire-Pak extinguisher will be of value in extinguishing small fires in their initial stages. The charge here under consideration will be dismissed for failure to show that respondent made the *unqualified* representation with which he is charged.

Secondly, the complaint alleges that respondent through various advertisements has represented, directly and by implication, that the Fire-Pak extinguisher "Will extinguish fires of all sizes and types and is safe and effective for use on butane and propane fires." Since there is more than one representation involved in this allegation, the representations therein will be dealt with separately.

Respondent in his answer vigorously denies that he has anywhere in his advertisements claimed that the Fire-Pak extinguisher will extinguish "fires of all sizes".

The examiner has carefully examined all of the involved advertisements and finds no evidence therein of a claim that the Fire-Pak extinguisher will extinguish fires of all sizes. While as shown in the preceding issue the advertisements do state that the extinguisher is "excellent fire protection in automobiles, boats, buses" and so forth, such advertisement when considered in conjunction with the many warnings in the advertisements that "All Fires Start Small" and the diminutive size of the extinguisher makes it clear that respondent has not represented his extinguisher as effective on "fires of all sizes" but only on fires in their initial stages. The charge here under consideration will be dismissed because of failure to show that respondent made the representation with which he is charged.

The complaint as seen also alleges that respondent through the above-described advertisement represented that his Fire-Pak extinguisher will extinguish fires "of all types".

Respondent in his answer alleges that the only representation he has made in this connection is that the Fire-Pak extinguisher will be "effective on flammable liquids, electric fires and controls flame in ordinary combustibles." The examiner finds that this statement is the only direct representation made by respondent in any of the involved advertisements as to the types of fires on which the Fire-Pak would be effective. The statement appears on both the brochure and the carton of the extinguisher. As heretofore shown, fires are generally classified into Class "A", Class "B", and Class "C" fires and that a Class "A" fire involves ordinary combustibles (wood, paper, cloth), Class "B" involves flammable liquids, and a Class "C" fire involves electrical fires. The examiner has carefully examined all of the involved advertisements and finds that respondent has not represented therein, directly or by implication, that the Fire-Pak will extinguish all types of fires but only a representation that it will extinguish the described fires which fall into Classes "B" and "C". With respect to Class "A" fires, the ads represent only that the extinguisher will "control", not extinguish, such fires by smothering. Since there has been a failure to show that respondent has represented that his fire extinguisher will extinguish all types of fires, the charge that respondent made such representations will be dismissed.

The remaining portion of the alleged representation here under consideration charges respondent with representing that the Fire-Pak extinguisher is "safe and effective for use on butane and propane fires." The reference here is to a single non-conspicuous statement on the last page of the four page brochure which reads: "Fire-Paks are practical as protection around the home, industry, boats, auto, and farms, because they are effective on grease, gasolene, overheated stoves, electrical fires, *butane and propane pressure fires.*" (The underscoring has been supplied; it is not present in the brochure.) It should be noted that there is no claim in the above statement that the Fire-Pak extinguisher is "safe" for use on butane and propane pressure fires but only that it is "practical" for such purpose. The above statement is the only reference in all the involved advertisements with respect to the use of the Fire-Pak extinguisher on butane and propane pressure fires.

The examiner has carefully examined the advertisements in question and finds that the word "safe" has been used therein only in the sense claimed by respondent. As heretofore found, the advertisements in question represent that the Fire-Pak's extinguishing agent is "safe" in the sense of being "Non Toxic Non Corrosive Non Conductor of Electricity. Will Not Deteriorate or Evaporate." The record establishes that the treated sodium bicarbonate used as an extinguishing agent in the Fire-Pak extinguisher is "safe" to human beings in the sense that word is used in the advertisements in that it is non-toxic and a non-conductor of electricity and is "safe" with respect to machinery and other properties in that it will not cause corrosion or abrasion and is "safe" in the further sense that the dry chemical will not freeze, deteriorate or evaporate. (See Tr. 84–86 for testimony of one of the Commission's expert witnesses which has been adopted by all other Commission expert witnesses; Tr. 183–185.) It is found that in the sense the word "safe" has been used in the advertisements in question there has been no misrepresentations or false, misleading or deceptive statements. But it should be again noted that in the particular representation here under consideration (see above) the word "safe" is not used at all.

The respondent has not anywhere in his advertisements represented that the use of his extinguisher is the safest way to extinguish a fire of butane or propane origin. The record shows that the safest way to extinguish such a fire is to turn off the valve to the tank which holds the gas. When this is done and the surroundings "* * * are kept cool below their point of combustion * * *," the fire will burn itself out of its own accord. On the other hand, if the fire is extinguished by means of an extinguishing agent without shutting off the valve, this may cause an explosion from accumulated vapors which could be more of a hazard than the fire itself. For this reason the standard instructions for extinguishing a butane or propane fire is to turn off the valve. This is well known to all industrial users of the gases in question. (Tr. 87–88, 323–325.) However, there are occasions when it is impossible to get to the valve because of surrounding fire or to turn off the valve because it has been broken or damaged. In such event, an extinguisher must be used and presumably other measures are taken, if possible, to prevent an explosion. (Tr. 324–325.) Required by law, it is standard practice for bulk transport trucks and storage plants of the liquefied gas under consideration to be equipped with fire extinguishers. (Tr. 283, 288.)

In view of the fact that respondent has not made any representations in the advertisements in question that the Fire-Pak extinguisher "* * * is safe * * * for use on butane or propane fires" in the sense that an extinguisher is the best way to put out such fires, the charge here under consideration will be dismissed. There is an indication in the record that respondent would be quite willing to revise his advertisements to include a warning that the safest way to extinguish a butane or propane pressure fire is to turn off the outlet valve. (Tr. 470.) Respondent is advised to make this change in all future advertisements in which the Fire-Pak is recommended for use on butane or propane pressure fires in the interest of placing the fullest possible information before his purchasing public about recommended procedures for dealing with butane and propane fires.

As to the alleged representation that the Fire-Pak extinguisher is "effective" on butane and propane pressure fires, respondent admits in his answer, as the above quoted excerpt from his brochure shows, that he made this claim but respondent vigorously alleges that such claim is true. The record is clear that the extinguishing agent in the Fire-Pak will readily put out a pressure fire of butane or propane gas origin. This is admitted by the Commission's key expert witness, Roger C. Hale, who stated on direct examination that the extinguishing agent used in the Fire-Pak "* * * has been used successfully under high pressure in dense, large clouds to put out some spectacular butane or propane fires." (Tr. 88; Mr. Hale is a "key" witness in the sense that all of complaint counsel's expert witnesses adopted or concurred in the expert testimony given by Mr. Hale.) A film introduced by respondent with verbal descriptions in the record of its fire extinguishing scenes demonstrates the spectacular extinguishment of a large combination gasolene and butane fire through the use of the Fire-Pak extinguisher in some six or seven seconds. (Tr. 543.)

Since there has been a failure to show that respondent's representation that the Fire-Pak extinguisher is not effective on butane or propane fires, the charge that such representation is false, misleading, and deceptive will be dismissed.

Thirdly, the complaint alleges that respondent through his advertisements has represented, directly and by implication, that the Fire-Pak extinguisher: "Has been approved by a recognized testing laboratory or by recognized regulatory authorities for use on boats, trucks, buses, and in schools, service stations, institutions, and other types of vehicles and establishments." The complaint further charges that said representation is false, misleading, and deceptive.

It will be recalled that complaint counsel has not adduced and does not rely on any consumer testimony on the interpretation or meaning to be given to any of respondent's advertisements but requests the examiner to make such determination from the advertisements themselves.

The examiner has carefully examined all of the involved advertisements and finds that the only statement therein that uses the word "approved" is the following: "An Approved Extinguishing Agent." This appears on the label of the Fire-Pak extinguisher and on the full size illustration thereof on the brochure and is also repeated on one of the panels of the extinguisher's carton. The statement is a part of other surrounding statements on the label and carton panel which refer only to the dry chemical content of the extinguisher and not to the extinguisher as a unit. (See CX-1 and 2A.)

As heretofore shown, one of the panels of the carton does state that the Fire-Pak affords fire protection in schools, service stations, institutions, and other types of vehicles and establishments, but there is nowhere in this statement or elsewhere in respondent's advertisement any claim that the Fire-Pak extinguisher as a unit "has been approved by a recognized testing laboratory or by recognized regulatory authorities for use" on such properties, as charged in the complaint.

It should be noted that the issue in question under the pleadings is not whether the respondent has represented that his extinguisher employs "an approved extinguishing agent" but whether respondent has represented, directly and by implication, that his Fire-Pak extinguisher as a unit (*i.e.*, the metal container with its appendages and its dry chemical content) has been approved by a recognized testing laboratory or by recognized regulatory authorities for use on the aforementioned properties. On the latter the examiner finds after careful study of all the involved advertisements that respondent has not made such a representation either directly or by implication. Since respondent did not make the representation, the charges in the complaint involving such alleged misrepresentation must necessarily be dismissed.

Although the question of whether or not respondent's extinguishing agent is "an approved extinguishing agent" has not been placed in issue by the pleadings in this proceeding, it may be noted in passing that the dry chemical that respondent uses in his Fire-Pak extinguishers is approved by the National Board of Fire Underwriters and also, as noted earlier, is in wide use. (CX–5, p. 43; CX–9, p. 17.)

Fourthly, the complaint alleges that respondent through his advertisements has represented, directly and by implication, that the Fire-Pak extinguisher "Is in regular and continuing use with, and hence is approved for use by, the United States Department of Agriculture and the United States Army Corps of Engineers." The complaint further alleges that such representations are false.

The brochure is the only advertisement of those here involved in which respondent makes a claim that the Fire-Pak is in use by the United States Department of Agriculture and the United States Corps of Engineers. The claim appears in a small space in the last page of the brochure and reads in part as follows:

> FIRE-PAKS
> are in use with:
> U.S. Department of Agriculture
> (Forest Division)
> U.S. Army Engineers
> State Forestry Services
> State Highway Departments
> County Law Enforcement Agencies
> City Fire Departments
> * * *

It will be noted that respondent has not anywhere stated or claimed in the above advertisement that the Fire-Pak extinguisher is "in regular and continuing use with, and hence is approved for use" by the United States Department, Forest Division, and by the United States Army Engineers.

The evidence presented by respondent shows that the two agencies have been in fact fairly regular and substantial purchasers of the Fire-Pak extinguishers over a period of years extending into the current year. (See page 202 *supra.*) Thus, the Department of Agriculture has purchased more than $2,000 in Fire-Paks in the years 1956 to 1963 which if computed on the basis of the regular list price of $6 per Fire-Pak would constitute purchases in excess of 700 Fire-Paks. (Actually respondent gives substantial discounts on the list price on quantity orders.) Similarly the United States Corps of Engineers purchased about $2,100 in Fire-Paks in the years 1959 to 1963. One invoice to the Corps totaled $736. (RX–5 A and B.)

It is found that respondent has not represented, directly and by implication, as charged in the complaint, that the Fire-Pak extinguisher is approved for use by the United States Department of Agriculture and the United States Army Corps of Engineers.

It is further found that respondent has not directly represented, as charged in the complaint, that the Fire-Pak extinguisher "is in regular and continuing use" by the United States Department of Agriculture and the United States Corps of Engineers but insofar as such representation can be implied from the advertisement in question, complaint counsel has failed to establish that the implied representation is not true in view of respondent's substantial sales to the said agencies over the years. Accordingly the charges here under consideration will be dismissed.

The fifth and final charge of the complaint is that respondent has falsely represented in his advertisements that the Fire-Pak extinguisher "Is unequaled in effectiveness, has greater fire extinguishing capability than other types of fire extinguishers and is more effective than extinguishers costing up to six times as much."

It will be noted that the quoted paragraph charges three separate representations. The first of these alleged representations is that the Fire-Pak extinguisher "is unequaled in effectiveness." Respondent in his answer expressly denies that he has made this representation, "* * * but states affirmatively that his advertising material represents that the Fire-Pak Extinguisher is unequaled in the combination of three factors, those of speed, simplicity and effectiveness, and the impression conveyed regarding this point in Respondent's advertising material is that for those fire extinguishers on the market today that are fast and speedily used of the category the speedy and simple fire extinguishers, the Fire-Pak is in this group the most effective and is therefore unequaled."

The complaint in this connection alleges, as heretofore shown, that respondent in his brochure has represented that the Fire-Pak extinguisher is "Unequaled in * * * effectiveness." The stars shown in the quotation are part of the quotation as set forth in the complaint; they represent word omissions from the full text of the representation under consideration. The full text thereof in respondent's brochure (CX-1) reads as follows:

Speed
UNEQUALED in Simplicity
Effectiveness

(In the advertisement the height of the word "Unequaled" is the same as the combined height of the three words, Speed, Simplicity, Effectiveness.)

As heretofore indicated no consumer testimony on the meaning of this advertisement (or any other) was adduced by complaint counsel; he requests the examiner to find from the advertisement itself that the alleged representation was in fact made. Complaint counsel contends that the abbreviated advertisement set forth in the complaint "Unequaled in * * * effectiveness" stands alone as an independent representation without reference to the claims of "speed" and "simplicity" for the extinguisher. (Tr. 225–227.)

Respondent, on the other hand, as seen in his answer and in his testimony contends that he intended to convey the thought in the complete non-abbreviated statement, and that the reasonable interpretation of the non-abbreviated statement is, that the Fire-Pak extinguisher is unequaled *in the combination* of the factors of speed, simplicity and effectiveness. The complaint does not challenge the representation that the Fire-Pak extinguisher has "speed" and "simplicity" and counsel supporting the complaint does not appear to challenge the truthfullness of respondent's contention that the Fire-Pak extinguisher is "unequaled *in the combination* of the factors of speed, simplicity and effectiveness." (Emphasis supplied.) In his testimony under cross examination, respondent readily conceded, with the candor that is characteristic of all of his testimony, that an unqualified representation that the Fire-Pak is "unequaled in effectiveness" would be absolutely false. (Tr. 227.)

The ultimate question is thus whether the full unabbreviated statement should be interpreted as a claim that the Fire-Pak was being unqualifiedly represented as being unequaled in effectiveness to all other extinguishers *or* only as a claim that *in the combination of the three factors* of speed, simplicity and effectiveness the Fire-Pac is unequaled by any other extinguisher.

As stated in *Zenith Radio Corp. v. Federal Trade Commission, supra*, the Commission not only has a right to look at the advertisements in question but *also* to " * * * consider the relevant evidence of record that would aid * * * in interpreting the advertisements * * * " in making its decision as to whether the practices engaged in by a respondent are unfair or deceptive as charged in a complaint.

The interpretation to be given to the unabbreviated representation in question is best approached in steps. As the first step, the examiner finds that the consuming public would regard and interpret the words

Speed
UNEQUALED in Simplicity
Effectiveness

as a single, unified statement reading "Unequaled in speed, simplicity, and effectiveness" and not as three separate, isolated sentences reading

"Unequaled in speed," "Unequaled in simplicity" and "Unequaled in effectiveness."

It is our further finding that the buying public would relate the unified statement "Unequaled in speed, simplicity, and effectiveness" to the diminutive size of the Fire-Pak as illustrated in life-size in the very brochure which carries the unified statement and on the basis of these two factors would conclude that the unified statement was simply a representation that the Fire-Pak fire extinguisher was unequaled *in the combination* of the three factors of speed, simplicity and effectiveness.

The examiner further finds that the unified statement would not in any event be suggestive to respondent's current and prospective customers, consisting almost entirely of industrial and commercial firms and Government agencies experienced in the purchase of fire protection equipment, of a representation that the Fire-Pak was "unequaled in effectiveness" because on the basis of their experience with fire extinguishers they would know even without thinking about it consciously that such was not the thought intended to be conveyed by the unified statement. In this connection one of the other statements in respondent's brochure (not a subject of the present litigation) is here pertinent. It reads:

> Fire-Paks were developed over four years ago to meet the need of commercial and industrial people, who have widely dispersed operations, such as vehicles, shops, and thousands of other installations that create a potential fire hazard. An operation of any type is always under-protected because of the high cost of larger fire equipment as well as the service and maintenance problem such equipment creates. (CX-1.)

The examiner finds and concludes that there has been a failure of proof to show that the full advertisement (unified statement) here under consideration is false, misleading and deceptive and accordingly the charge based on this advertisement will be dismissed.

The next portion of the charge under consideration is the alleged representation in the respondent's advertisements that the Fire-Pak "* * * has greater fire extinguishing capability than other types of fire extinguishers * * *."

In his answer respondent specifically denies that he has made in any of his advertising material the claim "* * * that the Fire-Pak Fire Extinguisher is more effective than 'other types of fire extinguishers'" but he contends that he has merely represented that the Fire-Pak has greater fire extinguishing capabilities *than certain other specified types of fire extinguishers of specified size or capacity.*

The examiner finds that the only advertising claim in the advertisements in question which relates to the above alleged representation is the representation in respondent's brochure that "Tests Revealed That One Fire-Pak Has More Fire Killing Power than Three One Quart Carbon Tetrachloride Extinguishers * * * or Two 5 LB CO_2 Extinguishers * * *."

It is concluded and found that respondent has not represented in his advertisements that the Fire-Pak has "greater fire extinguishing capability than other types of fire extinguishers" as he is charged with in the complaint but that he has represented only that the Fire-Pak has greater fire extinguishing capability than *certain other specifically identified types of fire extinguishers of specified size or capacity*, namely, three one quart carbon tetrachloride extinguishers or two five pound CO_2 extinguishers.

There has thus been a failure of proof that respondent has made the alleged representation but even if the alleged representation is construed to mean that respondent has represented, as he admits, that the Fire-Pak has greater fire extinguishing capability than three one quart carbon tetrachloride extinguishers or two five pound CO_2 extinguishers, there has also been a failure of proof that this representation is not true. In fact complaint counsel has not introduced any evidence to show that the latter statement or representation is not true. On the other hand, respondent did present testimony in support of his actual representation although the burden of proof did not require him to do so. (Tr. 228, 344, 427.)

The examiner finds and concludes that respondent has not made the representation (*i.e.* that the Fire-Pak has greater fire extinguishing capabilities than other types of fire extinguishers) alleged in the complaint and accordingly the charge of false advertising in connection therewith will be dismissed as the premise therefor is missing.

The final portion of the charge here under consideration is the alleged false representation in respondent's advertisements that the Fire-Pak "* * * is more effective than extinguishers costing up to six times as much."

The alleged representation is based on a sentence on the last page of respondent's brochure reading: "Fire-Paks are more effective than most extinguishers costing up to six times as much."

It should be observed that there is some disparity between the representation as alleged in the complaint and the actual text of the statement made in the brochure. The statement in the brochure limits the application of the claim made therein to "most" extinguishers costing up to six times as much, as the Fire-Pak. On the other hand, the alleged representation appears to make the claim applicable *to any and all* extinguishers costing up to six times as much as the Fire-Pak.

It should also be noted that the above-quoted statement in the brochure is followed immediately by another sentence or statement which respondent contends relates to and has the effect of specifically identifying the types of fire extinguishers which respondent has reference to in his claim that the Fire-Pak is more effective "than *most* extinguishers costing up to six times as much" as the Fire-Pak. (Emphasis supplied.) (Tr. 222–224.) The sentence in the brochure which immediately follows the quoted claim reads: "Particular attention is invited to the effective rating chart on this brochure." The examiner agrees with respondent's contention that the two sentences are related and that the effect of the second sentence is to qualify the first sentence by specifically identifying the types of extinguishers the advertiser, respondent) is referring to in the expression "most extinguishers costing up to six times as much." The examiner further finds that the normal reaction of prospective purchasers would be to refer to the mentioned chart in the brochure if they desire a specific identification of the competing fire extinguishers the advertiser is referring to in the phrase "most extinguishers costing up to six times as much."

