corporations, partnerships, associations and other legal entities as well as natural persons.

VIII

Permanente Cement Company shall periodically, within sixty (60) days from the date this order becomes final and every ninety (90) days thereafter until divestiture is fully effected, submit to the Commission a detailed written report of its actions, plans, and progress in complying with the provisions of this order and fulfilling its objectives.

It is further ordered, That the initial decision be, and it hereby is, vacated and set aside with respect to Count II of the complaint.

It is further ordered, That with respect to Count II of the complaint this matter be, and it hereby is, remanded to the hearing examiner for further proceedings in accordance with the directions contained in the accompanying opinion.

It is further ordered, That, upon conclusion of such further proceedings, the hearing examiner shall make and file a new initial decision determining all issues of law and fact raised by the record as then constituted.

Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

DAVID MANN ET AL. TRADING AS NAME BRAND DISTRIBUTORS

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

Docket 8533. Complaint, Oct. 10, 1962—Decision, Apr. 24, 1964

Order requiring a mail order catalog house in Woodside, N.Y., to cease representing that the products they sold—including typewriters, electrical shavers, vacuum cleaners, electric mixers, and rotisserie broilers—were guaranteed without disclosing the limitations on the guarantees, and dismissing charges that it was selling at wholesale prices.

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 David Mann and Morris Appleblatt, individually and as copartners trading as Name Brand Distributors, 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 David Mann and Morris Appleblatt are individuals trading as a copartnership under the name of Name Brand Distributors. Their office and place of business is located at 37–42 58th Street, Woodside, Queens, 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 articles of general merchandise, including typewriters, electric shavers, vacuum cleaners, electric mixers and rotisserie broilers, to the purchasing public.

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

PAR. 4. In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their merchandise, respondents have advertised the same by means of circulars and catalogues circulated and disseminated by and through the use of the U.S. mails to prospective purchasers located in various States other than the State of New York.

PAR. 5. By statements appearing in their catalogues, circulars and other printed advertising matter, respondents have represented and do represent, directly and by implication, that they are wholesalers and that they sell their merchandise at wholesale prices. In explanation of the method to be used by the customer in order to identify what respondents represent as the wholesale cost of their articles of merchandise, respondents have imprinted the following instruction in said catalogue:

HOW TO FIND YOUR WHOLESALE COST

Your Cost is Part of Our Coded Stock Number

Here is a Typical Price Example

No 1014W1285 -- $26.95

1014	x	*1285*
Stock Number		Your Cost is $12.85 Just point off 2 decimal places from the last number on right.

Typical and illustrative, but not all inclusive, of the statements and representations appearing in respondents' catalogues and letters of solicitation are the following:

All list prices shown are either the suggested or retail prices set by the manufacturer.

We are wholesale distributors of nationally advertised NAME BRAND MERCHANDISE.

ADDED NOTE: Once again we wish to impress on you that we will sell you NAME BRAND NATIONALLY ADVERTISED MERCHANDISE at WHOLESALE PRICES—not merely at discount prices.

Smith-Corona Skyriter, No 733M5970	$79.10
Remington "Quiet-Riter Eleven" Portable, No 3000M11995	$145.21
Remington "Travel-Riter" Portable, No 3565M6995	$89.79
Royal "Royalite" Portable, No 808M4995	$79.75
Royal "Futura" Portable, No 800M10995	$142.13
New Norelco "Speedshaver", No 7900B1497	$24.95
New Remington Roll-A-Matic, No 695M1715	$26.95
Lady Sunbeam, No 431M978	$13.95
The Convertible 67 by Hoover, No 67M7995	$109.95
Regina Electrikbroom, No 3911M2997	$49.95
2-Speed Deluxe Chrome Osterizer, No 403M3442	$52.95
Black Angus Monte Carlo King-Size Rotisserie Broiler, No 700M5497	$89.95
Waring Blender, No 702M3069	$47.95

PAR. 6. Respondents in referring to various articles of merchandise, set forth in their catalogues mailed to prospective purchasers who buy for their own use, set out two prices; one, a so-called coded price, is represented to be the wholesale price of the merchandise, and the other, the higher price, is designated as manufacturer's list price or retail price. By means of such pricing methods, the aforesaid quoted statements, and others of like import not specifically set out herein, respondents represent, directly or indirectly, that they are wholesalers who sell all of their merchandise at wholesale prices; that the so-called coded prices, as set out in their catalogues at which the merchandise referred to is offered for sale, are wholesale prices; that the prices designated as manufacturer's list or suggested prices or retail prices in their catalogues are the prices at which the merchandise is usually and customarily sold at retail in the trade areas where the representations are made; and that the difference between their coded price and the manufacturer's list price or retail price represents savings from the usual and customary retail prices in the trade areas where the representations are made.

PAR. 7. In truth and in fact, respondents are not wholesalers with respect to many of the articles offered for sale and sold by them, nor do they offer to sell, or sell, many of their articles of merchandise at wholesale prices but, to the contrary, the prices of many of such articles of merchandise are in excess of wholesale prices. In many instances the coded prices of many articles of merchandise set out in respondent's catalogues are not wholesale prices but are in excess thereof, and the prices designated as manufacturer's list prices or retail prices for many of their articles of merchandise are in excess of the prices at which said merchandise is usually and customarily sold at retail in the trade areas where such representations are made. The difference between respondents' coded prices and manufacturer's list prices or retail prices do not represent savings from the generally prevailing retail price or prices in the trade areas where the representations are made. Therefore, respondents' aforesaid statements and representations referred to in Paragraphs Five and Six are false, misleading and deceptive.

PAR. 8. Respondents, in their catalogues distributed as hereinabove set forth, made the following representations, among others:

GUARANTEE

Every article we sell is brand new and guaranteed to be exactly as illustrated and described. Each item is guaranteed by both the manufacturer and Name Brand Distributors.

PAR. 9. Through the use of the aforesaid statements, respondents represent that their said merchandise is unconditionally and completely guaranteed by respondents and the manufacturers of every article of merchandise in the catalogue.