The verbal text of the chart referred to has heretofore been alluded to and quoted in another connection but with an omission of the cost data therein which is here pertinent. The full text of the chart reads: "Tests revealed that one Fire-Pak has more fire killing power than three one quart carbon tetrachloride extinguishers (at 1/3 the cost of only one C.T.C.) or two 5 lb. CO_2 extinguishers (at 1/7 the cost of one CO_2)." The cost data is, of course, that shown between the parentheses.

No proof was offered by counsel supporting the complaint that the Fire-Pak did not have as claimed "more fire killing power" than three one quart carbon tetrachloride extinguishers or two five pound CO_2 extinguishers and similarly complaint counsel did not submit any evidence to disprove respondent's claim in the involved statement that a Fire-Pak sells at a fraction of the cost of the two mentioned competing types of fire extinguishers. The only evidence the examiner has been able to find in the record on the charge here under consideration is the following colloquy between complaint counsel and one of his expert witnesses, a deputy fire chief of Washington, D.C.:

Q. Is Commission's Exhibit 2–B [*i.e.*, a Fire-Pak in evidence as a physical exhibit] more effective than extinguishers costing up to six times as much?

A. Are more effective?

Q. Yes, sir, more effective?

A. I wouldn't think so, no, sir. (Tr. 147.)

and a statement by another of complaint counsel's expert witnesses, an employee of the Department of Agriculture, Division of Fire Control, the Bureau of Forest Services, who being handed respondent's brochure aand given carte blanche by complaint counsel to go through it and to pick out therefrom statements he thought were false, stated:

A. * * * And it [the brochure, CX–1] says, "Fire-Paks are more effective than most extinguishers costing up to six times as much" and I would say that is a false statement. (Tr. 152.)

Thus the issues raised by the two related sentences in the brochure (*i.e.*, "Fire-Paks are more effective than most extinguishers costing up to six times as much. Particular attention is invited to the effective chart on this brochure.") as qualified by the reading matter on the "effective chart" (*i.e.*, "Tests revealed that one Fire-Pak has more fire killing power than three one quart carbon tetrachloride extinguishers (at 1/3 the cost of only one C.T.C.) or two 5 lb. CO_2 extinguishers (at 1/7 the cost of one CO_2)" is whether it is true that one Fire-Pak sells at one-third the cost of a one quart carbon tetrachloride extinguisher or at one-seventh the cost of a one five pound CO_2 extinguisher *and* whether one Fire-Pak has "more killing power" than the described carbon tetrachloride or CO_2 extinguishers.

Needless to say the above opinion testimony is hardly germane to the precise issues here involved as shown above. But even if such expert opinion is considered germane, its value is questionable because it is mere opinion without the backing of tests or experiments and cost data to support it.

Accordingly the mentioned expert opinion testimony cannot be deemed reliable, probative and substantial evidence of the alleged untruthfulness of respondent's claim that the Fire-Pak at lesser cost "has more fire fighting power" than the described competing types of fire extinguishers. On the other hand, evidence was introduced by respondent tending to support the advertised claim although he did not have the initial burden of proof thereon. (Tr. 222–224, 300–302, 322, 344.) The examiner, however, does not deem it necessary to pass on such evidence and specifically refrains from making any findings based on such evidence relative to the truthfulness of the advertisement in question.

It is found and concluded that there has been a failure of proof to show that respondent's representation that the Fire-Pak is more effective than most extinguishers costing up to six times as much as the Fire-Pak is false. Accordingly the charge of false advertisement based on such representation will be dismissed.

Although the above disposes of the issues in this proceeding, a summary of complaint counsel's case-in-chief and the examiner's evaluation thereof may be of assistance to the Commission on review. Complaint counsel, who took over from previous counsel what would be a very difficult case to present in any circumstances, adduced the testimony of eight expert witnesses in the field of fire protection. Through them he sought to show that the Fire-Pak fire extinguisher was not "safe" and "effective" contrary to the complaint's *abridged* version of respondent's advertisement that the Fire-Pak extinguisher was "Safe—effective." As heretofore shown, the word "Safe" in the *unabridged* advertisement (CX–2A) is followed by the words "Non Toxic," "Non Corrosive," "Non Abrasive" and "Non Conductor of Electricity" which the examiner has found were the only meanings in which the word "Safe" is used in the advertisement. Through his witnesses complaint counsel sought to import to the word "Safe" a new connotation not suggested by the advertisement, namely, that the Fire-Pak fire extinguisher by virtue of the fact that it requires manual manipulation to discharge its dry chemical contents requires the user to get so close to a fire as to endanger his person. (Tr 85.)

This attempt failed as may be seen from the following colloquy between complaint counsel and his key witnesses, Roger C. Hale, whose testimony was adopted by all other Commission witnesses:

> Q. Keeping your mind away from the toxic value [meaning the Fire-Pak's non-toxic quality] of it but the fact that you have to go to the fire and shake this ingredient on the fire, do you think there is any possible chance of hazard, or danger?
>
> A. There could be from the heat absorption and possibly catching your own clothing on fire by getting too close. The general problem is that most inexperienced people will not get that close * * *. (Tr 85.)

From the testimony of the same expert witness it is also found that the word "Safe", when used in connection with a fire extinguisher, is normally used to convey the thought that the chemical content of the extinguisher is non-toxic and a non-conductor of electricity. (Tr. 85–86.)

Through his expert witnesses, complaint counsel also sought to show that the Fire-Pak extinguisher was not "Effective" in a sense other than that used in the *unabridged* advertisement in question (CX–2A) in which it will be recalled that the full text of the advertisement reads:

EFFECTIVE
on
Flammable Liquids
Electrical Fires and
will control flame in
ordinary combustibles
(Smothers fire instantly)

In his direct examination of his expert witnesses, complaint counsel sought to show through testimony adduced from such witnesses that the "shaker-type" Fire-Pak extinguisher is not an "effective" fire extinguisher in the sense that its hand method of application severely limits its speed, continuity and range of application as compared to a "pressure-type" of extinguisher and is therefore of value only in small incipient fires. (Tr. 72–74, 76, 145, 154.) This evidence is irrelevant because our findings show that respondent in his advertisements represents only that the Fire-Pak is effective on small incipient fires and because the complaint does not seek to enjoin respondent from advertising that his product is effective on "* * * small fires in their initial stages."

Complaint counsel introduced in evidence ten pictures of fires. (CX–6 A–J.) For the most part these represent fires of either flammable liquids or a combination of flammable liquids and wood gratings. There is no clear cut evidence from which it can be determined whether the fires shown in the pictures are small incipient fires or larger fires but all are serious fires. (Tr. 111.) The record does not contain a definition of a "small fire" and it is probable that a universally acceptable definition of a "small fire" does not exist. The Commission witnesses testified that it was their expert opinion that the Fire-Pak was incapable of putting out any of the fires shown in the pictures except one or two. There is no showing of record that any of the Commission expert witnesses have ever had any actual experience in trying to put out fires like those shown in the pictures *with a shaker-type fire extinguisher* similar to the Fire-Pak.

On the other hand, respondent testified categorically that he has actually extinguished with the Fire-Pak extinguisher fires identical with those shown on eight of the pictures and fires similar to those shown on the remaining two pictures. (Tr. 549–556.) The examiner has carefully observed the demeanor of respondent during his participation in this proceeding both as a witness and as counsel *pro se*. He has noted respondent's sincerity, candor and endeavor to answer all questions with care and exactitude and saw no evidence of evasion or attempt to distort facts. The examiner finds respondent's testimony throughout the hearing to be probative and reliable and not subject to discount for reasons of self-interest.

S. J. King, Jr., an Assistant Fire Chief of the Jacksonville (Fla.) Fire Department, testifying in behalf of respondent, also testified that a Fire-Pak extinguisher would put out any of the fires shown in the ten pictures noted above. (Tr. 305–315.) Similar testimony is of the record by respondent's brother, Jarrell Lamar Dudley, who for a number of years sold and demonstrated Fire-Pak extinguishers.

The record also contains a film made in behalf of respondent showing the extinguishment of ten different fires by means of Fire-Pak extinguishers, some of which are similar to the fires in the ten pictures introduced into evidence by complaint counsel and some are even more spectacular. (RX-10.) The film is also described verbally in the record. (Tr. 496–546.) As heretofore shown, respondent has had *repeat* orders over the years for Fire-Pak extinguishers from many Fire Departments, from the Forest Division of the United States Department of Agriculture, from the United States Army Engineers Corps, and from innumerable commercial and industrial concerns.

In so far as the Commission's ten pictures of fire scenes (CX-6 A-J) are here relevant, from the entire record it is found that the Fire-Pak extinguisher in the hands of an experienced handler would extinguish the fires therein shown.

Complaint counsel recognizes that the problem in this case has been not whether respondent's product possesses merit but rather the determination of its limitations which he candidly admits is a difficult matter to appraise with definitiveness. (Tr. 316, 318.) But whatever these limitations are, the examiner is satisfied from the record that respondent has not made any false representations about his product in the advertisements in question.

To some extent this proceeding has been brought about by imprecisions in respondent's advertisements. At the hearing respondent expressed a willingness and even an eagerness to remove these imprecisions from his advertisements. (Tr. 469–480; 494–495.) It is suggested to respondent that he take immediate steps to eliminate from his advertisements the imprecisions which are sufficiently identified in the body of this initial decision.

ORDER

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

FINAL ORDER

The Commission, on September 23, 1963, having issued an order staying the effective date of the decision herein, and the Commission now having determined that the proceeding should not be placed on its own docket for review, but that the initial decision of the hearing examiner should be modified in certain particulars:

It is ordered, That the below-quoted paragraph from page 213 of the initial decision of the hearing examiner, filed August 19, 1963, be, and it hereby is, stricken.

"Although the question of whether or not respondent's extinguishing agent is 'an approved extinguishing agent' has not been placed in issue by the pleadings in this proceeding, it may be noted in passing that the dry chemical that respondent used in his Fire-Pak extinguishers is approved by the National Board of Fire Underwriters and also, as noted earlier, is in wide use. (CX-5, p. 43; CX-9, p. 17)"

It is further ordered, That the following paragraph be, and it hereby is, substituted in place of the paragraph heretofore stricken:

"Although the question of whether or not respondent's extinguishing agent is 'an approved extinguishing agent' has not been placed in issue by the pleading in this proceeding, respondent is cautioned in his use of the word 'approved.' A representative of the company which produces respondent's extinguishing agent testified that it was approved only when used in one of their extinguishers (Tr. 271, 273). The National Board of Fire Underwriters does not approve chemical extinguishing agents separately, but grants approval only to fire extinguishers or systems as a whole (CX-5, CX-9). An accurate statement concerning respondent's extinguishing agent, therefore, would be that it is utilized in certain extinguishers which have been approved by the National Board of Fire Underwriters, but that no express approval has been accorded the agent itself. It is suggested that respondent either precisely qualify his use of the word 'approved' or that he eliminate it from his advertisements until such time as he obtains express approval of his device from a recognized testing laboratory."

It is further ordered, That the initial decision of the hearing examiner, filed August 19, 1963, as herein modified, be, and it hereby is, adopted as the decision of the Commission.

ORDER

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

IN THE MATTER OF

SAMUEL SCHEFF ET AL. DOING BUSINESS AS BURMAX SALES COMPANY

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

Docket 8553. Complaint, Jan. 11, 1963—Decision, Jan. 15, 1964

Order requiring a New York City distributor of nonrubber combs to retailers, to cease misrepresenting the composition of its nonrubber combs by using the terms "Rubber," "Rubber-Resin," and "Hard Rubber" in stamping and advertising.

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 Samuel Scheff and Burton H. Scheff, individually and as copartners doing business as Burmax Sales Company, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Samuel Scheff and Burton H. Scheff, are individuals and copartners doing business as Burmax Sales Company, with their office and principal place of business located at 156 Fifth Avenue, New York 10, 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 combs designed for use on human hair to 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 product, when sold, to be shipped from their place of business in the State of New York and otherwise, to purchasers thereof located in the 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 combs in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale and distribution of combs designed for use on human hair.

PAR. 5. Respondents, in the course and conduct of their aforesaid business, and for the purpose of describing, and to induce the purchase of, their combs, have stamped and branded said combs as "Rubber" and "Rubber-Resin", thereby representing, directly or by implication, that said combs are made or composed of rubber or hard rubber. Respondents have also designated, referred to and represented said combs as "Rubber", "Rubber-Resin" and "Hard Rubber" on boxes, packages, circulars, invoices and in various forms of advertising material circulated by them.

PAR. 6. The said representations were and are false, misleading and deceptive. In truth and in fact, respondents' said combs so stamped, branded and referred to are not made or composed of rubber or hard rubber, but are made or composed of material other than rubber or hard rubber.

PAR. 7. There are among the purchasing public substantial numbers of persons who prefer combs made of rubber or hard rubber, as distinguished from combs made or composed of the materials used in respondents' said combs.

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' product by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Mr. Charles S. Cox supporting the complaint.
Mr. Donald E. Van Koughnet, Washington, D.C., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

SEPTEMBER 10, 1963

The complaint which was issued herein charged respondents Samuel Scheff and Burton H. Scheff as individuals and copartners doing business as Burmax Sales Company with violating Section 5 of the Federal Trade Commission Act by offering for sale, selling and distributing in interstate commerce combs designed for use on human hair, which combs were sold to retailers for resale to the public and were deceptively branded and designated as "Rubber" and "Rubber-Resin" and "Hard Rubber" when in truth and in fact the combs so stamped, branded and designated were not made or composed of rubber or hard rubber, but were made or composed of material other than rubber or hard rubber. Respondents were duly served with the complaint, and filed their answer thereto. A series of prehearing conferences were convened at which it developed, among other things, that Samuel Scheff, one of the respondents named in the original complaint and a partner of Burmax Sales Company, had died on February 9, 1963, leaving Burton H. Scheff, the other respondent, as the sole surviving partner of Burmax Sales Company. At a prehearing conference convened on July 30, 1963, counsel for respondents moved to withdraw the answer which had theretofore been filed on behalf of respondents and to file, in substitution therefor, an admission answer under the Commission's Rules of Practice for Adjudicative Proceedings. Such admission answer, filed on July 31, 1963, and, by order of August 9, 1963, substituted for the original answer, *inter alia*, recites:

In answer to the complaint filed in the above entitled proceeding, respondents admit, deny and aver as hereinafter set forth.

1. Respondents admit all of the material allegations of the complaint except the allegations in respect of respondent Samuel Scheff concerning any acts subsequent to February 9, 1963, the said Samuel Scheff being deceased as of February 9, 1963 as established by Respondents' Exhibit No. 1, which was received in evidence at a prehearing conference on July 30, 1963.

2. Respondents waive their right under the Commission's Rules of Practice to submit proposed findings and conclusions herein.

3. Respondents specifically reserve their right to petition for review under Section 4.20 of the Commission's Rules of Practice.

Counsel supporting the complaint has likewise waived his right to submit proposed findings and conclusions, and has reserved his right to appeal from this Initial Decision. On the basis of the allegations in the complaint, the admissions in the amended answer filed July 31, 1963, on behalf of respondents, and the death certificate of Samuel Scheff (RX 1), the undersigned makes the following:

FINDINGS OF FACT

1. Respondents, Samuel Scheff and Burton H. Scheff, named in the complaint filed herein, were until February 9, 1963, individuals and copartners doing business as Burmax Sales Company with their office and principal place of business located at 156 Fifth Avenue, New York 10, New York. Samuel Scheff, named respondent in the complaint filed herein individually and as a copartner of Burmax Sales Company, died on February 9, 1963, leaving as the sole sur-

viving partner of Burmax Sales Company the respondent Burton H. Scheff.

2. At the time of the issuance of the complaint herein and for some time prior thereto respondents had been engaged in advertising, offering for sale, selling and distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, combs which were designed for use on human hair. Said combs were offered for sale, sold and distributed to retailers for resale to the public.

3. In the course and conduct of their business, respondents had caused, and for some time prior to the issuance of the complaint herein, had caused their products, when sold, to be shipped from their place of business in the State of New York, and otherwise, to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents had maintained, and at all times relevant to this proceeding, had maintained a substantial course of trade in said combs in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of their business, and at all times relevant to these proceedings, respondents had been in substantial competition, in commerce, with corporations, firms and individuals in the sale and distribution of combs designed for use on human hair.

5. In the course and conduct of their business, and for the purpose of describing, and in order to induce the purchase of their combs, respondents have stamped, branded and designated their said combs as "Rubber", "Rubber-Resin" and "Hard Rubber" and thereby represented, directly or by implication, that said combs were made or composed of rubber or hard rubber. Respondents have also designated, referred to, and represented their said combs as "Rubber", "Rubber-Resin" and "Hard Rubber" on boxes, containers, packages, circulars, invoices and in various forms of advertising material circulated by respondents.

6. The aforesaid representations by respondents were and are in fact false, misleading and deceptive. Respondents' said combs, which had been stamped, branded and designated by them as hereinabove set forth were not composed of rubber or hard rubber, but were made or composed of material other than rubber or hard rubber.

7. Substantial numbers of persons among the purchasing public who purchase combs, prefer combs made of rubber or hard rubber, as distinguished from combs made or composed of materials used in respondents' said combs.

8. Respondents' use of the above-mentioned false, misleading and deceptive statements, representations and designations 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 have had the effect of inducing the purchase of substantial quantities of respondents' products by reason of the aforesaid false, misleading and deceptive designation of the combs as rubber, rubber-resin and hard rubber when in truth and in fact said combs were and are made or composed of material other than rubber or hard rubber.

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

The undersigned makes the following:

CONCLUSIONS

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

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

3. The acts and practices of respondents in using the false, misleading and deceptive statements and representations herein described were, and are, all to the prejudice of the public and respondents' competitors, and constituted, and now constitute, unfair and deceptive acts and practices, and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

4. The aforementioned false, misleading and deceptive acts and practices of respondents are proscribed by the Federal Trade Commission Act and should be enjoined.

Now, therefore,

It is ordered, That respondent Burton H. Scheff, individually, and as a surviving partner of Burmax Sales Company, and under any other name or names, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of combs designed for use on human hair, do forthwith cease and desist from:

1. Using the word "rubber" or any other word of similar import or meaning, alone, or in combination with any other word or words, to designate, describe or refer to such combs which are not in fact made entirely of vulcanized hard rubber;

2. Representing in any manner that said combs are rubber or hard rubber or are made of rubber or hard rubber unless they are in fact made of vulcanized hard rubber.

It is further ordered, That this complaint be and it hereby is dismissed as to Samuel Scheff, deceased.

Final Order

The Commission, on October 23, 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 September 11, 1963, be, and it hereby is, adopted as the decision of the Commission.

ORDER

It is ordered, That respondent Burton H. Scheff, individually, and as a surviving partner of Burmax Sales Company, and under any other name or names, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of combs designed for use on human hair, do forthwith cease and desist from:

1. Using the word "rubber" or any other word of similar import or meaning, alone, or in combination with any other word or words, to designate, describe or refer to such combs which are not in fact made entirely of vulcanized hard rubber;

2. Representing in any manner that said combs are rubber or hard rubber or are made of rubber or hard rubber unless they are in fact made of vulcanized hard rubber.

It is further ordered, That this complaint be, and it hereby is, dismissed as to Samuel Scheff, deceased.

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

IN THE MATTER OF

ABRAHAM RABEN ET AL. TRADING AS FURS BY RABEN OF CLAYTON

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

Docket C-680. Complaint, Jan. 15, 1964—Decision, Jan. 15, 1964

Consent order requiring a manufacturer and retailer of furs in Clayton, Mo., to cease violating the Fur Products Labeling Act by misbranding, deceptively invoicing and advertising its fur products, and substituting labels which do not conform to the requirements of the Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Abraham Raben also known as Al Raben, an individual trading as Furs by Raben of Clayton, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Abraham Raben also known as Al Raben is an individual trading as Furs by Raben of Clayton.

Respondent is a manufacturer and retailer of fur products with his office and principal place of business located at 920 South Brentwood, Clayton, Missouri.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and has manufactured for sale, 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 they were falsely and deceptively labeled or otherwise falsely or deceptively identified with respect to the name of the country of origin of furs contained in such fur products, in violation of Section 4(1) of the Fur Products Labeling Act.

Among such misbranded fur products, but not limited thereto, were fur products labeled to show the country of origin of furs used in such fur products as the United States when in fact the furs used in such fur products were imported.

PAR. 4. Certain of said fur products were misbranded in that they were falsely and deceptively labeled or otherwise falsely or deceptively identified with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 4(1) of the Fur Products Labeling Act.

Among such misbranded fur products, but not limited thereto, were fur products labeled as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 5. 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 certain fur products without labels and certain fur products with labels which failed:

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

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

3. To show the name, or other identification issued and registered by the Commission, of one or more of the persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale, in commerce, or transported or distributed it in commerce.

4. To show the country of origin of the imported furs contained in the fur product.

PAR. 6. 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) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on labels in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "Persian Lamb" was not set forth on labels in the manner required by law, in violation of Rule 8 of said Rules and Regulations.

(c) The term "Dyed Broadtail-processed Lamb" was not set forth on labels in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(d) 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.

(e) The disclosure that fur products were composed in whole or in substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces or waste fur where required was not set forth on labels in violation of Rule 20 of said Rules and Regulations.

(f) 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.

(g) 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.

(h) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

(i) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth separately on labels with respect to each section of fur products composed of two or more sections containing different animal furs, in violation of Rule 36 of said Rules and Regulations.

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

PAR. 7. Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

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

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

3. To show the country of origin of imported furs used in fur products.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced in that respondent set forth on invoices pertaining to fur products the name of an animal other than the name of the animal that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Broadtail" thereby implying that the furs contained therein were entitled to the designation "Broadtail Lamb" when in truth and in fact they were not entitled to such designation.

PAR. 9. Certain of said fur products were falsely and deceptively invoiced with respect to the name of the country of origin of imported furs used in such fur products, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products invoiced to show the name of the country of origin of furs contained in such fur products as the United States when in fact the furs used in such fur products were imported.

PAR. 10. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on invoices in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "Persian Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 8 of said Rules and Regulations.

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(c) The term "Dyed Mouton Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 9 of said Rules and Regulations.

(d) The term "Dyed Broadtail-processed Lamb" was not set forth on invoices in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(e) The term "natural" was not used on invoices 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.

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

PAR. 11. 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 such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements of respondent which appeared in issues of the St. Louis County Observer, a newspaper published in the State of Missouri.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed:

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

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

PAR. 12. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondent falsely and deceptively advertised fur products in that certain of said advertisements contained the name or names of an animal or animals other than those producing the fur contained in the fur product, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 13. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondent falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "Persian Lamb" was not set forth in the manner required, in violation of Rule 8 of the said Rules and Regulations.

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

PAR. 14. In advertising fur products for sale, as aforesaid, respondent made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondent in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such pricing claims and representations were based, in violation of Rule 44(e) of the said Rules and Regulations.

PAR. 15. Respondent in introducing, selling, advertising, and offering for sale, in commerce, and processing for commerce, fur products; and in selling, advertising, offering for sale and processing fur products which have been shipped and received in commerce, has 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. 16. 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 respondent named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent Abraham Raben also known as Al Raben is an individual trading as Furs by Raben of Clayton, with his office and principal place of business located at 920 South Brentwood, Clayton, Missouri.

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

ORDER

It is ordered, That respondent Abraham Raben, otherwise known as Al Raben, an individual, trading as Furs by Raben of Clayton, or under any other trade name, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for 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 manufacture for sale, 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 the terms "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 any such fur product as to the country of origin of furs contained in such fur product.

2. Falsely or deceptively labeling or otherwise identifying any such fur product as to the name or designation of the animal or animals that produced the fur contained in the fur product.

3. 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.

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

5. Failing to set forth the term "Persian Lamb" on labels in the manner required where an election is made to use that term instead of the word "Lamb".

6. Failing to set forth the term "Dyed Broadtail-processed Lamb" on labels in the manner required where an election is made to use that term in lieu of the term "Dyed Lamb".

7. 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.

8. Failing to disclose on labels that fur products are composed in whole or in substantial part of paws, tails, bellies, sides, flanks, gills, ears, throats, heads, scrap pieces or waste fur.

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

10. 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.

11. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on labels in the sequence required by Rule 30 of the aforesaid Rules and Regulations.

12. Failing to set forth separately on labels attached to fur products composed of two or more sections containing different animal fur the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to the fur comprising each section.

13. Failing to set forth on labels the item number or mark assigned to a fur product.

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 in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Setting forth on invoices pertaining to fur products any false or deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.

3. Misrepresenting in any manner, directly or by implication, the country of origin of the fur contained in fur products.

4. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

5. Failing to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of the word "Lamb".

6. Failing to set forth the term "Dyed Mouton Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb".

7. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb".

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

9. Failing to set forth on invoices the item number or mark assigned to fur products.

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

3. Fails to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of the word "Lamb".

4. Fails to set forth the term "Natural" as part of the information required to be disclosed in advertisements 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.

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 respondent full and adequate records disclosing the facts upon which such claims and representations are based.

It is further ordered, That Abraham Raben, also known as Al Raben, an individual trading as Furs by Raben of Clayton, or under any other trade name and respondent's representatives, agents 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 misbranding fur products by substituting for the label 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.

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

IN THE MATTER OF

OXWALL TOOL COMPANY, LTD., ET AL.

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

Docket 7491. Complaint, May 15, 1959—Decision, Jan. 16, 1964

Order denying motion for further modification of amended order, dated September 9, 1963, 63 F.T.C. 566, and restating the provisions of the cease and desist order—requiring conspicuous affirmative disclosure of the country of origin on imported handtools themselves and on the containers thereof.

OPINION OF THE COMMISSION

JANUARY 16, 1964

This proceeding is concerned with respondents' obligation to disclose the foreign origin of tools they import for domestic sale and distribution. We have already considered this matter on two other occasions, and it has now come up on respondents' motion and affidavit requesting clarification and modification of the Commission's final order entered September 9, 1963 whose pertinent provisions are set forth in the margin.[1] At respondents' request the effective date of that order has been stayed pending our decision on their latest motion.

Respondents contend that the modification of the original order to cease and desist, incorporated in the order of September 9, 1963, does not go far enough to meet the exigencies of their business and, in fact, has made uncertain the measures they must undertake to assure compliance with the Commission's order.

Our original order prohibited respondents from selling imported tools without conspicuously disclosing thereon the country of origin

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[1] "IT IS ORDERED that respondents * * * do forthwith cease and desist from:

"1. Offering for sale, selling or distributing said products without affirmatively and clearly disclosing in a conspicuous place on the products themselves the country of origin thereof.

"2. Offering for sale, selling or distributing said products in containers or with attachments in a manner which causes the mark on the products identifying the country of origin to be hidden or obscured without clearly disclosing the country of origin of the products in a conspicuous place on the container or attachment. Provided, however, that in those instances where (a) two or more products imported from two or more foreign countries or places are packaged together in the same container, where (b) the imported articles themselves are clearly and conspicuously marked with the country of origin, and where (c) the container is unsealed and the articles may be readily removed therefrom for examination by a prospective purchaser prior to purchase, the disclosure, in a conspicuous place on the container, that all or a portion of the contents of such package are imported and that the country or place of origin of foreign made products is set forth on each product, shall constitute compliance with the terms of this order."

or from selling imported tools in containers or with attachments obscuring the mark on such products identifying the country of origin, unless this information is conspicuously disclosed on the container or attachment.[2] Oxwall and the individual respondents do not object to making the required disclosure on the tools themselves but argue strenuously that any requirement going beyond the obligation to generally disclose on the containers or attachments of their products that such merchandise is imported and requiring in addition the identification of the country of origin of the imported tools on such containers or attachments, as a practical matter, is impossible of fulfillment, or at least unduly burdensome because their sources of supply for identical tools may be scattered throughout the world and they cannot anticipate with accuracy the country of origin of particular articles at any one time. This problem is compounded, respondents assert, when their tools are sold in assortments comprising imports from several countries.

Respondents previously submitted this argument to the Commission in their motion to reopen and modify filed November 20, 1962. In response to these contentions, we reopened the proceeding and modified the challenged prohibition. As amended, the order provides that in those instances where the containers hide or obscure the mark identifying the country of origin on the imported merchandise, a statement on the container to the effect that all or part of the products contained therein are imported and that the place of origin of the foreign articles is set forth on each product will suffice if three conditions are met—first, two or more tools are imported from different countries and are packaged in the same container; second, the imported articles are themselves clearly marked with the country of origin, and third, the articles in the container may be readily removed for inspection prior to purchase.[3]

We first turn to respondents' most serious contention, namely, that under the terms of the order respondents are precluded from utilizing certain methods of packaging, namely, skin and bubble packs.[4] The first sentence of paragraph 2 of the order permits any type of pack-

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[2] The challenged provision of the original order stated as follows:

"IT IS ORDERED that respondents * * * do forthwith cease and desist from:

* * * * * * *

"2. Offering for sale, selling or distributing said products in containers or with attachments in a manner which causes the mark on the products identifying the country of origin to be hidden or obscured without clearly disclosing the country of origin of the products in a conspicuous place on the container or attachment * * *".

[3] See footnote 1, *supra*.

[4] A bubble or skin pack is essentially a container consisting of clear, transparent material, sealing merchandise to a background card. (p. 10, Respondents' affidavit, filed November 1, 1963.)

aging, sealed or unsealed, with no requirement that a notation signaling foreign origin be marked on the container or attachment as long as such container or attachment does not conceal or obscure the mark on the merchandise disclosing the country of origin. Respondent, however, apparently misconstrued this proviso as requiring that in each case the exact country of origin be marked not only on the tool but also on the container or attachment even in those cases where the container or attachment does not obscure the foreign origin identification on the imported item. Their misapprehension on this basic point seems to be the principal source of their difficulties. Assuming that skin or bubble packs are in fact constituted of clear, transparent material as respondents assert in their motion, they should have no insuperable difficulty in complying with the terms of this provision.

We now turn to the ambiguities which respondents assert are inherent in the order. Despite their suggestion to the contrary, the omission of the phrase "or with attachments" from the second sentence of paragraph 2 is intentional.[5] As already pointed out, respondents are free to utilize sealed containers such as bubble or skin packs without any foreign origin identification on these containers as long as such packaging does not obscure the foreign origin mark on the articles enclosed therein. In this connection, we note further that respondents have correctly construed the second sentence of paragraph 2 as limiting their option to apprise prospective customers of the foreign origin of their merchandise by the more general notation on the container that all or part of its contents are imported to those instances where such containers are unsealed and the enclosed items may be readily removed for inspection.

The order, moreover, does not permit the inference that Oxwall is prohibited from using skin or bubble packs in those instances where one or more of the items are imported from two or more foreign countries merely by condition (a) in the second sentence in paragraph 2 of the order;[6] the two sentences in the second paragraph of the order do not limit each other as respondents apparently contend: rather, they afford alternative methods of compliance.

Respondents object further that the use of the term "products" in the first sentence in paragraph 2 of the order is not clear. They assert:

> * * * A literal reading of that sentence, our attorney advises us, may either mean the same item imported from several countries or several items, each

[5] Attachments, for the purposes of this order, are to be construed as packaging or containers consisting of a clear plastic material sealed to a background card.

[6] See footnote 1, *supra*.

of which may come from one or more countries. In either case, whichever the meaning the problem of mistake or unintentional misrepresentation as to country of foreign origin, or deliberate sabotage of our instructions still exist * * *.[7]

A straightforward reading of the order, we hold, can lead to no conclusion except that the term "products" necessarily encompasses both interpretations advanced by respondents. Conceivably, however, respondents may find compliance with the terms of the order not as difficult as they profess, since evidently their protest, to a considerable extent, at least, must be ascribed to a fundamental misapprehension on their part as to the import of the provisions of the amended order.

Submission by respondents of the packaging and foreign origin markings they intend to use to the Compliance Division would be helpful in dispelling the misunderstanding which now seems to exist. Consultation by the Commission's Staff and respondents relating to concrete examples of Oxwall's containers and foreign origin markings in the light of this opinion would be the procedure most calculated to define Oxwall's obligations under the order with dispatch.

Under the circumstances, there is no reason for further extended consideration of respondents' suggested order submitted in their earlier motion filed November 20, 1962. This proposal would provide without qualification that the foreign disclosure requirement is satisfied in the case of all types of packaging by a general statement on the container or attachment to the effect that the contents are imported wholly or in part, and that the country of foreign origin is specifically set forth on the enclosed imported articles. Respondents, in urging the Commission to adopt this course, rely on *Regent Games, Inc., et al.*, Docket No. C-167 (1962) [61 F.T.C. 44], a consent proceeding. In our disposition of this matter, we are not unmindful of the order in *Regent Games*, and in fact we modified Oxwall's order in the light of that precedent. The remedy imposed in each proceeding, however, must be fitted to the facts of the particular case. Although the Commission may, in certain instances, adapt the approach taken in a consent order proceeding to other matters, we have determined that the *Regent* order is not applicable without qualification to the facts of this case. The remedy imposed in consent proceedings, which are devoid of finding of fact, can be applied to other matters only with caution, since cases settled by consent in general give only the broadest outline of the unfair trade practices giving rise to Commission action. In this instance we are persuaded

[7] Respondents' affidavit filed November 1, 1963, p. 7.

that the final order issued September 9, 1963 has afforded respondents as much relief in the light of their practical business problems as is consistent with the right of prospective customers to be fully advised of the origin of Oxwall's products. Accordingly, respondents' request for further modification of the order in this proceeding will be denied.

Final Order

This matter came before the Commission on respondents' motion and affidavit filed November 1, 1963, for a clarification and modification of the final order issued September 9, 1963 [63 F.T.C. 566]. At the same time respondents requested an extension of time within which to file their report of compliance and a stay of the effective date of the order to preserve their right of appeal pending Commission action on their motion. Complaint counsel on November 12, 1963 filed his answer in opposition to respondents' motion and affidavit. The effective date of the final order of September 9, 1963 was stayed until further notice. The Commission has now determined for the reasons stated in the accompanying opinion, construing the order in response to the questions raised by respondents' motion and affidavit, that the final order should not be modified. Accordingly:

It is ordered, That respondents Oxwall Tool Company, Ltd., a corporation, and its officers, and respondents Max J. Blum and Sidney Blum, 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 and distribution of imported merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing said products without affirmatively and clearly disclosing in a conspicuous place on the products themselves the country of origin thereof.

2. Offering for sale, selling or distributing said products in containers or with attachments in a manner which causes the mark on the products identifying the country of origin to be hidden or obscured without clearly disclosing the country of origin of the products in a conspicuous place on the container or attachment. Provided, however, that in those instances where (a) two or more products imported from two or more foreign countries or places are packaged together in the same container, where (b) the imported articles themselves are clearly and conspicuously marked with the country of origin, and where (c) the container is unsealed and the articles may be readily removed

therefrom for examination by a prospective purchaser prior to purchase, the disclosure, in a conspicuous place on the container, that all or a portion of the contents of such package are imported and that the country or place of origin of foreign made products is set forth on each product, shall constitute compliance with the terms of this order.

It is further ordered, That respondents, Oxwall Tool Company, Ltd., Max J. Blum and Sidney Blum, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist as set forth herein.

IN THE MATTER OF

BRILLO MANUFACTURING COMPANY, INC.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 6557. Complaint, May 22, 1956—Decision, Jan. 17, 1964

Order requiring the largest producer of steel wool and steel wool products in the United States, to divest itself absolutely, within one year, of all the assets, properties, rights and privileges, tangible and intangible, relating to the sale of industrial steel wool, acquired by its acquisition in 1955 of the fourth ranking producer of household steel wool, but excluding from the order the plant and fixed assets of the acquired company; to refrain for five years from selling industrial steel wool to customers of the acquired company except as it served them in 1955; and to cease and desist from manufacturing industrial steel wool on the acquired premises except for such amounts as might be a by-product of the manufacture of household steel wool products.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950, hereby issues its complaint, pursuant to Section 11 of the aforesaid Act (U.S.C. Title 15, Sec. 21) charging as follows:

PARAGRAPH 1. Respondent Brillo Manufacturing Company, Inc., (hereinafter referred to as "respondent"), is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business at 60 John Street, Brooklyn 1, New York.

PAR. 2. The Williams Company (hereinafter referred to as "Williams") is a corporation organized and existing under the laws of the State of Ohio, with its office and principal place of business at London, Ohio.

PAR. 3. Respondent is engaged in the production and sale of steel wool and steel wool products for household usage and of steel wool and steel wool products for industrial usage, and other metal wools, in commerce, as "commerce" is defined in the Clayton Act. During the year 1954, respondent's sales of said products exceeded $11,000,000. Respondent is, and prior to the acquisition described in Paragraph 5 hereof was, the largest producer of steel wool and steel wool products in the United States.

PAR. 4. Prior to July 1955, Williams was engaged in the production and sale of steel wool and steel wool products for household usage and of steel wool and steel wool products for industrial usage, in commerce, as "commerce" is defined in the Clayton Act. During the year 1954, Williams' sales of said products were approximately $838,000. Prior to its acquisition by respondent, Williams was one of the four largest producers of steel and steel wool products in the United States.

PAR. 5. On or after July 5, 1955, respondent acquired, for the sum of $800,000, all of the outstanding capital stock and the assets and the business of Williams.

PAR. 6. Prior to the aforementioned acquisition, respondent was the dominant factor in the steel wool producing industry in both the household and the industrial segments of said industry.

Sales by producers of steel wool and steel wool products for household usage totaled approximately $20,000,000 in the United States in 1954. Respondent's sales accounted for approximately 50% of this amount. Respondent's sales, when combined with those of the number two ranking producer in the household market, accounted for approximately 90% of all sales in said market in 1954.

The remaining 10% of 1954 household sales was distributed among the remaining four producers in the household market, including Williams. Williams ranked number four in the household market even though its sales of household steel wool and steel wool products were only a minor fraction of its gross 1954 sales.

Respondent, by virtue of the acquisition of Williams, increased its dominance in the production and sale of household steel wool and steel wool products and eliminated as a competitive factor in the market the fourth ranking producer of said products. Respondent's acquisition of

Williams increased respondent's market share of the household market to a far greater extent than that enjoyed by respondent and Williams combined prior to the acquisition. This disproportionate increase is due to the fact that respondent, by virtue of the acquisition of Williams' facilities, has been able to produce larger amounts of household steel wool and steel wool products from said facilities than Williams produced, while retaining or increasing the production of steel wool and steel wool products for industrial usage from said facilities.

Sales by producers of steel wool and steel wool products for industrial usage totaled approximately $4,500,000 in the United States in 1954. Respondent's sales accounted for approximately 30% of this amount. Respondent's sales, when combined with those of the number two ranking producer in the industrial market, accounted for approximately 55% of all sales in said market in 1954. The remaining 45% of 1954 industrial sales was distributed among the remaining five producers, including Williams, in the industrial market. Williams was the third ranking producer in the industrial market in 1954, its share of said market being approximately 17% of the total market and 33% of the market enjoyed by the smallest five producers. Respondent, by virtue of the acquisition of Williams, increased its dominance in the production and sale of industrial steel wool and steel wool products and eliminated as a competitive factor in the market the third ranking producer of said products.