PAR. 10. In truth and in fact the guarantee provided is and was subject to certain conditions and limitations not disclosed in the advertisements in which such guarantee representation was made, and the terms, conditions and extent to which such guarantee applies and the manner in which the guarantors will perform thereunder are not clearly and conspicuously disclosed in close conjunction with the representations of guarantee. Therefore, respondents' aforesaid representations referred to in Paragraphs Eight and Nine are false, misleading and deceptive.

PAR. 11. 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 of articles of general merchandise, including typewriters, electric shavers, vacuum cleaners, electric mixers and rotisserie broilers and other articles of merchandise of the same general kind and nature as that sold by respondents.

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

PAR. 13. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violation of Section 5 (a) (1) of the Federal Trade Commission Act.

Mr. Marvin G. Rosenbaum and *Mr. Anthony J. Kennedy, Jr.*, supporting the complaint.

Mr. Alexander J. Lekus, New York, N.Y., for respondents.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

NOVEMBER 5, 1963

The complaint in this proceeding charges respondents, David Mann and Morris Appleblatt, individually, and as copartners trading as Name Brand Distributors, a mail catalogue house, with violating Section 5 of the Federal Trade Commission Act by false, misleading and deceptive pricing representations and practices, and deceptive guarantees, in circulars and catalogues disseminated to prospective purchasers of respondents' products through the United States mails.

The complaint avers that, "by statements appearing in their catalogues, circulars and other printed advertising matter, respondents have represented and do represent, directly and by implication, that they are wholesalers and that they sell their merchandise at wholesale prices * * *", whereas,

PARAGRAPH SEVEN: In truth and in fact, respondents are not wholesalers with respect to many of the articles offered for sale and sold by them, nor do they offer to sell, or sell, many of their articles of merchandise at wholesale prices but, to the contrary, the prices of many of such articles of merchandise are in excess of wholesale prices. In many instances the coded prices of many articles of merchandise set out in respondents' catalogues are not wholesale prices but are in excess thereof, and the prices designated as manufacturer's list prices or retail prices for many of their articles of merchandise are in excess of the prices at which said merchandise is usually and customarily sold at retail in the trade areas where such representations are made. The difference between respondents' coded prices and manufacturer's list prices or retail prices do not represent savings from the generally prevailing retail price or prices in the trade areas where the representations are made * * *.

The complaint further avers that respondents, in their catalogues, represent

GUARANTEE

Every article we sell is brand new and guaranteed to be exactly as illustrated and described. Each item is guaranteed by both the manufacturer and Name Brand Distributors.

Thereby respondents represent that their merchandise is unconditionally guaranteed by respondents and the manufacturers when, in fact, the guarantee is and was subject to certain undisclosed conditions and limitations, "and the terms, conditions and extent to which such guarantee applies and the manner in which the guarantors will perform thereunder are not clearly and conspicuously disclosed in close conjunction with the representations of guarantee."

The complaint asserts these allegedly deceptive practices: (1) respondents' representation of their coded prices as wholesale prices when they in fact are not wholesale prices, (2) respondents' use of a list price in close proximity to these coded prices in order to convey the impression that respondents' customers save the difference between the coded price and the list price, when such savings are in fact not afforded, and (3) respondents' failure to set forth in a nondeceptive manner a complete statement of the limitations in the guarantees which they and the manufacturers make as to their products.

In their answer respondents admitted the allegations of the first four paragraphs of the complaint. As a result of a prehearing conference convened immediately prior to the beginning of the hearings, respondents admitted the allegations of paragraphs eight, nine and ten of the complaint.

Respondents' admission of the first four paragraphs of the complaint establishes the jurisdictional prerequisites, and their admission of paragraphs eight, nine and ten of the complaint, as a matter of law and of fact, supports a cease and desist order as to the false guarantee charges. Respondents assert, however, that the issuance of a cease and desist order as to the false guarantee is not required at this time because that practice has been abandoned. Respondents have not offered any evidence from which the hearing examiner can make findings which would establish the defense of abandonment. The guarantee is omitted from respondents' 1962–1963 catalogue in evidence (RX 13).

At the hearings respondents did not prove nor attempt to prove that they are in fact wholesalers, even though their entire sales pitch in CX 1, the 1960–1961 catalogue; RX 12, the 1961–1962 catalogue, and in their sales flyer, CX 2A–D, is based upon the unequivocal representation to prospective customers that such customers do purchase at "wholesale" prices. Respondents' counsel admitted at the prehearing conference and respondent Mann testified in the hearings that 99% of respondents' sales are made directly to the consumers, to the public (Tr. 13).

Moreover, pursuant to written request of counsel supporting the complaint, the hearing examiner took official notice of the meaning of the words "wholesale", "wholesaler", "retail", and "retailer" as follows:

(1) *Wholesale*

Wholesale is defined as "to sell by large parcel generally in original package, and not by retail" (Bouvier's Law Dictionary, page 3454);—

"pertaining to or engaged in trade by the piece or large quantity; selling to retailers or jobbers rather than the consumers at wholesale price; wholesale merchants" (Webster's New International Dictionary);—

"To sell by wholesale is to sell by large parcels generally in original packages and not by retail; to sell goods in gross to retailers who sell to consumers" (Black's Law Dictionary, page 1844).

(2) *Wholesaler*

The Federal Trade Commission in the matter of L. & C. Mayers Co., Inc., 21 F.T.C. Decisions, page 439, defined " 'wholesaler' as one who sells to the trade for resale and seldom if ever to the purchasing public, with the exception that sales to industrial concerns, public utilities, banks and other similar organizations which purchase in quantity lots, i.e., simultaneous sales of more than one of a given item, not for resale but for use by such organizations are considered as wholesale transactions." (This definition was approved by the Court in L. & C. Mayers Co., Inc. *v.* F.T.C., 97 Fed (2), 365.)

The United States Circuit Court for the Second Circuit in Mennen Co. *v.* F.T.C., 288 Fed 774, stated: "Whether a buyer is a wholesaler or not does not depend upon the quantity he buys. It is not the character of his buying but the character of his selling which marks him as a wholesaler * * * A wholesaler does not sell to the ultimate consumer but to a jobber or a retailer.

(3) *Retail*

Retail to sell in small quantities as by the single yard, pound, gallon, etc.—to sell directly to the consumer as to retail cloth or groceries. (Webster's International Dictionary.)