PAR. 7. In addition to the increased dominance in both the household and industrial markets, as heretofore delineated, respondent, by virtue of the acquisition, has acquired a new location and facilities in London, Ohio, from which shipments of household and industrial steel wool and steel wool products can be shipped to respondent's customers in the western, southern and midwestern areas of the United States at lower freight rates than shipments to said customers formerly made from respondent's Brooklyn, New York, address. Said freight benefits vary from $2.50 to $3.00 per 100 pounds of goods shipped. Freight costs are a major factor in the steel wool industry and steel wool and steel wool products are customarily sold freight prepaid by the producer. As a result of the aforementioned freight benefits gained by virtue of the acquisition, respondent may be able to reduce the prices it charges for its steel wool and steel wool products in both the household and industrial markets. The effect of said freight advantages resulting from the acquisition has had and may have a substantial tendency to further increase respondent's dominance in both the household and the industrial markets.

PAR. 8. Respondent has violated Section 7 of the Clayton Act as amended in that the acquisition of the stock and assets of Williams, as described in Paragraph 5 hereof, may have the effect of substantially lessening competition or tending to create a monopoly in the production and sale of steel wool and steel wool products in the United States and in each of them.

More specifically, the aforesaid effects include the actual or potential lessening of competition and a tendency to create a monopoly in violation of Section 7 of the Clayton Act, as amended, in the following ways, among others:

1. Actual and potential competition between respondent and Williams has been and will be eliminated in the production and sale of household steel wool and steel wool products.

2. Actual and potential competition between respondent and Williams has been and will be eliminated in the production and sale of industrial steel wool and steel wool products.

3. Actual and potential competition generally in the production of steel wool and steel wool products, both household and industrial, may be substantially lessened.

4. Williams has been permanently eliminated as an independent competitive factor in the steel wool industry, in both the household and industrial markets.

5. Respondent's competitive position in the production and sale of household and of industrial steel wool and steel wool products may be enhanced to the detriment of actual and potential competition.

6. Industrywide concentration of the production and sale of household and of industrial steel wool and steel wool products has been and may be increased.

7. The elimination of one of the four leading producers of steel wool and steel wool products in both the household and the industrial markets substantially increases respondent's position and dominance in said markets.

8. The acquisition gives respondent the facilities, the market position and the dominant ability to monopolize or to tend to monopolize the household and the industrial steel wool and steel wool products markets.

PAR. 9. The foregoing acquisition, acts and practices of respondent as hereinbefore alleged and set forth, constitute a violation of Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950.

OPINION OF THE COMMISSION

JULY 31, 1963

By DIXON, *Commissioner:*

I

This is a proceeding under Section 7 of the Clayton Act, as amended,[1] which provides in part as follows:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

We are here solely concerned with the acquisition by the respondent, Brillo Manufacturing Company, Inc. (hereinafter Brillo), of The Williams Company (hereinafter Williams), a corporation competing with Brillo in the manufacture and sale of steel wool products.

This is the third time that this matter is being considered by the Commission and this constitutes the third opinion on the merits. The two preceding opinions, issued May 23, 1958 (54 F.T.C. 1905), and March 25, 1960 (56 F.T.C. 1673), were occasioned by appeals from the hearing examiner's decisions dispositive of respondent's motions to dismiss. In its March 25, 1960, opinion reversing the hearing examiner's initial decision granting the motion to dismiss, the Commission discussed at some length its reasons for holding that the evidence was sufficient to establish a prima facie violation of the statute. Since the respondent has not seen fit to present any additional evidence in its defense,[2] we are reviewing precisely the same evidence we have twice before considered. But this fact does not make the present opinion redundant, for the case before us is now in quite a different posture. Under our practice when a motion to dis-

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[1] 64 Stat. 1125, 15 U.S.C. § 18.

[2] While the respondent has not chosen to adduce any additional evidence beyond that presented during the time when the case-in-chief was in progress, this does not mean that the record is devoid of defensive evidence. During presentation of the case-in-chief the respondent was permitted to engage in cross-examination which extended well beyond the scope of the direct examination. It was also permitted to place in evidence a substantial number of defensive exhibits.

miss is under consideration, all evidence adduced in support of the case-in-chief is viewed in the light most favorable to the complaint.[3] In ruling upon the two motions to dismiss we have never reached the ultimate decision as to whether the facts merit the issuance of an order of divestiture. As we pointed out in the *Vulcanized Rubber* opinion (note 3, *supra*), "The ultimate decision of whether an order to cease and desist will be issued, even in the absence of further evidence, is not reached; and it could well be that a hearing officer, upon full consideration of a proceeding submitted for final decision, after making appropriate determinations concerning the credibility of witnesses, the weight to be given conflicting evidence, and other pertinent questions involved, would dismiss the complaint even though he had theretofore denied a motion to dismiss for failure of the record to establish a prima facie case." What applies to the hearing examiner, of course, applies equally to the Commission and we are not committed at this point to either dismissal or the issuance of a corrective order.

There seems to be little point in reviewing at length all of the elements examined in the preceding opinion which led the Commission to conclude that a prima facie case existed. We do, however, feel the need to enlarge upon some of the points previously made, for the purpose of clarifying our position in the light of recent authoritative decisions by the Supreme and lesser Federal Courts. In this connection it must be remembered that the amended Section 7 is an infant among the antitrust statutes and it is only in very recent years that authoritative precedents have come into being.

II

The acquisition with which we are here concerned took place on July 5, 1955. Brillo acquired all of the outstanding shares of Williams stock for $800,000. At the time of the acquisition the appraised value (net sound value) of Williams was $891,935. The acquisition is very definitely of the "horizontal" type and there is no question that Brillo and Williams did in fact compete in the sale of many steel wool products.

Since the acquisition Brillo has operated Williams as a subsidiary, exercising complete control and direction over its operations. The

[3] "A hearing examiner in ruling on a motion to dismiss for failure of proof, made at the close of the case-in-chief, like a Federal district court in ruling on a similar motion in a nonjury trial, views the evidence and inferences reasonably to be drawn therefrom in the light most favorable to the complaint. Thus, an appeal from a ruling denying such a motion should be granted only when it is apparent that there is in the record no substantial evidence in support of the complaint and the ruling was obviously erroneous." *Vulcanized Rubber and Plastics Company*, 52 F.T.C. 533, 534–535 (1955).

Brillo president is now the president of Williams and the former president of Williams is now the executive vice president and general manager of Williams. With one exception all of the directors on the Williams board are officials of Brillo. Brillo has greatly increased the size of the Williams physical plant and has utilized it to manufacture and ship Brillo-branded products as well as continuing the manufacturing and sale of the Williams product line.

Williams was not a failing company but operated at a profit at the time of the acquisition. The sales and profit position of Williams during the three and one-half years immediately preceding its acquisition is illustrated by the following tabulation:

	1952	1953	1954	1955 to June 29
Sales	$869, 479	$869, 964	$837, 921	$514, 185
Net income	53, 305	62, 736	20, 884	26, 420

The basic raw material from which steel wool is made is a specially processed steel wire made to rigid specifications. All of the United States steel wool producers purchase steel wire from only two sources, American Steel and Wire Division of the United States Steel and The Bethlehem Steel Company. The wire suppliers do not offer quantity discounts and it appears that all producers pay the same basic price for wire regardless of the quantity purchased.

In making steel wool, a continuous length of wire travels at a high rate of speed over a series of tracks and reels. Hardened, sharpened tools are held against the wire at various points, shaving off the tiny V-shaped strands of steel wool. The knives or tools used to shave off the finer grades of steel wool contain teeth which are invisible to the naked eye. The most critical point in the manufacturing process is adjustment of the tool against the wire. Highly competent and well-trained personnel are needed to operate the machines. A training period of from three to six months is required to adequately train an operator.

The steel wool machines themselves are very large, stationary, custom-made units not generally available on the open market. They have no utility or function other than the production of metal wool and may cost as much as $200,000 each. There is available, however, a custom-made machine of German manufacture which is available for a substantially lower price. One of the producers, International Steel Wool Co. of Springfield, Ohio, uses only this cheaper machine and has found it to be satisfactory.

While wools from a base material of bronze or aluminum can be and are produced, this production accounts for a very minor part of the business of any of the producers.

Steel wool itself is most commonly classified into seven grades or sizes: 0000, 000, 00, 0, 1, 2, and 3. Grade 0000 is the finest or smallest grade and grade 3 is the heaviest or most coarse grade.

After production on a steel wool machine, steel wool is further processed into a variety of distinct products and while there is some overlapping it would appear that the products fabricated for one group of consumers or market are generally not useful to other types of consumers constituting other markets.

III

In ruling upon the respondent's first motion to dismiss, the hearing examiner found that the lines of commerce involved in this proceeding are industrial and household. By this it was meant that that group of customers who purchase steel wool products for eventual resale to consumers who will make use of it in their homes constitute a separate and distinct market from that group of purchasers who make commercial, institutional or industrial use of the products. In our opinion upon the cross-appeals taken from the hearing examiner's disposal of the first motion to dismiss we assigned as error the hearing examiner's delineation of the two separate markets or lines of commerce upon the sole basis that the industrial and household markets constitute the areas of effective competition between the acquired and the acquiring corporations. We held that:

* * * The test instead is whether these products are shown by the facts to have such peculiar characteristics and uses as to constitute them a "line of commerce" within the meaning of the act. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). That the acquired and acquiring corporations both made industrial steel wool was only one circumstance to be considered. Additional factors which could have been taken into account include data relating to the manner in which the products are marketed, their physical characteristics, prices and possibly other things bearing on the question of whether or not they may be distinguished competitively from other wares. On the other hand, as the examiner in essence held, the mere fact that articles other than steel wool are marketed for industrial use as abrasives is not adequate legal warrant for including all abrasive products in the relevant line of commerce. The determinations as to the area of effective competition should have been made on the basis of all record facts delineating the relevant market or markets. (54 F.T.C. 1905, 1906.)

Acting in compliance with the Commission's instruction, the hearing examiner re-examined his conclusions as to the lines of commerce involved and in his initial decision of November 25, 1958, again decided that the proper relevant markets would encompass household and industrial steel wools. Our opinion of March 25, 1960 (56 F.T.C.

1672), reversed the hearing examiner on his dismissal of the case but affirmed his findings with respect to the lines of commerce.

Since the proper definition of the lines of commerce here involved has been considered at such lengths in preceding stages of this litigation, only a few comments are necessary at this time. We do not believe that the recent decision of the Supreme Court in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), has changed the law with respect to this concept but constitutes more of a reaffirmation of principles previously announced. The Court held that the boundaries of a market sufficiently well defined to be useful for antitrust purposes " * * * may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." (370 U.S. at 325.)

Without going into burdensome and probably redundant detail pointing out the manner in which the facts in this proceeding meet this criteria, there is utility in a brief discussion of a few salient points which we deem important and controlling. Steel wool is generally recognized as an essentially unique product, *i.e.*, possessing "peculiar characteristics and uses." It can be used either wet or dry and on either a wet or dry surface. It will both clean and polish solid and oxidized surfaces. It is fine and flexible so that it can be used on rough and irregular surfaces.

Respondent urges that many products compete directly with steel wool and should be included within the lines of commerce. It points out that products such as cleansing powders and plastic sponges can be used to clean household pots and pans. Without going into detail concerning these and the many other products which compete with steel wool, we note that no competing product is capable of the variety of applications possible with steel wool. Any householder who has ever utilized steel wool to clean cooking utensils, white-wall tires, golf clubs, rusty tools, linoleum or tile floors, and to remove peeling paint or rust recognizes that this is a uniquely versatile product. The same holds true in the industrial field where steel wool has no peer for smoothing the curved surfaces of fine furniture, for cleaning and smoothing hardwood floors, and deburring metal.

Moreover, both the industry members and the public recognize steel wool as an essentially unique product sold and distributed in its own separate markets. There is little or no cross-elasticity of demand between steel wool and other products. The machinery upon which it is produced cannot be utilized to produce products other than metal wool.

The division of the total steel wool market into the two submarkets of household and industrial follows the practice of the producers themselves. The industry considers the household market a separate and distinct field from the industrial market and different products and prices prevail between the two.

The principal household product is the compressed steel wool pad, sold either impregnated with soap or in boxes containing a separate bar of soap. A product form of less importance in this market is steel wool processed into small balls. On the other hand, industrial steel wool products take a wide variety of forms. Industrial steel wool is sold in huge compressed pads for use on floor grinding and polishing machines; it is also sold in huge rolls for use in various factory operations.

The evidence clearly indicates that both household and industrial steel wool products are sold in separate relevant product markets. The single most peculiar "characteristic and use" of steel wool and steel wool products is that no other product will perform all of the multiple functions of steel wool in either the household or the industrial market. The housewife can buy steel wool for dozens of household uses rather than buying separate products for each use. The same fact applies equally in the industrial field. Although other products may compete with steel wool for some uses, such demand exists at the outer boundaries of the steel wool market and need not be considered in evaluating the competitive impact of this merger between two steel wool producers.

Both parties agree that the section of the country, that is, the relevant geographic market, consists of the entire United States.

IV

The manufacture of steel wool is not a large industry and there have never been more than eight independent producers of steel wool actually operating at any one time.

In 1955, the year of acquisition, there were only seven producers in effective operation. These seven companies and their sales volume in 1955 were as follows:

Company:	*Total Steel Wool Sales*
Brillo Manufacturing Company, Brooklyn, New York	$12, 953, 629
SOS Manufacturing Co., Chicago, Illinois	12, 848, 395
American Steel Wool Company, Long Island City, New York	1, 311, 654
James H. Rhodes & Company, Chicago, Illinois	949, 801
The Williams Company, London, Ohio	935, 913
Durawool Company, Brooklyn, New York	301, 080
International Steel Wool Company, Springfield, Ohio	120, 432

Brillo and Williams were competitors in both the industrial and household steel wool markets. In the year prior to the acquisition Brillo accounted for 46.39 percent of sales in the household market, and 32.6 percent of sales in the industrial market; Williams' share in these respective markets were .3 percent and 18.0 percent. Since the major impact of the merger quite obviously was in the industrial market, we shall turn first to this aspect of the matter.

The term "industrial market" is not comprehensively descriptive of the line of commerce it is here used to describe. The industrial market in this proceeding includes all sales of steel wool to purchasers other than householders. It includes, for example, sales made to the United States Government and sales to hospitals, hotels and restaurants, where it is probably put to much the same use as in a household. In manufacturing, steel wool is used to remove burrs from nonferous metals and laminated plastics. The furniture manufacturing industry utilizes substantial quantities for smoothing down raw woods and for rubbing successive coats of varnish and other finishing agents to produce a desired degree of sheen. Steel wool is extensively used by painting contractors to roughen and clean old painted surfaces. The flooring installation and maintenance trade makes extensive use of steel wool to finish and clean wooden floors. It is also used to remove wax and to otherwise maintain floors of all kinds.

While household steel wool is sold to consumers through retail grocery stores, industrial steel wool is sold to distributors and jobbers who, in turn, resell to hardware stores, building and painting supply houses, and building maintenance supplies dealers. Many of the largest industrial users purchase steel wool directly from the manufacturers through brokers.

The following tabulation shows the total sales made by all participants in the industrial market for the years 1950 through 1956:

TOTAL INDUSTRIAL SALES OF AMERICAN PRODUCERS

Company	1950		1951		1952		1953	
	Amount	Percent	Amount	Percent	Amount	Percent	Amount	Percent
Brillo	$800, 369	17. 6	$1, 070, 156	19. 0	$899, 217	25. 5	$1, 087, 280	26. 3
Williams	1, 136, 473	25. 0	1, 379, 819	24. 4	781, 295	22. 2	790, 718	19. 2
S.O.S	--------	--------	89, 055	1. 6	5, 786	0. 2	6, 279	0. 1
Cleanser	43, 478	1. 0	168, 113	3. 0	21, 110	0. 6	12, 013	0. 3
American	1, 156, 575	24. 4	1, 206, 655	21. 4	825, 965	23. 4	959, 675	23. 3
Rhodes	1, 068, 905	23. 5	1, 329, 040	23. 5	757, 359	21. 5	951, 345	23. 0
Durawool	160, 520	3. 5	232, 078	4. 1	159, 403	4. 5	242, 528	5. 9
International	180, 134	4. 0	170, 181	3. 0	73, 277	2. 1	76, 689	1. 9
Alloy	xxx	--------	xxx	--------	xxx	--------	xxx	--------
	4, 546, 456	100. 0	5, 645, 098	100. 0	3, 523, 412	100. 0	4, 126, 527	100. 0

TOTAL INDUSTRIAL SALES OF AMERICAN PRODUCERS—Continued

Company	1954		1955		1956	
	Amount	Percent	Amount	Percent	Amount	Percent
Brillo	$1,229,187	29.1	$1,582,334	32.6	$1,750,461	33.1
Williams	770,093	18.2	[1] 872,932	18.0	[4] 770,233	14.5
Total			2,455,266	50.6	2,520,694	47.6
S.O.S	11,732	0.3	99,641	2.0	228,548	4.3
Cleanser	52,055	1.2	(2)			
American	908,473	21.5	984,954	20.3	1,013,899	19.2
Rhodes	901,994	21.3	949,801	19.5	990,094	18.7
Durawool	255,833	6.1	249,080	5.1	270,198	5.1
International	98,000	2.3	120,432	2.5	115,045	2.2
Alloy	xxx		112	(3)	151,613	2.9
	4,227,367	100.0	4,859,286	100.0	5,290,091	100.0

[1] Does not include transfer of $86,987 to Brillo.
[2] Acquired by S.O.S.—1954.
[3] Less than five one-hundredths of one percent.
[4] Does not include transfer of $382,299 to Brillo.

Among the significant trends indicated by the tabulation is the dramatic growth of Brillo at the expense of its competitors. In 1950 Brillo ranked fourth in the market, accounting for only 17.6 percent of the total sales. By 1955, prior to the merger, Brillo had increased its market share by 15 percentage points, thereby nearly doubling its share. The three principal competitors which formerly outranked it, American, Williams, and Rhodes, lost a total of approximately 16 percent in market shares. The acquisition of Williams further increased Brillo's share of the market, giving it 50.6 percent as opposed to its 1950 share of 17.6 percent. We do not consider significant the 1956 drop in Brillo and Williams' combined market share since such short run post-complaint aberrations are unlikely to reflect a permanent situation or trend.

As we stated above in this opinion, we do not intend to repeat all of the findings and conclusions made in our preceding opinions and, in particular, in our opinion of March 25, 1960 [56 F.T.C. 1672]. All of the findings and conclusions with respect to industrial market which appear in that opinion continue in full effect and there is no need to restate them here. However, it seems to the Commission that the significance to be attached to market structure data in this proceeding requires some clarification.

In our 1958 opinion we held that it was error for the hearing examiner to hold "* * * that a significant increase in a producer's already substantial share of the market necessarily demonstrates likelihood of statutorily forbidden effects in every distributional situation." (54 F.T.C. 1905, 1907.) In our 1960 opinion we pointed out that our prior ruling was based upon the belief that the hearing examiner "* * * gave overwhelming consideration to market shares to the complete exclusion of all other relevant economic factors." (56 F.T.C. at 1674.) We then pointed out that the hearing examiner apparently misconstrued our prior holding and "He now ignores the great and perhaps conclusive weight to be given to these very same considerations when viewed in connection with an already existing heavy industry concentration and other relevant record facts. When we refused to adhere to the rigid yardstick utilized by the hearing examiner in his earlier ruling, and directed that he look at all the relevant facts of competition, we did not want to be taken to conclude that in certain situations the rigid yardstick of market shares might not only be extremely meaningful, but indeed perhaps conclusive under some circumstances on the issue of probability of competitive injury or tendency to monopoly. Obviously the more concentrated an industry, the more meaningful it becomes; * * *" (56 F.T.C. at 1674.)

The soundness of the Commission's view on this point has recently been confirmed by the Supreme Court. In *United States* v. *Philadelphia National Bank et al.*, 31 U.S. L. Wk. 4650 (June 17, 1963), the Court stated:

[The] intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. 31 U.S. L. Wk. at 4662.

Previously, the Court in its *Brown Shoe* decision had analyzed the entire problem of whether the effect of a merger "may be substantially to lessen competition" and had enumerated a number of economic factors which may "properly be taken into account" in determining the probable competitive effect. It declared:

* * * Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry. That is whether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance with the merger under consideration, which would properly be taken into account. 370 U.S. 294, 321–322.

The Court did not imply, however, that all of these factors would be relevant in every case. Indeed, evidence was not developed with respect to each of these factors in the case then before the Court. The Court explained that "* * * the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its market structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." *Ibid.*, p. 322, n. 38. Obviously, the extent of "further examination of a particular market" required for "judging the probable anticompetitive effect of the merger" will vary from case to case. The relevant factors necessary for judging one case are not necessarily relevant in judging another.

The market structure evidence in this record provides sufficient basis for making the judgment that this merger may tend toward monopoly in the industrial steel wool market. Here we have an industry which was already highly concentrated prior to the merger, and was experiencing increasing concentration. When a merger takes place within the framework of a highly oligopolistic market, economic factors which may be relevant in mergers taking place in less concentrated markets are of little or no importance, while conversely, the materiality of others is intensified. Obviously, in an industry which has always been highly concentrated among a very few firms, factors such as a history of mergers in the industry and of growth of the respondent by mergers are of little significance, for in such an industry no lengthy trends could develop. In the industrial steel wool market three or four additional mergers would produce an absolute monopoly.

In this case the record establishes beyond question that prior to the merger Brillo already was the leading concern in the industrial steel wool market and that the acquisition has served to enhance its power and potential dominance over this market. The record clearly shows a tremendous disparity between the size and resources of Brillo as compared to any of its competitors in this market, excepting S.O.S., which does not appear to be deeply engaged therein. The record shows that Brillo's competitors operate at low profit margins, in part occasioned by an inability to fully utilize their plant capacity. Brillo, on the other hand, would appear to be a profitable concern in a strong financial position.[4] Moreover, it appears that the disparity has progressively widened during the period from 1950 to

[4] As an example of the financial disparity which exists, the remuneration, consisting of salary and dividends, received by Brillo's four top officers in 1956 exceeded the sales of two of its competitors, International and Alloy.

1955, with Brillo increasing its share of the market at the expense of its competitors. As the tabulation of industrial sales which appears above shows, Brillo's share of the industrial market in 1950 was only 17.6 percent. In that year its three principal competitors, Williams, American and Rhodes, had 25 percent, 25.4 percent and 23.5 percent, respectively. By 1955 Brillo had increased its share to 32.6 percent. Williams had dropped to 18 percent while American and Rhodes had dropped to 20.3 percent and 19.5 percent, respectively.

As we pointed out in our opinion of March 23, 1960, the conditions in the industrial market make it extremely unattractive to prospective entrants, and those attempting entry face formidable barriers to success. The increasing dominance of Brillo makes this field even less attractive to prospective entrants. Moreover, Brillo's relatively large sales and profits in the household market free it from sole reliance on competitive circumstances in the industrial market, whereas all but one of its competitors, S.O.S., are dependent entirely on the sales and profits which they earn in the industrial market.

Respondent argues that it is very easy to enter the industrial wool industry and that, therefore, the mere existence of potential entrance was sufficient to undermine any adverse effects which might otherwise result from the merger. Especially important, in its view, was the fact that two firms have in fact entered the industry since World War II.

The record indicates that the chief barrier confronting new entrants in the industrial steel wool industry is that the small size of the industry makes it difficult for new entrants to acquire a sufficient market share to sustain an efficient size operation; thus, even though they may be able to build, equip and operate an efficient plant, they are unable to obtain sufficient sales volume to operate it efficiently. The experiences of Alloy and Durawool demonstrate this problem. Although Alloy had the potential ability to produce at costs comparable to other plants, it was not able to obtain a sales volume sufficient to operate at capacity. Similarly, although Durawool had a larger market share than Alloy, its profit margins were less than one-third those of Brillo's. Its failure to expand significantly its market share—which peaked in 1954—between 1950 and 1956 suggests that its prospects of becoming as efficient as Brillo are not good.

The very fact that there have never been more than eight producers of industrial steel wool speaks ill for the chances of effective price competition in this industry. In such an oligopolistic setting, the chances of effective competition of the type envisioned by the framers of Section 7 are further endangered when the largest producer expands its position *vis-a-vis* its smaller rivals by acquiring one of the largest rivals. There may be truth to respondent's statement that the relatively small size of this industry prohibits the pie from being cut into many pieces. But the future size of the cuts of the pie for all except Brillo is likely to be even smaller as the dominance of Brillo is further enhanced through this merger. Certainly if prior to the merger competitors already found it difficult to expand their market position, and only two new firms entered this industry, it is hardly likely that potential entrants will neutralize the adverse effects of this merger upon competition. In truth, past structural developments in this industry argue to the contrary.

It is the Commission's conclusion that Brillo's acquisition of Williams may lessen competition or tend to monopoly in the industrial steel wool line of commerce throughout the country. The acquisition has significantly enhanced the power of the dominant firm in an already oligopolistic market. Lacking some showing of special circumstances in justification of the merger we must, and do, hold that Brillo has violated Section 7 of the amended Clayton Act.

In the current initial decision from which the respondent is now appealing, the hearing examiner did not consider it necessary to make any finding with respect to the impact of the merger upon the household market, holding: "It must now be considered well settled that an acquisition violates the Act if it has the proscribed effect in any one out of all the relevant lines of commerce." (Initial decision of February 28, 1962, p. 15.) We concur in this view of the examiner.

V

We think there is an alternative route to decision in this case which also fully supports a finding of illegality under Section 7. In its recent decision in *United States* v. *Philadelphia National Bank*, *supra*, the Supreme Court made the following statement concerning the enforcement of Section 7 of the Clayton Act: "in any case in which it is possible, without doing violence to the congressional objective embodied in section 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration." 31 U.S. L. Wk. 4650, 4662. At the time of Brillo's acquisition of Williams, there were in the entire steel wool manufacturing industry only seven firms, and the two leading ones, Brillo and S.O.S., between them accounted for 88 percent of the total sales of the industry. (Williams accounted for 3 percent of such sales.) Under such circumstances, *any* acquisition by Brillo or S.O.S. of one of its competitors would, we believe, be presumptively violative of

Section 7. For the market structure was already so unhealthy, from the viewpoint of preserving conditions favorable to competition, that every additional increase in concentration would almost certainly have a pronounced anticompetitive effect, and indeed bring the industry perilously close to duopoly. As the Supreme Court stated in *Philadelphia National Bank*, "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." 31 U.S. L. Wk., at 4663, n. 42. The instant case reveals a degree of market concentration far greater than was involved in *Philadelphia National Bank*, and therefore an even more streamlined approach than was there adopted by the Supreme Court is appropriate here. When an industry reaches the extraordinary degree of concentration here present, where two firms control almost 90 percent of the total sales of the industry and face only five competitors, any acquisition by the dominant firms of a competitor "is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." 31 U.S. L. Wk. at 4662. No such evidence has been forthcoming in the instant case.

Consequently, the acquisition of Williams by Brillo is seen to be unlawfully independently of our analysis, in an earlier part of this opinion, of relevant product market and barriers to entry. Even if it were the case that the industrial and household markets should be considered together as a single "line of commerce," and that, therefore, the Commission's previous conclusions are not decisive, there is still no affirmative showing that the barriers to entry into the appropriate line of commerce are insubstantial enough to rebut the presumption that the acquisition may substantially lessen competition. And, under the proper approach to Section 7 described by the Supreme Court, the absence of such affirmative proof is decisive in a case involving the extraordinary degree of concentration shown by this record.

Having found a law violation, the Commission is now confronted with the question of the proper remedy. The aim of an order here, as in any merger proceeding, must be to restore competition to the level which existed prior to the acquisition. But in accomplishing this result, care must be exercised to insure that the remedial order will not unduly handicap or restrict the respondent in its operation of a viable business.

After respondent's motion to rest and present this matter for final decision upon the record was granted on August 25, 1961, the hearing examiner solicited the parties' views with respect to the form of order which should be entered. Without conceding any violation, counsel for respondent proposed an order which would divest Brillo of certain assets but would permit it to retain the physical plant and facilities of Williams. Complaint counsel requested a complete divestiture and persuaded the hearing examiner that this remedy was appropriate. Complaint counsel also requested an order which would direct Brillo to refrain from future acquisitions of competitors in the steel wool industry.

Under the circumstances of this proceeding, the Commission feels that its ability to formulate an equitable and effective remedy will be greatly improved by knowledge of the current views of the parties on this point. Thus, an order will issue directing respondent's counsel and counsel supporting the complaint to file, within thirty days, an order deemed appropriate in the light of current industry conditions, together with a brief in support thereof.

The findings and conclusions upon which the Commission's decision is based are its own as set out in this and its preceding opinions. The Commission, therefore, does not adopt the initial decision of the hearing examiner, and our order will provide for such decision to be set aside.

Commissioner Anderson concurs in the result.

Order Providing for Submission of Proposals for Final Order

JULY 31, 1963

This matter having been heard upon the respondent's appeal from the hearing examiner's initial decision filed February 28, 1962, and the Commission, for the reasons stated in its accompanying opinion, having determined that the respondent by the acquisition of The Williams Company, Inc., has violated Section 7 of the Clayton Act, as amended:

It is ordered, That the respondent's appeal seeking dismissal of the complaint be, and it hereby is, denied.

It is further ordered, That the hearing examiner's initial decision be, and it hereby is, vacated and set aside, in lieu of which the Commission hereby adopts the findings and conclusions set forth in its accompanying opinion and in its opinions of May 23, 1958 [54 F.T.C. 1905], and March 25, 1960 [56 F.T.C. 1672].

It is further ordered, That counsel for the respondent and counsel supporting the complaint shall, within thirty (30) days after service upon them of this order, file with the Commission proposed forms of an order deemed appropriate for disposition of this proceeding in the light of the Commission's decision, together with supporting briefs. The Commission thereafter will enter its final order.

By the Commission, Commissioner Anderson concurring in the result.

FINAL ORDER

Pursuant to the Commission's order of July 31, 1963, counsel for the respondent and counsel supporting the complaint having filed with the Commission proposed forms of final orders deemed suitable for the Commission's use in disposition of this proceeding, together with supporting briefs; and

The Commission having considered the proposals and having concluded that the order submitted by respondent's counsel, modified in the interest of clarity and to encompass respondent's successors and assigns, will be appropriate in the light of the Commission's decision:

It is ordered, That respondent Brillo Manufacturing Company, Inc., a corporation, and its officers, directors, agents, representatives and employees, and its successors and assigns, within one year from service hereof shall divest itself absolutely, in good faith, of all assets, properties, rights and privileges, tangible and intangible, of The Williams Company relating to the sale of industrial steel wool, including patents, trademarks, trade names, and customers' lists, acquired by said respondent as a result of its acquisition of the stock of The Williams Company, but excluding the Williams plant, machinery, equipment and other fixed assets.

It is further ordered, That in such divestment no property above mentioned to be divested shall be sold or transferred, directly or indirectly to anyone, who at the time of the divestiture is a stockholder, officer, director, employee or agent of, or otherwise directly or indirectly connected with, or under the control or influence of, respondent or any of respondent's subsidiaries or affiliated companies.

It is further ordered, That from and after the effective date of such divestiture, respondent shall refrain, for a period of five (5) years, from selling industrial steel wool to customers of The Williams Company, excepting that respondent may continue to sell industrial steel wool to any customer it served in common with Williams as of July 5, 1955, providing the maximum unit annual quantity sold to each such common customer does not exceed the total unit quantity which respondent sold to it in the twelve months immediately preceding July 5, 1955.

It is further ordered, That from and after the effective date of such divestiture, respondent shall cease and desist from manufacturing industrial steel wool on the premises acquired from The Williams Company, except such amounts of industrial steel wool as may be incidental or a by-product of the manufacture of household steel wool products on such premises, and which are not suitable for conversion into household form.

It is further ordered, That as used herein the term "industrial steel wool" means steel wool of all grades and finished forms produced for sale to industrial users; the term "household steel wool" means steel wool and steel wool products other than industrial steel wool, and includes all steel wool products produced and sold for use by householders.

It is further ordered, That respondent shall, within ninety (90) days from the date of service upon it of this order, submit, in writing, for the consideration and approval of the Commission, its plans for compliance with this order, including the date within which compliance can be effected.

By the Commission, Commissioner Anderson concurring in the result and Commissioner MacIntyre not concurring.

IN THE MATTER OF

CONRICH, LTD., ET AL.

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

Docket 8583. Complaint, June 28, 1963—Decision, Jan. 18, 1964

Order requiring New York City jobbers of wool products to cease violating the Wool Products Labeling Act and the Federal Trade Commission Act by labeling and invoicing as "100% Cashmere", fabrics which contained substantially different fibers and quantities of fibers, and failing to disclose on fabric labels the true generic names of the fibers present and the percentage thereof.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939 and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Conrich, Ltd., a corporation, and Richard Weinstein, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof, would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Conrich, Ltd., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York. Individual respondent Richard Weinstein, is an officer of the corporate respondent. Said individual respondent, formulates, directs and controls the acts, policies and practices of the corporate respondent, including the acts and practices hereinafter referred to. Respondents have their office and principal place of business located at 257 West 38th Street, New York, New York. Respondents are jobbers and distributors of wool products including fabrics.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939 and more especially since December 1960, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment, shipped, and offered for sale in commerce wool products as the terms "commerce" and "wool product" are defined in said Act.

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

Among such wool products were fabrics stamped or tagged as "100% Cashmere" whereas, in truth and in fact, said fabrics were not composed of 100% Cashmere but contained substantially different fibers and quantities of fibers.

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

Among such misbranded wool products, but not limited thereto, were fabrics with labels which failed: (1) to disclose the true generic names of the fibers present and (2) to disclose the percentage of such fibers.

PAR. 5. The aforesaid acts and practices of respondents constituted misbranding of wool products and 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. 6. Respondents are now, and for some time last past, have been engaged in the offering for sale, sale and distribution of certain products, namely fabrics, to manufacturers and jobbers. In the course 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 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. 7. Respondents in the course and conduct of their business, as aforesaid, have made statements on invoices and shipping memoranda to their customers misrepresenting the character and fiber content of certain of their said products. Among such misrepresentations, but not limited thereto, were statements representing certain fabrics to be "100% Cashmere", whereas said fabrics contained substantially different fibers and quantities of fibers than represented.

PAR. 8. The acts and practices set out in Paragraph 6 and 7 have had and now have the tendency and capacity to mislead and deceive the purchasers of said products as to the true content thereof and to cause said purchasers to misbrand products manufactured by them in which said materials were used.

PAR. 9. The acts and practices of the respondents set out in Paragraph 6 and 7 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, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Michael P. Hughes for the Commission.

Schein & Lazarus, New York, N.Y., for the respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

DECEMBER 4, 1963

On June 28, 1963, the Federal Trade Commission issued a complaint charging respondents with violating the Federal Trade Commission Act and the Wool Products Labeling Act of 1939. The crux of the charge is that respondents' wool products were misbranded as "100% Cashmere", although they contained substantially different fibers and quantities of fibers.

Respondents filed an answer on July 31, 1963, dated July 29, 1963, which is essentially a general denial of the foregoing charges.

On August 29, 1963, Hearing Examiner John Lewis (to whom the case was assigned on June 28, 1963) was served with a request for a prehearing conference.

On September 4, 1963, Acting Director of Hearing Examiners Edward Creel issued an order substituting Hearing Examiner Edgar A. Buttle in this matter.

On September 5, 1963, the undersigned hearing examiner issued an order scheduling a prehearing conference for September 18, 1963, in Washington, D. C., and further ordered the initial hearing, scheduled for September 10, 1963, to be adjourned to a date to be fixed at the prehearing conference.

On September 9, 1963, counsel supporting complaint filed a motion for production of documents by respondents.

On September 13, 1963, respondents' attorney Lester A. Lazarus wrote directly to this examiner requesting an adjournment of said prehearing conference stating his reasons for said adjournment as follows:

The respondent, CONRICH LTD. has found itself unable financially to continue its business and to that extent is presently negotiating with a Committee of its creditors. At the present time, it does not appear likely that the business will continue, but this will not be known for several weeks.

In the event that the business will not continue but will be liquidated pursuant to 'An assignment for the benefit of creditors', then application will most likely be made for permission to consent to a CEASE AND DESIST ORDER. However, this is not yet known, and will not be known for several weeks.

It would be in the interest of everybody concerned if the pre-trial hearing conference is adjourned to some day after October 15, 1963, and I respectfully submit that such adjournment will not prejudice either party, and may ultimately save both the Commission and the respondent a considerable amount of time, effort, and money.

On September 16, 1963, the examiner treated respondents' letter of September 13, 1963, as a motion for adjournment and denied same.

Following a decision to liquidate and go out of business, respondents made a motion, filed on October 7, 1963, to withdraw their prior answer and to file a substitute answer. By order of the hearing examiner withdrawal and substitution were authorized.

On October 7, 1963, the respondents filed the following substitute answer:

COMES NOW the respondents Conrich, Ltd. and Richard Weinstein, individually and as an officer of said corporation and answering the complaint in this proceeding states:

That said respondents elect not to further contest the allegations of fact set forth in the complaint, and that in accordance with Section 3.5(b)(2) of the Federal Trade Commission's Rules of Practice respondents admit all of the material allegations of the complaint to be true. Respondents further waive any rights of hearings as to the facts alleged in the complaint and agree that this answer together with the complaint will provide a record basis on which the hearing examiner may file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. Respondents further waive the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under §3.22.

The hearing examiner has carefully considered the proposed findings of fact and conclusions submitted by counsel in support of the complaint (submission of proposed findings having been waived by respondents) and has found such proposed findings consistent with the uncontested allegations of the complaint.

Upon the entire record in the case, the hearing examiner therefore makes the following findings of facts and conclusions:

FINDINGS OF FACT

1. Respondent Conrich, Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Individual respondent Richard Weinstein is an officer of the corporate respondent. Said individual respondent formulates, directs and controls the acts, policies and practices of the corporate respondent, including the acts and practices hereinafter referred to. Respondents have their office and principal place of business located at 257 West 38th Street, New York, New York. Respondents are jobbers and distributors of wool products, including fabrics.

2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since December 1960, respondents have introduced into commerce, sold, transported, delivered for shipment, shipped, and offered for sale in commerce, wool products as the terms "commerce" and "wool product" are defined in said act.

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

Among such wool products were fabrics stamped or tagged as "100% Cashmere" whereas, in truth and in fact, said fabrics were not composed of 100% Cashmere but contained substantially different fibers and quantities of fibers.

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

Among such misbranded wool products, but not limited thereto, were fabrics with labels which failed: (1) to disclose the true generic names of the fibers present and (2) to disclose the percentage of such fibers.

5. The aforesaid acts and practices of respondents constituted misbranding of wool products and 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.

6. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of certain products, namely fabrics, to manufacturers and jobbers. In the course 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 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.

7. Respondents in the course and conduct of their business, as aforesaid, have made statements on invoices and shipping memoranda to their customers misrepresenting the character and fiber content of certain of their said products. Among such misrepresentations, but not limited thereto, were statements representing certain fabrics to be "100% Cashmere", whereas said fabrics contained substantially different fibers and quantities of fibers than represented.