Retail means a sale in small quantity.

The word "retail" in ordinary trade means a sale in small quantity or direct to the consumer. (37A Words and Phrases, page 167)

Retail price is price that ultimate consumer is expected to pay. (37A Words and Phrases, page 187)

(4) *Retailer*

A retailer is one who sells in small quantities directly to the consumer. (37A Words and Phrases, page 172)

Retail sales means sales to consumer rather than to dealers or merchants (*supra*, page 187).

The Federal Trade Commission in its decision in the very recent matter of Helbros Watch Co., Inc., et al., Docket 6807, has in effect adopted the above definitions of a "retailer". The Commission states:

The aforementioned catalog and discount houses were selling respondents' watches to the ultimate consumers and were therefore selling at retail.

This taking of official notice by the hearing examiner did not conclusively prove that of which official notice was taken, but constituted *prima facie* evidence of such matters. Respondents had the right to attempt to disprove at the hearing the matters of which official notice had been taken, but they did not do so.

With the record in this posture, the sole contested issue is whether counsel supporting the complaint have proven by reliable, probative and substantial evidence that respondents' pricing practices and representations typified in respondents' 1960–1961 catalogue, CX 1 in evidence, and their flyer, CX 2A, B, C and D in evidence, are false, misleading and deceptive within the intent and meaning of the Federal Trade Commission Act.

Commission adjudicative proceedings involving issues similar in whole or in part to the issues in this proceeding include: *The Sessions Company*, Docket 7655 [63 F.T.C. 333], Commission decision issued August 1, 1963, adopting the initial decision containing an order to cease and desist; *Sans and Streiffe, Inc.*, Docket 8466, Commission decision issued July 12, 1963 [63 F.T.C. 138], adopting initial decision containing an order to cease and desist only as to the false guarantee charge of the complaint and dismissing the false and deceptive pricing and savings claims; *Majestic Electric Supply Company, Inc.*, Docket 8449 [64 F.T.C. 1166], pending on appeal to Commission from initial decision of hearing examiner, containing an order to cease and desist: *National-Porges Co.*, Docket 8428, Commission decision issued July 15, 1963 [63 F.T.C. 163], vacating initial decision but dismissing complaint for "failure of proof"; *Southern Indiana Wholesalers, Inc.*, Docket 7962, Commission opinion issued November 19, 1962, adopting, after modification, initial decision and issuing order to cease and desist, final order issued January 16, 1963 [62 F.T.C. 46]; *Silvo Hardware Company*, Docket 8561, initial decision of hearing examiner dated August 15, 1963 [64 F.T.C. 409], containing order to cease and desist; *Continental Products, Inc.*, Docket 8517, pending on appeal from initial decision of June 18, 1963 [p. 361 herein], containing cease and desist order.

Proposed findings of fact, conclusions of law, and order have been filed and considered by the hearing examiner. The proceeding is now before the undersigned for final consideration on the entire record, including the complaint, answer, amendment to answer, testimony, and other evidence. All findings and conclusions proposed by the parties which are not hereinafter specifically found or concluded in the precise form proposed, or substantially such form, are hereby rejected. All motions heretofore made, and presently undisposed, which are not otherwise specifically ruled upon in this decision, are hereby denied. After having carefully considered the entire record in this proceeding, the undersigned makes the following:

FINDINGS OF FACT

1. Respondents David Mann and Morris Appleblatt are individuals trading as a co-partnership and conducting a mail order catalogue business under the name of Name Brand Distributors. Their office and principal place of business, for the years 1960 to the present time, was and now is located at 37–42 58th Street, Woodside, New York (Tr. 12).

2. Name Brand Distributors is a catalogue house selling general merchandise at retail directly to the ultimate consumer, to the public (Tr. 13) by the use of catalogues and other sales material disseminated to respondents' prospective customers through the United States mail. Respondents' catalogues for the pertinent periods are in evidence as follows: for the period 1960–1961–CX 1, for the period 1961–1962–RX 12, and for the period 1962–1963–RX 13. The partnership does approximately $350,000 a year business. In 1960 it did approximately $500,000. In 1961 it did a little less than $500,000.

3. Approximately 60% of respondents' sales are made outside the state of New York and 99% of its sales are made directly to the consumers, to the public.

4. More than 40,000 copies of respondents' 1960–1961 catalogues (CX 1) were disseminated by respondents to prospective customers through the United States mails. CX 2A–D is a four-page sales flyer of which more than 60,000 pieces were disseminated during the same general period of time as the 1960–1961 catalogue to prospective customers through the United States mails by respondents. The 1960–1961 catalogue and the sales flyer were mailed by respondents to prospective customers located, among others, in the states of Ohio, Michigan, Wisconsin, New Jersey and Connecticut, and to the trade areas of Trenton and Newark, New Jersey, and Bridgeport and New Britain, Connecticut (Tr. 16; CX 9A–9F).

5. In the course and conduct of their business, and for the purpose of inducing the purchase of their merchandise, respondents have advertised and do advertise said merchandise in the aforesaid "sales flyers", circulars and catalogues, hereinbefore specifically identified (CX 1, CX 2A–2D, RX 12, and RX 13 in evidence), which were and are disseminated through the United States mails, to prospective purchasers located in states of the United States, other than those named in the preceding paragraph, and to trade areas other than those named.

6. However, complaint counsel has confined his proof of specific instances of deception to the trade areas of Newark and Trenton, New Jersey, and Bridgeport and New Britain, Connecticut. This initial decision is based upon the record made as to those four trade areas.

7. Witnesses testified as to the usual and customary retail prices, during the relevant period, in these trade areas, for five models of typewriters, three models of electric shavers, two vacuum cleaners, one osterizer, one rotisserie broiler, and one Waring blender. At the same time, these thirteen items of merchandise were sold at retail in the trade areas named, they were also offered for sale by respondents in their 1960–1961 sales catalogue (CX 1) as follows:

Typewriters:	
Smith-Corona Skywriter	CX 1, page 160
Remington Quiet-Riter Eleven Portable	CX 1, page 160
Remington Travel-Riter Portable	CX 1, page 160
Royal Royalite Portable	CX 1, page 160
Royal Futura Portable	CX 1, page 160
Electric Shavers:	
New Norelco Speed Shaver	CX 1, page 111
New Remington Roll-A-Matic	CX 1, page 111
Lady Sunbeam	CX 1, page 111
Vacuum Cleaners:	
Hoover Convertible 67	CX 1, page 44
Regina Electrikbroom	CX 1, page 46
2-Speed Deluxe Chrome Osterizer	CX 1, page 28
Waring Blender	CX 1, page 28
Black Angus Monte Carlo King-Size Rotisserie-Broiler	CX 1, page 31

8. Respondent David Mann is primarily responsible for preparing the catalogues and other printed sales material which respondents circulate in interstate commerce in order to sell their products, but respondent Morris Appleblatt has full knowledge of the sales material and the representations therein. Appleblatt acquiesces in the circulation of the sales material. The business functions of the partners are roughly delegated so that respondent Morris Appleblatt runs the office and respondent David Mann has basic responsibility for sales and selling.

9. Respondents are now and for some time last past have been engaged in advertising, offering for sale, selling and distributing, at retail to the general public in the manner herein described, articles of general merchandise, consisting of approximately 1200 separate and distinct items (see page 2, Index of CX 1), including, but not limited to, the typewriters, electric shavers, vacuum cleaners, electric mixers and rotisserie broilers, hereinbefore listed.

10. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said articles of merchandise, when sold, to be shipped from their place of business in the state of New York to purchasers thereof located in various other states of the United States and the District of Columbia, and respond-

ents maintain and at all times relevant to these proceedings, have maintained a substantial course of trade in their products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

11. Respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale as aforesaid of articles of general merchandise, including typewriters, electric shavers, vacuum cleaners, electric mixers and rotisserie broilers and other articles of merchandise of the same general kind and nature as that sold by respondents. This merchandise is specifically described in respondents' catalogue, CX 1 in evidence. Respondents, during the relevant period, were in such competition with corporations, firms and individuals in the Trenton and Newark, New Jersey, trade areas, and in the Bridgeport and New Britain, Connecticut, trade areas.

12. The Federal Trade Commission has jurisdiction over the parties to and subject matter of this proceeding, and this proceeding is in the public interest.

13. CX 9A, B, C, D, E and F in evidence is a list of prospective customers in the Trenton and Newark, New Jersey; and Bridgeport and New Britain, Connecticut, trade areas to whom respondents mailed their sales catalogue during the period of time relevant to this proceeding.

14. Respondents warehouse at their place of business in Woodside, New York, the items of merchandise which they offer for sale through their catalogues.

15. Respondents' catalogues for 1960–1961 (CX 1), for 1961–1962 (RX 12), and for 1962–1963 (RX 13), were and are mailed by respondents to prospective purchasers selected from respondents' mailing list. The sales "flyer", CX 2A–CX 2D in evidence, was mailed to prospective purchasers whose names were culled from a mailing list which respondents purchased from Walter Karl, Inc., of Armonk, New York, a broker for such mailing lists. Walter Karl sells the list that he gets from various other people who own them.

16. A photographic reproduction of the third page from respondents' 1960–1961 catalogue (CX 1 in evidence) is:

(CX 1)

HOW TO FIND YOUR WHOLESALE COST

Your cost is part of our Coded Stock Number

Here is a typical price example

No. 1014M1285 --- $26.95

Stock Number 1014M1285 Your Cost is $12.85

Just point off 2 decimal places from the last number on right.

SHIPPING INFORMATION

All merchandise shown in our catalog is stocked in our warehouse and available for immediate delivery. Orders are usually shipped within 24 hours of receipt. We select the method of shipment most rapid and economical for your order, unless you specify a particular carrier, shipping weights are shown in this confidential price book, permitting you to judge parcel post rates. On all orders shipped parcel post you must include sufficient amount to cover postal charges and insurance. Shipments which cannot be handled by parcel post because of size or weight will be shipped via motor freight or Railway Express, charges collect. In case you have included parcel post money a refund will be sent to you immediately.

GUARANTEE

Every article we sell is brand new and guaranteed to be exactly as illustrated and described. Each item is guaranteed by both the manufacturer and Name Brand Distributors.

PRICES

Prices in this catalog are based on costs prevailing at the time of printing. Should the cost of any item decline, our prices will be reduced immediately. If a price goes up, you are billed at the new price. However, if there is a considerable advance in price, we will write you before shipping. All list prices shown are either the suggested or retail prices set by the manufacturer.

HOW TO ORDER

Minimum order: One or more of any item may be ordered, however, the total amount of the order must be at least $15.00.
C.O.D. Orders: Please send 25% deposit on all C.O.D. orders. You save C.O.D. collection fees if total payment is made with your order.

REFUNDS

If for any reason there is a refund due you, a refund check will be sent to you promptly.

TERMS

All prices are net, F.O.B. New York. Please note that all cash and trade discounts have been deducted. Open account to firms rated by Dun and Bradstreet in the first column . . . net 10 days. Personal Checks: Personal checks will delay your order for a few days unless certified. We suggest P.O. Money Orders, Express Money Orders or certified checks for immediate shipment. Checks from dealers or companies listed by commercial agencies are honored immediately.
All prices subject to change without notice.

CLAIMS

Our responsibility passes to the carrier upon turning your shipment over to the carrier in good order. If goods are damaged, pilfered, or lost in transit, contact your shipping agent and file claim. We will of course co-operate with you fully in all ways.

FEDERAL EXCISE TAXES

Where items subject to tax are ordered for any purpose other than RESALE, such as prizes, premiums, gifts, personal use, etc., a federal tax of 10% must

be added. Items in this category are—Diamonds, Jewelry, Watches, Binoculars, Sterling Silver, Luggage (all kinds), Leather Goods, Wallets, Clocks and Silver Plated Holloware.
Note: taxes are based on our wholesale confidential prices and not from list prices.

SHOW ROOM HOURS

We extend a cordial invitation to visit our show room when in the city. Business hours are 9 to 5:30 Monday through Saturday. Closed Saturdays during JULY and AUGUST.