CONCLUSIONS

1. The acts and practices of the respondents set out in Paragraphs 6 and 7 of the complaint have had, and now have, the tendency and capacity to mislead and deceive the purchasers of said products as to the true content thereof and to cause said purchasers to misbrand products manufactured by them in which said materials were used.

2. The acts and practices of the respondents set out in Paragraphs 6 and 7 of the complaint 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 in commerce within the intent and meaning of the Federal Trade Commission Act. Accordingly, it is

ORDER

Ordered, That respondent Conrich, Ltd., a corporation, and its officers, and Richard Weinstein, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the offering for sale, sale, transportation, distribution, or delivery for shipment in commerce of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding wool products by:

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

2. Failing to securely affix to, or place on, each such 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, and, it is

Further ordered, That respondents Conrich, Ltd., a corporation, and its officers, and Richard Weinstein, individually and as an officer 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 fabrics or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in such products on invoices or shipping memoranda applicable thereto, or in any other manner.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice effective August 1, 1963, the initial decision of the hearing examiner shall, on the 18th day of January, 1964, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Conrich, Ltd., a corporation, and Richard Weinstein, individually and as an officer of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the adopted initial decision.

IN THE MATTER OF

EXQUISITE FORM BRASSIERE, INC.

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

Docket 6966. Complaint, Nov. 29, 1957——Decision, Jan. 20, 1964*

Order—following remand by the court, 301 F. 2d 499, and reconsideration by the Commission, as directed, of previously rejected evidence in support of Section 2(b), Clayton Act, defense—reinstating the desist order of Oct. 31, 1960, 57 F.T.C. 1036, which required an industry leader in the manufacture and sale of brassieres, with principal office in New York City, to cease discriminating in price between competing customers in violation of Secs. 2(d) and 2(e) of the Clayton Act by paying advertising allowances and furnishing "stylists" to certain large retailer customers while not making either available on proportionally equal terms to competing smaller customers.

Mr. Peter J. Dias and *Mr. Francis A. O'Brien* for the Commission.
Mr. Peyton Ford of Washington, D.C., for respondent.

REVISED INITIAL DECISION AFTER REMAND BY ROBERT L. PIPER, HEARING EXAMINER

MARCH 15, 1963

PRELIMINARY STATEMENT

On October 31, 1960, the Commission issued its decision, affirming the undersigned, finding respondent in violation of subsections (d) and (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, also finding that the services in violation of Section

* Amended and supplemental complaint issued August 1, 1958.

2(e) had not been furnished in good faith to meet services furnished by a competitor, and further finding as a matter of law that the good faith meeting of competition defense set forth in Section 2(b) was not applicable to Section 2(d). On November 22, 1961, upon appeal, the United States Court of Appeals for the District of Columbia affirmed the findings of violation of Sections 2(d) and (e) and the finding that respondent's services in violation of Section 2(e) had not been furnished in good faith to meet those of a competitor, but reversing the holding that the good faith meeting of competition defense under Section 2(b) was not applicable to Section 2(d).[1]

The Court remanded the case to the Commission for the reception of respondent's proof, which had been rejected, that its discriminatory payments for services or facilities to some customers had been "in good faith to meet the services or facilities furnished by a competitor." In all other respects, the findings, conclusions and order of the Commission were affirmed.

On May 21, 1962, the Commission's petition for certiorari was denied by the Supreme Court.[2] On June 6, 1962, the Commission remanded the proceeding to the undersigned for the reception of respondent's evidence in support of its Section 2(b) defense to Section 2(d) and such rebuttal evidence as counsel supporting the complaint might offer. Thereafter, additional hearings were held for the reception of such evidence. Both parties filed additional proposed findings of fact, conclusions of law, and briefs. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following additional:

FINDINGS OF FACT

I. The Issue

The sole issue on this remand is whether respondent's discriminatory payments for services or facilities furnished by or through certain customers were made in good faith to meet services or facilities so furnished by a competitor.

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[1] *Exquisite Form Brassiere, Inc* v. *FTC* 301 F. 2d 499 (D.C. Cir. 1961).

[2] 369 U.S. 888 (1962).

II. Good Faith Meeting of Competition

Respondent's legal theory with respect to the Section 2(b) defense of meeting competition as applied to Section 2(d) is that, in addition to meeting specific payments or offers of its competitors to its customers, respondent was entitled to grant promotional allowances, not made available on proportionally equal terms to all competing customers, in response to general systems of promotional allowances prevailing among its competitors. While the undersigned does not agree with this concept of the meaning or construction of the Section 2(b) defense as applied to Section 2(d), in the interest of allowing respondent full and adequate opportunity to present such defense all of respondent's evidence in support thereof was received and has been considered, inasmuch as neither the Commission nor any court has ruled directly on the point.

To begin with, it has been found and affirmed by the Court of Appeals that respondent paid for certain services, primarily newspaper advertising featuring respondent's products, furnished by or through certain customers, without making such payments available on proportionally equal terms to other competing customers, in violation of Section 2(d). This was accomplished by means of a cooperative advertising program under which respondent paid to such customers certain percentages of the cost of their advertising, in the amounts and during the relevant periods as found in the original decision herein.

Respondent established that all, or substantially all, of its competitors, *i.e.*, other brassiere manufacturers, had varied cooperative advertising programs in effect under which they paid all or certain customers a percentage of the cost of their newspaper advertising featuring such competitors' respective products. However, none of these plans or offers was the same as respondent's program. In certain important respects respondent's promotional allowances exceeded those of all competitors. The following chart sets forth the terms of the cooperative advertising programs of respondent and its competitors as found in the record:

COOPERATIVE ADVERTISING OFFERS

Company	Years	Percent paid	Other features	Limitation on advtg. (based on purchases)	Required lineage	Required No. of ads	Time period
Exquisite [3]	1955	60		No limit	400	Any number	Annual.
		70		No limit	400	5 in 6 mos	
		80		No limit	400	8 in 6 mos	
	1956 to 7/1/57	50		No limit	200	Any number	Annual.
		60		No limit	200	2 in 3 mos	
		70		No limit	200	3 in 3 mos	
		80		No limit	200	4 in 3 mos	
	After 7/1/57	50		No limit	200	Any number	Annual.
Loveable [4]	1955	50		1½%	None	Any number	Annual.
	1956 to 1957	50	On accounts over $2,500, also gave cash refunds of 2, 2½ and 3% for any promotional purpose.	1½%	None	Any number	Annual.
Bali [5]	'55-'57	50		5%	None	Any number	Annual.
Warner [6]	'55-'57	50		3%	None	Any number	Annual.
Playtex [7]	1955 to 1957	50	Also gave 6% cash refund on purchases, if customer's ads totaled at least 6% of purchases.	12%	None	Any number	Quarterly.
Formfit [8]	'55-'57	50		3%	None	Any number	Annual.
Maidenform [9]	1—6/55	50		2%	None	Any number	6 months.
	6/55 to 12/55	50		3%	None	Any number	6 months.
		75		3%	400	4 in 6 mos	6 months.
	1/56-6/57	50		3%	None	Any number	6 months.
	After 6/57	50		5%	None	Any number	6 months.
		75		5%	400	4 in 6 mos	6 months.
Jantzen [10]	1/55-6/55	50	Only if bought at least $500	5%	None	Any number	6 months.
	7/55-6/56	50	Only if bought at least $750	5%	None	Any number	6 months.
	6/56-6/57	50	No required minimum	5%	None	Any number	6 months.
	After 6/57	50	Only if bought at least $1,000	5%	None	Any number	6 months.
Lily [11]	'55-'57	50		5%	None	Any number	Annual.
Stein [12] (Perma-lift)	'56-'57	50		5%	None	Any number	Annual.
Peter Pan [13]	'55-'57	50	Plus 100% of any "color" costs	5%	None	Any number	Annual.
Sarong [14]	'55-'56	None					
	'57	75		n.a.	n.a.	n.a.	

Source of Data

[3] Admitted in answer, and found in original decision.
[4] RX-2, Transcript 457-462.
[5] Transcript 375-7, 986; RX-29.
[6] Transcript 392-3.
[7] Transcript 496-498, 1051.
[8] Transcript 515.
[9] Transcript 331-3.
[10] RX-23 thru RX-28; Transcript 475-6, 963-4.
[11] Transcript 447-8.
[12] RX-3.
[13] Transcript 489.
[14] Transcript 471.

The foregoing chart establishes that while respondent's competitors were generally engaging in cooperative newspaper advertising, respondent was not in fact meeting their competitive offers, but was allowing greater amounts of cooperative advertising and larger payments therefor than any of its competitors, and hence was beating rather than meeting such competition. During the relevant years respondent paid 80% of certain customers' costs of advertising, under the circumstances set forth above, more than any other competitor. The increased amounts paid for a multiplicity of advertisements during a given period *at the option of the customer* also negates any possibility that they were in fact to meet competition. In addition, respondent granted an unlimited amount of cooperative advertising, whereas all of its competitors limited the amount of their cooperative advertising to a percentage of the amount of the customers' purchases, most commonly 5%.[15] Furthermore, as shown above, respondent required for payment of its minimum percentage of cooperative advertising costs either 400 or 200 line advertisements, whereas none of its competitors had any lineage requirement for their minimum cooperative advertising payment, and only Maidenform, during a portion of the relevant period, had any lineage requirement for a higher percentage of payments, which percentage was not the same as that granted by respondent.

While the Commission and the courts have not construed the Section 2(b) meeting-of-competition defense as applied specifically to Section 2(d), it is well settled that such a defense is limited to meeting a competitor's offer and does not encompass granting more favorable terms, *i.e.*, beating those offered by a competitor. Section 2(b) provides that a seller may rebut the prima facie case by showing that his "furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet * * * the services of facilities furnished by a competitor." As the Supreme Court observed in the Standard Oil case:[16]

> The defense in subsection (b), now before us, is limited to a price reduction made to meet in good faith an equally low price of a competitor. It thus eliminates certain difficulties which arose under the original Clayton Act. For example, it omits reference to discriminations in price "in the same or different communities * * *" and it thus restricts the proviso to price differentials occurring in actual competition. It also *excludes reductions which undercut the "lower price" of a competitor.* * * (Emphasis supplied.)

[15] In addition to the evidence set forth in the chart above, respondent's Exhibit 6 admits that it was the first manufacturer after January 1, 1956 to pay cooperative advertising allowances for "production" costs, and that "it has always granted the most generous cooperative advertising allowances in the industry."

[16] *Standard Oil Co.* v. *FTC,* 340 U.S. 231 (1951).

The Supreme Court also has held that the question of whether a respondent's discriminatory prices (promotional allowances) were made to in fact meet competition is a question of fact for the determination by the Commission. As the Court stated in *Staley*:[17]

> Congress has left to the Commission the determination of fact in each case whether the person, charged with making discriminatory prices, acted in good faith to meet a competitor's equally low prices. The determination of this fact from the evidence is for the Commission.

The Court further stated therein:

> * * * We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would *in fact meet* the equally low price of a competitor. Nor was the Commission wrong in holding that respondents failed to meet this burden. (Emphasis supplied.)

This latter statement was quoted with approval by the Court in *Standard Oil.*[18]

Assuming *arguendo* that respondent's cooperative advertising program did in fact meet the terms of one or some of its competitors' advertising programs, as distinguished from individual offers to a customer or customers of respondent, it is well settled that the good faith meeting of competition defense is restricted to individual competitive situations and does not apply to the meeting of a competitor's discriminatory plan or system. In the original decision herein such a holding with respect to the meeting-of-competition defense as applied to Section 2(e) was affirmed by the Commission and the Court of Appeals. As the Commission stated:

> In his consideration of the respondent's defense that it was meeting competition in the furnishing of the services of the stylists [the 2(e) count] the hearing examiner applied substantially the same tests which have been applied by the Commission and the courts in cases where the meeting competition defense has been raised to justify a price discrimination under Section 2(a) of the Act. * * * he concluded that the stylists' plan was designed and used by respondent as a general method of sales promotion and not for the purpose of meeting similar services furnished by other brassiere manufacturers in *individual competitive situations.* We are convinced that the hearing examiner's appraisal and evaluation of the evidence was correct and that his holding that respondent had not furnished the services of stylists in good faith to meet competition is fully supported by the record. (Emphasis supplied.)

With regard to this conclusion, the Court of Appeals stated:

> We think the Commission's finding is sufficiently supported. The same observation applies to the defense proffered by Exquisite to the effect that the stylists were used only to meet competition.

[17] *Federal Trade Commission* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945).
[18] Footnote 16, *supra.*

In its consideration of the applicability of Section 2(b) to Section 2(d), the Court of Appeals pointed out the similarity between Sections 2(e) and 2(d), one prohibiting the discriminatory furnishing of services and facilities, and the other prohibiting the discriminatory payment for such, which led the Court to conclude that Section 2(b) applied to Section 2(d) in the same manner as it had been held to apply to Section 2(e).[19] For the same reasons, it seems apparent that the construction of the defense of meeting competition in good faith with respect to Section 2(d) must be the same as that applied to Section 2(e).

The Supreme Court in a number of decisions has made it clear that the meeting of competition defense is limited to individual competitive situations and does not apply to meeting a competitor's like discriminatory system. The following decisions and quotations appear pertinent:

Federal Trade Commission v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945).

* * * Thus it is the contention that a seller may justify a basing point delivered price system, which is otherwise outlawed by § 2, because other competitors are in part violating the law by maintaining a like system. If respondents' argument is sound it would seem to follow that even if the competitor's pricing system were wholly in violation of § 2 of the Clayton Act, respondents could adopt and follow it with impunity.

This startling conclusion is inadmissible only upon the assumption that the statute permits a seller to maintain an otherwise unlawful system of discriminatory prices, merely because he had adopted it in its entirety, as a means of securing the benefits of a like unlawful system maintained by his competitors. But § 2(b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition. Respondents are here seeking to justify delivered prices which discriminate in favor of buyers in Chicago and at points nearer, freightwise, to Chicago than to Decatur, by a pricing system involving phantom freight and freight absorption. We think the conclusion is inadmissible, in view of the clear Congressional purpose not to sanction by § 2(b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another.

Federal Trade Commission v. *Cement Institute, et al.*, 333 U.S. 683 (1948).

Section 2(b) permits a single company to sell one customer at a "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." But this does not mean that § 2(b) permits

[19] In a recent decision, the Commission conceded the applicability of the Section 2(b) defense to Section 2(d) *J. A. Folger & Co.*, 61 F.T.C. 1166, Docket 8094 (1962).

a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others. We held to the contrary in the *Staley* case. There we said that the Act "speaks only of the seller's 'lower' price and of that only to the extent that it made 'in good faith to meet an equally low price of a competitor.' The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition."

Standard Oil Co. v. *FTC*, 340 U.S. 231 (1951).

* * * None of these changes, however [in the original Clayton Act] cut into the actual core of the defense. That still consists of the provision that wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price. Actual competition, at least in this elemental form, is thus preserved.

Federal Trade Commission v. *National Lead Company, et al.*, 352 U.S. 419 (1957).

Respondents contend that the cease and desist order, as written, exclude the benefits of § 2(b) of the Clayton Act. While §2(b) "does not concern itself with pricing systems * * * [but] only [with] the seller's 'lower' price and [with] that only to the extent that it is made 'in good faith to meet an equally low price of a competitor,' *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945), this section is read into every Commission order. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 476 * * *. This is not to say that a seller may plead this section in defense of the use of an entire pricing system. The section is designed to protect competitors in individual transactions.

Federal Trade Comm'n v. *Standard Oil Co.*, 355 U.S. 396 (1958).

Both parties acknowledge that discrimination pursuant to a price system would preclude a finding of "good faith." *Federal Trade Comm'n* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *Federal Trade Comm'n* v. *Cement Institute*, 333 U.S. 683 (1948); *Federal Trade Comm'n* v. *National Lead Co.*, 352 U.S. 419 (1957).

The dissenting opinion also observed:

The Court concedes Standard did not meet the burden of proving its good faith if its discriminatory prices were made pursuant to a pricing "system" within the meaning given that term by *Federal Trade Comm'n* v. *Staley Co.*, 324 U.S. 746; *Federal Trade Comm'n* v. *National Lead Co.*, 325 U.S. 419.

Respondent contended, and in fact offered evidence to attempt to establish, that it granted promotional allowances to some customers and not to other competing customers, because its competitors were granting such allowances to some customers and not to such others, arguing that this tended to establish respondent's "good faith" in meeting competition. Actually this establishes the contrary. It amounts to arguing that good faith requires one to discriminate because one's competitors are discriminating. If respondent, as it here concedes, was making such payments to some customers and not to other competing customers in order to meet competition of the same kind, then respondent knew that its competitors' promotional allowances, like its own, were not available to competing customers upon proportionally equal terms and hence were unlawful. In both *Staley* and *Standard Oil*, *supra*, the Supreme Court held that a good faith meeting of competition entails the meeting of a lawful price or offer of a competitor. As the Court stated in *Standard Oil:*[20]

> In the *Staley* case, *supra*, most of the Court's opinion is devoted to the consideration of the evidence introduced in support of the seller's defense under § 2(b). The discussion proceeds upon the assumption, applicable here, that if a competitor's "lower price" is a lawful individual price offered to any of the seller's customers, then the seller is protected, under § 2(b), in making a counteroffer provided the seller proves that its counteroffer is made to meet in good faith its competitor's equally low price.

Further, in footnote 14, the Court stated:

> * * * The Chairman of the House Conferees also received permission to print in the Record an explanation of the proviso. 80 Cong. Rec. 9418. This explanation emphasizes the same interpretation as that put on the proviso in the *Staley* case to the effect that the lower price which lawfully may be met by a seller must be a *lawful price.* (Emphasis supplied.)

In *Staley*, hereinabove quoted, the Court found that it was "the clear Congressional purpose not to sanction by Section 2(b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another."

Either respondent did or did not know what the cooperative advertising offers of its competitors were. If it knew and was in fact meeting them, then it had reason to believe and in fact knew that such systems were discriminatory and hence unlawful. Thus meeting them could not be a good faith meeting of competition, as pointed out by the Supreme Court. On the other hand, if it did not know the terms which its competitors in fact were offering, then it did not in good faith have reason to believe that its discriminatory allowances were in fact meeting competition. As the Supreme Court further pointed out in *Staley*, while a seller is not required "to justify price discrimination by showing that in fact they met a competitive price, * * * the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."

[20] *Standard Oil Co.*, v. *FTC*, 340 U.S. 231 (1951).

Thus the barrenness of respondent's contention that it is entitled to meet a generally prevailing system of promotional allowances, as distinguished from individual competitive offers, is demonstrated.

In addition to its broad contention concerning the applicability of the Section 2(b) defense to a meeting of general systems of competitors, considered above, respondent also offered evidence in an attempt to establish that its specific promotional allowances proven in the case-in-chief in fact met specific allowances granted to the same customers by its competitors.[21] In this connection, respondent had a search conducted during the remand hearings to ascertain whether any such customers had received any cooperative advertising allowances from its competitors either shortly before or after receiving the proven cooperative advertising allowance from respondent. Thus respondent did not know whether any specific customer had been granted an allowance by any competitor at the time respondent granted an allowance to such customer, and, as the record demonstrates, did not in fact make any attempt to actually meet any such specific allowances. It has been found hereinabove that respondent did not in fact meet any prevailing promotional allowances but granted greater amounts and larger payments than any of its competitors.