TRADE REFERENCES

Dun and Bradstreet
Jewelers Board of Trade
Chase Manhattan Bank
Long Island City Chamber of Commerce

NAME BRAND DISTRIBUTORS

37–42 58th Street, Woodside, N.Y. HAvemeyer 9–6180

17. In the foregoing third page of their 1960–1961 catalogue, reproduced *supra* (page 507), respondents, *inter alia*, represent (a) that they sell their merchandise at "wholesale" prices; (b) that "all list prices shown are either the suggested or retail prices set by the manufacturer."[1] (c) that the manufacturers' "suggested" or "list" price juxtaposed to the right of respondents' coded wholesale price is the usual and customary price for such merchandise in the trade areas into which respondents mail their catalogues, and (d) that respondents' prospective purchasers in the trade areas into which their catalogues were mailed, buying from them at their coded "wholesale" price save the difference between such coded wholesale price and the manufacturers "suggested" or "list" price. See *Giant Food, Inc.*, Docket 7773, opinion of the Commission dated June 13, 1962 [61 F.T.C. 326], *affirmed*, *Giant Food, Inc.* v. *Federal Trade Commission*, 322 F. 2d 977, No. 17269, decided June 13, 1963 (C.A.D.C.); CCH 1963 Federal Trade Cases, Para. 70810.

18. The essence of the deception proven in this record is (d) above, *i.e.*, respondents' representation, contrary to the fact, that persons buying Name Brand merchandise at respondents' coded "wholesale" price, in the trade areas into which their catalogues were and are mailed, save the difference between the "wholesale" price and the "list" price juxtaposed to the right of the "wholesale" price.

19. Twelve witnesses testified in this proceeding. One was respondent David Mann. Two others were Jeremiah Casey and Myron H. Blumenfeld of Bloomingdale's Department Store, 59th Street and

[1] This representation is also made in the 1961–1962 catalogue, RX 12; and in the 1962–1963 catalogue, RX 13.

Lexington Avenue, New York, New York. Since complaint counsel are not basing their case upon pricing practices in the New York City trading area, it is not necessary to determine whether the testimony of Messrs. Casey and Blumenfeld did in fact establish the usual and customary prices in the New York City trading area for the 13 articles of merchandise here involved.

20. Nine witnesses testified to the usual and customary area retail sale price of the 13 items of merchandise described in paragraph 7, *supra*, in the four trade areas named. The retail establishments with which the witnesses were associated and their positions with the stores were:

Newark, New Jersey:

Fred Grossman, former manager of internal audit department, *Bamberger's department store* (Tr. 80).

William Kinast, home furnishings merchandise manager, *Hahne & Company* (Tr. 165).

Bridgeport, Connecticut:

Walter P. Griffith, controller, *D. M. Read, Inc.* (Tr. 126).

Gavin Semple, general manager, *Howland's Department Store* (Tr. 153).

New Britain, Connecticut:

Percy Katz, buyer, *Birnbaum Furniture Stores* (Tr. 105).

John R. Gehring, owner, *John R. Gehring Company* (Tr. 114).

Trenton, New Jersey:

Harold Koslow, controller, *S. P. Dunham & Company* (Tr. 181).

Benjamin Lavine, partner, *Trenton Lighting Company* (Tr. 200).

Martin Siegel, vice president, *Hamilton Jewelers*, a corporation (Tr. 224).

21. These witnesses testified that the prices at which their respective business concerns sold the indicated items at retail were the generally prevailing retail prices for such items in the trade area.

22. Following is a summary of the evidence relating to the 13 items of merchandise as to which evidence was introduced, showing respondents' coded "wholesale" prices, the "list" prices juxtaposed to the right of the wholesale prices in respondents' 1960–1961 catalogue, the usual and customary retail selling prices testified to in the Newark, Trenton, Bridgeport and New Britain trade areas, the witness testifying and the store selling at the indicated area retail price.

Item	Wholesale price	List price	Usual and customary retail price	Trade area	Witness	Tr. no.	Store
Smith-Corona Skyriter.	$59.70	$79.10	$59.98	Newark	William Kinast	168	Hahne & Co.
Remington Quiet-Riter Eleven Portable.	119.95	145.21	119.95	Newark	Fred Grossman	84	Bamberger's.
			107.50	New Britain	John H. Gehring	124	John H. Gehring Co.
			119.95	Bridgeport	W. P. Griffith	129	D. M. Read, Inc.
			120.00	Newark	William Kinast	169	Hahne & Co.
			110.00	Trenton	Harold Koslow	184	S. P. Dunham & Co.
			118.00	Trenton	Martin Siegel	226	Hamilton Jewelers.
Remington Travel-Writer Typewriter Portable.	69.95	89.79	69.98	Newark	Fred Grossman	84	Bamberger's.
			69.95	Bridgeport	W. P. Griffith	129	D. M. Read, Inc.
Royal Royalite Portable Typewriter.	49.95	79.75	49.95	Newark	Fred Grossman	85	Bamberger's
			49.95	New Britain	Percy Katz	108	Birnbaum
			49.95	New Britain	John H. Gehring	116	John H. Gehring Co.
			49.95	Bridgeport	W. P. Griffith	130	D. M. Read, Inc.
Royal Futura Portable Typewriter.	109.95	142.13	109.95	Newark	Fred Grossman	85	Bamberger's
			111.50	Bridgeport	W. P. Griffith	130	D. M. Read, Inc.
			111.50	Newark	William Kinast	169	Hahne & Co.
			109.00	Trenton	Martin Siegel	227	Hamilton Jewelers
New Norelco Speedshaver.	14.97	24.95	13.00 to 15.00	Newark	Fred Grossman	86	Bamberger's
			12.99 & 13.87	Newark	William Kinast	170	Hahne & Co.
			13.88	Trenton	Benjamin Lavine	205	Trenton Lighting.
			13.88	Trenton	Martin Siegel	228	Hamilton Jewelers.
New Remington Roll-A-Matic Shaver.	17.15	26.95	18.89	Newark	Fred Grossman	86	Bamberger's
			19.89	Bridgeport	Gavin Semple	156	Howland's Dept. Store.
			14.69	Newark	William Kinast	170	Hahne & Co.
			19.88	Trenton	Harold Koslow	185	S. P. Dunham & Co.
			17.00	Trenton	Martin Siegel	229	Hamilton Jewelers.
Lady Sunbeam Shaver.	9.78	13.95	9.95	Newark	Fred Grossman	86	Bamberger's
			10.88	Newark	William Kinast	171	Hahne & Co.
			7.95	Trenton	Benjamin Lavine	208	Trenton Lighting.
			9.88	Trenton	Martin Siegel	230	Hamilton Jewelers.
Convertible 67 by Hoover—Cleaner.	79.95	109.95	84.95	Newark	Fred Grossman	87	Bamberger's
Regina Electrikbroom.	29.97	49.95	29.88	Newark	Fred Grossman	87	Bamberger's
			29.88	Bridgeport	Gavin Semple	157	Howland's Dept Store.
			29.88	Newark	William Kinast	171	Hahne & Co.
2-Speed De-Luxe Chrome Osterizer.	34.42	52.95	38.99	Newark	Fred Grossman	88	Bamberger's
Black Angus Monte Carlo King-Size Rotisserie Broiler.	54.97	89.95	49.79	Newark	Fred Grossman	88	Bamberger's
Waring Blender	30.69	47.95	27.95	Bridgeport	W. P. Griffith	131	D. M. Read, Inc

23. The evidence in this record proves, and the examiner finds, that as to the 13 items concerning which price evidence was introduced, all but two could have been purchased from local retail stores in the trade areas of Newark, New Jersey; Trenton, New Jersey; Bridgeport, Connecticut; and New Britain, Connecticut, for a retail price as low or lower than respondents' "wholesale" price, and the other two items were sold only a few cents higher at retail. In other words, it was, and is, the *price savings* which has been, and is, deceptively represented by respondents. This is the deception which has been proven.

24. Respondents argue (a) that the items selected for proof of the deceptive price savings claims are customarily used as "loss leaders" and therefore the price savings thereon are not representative of their entire line, and (b) that 13 items out of approximately 1,200 items in the catalogue is not a fair sampling. However, the retailer witnesses denied that the 13 selected items were used as loss leaders to any greater extent than any of the other items in respondents' catalogue. Other than their cross-examination of complaint counsels' witnesses, respondents did not offer any of their own evidence to establish such loss leader premise. The record does not sustain a finding that the 13 items described in Finding 7, *supra*, were especially used by the retailers in the four areas as loss leaders.

25. Respondents did not offer any evidence which would prove their contention (b) above that respondents' pricing of the 13 items selected was not representative and typical of respondents' pricing of the other items in the catalogue. The 13 items of merchandise are specifically listed in the complaint as typical and illustrative of respondents' deceptive pricing practices. Respondents had not contended prior to the hearings, nor did they offer any evidence at the hearings, to prove that said 13 items of merchandise did not constitute a fair sampling of the merchandise generally offered for sale by Name Brand Distributors, and the pricing representations made as to the entire line of merchandise.

26. Once complaint counsel established *prima facie* price deception, which they did, the burden of going forward, as well as the burden of proof was upon respondents. Respondents elected not to accept either of these burdens. The record, therefore, consists of complaint counsel's evidence, and such adverse admissions, if any, which complaint counsel's witnesses made on cross-examination.

27. At transcript pages 120 and 121, Mr. John H. Gehring was asked, on cross-examination:

Q In other words, at this time, in the latter part of 1960, there was a special sale or featured sale of this machine at this price, is that correct?

A I would not say it was featured. It seems that everybody had the same price.

28. Upon cross-examination Harold Koslow of S. P. Dunham & Company of Trenton, New Jersey, testified (Tr. 191, *et seq.*):

Q As a matter of fact, aren't these particular items loss leaders and items that are sold at practically no markup in your area?

A We are not a discount operation and we do not sell loss leaders.

Q All right. I will reframe the question. Are there discount operators in your area?

A There are merchants who sell at small markups, yes.

Q In shopping these merchants, do you meet their price competitively?

A Yes.

Q If a merchant were to sell at no markup, you would meet his price, too?

A Yes.

Q Now, Mr. Koslow, I ask you, being familiar with what you have testified to, in such instances would the price at which you sell be the usual, ordinary retail price for the article?

A I don't know what you mean by "usual, ordinary, retail price."

Q You are testifying as an expert as to what you have been selling. What was the ordinary retail price for these two articles?

A The retail price that we sold the typewriter at was $110.

Q At that particular time?

A Yes.

29. Mr. Koslow further testified that Dunham's wholesale price for the Remington Quiet Riter Eleven was $86.58 (Tr. 192). It was sold at retail by Dunham for $110.00, was listed at $145.21 in respondents' catalogue (CX 1, p. 160) and respondents' coded "wholesale" price was $119.95. Respondents' "wholesale" price for the Quiet Riter was no less than the retail price of Bamberger's of Newark and D. M. Read & Co. of Bridgeport. It was higher than the retail prices of Hamilton Jewelers of Trenton, the Dunham Department Store of Trenton and Gehring & Company of New Britain. It was only 5¢ less than the $120.00 retail price of Hahne & Company of Newark.

30. None of complaint counsel's witnesses, on cross-examination, testified in such manner as to support a finding that the 13 items of merchandise listed in paragraph seven, *supra*, were used more frequently as "loss leaders" in the four trade areas involved than the other items in respondents' catalogue.

31. The initial burden of proof that respondents' representations as to the Name Brand wholesale prices were false was upon complaint counsel. Once complaint counsel made a *prima facie* case of such deception, which they did, the burden of proving affirmative defenses, if any, was upon respondents, who, although they now assert such defenses, did not plead such defenses in their answer nor offer any evidence in support thereof.

32. Photographic reproductions of 2 pages (CX 2A and CX 2D) from respondents' sales flyer hereby are made a part of this initial

decision. More than 60,000 copies of this flyer were mailed by respondents (*supra*, p. 4). The first and last pages, photographically reproduced, are:

(CX 2A)

NAME BRAND DISTRIBUTORS

37–42 58th Street, Woodside 77, New York

HAvemeyer 9–6180

Dear Friend: Yes, we can show you how to save hundreds and hundreds of dollars on your purchases of Nationally Advertised Name Brand Merchandise.

Briefly, our story is as follows—We are wholesale distributors of nationally advertised NAME BRAND MERCHANDISE. We will sell these quality products to you at savings up to 50% and more.