Patently, competitors' allowances granted after an allowance by respondent could have no bearing upon a good faith meeting of competition by respondent. For the same reasons, *ex post facto* information that a competitor coincidentally had granted a customer of respondent a cooperative advertising allowance could not have given respondent any reason to believe at the time of its granting of a cooperative advertising allowance that it in fact met the offer of a competitor.[22] In its *Corn Products* [23] and *Staley* [24] decisions, the Supreme Court held that hearsay evidence of a competitor's offers, believed by the respondents therein, was not sufficient "to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price [promotional allowance] would in fact meet the equally low price of a competitor."

In addition to such legal deficiencies, no proof of any competitive allowance was offered with respect to a number of the promotional allowances granted by respondent, and hence as to them the contention cannot even be advanced. Likewise, the finding of violation

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[21] Respondent's Exhibits 30 thru 123, inclusive.
[22] Forster Mfg. Co., Inc. 62 F.T.C. 852, Docket 7207 (1963).
[23] Corn Products Refining Co. v. FTC, 324 U.S. 726 (1945).
[24] Footnote 17, *supra*.

of Section 2(d) affirmed by the Court of Appeals also was based upon the granting by respondent of "push" or "prize" money to sales personnel of a customer. Respondent offered no evidence that this was granted in good faith to meet competition.

CONCLUSION

It is concluded and found that respondent's promotional allowances in violation of Section 2(d) were not made in good faith to meet promotional allowances furnished by a competitor.

ORDER

It is ordered, That the Order heretofore entered by the undersigned and adopted and issued by the Commission be and hereby is reinstated.

OPINION

By Dixon, *Commissioner:*

On November 22, 1961, the United States Court of Appeals for the District of Columbia remanded this case to the Commission and ordered that the respondent, Exquisite Form Brassiere, Inc., hereinafter referred to as Exquisite, be given the opportunity to respond to complaint counsel's prima facie case of discrimination in the payment of promotional allowances prohibited by Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, by presenting the good faith meeting competition defense permitted by Section 2(b) of that Act.[1] In all other respects, the findings of the Commission were affirmed.[2] The matter is presently before the Commission on Exquisite's appeal from the Revised Initial Decision After Remand, issued March 15, 1963, in which the examiner concluded that Exquisite had failed to establish the meeting competition defense. To place the issues now before us in the proper perspective, a review of the proceedings prior to the hearing on remand is necessary.

I

The Commission issued its complaint against Exquisite, which is engaged in the design, manufacture, and sale of brassieres in commerce to department stores, women's specialty shops, and dress shops for resale to the purchasing public, on November 29, 1957, charging a violation of Section 2(d) of the Clayton Act. Specifically, the

[1] 49 Stat. 1526 (1936), 15 U.S.C. 13(b), (d) (1958).

[2] *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission*, 301 F. 2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962) [7 S.&D. 259].

complaint alleged that Exquisite offered and paid cooperative advertising allowances to some, but not to all, of the retail customers competing in the distribution of its products. It further charged that the plan under which said allowances were paid was designed so as to be inapplicable to some of Exquisite's retail customers. An amended and supplemental complaint was issued by the Commission on August 1, 1958, containing a second count charging discrimination in the furnishing of services of "stylists" in violation of Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act.[3]

In his initial decision of January 27, 1960, the hearing examiner found that the cooperative advertising plan used by respondent from August 30, 1954, to January 25, 1956 provided for payment of sixty percent of the cost of advertisements pertaining solely to Exquisite's products placed by a retailer in certain recognized newspapers, provided that the advertisements were not less than four hundred lines.[4] If five such advertisements were placed within a six-month interval, payment of seventy percent of the cost of each was provided. Eight advertisements within a similar interval resulted in the payment of eighty percent of the cost of each. On January 26, 1956, the lineage requirement of four hundred lines was reduced to two hundred. Thereafter, Exquisite paid fifty percent of the cost of one advertisement. For successive advertisements within a three-month period, Exquisite paid sixty percent of the cost for two, seventy percent for three, and eighty percent for four. After July 1, 1957, Exquisite agreed to pay only fifty percent of the cost of all advertisements, regardless of the number placed. No minimum purchase was necessary to qualify for an advertising allowance, nor was a limit imposed on the number of advertisements for which allowances would be granted. In most instances, the allowances took the form of credit on future purchases of Exquisite products. No provisions were made at any time for advertisements of less than two hundred lines or in media other than certain recognized newspapers.

Those customers who did not participate in cooperative advertising were offered a "premium plan." Such customers accumulated one point each time they purchased $10 worth of Exquisite products. When a customer had accumulated thirty points, he became eligible

[3] 49 Stat. 1526 (1936), 15 U.S.C. 13(e) (1958). Respondent was permitted to present a Section 2(b) defense to this charge. The hearing examiner's holding that respondent had failed to establish the defense was adopted by the Commission and affirmed by the United States Court of Appeals.

[4] An Exquisite executive defined the lineage requirement as follows: "In figuring newspaper advertising space there are fourteen agate lines to an inch. That is a unit of measurement to a column inch. That is one inch by one column is fourteen inches."

for certain "premiums" or "prizes." The examiner rejected Exquisite's contention that this plan was a reasonable alternative to the cooperative advertising plan, because "* * * no one could seriously argue that an ice bucket, a pressure cooker, an iron, a percolator, a carving set or a bridge set were reasonable alternatives of proportional equality with hundreds of dollars worth of promotional advertising * * *."[5] Since this plan was discontinued in January 1955, renewed in June 1955, and finally permanently discontinued in January 1956, it was patently not a reasonable alternative. Exquisite's additional contention that its furnishing of display materials constituted a reasonable alternative was also correctly rejected, since these materials were offered and could be obtained by any customer irrespective of his participation in cooperative advertising.

The examiner found that the terms of the above cooperative advertising plan had not been offered or made known to some of Exquisite's retail customers competing with those to whom payments had been made.[6] Others who at one time had been offered the plan were not informed of the subsequent liberalization of the terms.[7] On several occasions, Exquisite failed to abide by the terms of the plan in making its payments. Some retailers received payments computed at greater percentages of the cost of each advertisement than authorized by the plan, while others received payments computed at lesser percentages.[8] The examiner also found that the plan itself was not designed or intended for the use of Exquisite's smaller accounts and, in this additional sense, was not available to all on proportionally equal terms.[9] Finally, there was a finding that Exquisite awarded "push" or "prize" money to a single retailer for

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[5] *Exquisite Form Brassiere, Inc.*, 57 F.T.C. 1036, 1042 (1960).

[6] The Jenart Shop, The Corset Bar, and Jacob's in Paterson, New Jersey, and Sobel's and The Plainfield Lace Store in Plainfield, New Jersey, were not offered and did not receive allowances. Lady Rose, Quackenbush's, The Caroline Shop, The Mart, Goldberg's and Jay Ann's in Paterson, and Tepper's and Rosenbaum's in Plainfield received allowances.

[7] Don Roberts in Plainfield, New Jersey, and Sloshberg's, Ann M. Selby, and Mae's Dress Shop in Trenton, New Jersey, were not informed of the subsequent changes. Lit Brothers, Yards, and Nevius Voorhees of Trenton were offered and received allowances under the plan's subsequent alterations.

[8] The examiner stated: "* * * Some customers were paid 80 percent of the cost of ads when they were only entitled to 50 percent under the terms of the plan; some were paid percentages not even set forth in the plan, such as 75 and 77 percent; and some were paid only 50 percent when they were entitled to a larger amount * * *." *Exquisite Form Brassiere, Inc.*, 57 F.T.C. 1036, 1042 (1960).

[9] An Exquisite executive testified that a retailer who purchased only a small amount of Exquisite products would not be able to participate in cooperative advertising under their plan because the cost of the advertisement to him would exceed his profits from the sale of the products. Ann M. Selby, the owner of a small shop, testified that she did little newspaper advertising because the cost was prohibitive and under no circumstances would place an advertisement as large as 200 lines. The owner of Mae's, another small shop in Trenton, testified that an advertisement in a newspaper would be of little promotional value because the shop was located away from the center of town.

payment to its sales personnel in reward for each Exquisite product sold by them during a limited period of time. This award was not available to competing retailers.

On October 31, 1960, the Commission issued its own opinion in which it adopted the initial decision of the examiner. The ruling that Section 2(b) did not provide a defense to a charge under Section 2(d) culminated in the remand by the court of appeals on November 22, 1961, with instructions to accord to respondent the opportunity of presenting such a defense. We reopened and remanded the matter to the examiner on June 6, 1962, with instructions to comply fully with the mandate of the court of appeals. At the hearing on remand, respondent was accorded the opportunity of presenting its Section 2(b) defense. As previously stated, the matter is now before us on respondent's appeal from the examiner's Revised Initial Decision After Remand, issued March 15, 1963, in which he concluded that respondent's promotional allowances were not made in good faith to meet the competition of similar promotional allowances furnished by competitors.

II

In the present appeal, Exquisite places great stress upon its proposition that the individual discriminatory payments may be excused under the meeting competition defense by proof that these payments were made pursuant to its cooperative advertising plan and that the plan was adopted in good faith to meet the competitive challenge of similar plans utilized by the majority of other brassiere manufacturers. Before reaching this question it should be noted that the instant case has been primarily concerned with individual instances of discrimination. The thrust of complaint counsel's prima facie case was discrimination in specific instances by the furnishing of allowances to some customers while concurrently failing to inform particular competing customers of the terms of the plan. On the basis of such specific evidence, the examiner found discrimination in regard to "various customers" and "some customers" readily identifiable from the evidence. In adopting the examiner's initial decision, we held that a violation of Section 2(d) was sustained "by the showing that the cooperative advertising allowance was granted to some customers but was not offered to other customers competing in the distribution of respondent's products." [10] The court of appeals, in affirming the Commission's finding of a prima facie violation of the statute, referred to these individual instances of discrimina-

[10] *Exquisite Form Brassiere, Inc.*, 57 F.T.C. 1036, 1050 (1960).

tion. Obviously, proof that the plan had been adopted in response to other plans would not excuse the failure on the part of respondent to offer or make known the terms of the plan or its subsequent liberalizations to some customers, while at the same time granting payments under the plan to others competing with those kept in ignorance. Further, such proof would not excuse those particular instances in which Exquisite disregarded the terms of the plan in furnishing allowances. Thus, evidence that respondent's plan was adopted in a general response to other plans, if a defense at all, could only excuse the finding that the plan itself was not designed for the use of smaller retailers and hence was inherently discriminatory. In the present posture of the case, therefore, the first issue to which we address ourselves is whether respondent has rebutted the above-mentioned specific instances of discrimination—the granting of allowances to certain favored retailers while withholding information on the plan's terms from competing retailers, and the failure to abide by the terms of the plan—by showing that the particular allowances granted to the favored retailers in these instances were good faith attempts to counter specific allowances furnished to the same retailers by competing brassiere manufacturers.

An essential element in the establishment of a meeting competition defense is that of "good faith." Implicit within the element of good faith is evidence that the respondent was genuinely responding to some particular action on the part of a competitor. Patently, an awareness of the competitor's allowance prior to the attempt to meet it is an integral aspect of a showing of good faith responsiveness. Examination of the legislative history of this section lends strong support to the requirement of actual awareness of the acts purportedly met. There it was stated:

This proviso represents a contraction of an exemption now contained in section 2 of the Clayton Act which permits discriminations without limit where made in good faith to meet competition. It should be noted that while the seller is permitted to meet local competition, it does not permit him to cut local prices *until his competitor has first offered lower prices*,* * * In other words, the proviso permits the seller to meet the price *actually previously offered* by a local competitor * * *." H.R. Rep. 2287, 74th Cong., 2d Sess., p. 16. (Emphasis supplied.)

In commenting on the Section 2(b) defense, Mr. Chief Justice Stone, in *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945) stated:

* * * The good faith of the discrimination must be shown in the face of the fact that the seller is aware that his discrimination is unlawful, unless good faith is shown, and in circumstances which are peculiarly favorable to price discrimination abuses. We agree with the Commission that the statute

at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor * * *. 324 U.S. at 759–760.

In a case where a proponent of the Section 2(b) defense wholly fails to show any prior knowledge of the acts of his competitor which he purports to be meeting, we conclude that the element of good faith is lacking. The meeting competition defense does not sanction the fortuitous meeting of competition which occurs when the manufacturer discriminates and then in hindsight points to the previously unknown fact that another was granting similar allowances at the same time. The absence of even a scintilla of evidence showing that the proponent of the defense was in some manner aware of its competitors' acts, which it was supposedly meeting, clearly precludes a finding of the good faith responsiveness required by this defense.

In the instant case, several witnesses testified that the practice of cooperative advertising was prevalent throughout the brassiere industry. Many brassiere manufacturers utilized plans similar in some of their terms to respondent's and some had furnished allowances to the stores receiving allowances from Exquisite. Through a search conducted in 1962 by a newspaper clipping service, Exquisite determined the dates on which seven retailers receiving its allowances heretofore determined to be discriminatory had placed newspaper advertisements during the years 1955, 1956 and 1957, featuring the products of other brassiere manufacturers.[11] Although the evidence does not clearly so establish, it appears that these advertisements, which comprise the bulk of respondent's exhibits pertaining to the meeting competition defense, were cooperative in nature, and we will so assume for the purposes of this opinion. Respondent's counsel has incorporated these advertisements into a table, attached hereto as an appendix [page 295, 296 herein], and arranged them so that each Exquisite advertisement placed by these seven retailers is antedated by one of the above advertisements featuring the products of other manufacturers. Respondent urges that said table, admittedly the result of an *ex post facto* search, establishes

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[11] The seven retailers were Lady Rose and Quackenbush's in Paterson, Tepper's and Rosenbaum's in Plainfield, and Lit Brothers, Nevius Voorhees, and Yards in Trenton. The clipping service was instructed to "* * * look for ads for Quackenbush, Lady Rose, Tepper's, Rosenbaum, and Lit Brothers that contained brassiere advertisements promoting competitive brands as close as possible in date to specific dates of Exquisite Form ads....

* * * * * * *

"If there was an Exquisite Form ad in the record for Quackenbush on May 5, 1957, * * * start in with the May 5, 1957 newspaper in Paterson and work forward and backward from that date until he came to a Quackenbush brassiere ad that was either Maidenform or Playtex or these other manufacturers."

that its own advertisements were furnished to meet the specified advertisements of its competitors, and requests us to so find.

We are unable to accept this contention. In the first place, there is considerable doubt as to whether respondent was actually in competition with some of the manufacturers whose advertisements it was purportedly meeting. The president of Lily of France, Inc., testified that his company, a producer of quality products, was in competition with Exquisite, which marketed less expensive products, only in the "broad sense of the word." The president of Warner Brothers stated that his company competed with Exquisite only in Warner's lower priced line. A vice president of Peter Pan Foundations testified that his company specialized in preshaped, padded brassieres, a type not marketed extensively by respondent, and thus sold to a different class of customers. Further, there was no evidence at all indicating the extent of competition between Exquisite and Carnival, Do-All, Goddess, Surprise, Breathin Bra, and Lilyette, all of which placed cooperative advertisements purportedly met by Exquisite.

Even if we assume that Exquisite is generally in competition with all brassiere manufacturers, irrespective of the diverse types and prices of brassieres produced, we are unable to accept the contention that there was a meeting of the listed competitors' advertisements. A search of the entire record fails to reveal either pertinent evidence or an offer of such evidence indicating that respondent was in any manner aware of these particular advertisements of its competitors when its own allowances were granted. Exquisite contends that there was an offer of such proof when, after the record had been closed at the conclusion of the hearing on remand, it moved to reopen to permit it to "* * * adduce direct evidence of Respondent's foreknowledge of the various competing cooperative advertising plans in response to which Respondent's own plans and programs were administered * * *." In support of this motion, Exquisite contended that the element of foreknowledge had been added to the Section 2(b) defense subsequent to the closing of the record by our opinion in *Forster Mfg. Co.*, Docket No. 7207, 62 F.T.C. 852, 888, January 3, 1963. In correctly denying this motion, the examiner held that *Forster*, rather than establishing a new element, merely reiterated and clarified existing elements. Significantly, this motion was limited to evidence of foreknowledge of competitors' "cooperative advertising plans" and did not encompass the production of evidence showing an awareness of the *individual* promotional advertisements incorporated into the table currently under consideration.

Without connecting evidence showing an awareness of the enumerated competitors' advertisements and a genuine responsiveness to them, respondent's table is inconclusive and might be rearranged to show that the majority of the competitors' advertisements were placed in response to those featuring respondent's products. For example, respondent contends that its cooperative advertisements placed by Lady Rose on October 16, 1956, and November 18, 1956, were responsive to those featuring Playtex products placed by Lady Rose on July 18, 1956, and August 16, 1956. However, with nothing more than the bare advertisements to support this contention, it could just as validly be argued that Playtex's advertisement of August 16, 1956, was placed in response to the advertisement featuring Exquisite products which appeared on May 30, 1956, and that Playtex's advertisement of July 18, 1956, appeared in response to Exquisite's of May 10, 1956. A similar rearrangement could be made with the remainder of the table. A finding, therefore, that Exquisite's allowances were furnished to meet the competitive challenge of the competitors' advertisements specified by respondent in the table would, of necessity, be predicated upon sheer speculation. Accordingly, we conclude that respondent's exhibits, as summarized in its table, fall far short of establishing that the discriminatory allowances furnished to the seven named retailers were granted in a good faith response to the enumerated competitors' advertisements.

Moreover, the record is devoid of evidence indicating that the respondent, as a matter of practice and policy, regularly made itself aware of competitors' specific cooperative advertisements and attempted, through allowances, to place similar advertisements of its own in response. At the second hearing, an Exquisite salesman testified that *if* he saw a customer engaging in cooperative advertising with a competitor, he attempted to persuade such customer to advertise Exquisite's products in a similar manner. However, this salesman dealt only with small accounts and was unable to recall any specific instance in the relevant area wherein he had persuaded or attempted to persuade a customer to engage in advertising with respondent. Is was stipulated that a second salesman, if called, would testify in a similar manner. No further evidence of this nature was adduced.

In addition, respondent offered nothing to show that the individual discriminatory allowances furnished The Caroline Shop, The Mart, Goldberg's, and Jay Ann's in Paterson, New Jersey, were good faith attempts to meet competition.[12] Accordingly, we do not feel that respondent has shown in this record that those individual instances of discrimination in which the cooperative advertising allowance

[12] See n. 6, *supra*.

was granted to some customers but not to their competitors and in which there were deviations from the cooperative plan in computing payments were in fact genuinely responsive to any particular competitor's advertisements or were made in good faith to meet the services or facilities furnished by a competitor. The prima facie case relating to these individual instances of discrimination, heretofore affirmed by the Commission and the court of appeals, stands unrebutted. Our conclusion on this point is independent of our consideration of the propriety of adopting an intrinsically discriminatory plan in its totality in an attempt to meet other plans in the industry and is unaffected by our decision on this latter question.

We turn now to the question of whether the examiner's finding that respondent's cooperative advertising plan was inherently discriminatory may be excused by proof that the plan as a whole was adopted in a good faith attempt to meet the competitive challenge imposed by other plans prevailing in the industry. The courts have consistently emphasized that the meeting competition defense does not provide a defense to general systems of competition and is applicable only in individual competitive situations. In *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945), Mr. Chief Justice Stone commented:

> * * * § 2(b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." *The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition.* 324 U.S. at 753. (Emphasis supplied.)