You can make your selections at your leisure from our beautifully illustrated large size catalog which offers a thousand and one items such as appliances, radios, jewelry, luggage, toys, watches, aluminum, silverware, cameras, wearing apparel, tools, etc., made by such famous names as Westinghouse, Kodak, Benrus, Dormeyer, Remington, International Silver, Sunbeam, Toastmaster, Shaeffer, Ronson, Spalding, Richelieu, Black and Decker, and many others.

HOW TO GET YOUR MONEY-SAVING CATALOG—
PLUS $1.00 CREDIT ON YOUR FIRST ORDER . . . .

We would like to send you this catalog free of charge, but we simply cannot afford to give these expensive catalogs out indiscriminately. In order to avoid curiosity-seekers and those who are not really interested in buying merchandise at WHOLESALE PRICES, we require a small deposit of $1.00 on this catalog. This $1.00 deposit, however, is REDEEMABLE or REFUNDABLE. THIS IS WHAT WE MEAN.

If upon examination of this catalog you are not completely satisfied with it, just return it to us within five (5) days and your dollar deposit will be refunded promptly—no questions asked. Our gift to you, the key—Tote is yours to keep *absolutely free of charge.*

However, should you decide to keep our catalog (and we are sure that you will) you will still get your dollar back! HERE'S HOW. With your first order we are going to give you CREDIT for the goodwill dollar you paid us for the catalog. For example: Supposing your order totals $15.00 at our low wholesale prices, your remittance to us would amount to only $14.00. Now, when you consider our low WHOLESALE PRICES plus the fact that we are allowing you a $1.00 credit on your order we are sure you will agree with us that this is an extremely generous offer and one which you cannot afford to pass up. So, do yourself and your pocketbook a big favor—send for your CATALOG and BONUS CERTIFICATE TODAY by filling out the catalog request on the back page of this folder. ADDED NOTE: Once again we wish to impress on you that we will sell you NAME BRAND NATIONALLY ADVERTISED MERCHANDISE at WHOLESALE PRICES—not merely at discount prices.

(CX 2D)

REMEMBER THESE FACTS ! !

1. YOU DEAL ONLY WITH US! Our customers buy wholesale, direct from us. Nobody else enters the picture.

2. NOT A "DIRECTORY." We wish to emphasize that our catalog is not a "Guide" or a "Buyers' Directory" that merely lists wholesale firms that you can try to contact or tells you "somebody" who MIGHT sell to you. No, sir! Our catalog is an honest-to-goodness merchandise catalog, jam-packed with bargains.
3. YOU'LL GET THE LOWEST PRICE AVAILABLE! Our tremendous volume of purchases, made possible by centralizing buying, assures you of the lowest prices available anywhere.
4. Every item is DOUBLY GUARANTEED—both by the manufacturer and by Name Brand Distributors.
5. Every item is BRAND NEW, first quality merchandise, packed factory fresh in a sealed container.
6. Every Item in the catalog is actually stored in our large modern warehouse to assure you prompt delivery of the merchandise you order. We welcome your personal visit to our spacious showroom, where you may examine our merchandise displays.

CATALOG REQUEST

NAME BRAND DISTRIBUTORS, 37–42 58th Street, Woodside 77, N.Y.

Gentlemen: Please rush me your huge catalog, plus bonus certificate for which I have enclosed $1.00. If not 100% satisfied, I understand that I may return the catalog and bonus certificate within 5 days for a full refund of my $1.00. Your gift to me—the Key-Tote—is mine to keep ABSOLUTELY FREE of any charge.

Name ____
(PLEASE PRINT)
Address ____
City________________________ Zone__________ State________________

In these two pages from their sales flyer (CX 2A and 2D), respondents emphasize two elements in their pricing: (a) that they sell at WHOLESALE PRICES, and (b) that purchasers of "Nationally Advertised Name Brand Merchandise" will "save hundreds and hundreds of dollars."

33. Respondents also represent in CX 2A, page 514, *supra*, contrary to the facts proven in this record, that they are "wholesale distributors." (See findings 2 and 3, *supra.*)

34. Respondents have this statement in CX 2D (reproduced *supra*, page 514):

3. YOU'LL GET THE LOWEST PRICE AVAILABLE! Our tremendous volume of purchases, made possible by centralized buying, *assures you of the lowest prices available anywhere.* (Underscoring supplied.)

This statement simply is not true. In the four trade areas enumerated, respondents' "wholesale" prices for the thirteen items of merchandise concerning which evidence was offered, were not the "lowest prices available anywhere."

35. In the same flyer, respondents assert (CX 2A):

ADDED NOTE: Once again we wish to impress on you that we will sell you NAME BRAND NATIONALLY ADVERTISED MERCHANDISE AT WHOLESALE PRICES—not merely at discount prices.

Respondents represent thereby that their wholesale prices are lower than "discount prices." Had respondents proven, as they have alleged but not proven, that the thirteen items of merchandise named *supra*, finding 7, were customarily discounted in the four trade areas by the retail stores whose representatives testified, the hearing examiner would, nevertheless, on the basis of the excerpt quoted above from CX 2A, be compelled to find that respondents' representation that their wholesale prices are lower than discount prices, was and is false, misleading and deceptive.