Accord, *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419 (1957), and *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948). This Commission has consistently held that a system of price discrimination adopted as a general competitive measure to secure a larger share of the market and unrelated to a particular competitive situation is not within the protection of the Section 2(b) defense. In *E. Edelmann & Company*, 51 F.T.C. 978 (1955), the Commission stated:

> * * * Furthermore, as found in the initial decision, respondent's pricing system is a continuing one related not to existing competition but to future competition. It is not geared to individual competitive offers or localized price cutting, but instead represents a nationwide system designed to come close enough to its two principal competitors' pricing systems to allow it to retain most of its customers and gain perhaps a few more. The exemption provided under Section 2(b) places emphasis, however, on individual competitive situations rather than upon a general system of competition. *F.T.C.* v. *A. E. Staley*

Mfg. Co., 324 U.S. 746. * * * 51 F.T.C. at 1006, 1007. *Aff'd, E. Edelmann & Company* v. *Federal Trade Commission*, 239 F. 2d 152 (2d Cir. 1956), *cert. denied*, 355 U.S. 941 (1958).

In *C. E. Niehoff & Co.*, 51 F.T.C. 1114 (1955), the Commission commented in like manner.

* * * The initial decision correctly found that respondent's price differentials are a part of a nationwide pricing system formulated to meet competition generally and not designed to meet exactly any competitor's prices.

* * * We do find, however, that a pricing program which provides for an inherent pattern of discrimination among competing customers and is geared generally to competing for business and not specifically for meeting competing prices is not within contemplation of this defense. Respondent has not shown by substantial, reliable and probative evidence on this record that its lower price or prices were made to meet an equally low price or prices of a competitor or competitors. 51 F.T.C. at 1146, 1147. Commission's order modified, *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37 (7th Cir. 1957); Commission's order affirmed in entirety, *Federal Trade Commission* v. *C. E. Niehoff & Co.*, 355 U.S. 411 (1958).

Moreover, in instances where a respondent's attempts to meet competition undercut or go beyond those of his competitors and are more discriminatory toward a certain class or more favorable toward another class, they cannot be excused under the meeting competition defense. *Cf. Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951).

In the instant case, the respondent, in support of its contention that its cooperative advertising plan was adopted in response to other plans, placed in evidence the terms of the plans of seven other brassiere manufacturers.[13] As previouly noted, there is some question as to the degree of competition between respondent and some of these manufacturers. However, for the purposes of this opinion, we assume that Exquisite competed with all of these manufacturers. We further assume, in view of the respondent's motion to reopen the record to allow it to adduce direct evidence of its foreknowledge of its competitors' cooperative advertising plans, that it possessed such knowledge of the particular terms of these various plans during the years relevant to this case.

The vice in respondent's cooperative advertising plan was its pronounced favoritism of larger retailers and its affirmative exclusion of smaller ones. This tendency was manifested in three of its features. First, the requirement that the advertisements be of a certain minimum size—four hundred lines prior to January 26, 1956, and two hundred lines thereafter—operated effectively to prevent the

[13] For a chart summarizing the terms of these plans, see the Revised Initial Decision After Remand, p. 274.

small retailer unable to advertise on such a grandiose scale from receiving allowances. Secondly, the graduated increases in the percent paid for each advertisement as a result of numerous successive advertisements favored the large retailer able to advertise frequently, and discriminated against the medium-sized and smaller retailers who were not able to advertise with the same degree of frequency. For example, a retailer able to place four or more two-hundred-line advertisements within a three-month span early in 1957 would have received payment for eighty percent of the cost of each. A smaller retailer financially able to place only two such advertisements during the same period would have received payment for only sixty percent of the cost of each. Finally, respondent placed no limit on the maximum amount it would pay any retailer during a given interval, while all other plans provided that the maximum amount granted was a fixed percentage of the retailer's purchases. Respondent's plan is thus obviously weighted in favor of the larger retailer and operates affirmatively to exclude from its benefits small retailers.

Some of respondent's competitors' plans utilized minimum participation requirements which had the capacity to exclude small retailers, while others possessed features which favored the larger retailer able to advertise extensively. However, none of these plans employed as many discriminatory features simultaneously as did respondent's. For example, although Jantzen did not require that the advertisements placed be of a specified size, qualification for participation in Jantzen's plan during the relevant years was limited to those merchants who purchased a specified dollar value of Jantzen products. This amount was $500 in 1955, $750 during part of 1956, and $1,000 during 1957. Although this feature doubtless operated to exclude some small retailers, Jantzen did not at the same time favor the larger retailers by increasing the percentage paid for each advertisement when successive advertisements were placed. Regardless of the number placed, Jantzen never paid more than fifty percent of the cost of each advertisement. Further, the maximum amount paid to any single merchant was limited to five percent of that merchant's purchases over a six-month period.

Maidenform's regular plan provided for payment of fifty percent of all advertisements regardless of the size of the advertisement or the previous purchases of the retailer. In June of 1955, Maidenform put into effect a supplemental plan, which functioned concurrently with the regular plan, providing for the payment of seventy-five percent of all advertisements if at least four, four-hundred-line advertisements were placed within a six-month span. The supplemental plan was discontinued in December of 1955 and reinstated in June of 1957. Exquisite's similar lineage requirement and its offer to pay increasing percentages of the cost of each advertisement when a specified number of supplemental advertisements were placed were operational in August of 1954. Accordingly, there can be no contention that these features of Exquisite's plan were adopted to meet Maidenform's supplemental plan, which, as previously stated, became effective in June of 1955.

Two other plans utilized features with a capacity to favor larger retailers. On accounts over $2,500, Lovable awarded certain cash refunds for any promotional purpose, while Playtex gave a six percent cash refund on purchases if the retailer's advertisements totaled at least six percent of the purchases. However, these plans did not simultaneously exclude the small retailer from all benefits by the adoption of requirements that the advertisements be of a minimum size or that the advertising retailer purchase a minimum amount of products. Further, each imposed a ceiling on the amount which would be paid any single merchant.

Considered in its entirety, therefore, respondent's plan went further than any of the plans of its competitors in its discriminatory aspects. The comprehensive effect of respondent's plan was that of greater favoritism toward large retailers and greater exclusion of small retailers than the plan of any other single competitor. Respondent offered no evidence showing the necessity for adopting a plan of such discriminatory proportions. By exceeding the plans of its competitors in total discriminatory effects, therefore, respondent in essence "beat" rather than met those plans. This is a factor which must be considered in determining whether the plan was adopted in good faith to meet the plans of competitors. *Cf. Standard Oil Co.* v. *Federal Trade Commission*, *supra.*

Moreover, respondent's plan was not in any sense of the word responsive to an individual competitive situation. It was operative on a nationwide scale, and was permanent and continuing in nature. Respondent did not make the plan available on an individual basis by offering its benefits solely in particular instances where liberal benefits had been awarded retailers as the result of competitors' plans. It is obvious that the terms of the plan were not formulated to meet the particular terms of another brassiere manufacturer's plan. Respondent's alterations of its terms were not related to changes in other plans. In short, irrespective of the definition of the term, Exquisite's plan was not a response to an individual competitive situation.

Finally, there is every indication that respondent's discriminatory plan, rather than being an effort to retain existing business by meeting competitive offers, was instead an aggressive, competitive measure designed to attract additional business and enhance respondent's position in the market. Factors previously discussed, such as the terms of the plan and its total discriminatory effect, support this conclusion. Further, an Exquisite executive used language in a press release, offered by respondent "for what it was worth", indicating that the company prided itself on being a leader in the cooperative advertising field. There it was said:

> Exquisite Form, with the largest national magazine and cooperative local newspaper advertising program in the industry, seeks to expand its newspaper advertising, not to cut it. To this end, it has always granted the most generous cooperative advertising allowances in the industry.
>
> * * * * * * *
>
> The traditional position of Exquisite Form since the founding of the company, has been to participate in the full cost of cooperative advertising with its customers * * *
>
> Accordingly, Exquisite Form is now pleased to announce its return to policies which have enabled it, and its retailers to flourish.

In addition, there was evidence that Exquisite was the first to employ the innovation of paying production costs when a retailer elected to design his own advertising formats rather than using those provided for him.

We conclude, therefore, that respondent's plan was not adopted in good faith to meet the services or facilities furnished by a competitor, and thus was not excusable under Section 2(b). This conclusion is not predicated upon any single factor, but is the result of a consideration of the entire record and all of the above-mentioned factors. Where our findings in support of this conclusion differ from those of the examiner, his findings are not adopted. Specifically, we find it unnecessary to reach the question of whether the plans of respondent's competitors were themselves intrinsically discriminatory and hence could not be lawfully emulated. Accordingly, we do not adopt the examiner's findings and conclusions relating thereto.

Respondent asserts that it was denied due process of law in several particulars. Essentially, this objection is predicated upon an allegation that the length of time between the two hearings made the production of evidence difficult and upon the examiner's refusal to re-call at Commission expense all of complaint counsel's witnesses whose testimony supported the Section 2(d) charge so that respondent could cross-examine them to establish in part the meeting competition defense. Contrary to respondent's contention, we are not of the opinion that the interval between the two hearings is grounds for dismissal of the charges. Further, without deciding whether a respondent has the right to develop an affirmative defense, such as the meeting competition defense, through cross-examination of complaint counsel's witnesses, we do not believe that the instant respondent could have supplied the missing elements of its defense by a cross-examination of these particular witnesses. Accordingly, we reject respondent's contention of procedural unfairness. Respondent also asserts that the push money charge must be dismissed because the amount paid was small and when considered in isolation would seem to be *de minimis*. This payment was part and parcel of sales transactions and other advertising grants to this favored retailer which were clearly not *de minimis*. When considered thusly, we conclude that jurisdiction was established and that this incident was amenable to a charge under Section 2(d).

In conclusion, we desire to state that this opinion must not be interpreted as a condemnation of cooperative advertising nor as the placing of an impossible burden of proof upon the proponent of a Section 2(b) defense. Instead, we emphasize that the manufacturer engaging in advertising must do so through a comprehensive, nondiscriminatory program containing reasonable alternatives for those small retailers unable to participate in cooperative newspaper advertising. Such a program must not favor the large retailer and should provide for the small retailer some sort of financial aid in methods of advertising economically available to him. Further, the plan, with its alternatives, must be uniformly offered in its entirety to all competing retail customers. Once such a comprehensive program has been established, deviations from it in the form of more generous allowances may be excused in individual instances shown to be good faith attempts to meet promotional allowances furnished by competitors. Considered in its entirety, the evidence of record herein utterly failed to indicate that such was the case with respondent.

For the aforementioned reasons, an order will issue adopting the examiner's Revised Initial Decision After Remand, except as herein modified, and reinstating the order to cease and desist contained in the original initial decision adopted by the Commission on October 31, 1960. Rules of Practice, § 3.24(b), 28 F. R. 7080, 7091 (July 11, 1963).

Commissioners Anderson and Elman concurred in the results.

Appendix

RESPONDENT'S TABLE OF INDIVIDUAL COOPERATIVE ADVERTISEMENTS

Exquisite Form ads			Prior competitors' ads		
Name of store	Source	Date	Date	Brand	Source
Lady Rose	Tr. 72	4/ 6/55	3/10/55	Peter Pan	Ex. 62.
"	Tr. 72	4/ 7/55	3/10/55	Lilyette	Ex. 63.
"	Tr. 72	11/17/55	10/13/55	Maidenform	Ex. 64.
"	Ex. 14C	3/29/56	10/19/55	Playtex	Ex. 37.
"	Ex. 14C	4/18/56	12/ 5/55	Playtex	Ex. 36.
"	Ex. 14C	5/10/56	12/13/55	Peter Pan	Ex. 65.
"	Ex. 14C	5/30/56	12/29/55	Carnival	Ex. 66.
"	Ex. 14C	8/23/56	3/15/56	Carnival	Ex. 67.
"	Ex. 14C	8/30/56	4/ 5/56	Do-All	Ex. 68.
"	Ex. 14C	9/13/56	4/24/56	Peter Pan	Ex. 69.
"	Ex. 14C	9/27/56	5/17/56	Carnival	Ex. 70.
"	Ex. 14C	10/16/56	7/18/56	Playtex	Ex. 71.
"	Ex. 14C	11/18/56	8/16/56	Playtex	Ex. 72.
"	Ex. 14C	11/29/56	9/20/56	Carnival	Ex. 73.
"	Ex. 14C	12/12/56	12/ 5/56	Playtex	Ex. 74.
"	Ex. 14C	1/16/57	12/ 6/56	Playtex	Ex. 39.
"	Ex. 14C	1/ 3/57	12/13/56	Carnival	Ex. 75.
"	Ex. 14C	3/ 4/57	12/26/56	Peter Pan	Ex. 76.
"	Ex. 14C	4/ 4/57	3/ 7/57	Playtex	Ex. 35.
"	Ex. 14C	4/17/57	3/11/57	Playtex	Ex. 77.
"	Ex. 14C	5/15/57	3/21/57	Playtex	Ex. 34.
"	Tr. 73	12/ 4/57	4/24/57	Playtex	Ex. 33.
"	Tr. 73	12/ 4/57	5/16/57	Do-All	Ex. 78.
Quackenbush	Tr. 154	12/12/55	11/21/55	Maidenform	Ex. 124.*
"	Ex. 14C Tr. 167	4/ 9/57	3/19/57	Maidenform	Ex. 45.
"	Tr. 167	6/11/57	5/13/57	Formfit	Ex. 46.
"	Tr. 167	6/18/57	5/20/57	Maidenform	Ex. 47.
"	Ex. 14C	8/16/57	5/21/57	Formfit	Ex. 48.
"	Ex. 14C	8/30/57	5/27/57	Playtex	Ex. 42.
"	Ex. 14C Tr. 166	9/ 4/57	6/13/57	Playtex	Ex. 38.
"	Tr. 166	9/ –/57	6/19/57	Peter Pan	Ex. 49.
Teppers	Tr. 185	10/ 3/55	9/21/55	Warner	Ex. 58.
"	Tr. 182	11/13/57	9/19/57	Goddess	Ex. 61.
Rosenbaum	Ex. 16B	11/20/56	6/ 7/56	Formfit	Ex. 88.
"	Ex. 16B	11/29/56	6/11/56	Surprise	Ex. 89.
"	Ex. 16B	12/ 4/56	6/21/56	Playtex	Ex. 90.
"	Ex. 16B	5/16/57	9/10/56	Playtex	Ex. 91.
"	Ex. 16B	6/17/57	9/18/56	Playtex	Ex. 92.
"	Ex. 16B	7/ 2/57	10/ 9/56	Formfit	Ex. 93.
"	Ex. 16B	7/ 3/57	10/23/56	Formfit	Ex. 94.
"	Ex. 16B	7/16/57	11/12/56	Formfit	Ex. 95.
"	Ex. 16B	10/8 /57	3/ 7/57	Formfit	Ex. 96.
"	Ex. 16B	10/14/57	4/16/57	Maidenform	Ex. 97.
"	Ex. 16B	10/15/57	8/27/57	Formfit	Ex. 98.
Lit Brothers	Tr. 242	7/21/55	5/11/55	Breathin Bra	Ex. 125.*
"	Tr. 242	9/18/55	6/15/55	Lilyette	Ex. 104.
"	Tr. 245	4/ 4/56	8/ 3/55	Peter Pan	Ex. 105.
"	Ex. 15D	4/24/57	2/28/56	Playtex	Ex. 105a.
"	Ex. 15D Tr. 245	5/ 5/57	3/15/56	Breathin Bra	Ex. 106.
"	Ex. 15D Tr. 245	6/23/57	4/10/57	Breathin Bra	Ex. 107.
"	Ex. 15D	8/ 4/57	5/22/57	Breathin Bra	Ex. 108.
"	Tr. 245	8/ 8/57	6/ 5/57	Surprise	Ex. 109.
"	Ex. 15D	9/ 8/57	8/21/57	Maidenform	Ex. 110.
"	Tr. 245	9/ 9/57	9/ 4/57	Maidenform	Ex. 111.
"	Tr. 245	11/17/57	10/ 2/57	Sarong	Ex. 126.*
"	Tr. 433	11/25/57	10/27/57	Peter Pan	Ex. 112.
Nevius Voorhees	Ex. 15C	3/ 4/56	2/17/56	Warner	Ex. 99.
"	Ex. 15C	4/ 9/56	3/19/56	Lilyette	Ex. 100.
"	Ex. 15C	5/14/56	4/20/56	Maidenform	Ex. 101.
"	Ex. 15C	6/25/56	5/ 8/56	Warner	Ex. 102.
"	Ex. 15C	3/22/57	1/ 6/57	Lilyette	Ex. 103.
"	Ex. 15C	4/24/57	2/21/57	Lily of France	Ex. 103a.
Yards	Ex. 15C	3/23/56	12/ 1/55	Bali	Ex. 127.*
"	Ex. 15C	3/18/57	2/14/56	Formfit	Ex. 113.
"	Ex. 15C	4/ 3/57	2/ 3/57	Playtex	Ex. 31.
"	Ex. 15C	5/14/57	2/14/57	Bali	Ex. 113a.
"	Ex. 15C	6/20/57	2/28/57	Jantzen	Ex. 113b.
"	Ex. 15C	8/13/57	3/ 7/57	Perma-lift	Ex. 114.
"	Ex. 15C	8/27/57	4/ 2/57	Warner	Ex. 115.
"	Ex. 15C	9/30/57	5/ 7/57	Jantzen	Ex. 116.

See footnote at end of table.

APPENDIX

RESPONDENT'S TABLE OF INDIVIDUAL COOPERATIVE ADVERTISEMENTS—con.

Exquisite Form ads			Prior competitors' ads		
Name of store	Source	Date	Date	Brand	Source
Yards	Ex. 15C	10/17/57	5/14/57	Perma-lift	Ex. 117.
"	Ex. 15C	11/ 7/57	8/ 8/57	Perma-lift	Ex. 118.
"	Ex. 15C	11/26/57	9/ 9/57	Perma-lift	Ex. 119.
"	Ex. 15C	11/28/57	9/17/57	Bali	Ex. 120.
"	Ex. 15C	12/ 5/57	9/23/57	Playtex	Ex. 32.
"	Ex. 15C	12/ 9/57	10/18/57	Bali	Ex. 121.

*Respondent's Exhibits 124, 125, 126 and 127 were offered, pursuant to a motion to reopen the record, after the official closing of the record on February 9, 1963.

FINAL ORDER

This matter having been heard by the Commission on exceptions to the hearing examiner's Revised Initial Decision After Remand, issued March 15, 1963, and upon briefs in support thereof and in opposition thereto, and the Commission having rendered its decision denying said appeal:

It is ordered, That the examiner's Revised Initial Decision After Remand, as modified in the attached opinion, be, and it hereby is, adopted as the decision of the Commission.

ORDER

It is ordered, That respondent Exquisite Form Brassiere, Inc., a corporation, its officers, directors, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale of brassieres in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

1. Paying, or contracting to pay to or for the benefit of any customer, an advertising allowance, push money or anything of value as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of respondent's products, unless such payment or consideration is offered and otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale of such products:

2. Discriminating, directly or indirectly, among competing purchasers of its products, by contracting to furnish, furnishing, or contributing to the furnishing of the services of stylists or any other services or facilities connected with the processing, handling, sale or offering for sale of respondent's products, to

any purchaser from respondent of such products bought for resale, unless such services or facilities are offered and otherwise made available on proportionally equal terms to all purchasers competing in the distribution or resale of such products.

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

By the Commission, Commissioners Anderson and Elman concurring in the result.

IN THE MATTER OF

IDEAL TOY CORPORATION

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

Docket 8530. Complaint, Sept. 12, 1962—Decision, Jan. 20, 1964

Order requiring a distributor of toys in Hollis, N. Y., to cease representing falsely by means of television commercials that its toy "Robot Commando" would perform acts as directed by vocal commands, including moving forward, turning, firing a "missile" and firing a "rocket".

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

PARAGRAPH 1. Respondent 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 184-10 Jamaica Avenue, Jamaica, Long Island, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of toys and related products, including toys designated "Robot Commando" and "Thumbelina" doll, to distributors and retailers for resale to the public.