36. In *Rayex Corporation* v. *Federal Trade Commission*, 317 F. 2d 290 (C.A. 2, 1963, decided May 7, 1963), at page 292, the court, *inter alia*, stated:

> * * * The Commission nevertheless is still required to prove by substantial evidence that preticketing is being used in a proscribed manner by the particular respondent involved in any case. "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established." NLRB *v.* Columbian Enameling & Stamping Co., 306 U.S. 292, 300, 59 S. Ct. 501, 505, 83 L. Ed. 660 (1939).[2]

Respondents assert, correctly, that complaint counsel has failed to prove by reliable, probative and substantial evidence in this record, and according to the standard established by *Rayex*, *supra*, just what were the regular wholesale prices to the stores, whose representatives testified, in the four trade areas involved, for the 13 items as to which price evidence was introduced. Absent such proof, the hearing examiner cannot find, on this record, that respondents' representations that their prices are "wholesale" prices are not true, or that respondents' prices may not be as low as wholesale prices in some trade areas. However, respondents' real deception is not in labeling their prices "wholesale", contrary to the fact; or advertising their prices as "cut rate", or "discount", or by any other name, contrary to the fact. Respondents' deception consists in their representations, contrary to the fact, that because their prices *are* "wholesale" prices, buyers of their merchandise will save the difference between their wholesale prices and the list prices juxtaposed to the right of the "wholesale" price. Stated another way—the deception is not intrinsic in the nomenclature, but in the impression created in the mind of a prospective Name Brand customer. Respondents' use of the word "wholesale", coupled with their comparative pricing technique (juxtaposing a higher "list" price to the right of their "wholesale" price) is designed to, and does

[2] The instant case *is not* a preticketing case as was *Rayex*. Another preticketing case decided after *Rayex* is *Regina Corporation* v. *Federal Trade Commission*, Docket 14254 (C.A. 3), opinion filed August 19, 1963, CCH 1963 Federal Trade Cases, Para. 70868. In *Regina*, the third circuit affirmed the Commission's order. In *Rayex*, the second circuit set aside the Commission's order.

convey to Name Brand customers the impression that they will benefit from a price saving which, in fact, does not exist.[3] For example, the purchaser of a New Remington Roll-A-Matic Electric Shaver, priced at wholesale at $17.15 in the Name Brand catalogue (CX 1, p. 111), with a stated list price of $26.95, could have purchased it in Trenton from Hamilton Jewelers for approximately $17.00 (Tr. 229); in Newark from Hahne & Co. for $14.69 (Tr. 170); and in Bridgeport from Howland's Department Store for $19.89 (Tr. 156). The $26.95 list price shown on page 111 of respondents' 1960–1961 catalogue (CX 1) was substantially higher than the usual and customary retail price for the Roll-A-Matic Shaver in either the Trenton, Newark, or Bridgeport areas. The Name Brand coded wholesale price of $17.15 was not "the lowest prices available anywhere" as represented in respondents' flyer (page 514, *supra*), nor would a Name Brand purchaser in Trenton, Newark, or Bridgeport have saved the difference between Name Brand's $17.15 "wholesale" price, and the $26.95 list price juxtaposed to the right of the wholesale price.

37. During the relevant period, by representations in their catalogues (*e.g.*, p. 507, *supra*) and their other sales material (*e.g.*, pp. 514 and 515, *supra*), respondents sought to and did convey the impression, contrary to the fact, that prospective purchasers of their merchandise (including, among others, those in the Trenton and Newark, New Jersey, and Bridgeport and New Britain, Connecticut, trade areas) who purchased merchandise at respondents' coded "wholesale" prices could effect greater savings thereby than they realized by so doing. As to most of the items of merchandise concerning which evidence was introduced, prospective purchasers were able to buy the identical articles at retail establishments in the same trade areas, at retail, as cheaply, and in some instances more cheaply, than from respondents.

38. By juxtaposing a so-called "list" or "manufacturers' retail" price to the right of their coded "wholesale" price in their catalogues, respondents sought to convey, and did convey the impression, contrary to the fact, that the "list" or "manufacturers' retail" prices were the prices at which the items were then being sold in the usual and regular course of business in the trade areas involved. In fact, the "list" and "manufacturers' retail" prices of the articles of merchandise here involved were substantially higher than the prices at which said articles were customarily then sold at retail in the said trade areas.

---

[3] See *Giant Food, Inc.*, Docket 7773, opinion of the Commission dated June 13, 1962, *affirmed*, *Giant Food, Inc.* v. *Federal Trade Commission*, 322 F. 2d 977, No. 17269, decided June 13, 1963 (C.A.D.C.); CCH 1963 Federal Trade Cases, Para. 70810.

39. Respondents' statement in their catalogue (p. 507, *supra*) that "All list prices shown are either the suggested or retail prices set by the manufacturer" was calculated to convey, and did convey the impression, contrary to the fact, that such prices were the prices at which the items were usually and customarily sold at retail by retail outlets in the trade areas of Trenton, New Jersey, Newark, New Jersey, Bridgeport, Connecticut, and New Britain, Connecticut. See paragraph 22 p. 510, *supra*.

40. Fred Grossman, formerly manager of the internal audit department of Bamberger's department store, Newark, New Jersey, testified that the Remington Quiet-Riter Eleven portable, asserted on page 160 of CX 1 to list at $145.21 was sold at retail by Bamberger's in Newark at $119.95, a price identical to respondents coded "wholesale" price for the same product. Retail purchasers in the Newark, New Jersey, area would not, by purchasing the Remington Quiet-Riter Eleven portable from respondents at $119.95 save the difference between $119.95 (respondents' coded "wholesale" price) and $145.21. Such purchasers could have bought the same typewriter at the same price of $119.95 from Bamberger's. Mr. Grossman further testified that the Remington Travel-Riter portable with list price of $89.79 and a "wholesale" price of $69.98 in respondents' catalogue (CX 1, p. 160), was sold at retail by Bamberger's for $69.98. Purchasers from respondents in the Newark trade area would not have saved the difference between the $89.79 list price and respondents' $69.98 "wholesale" price because they could have purchased it from Bamberger's for $69.98. Respondents made similar misrepresentations of the savings realizable by purchasing at their "wholesale price", as to all the other items as to which evidence was introduced. See summary page 511, *supra*.

41. The false, misleading and deceptive representations made by respondents, doing business as Name Brand Distributors, in their catalogues and other sales material, as herein described, and found, and their pricing practices, which are likewise herein described and found, were all to the prejudice and injury of the public, and constituted unfair acts and practices, and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

42. On the third page of their 1960–1961 catalogue (p. 507, *supra*, and RX 12, p. 3), respondents make the following representations:

GUARANTEE

Every article we sell is brand new and guaranteed to be exactly as illustrated and described. Each item is guaranteed by both the manufacturer and Name Brand Distributors.

On the fourth page of their sales flyer (p. 515, *supra*), respondents represent:

Every item is DOUBLY GUARANTEED—both the manufacturer and by Name Brand Distributors.

43. In and by said representations and statements, respondents represented, contrary to the facts, that their said merchandise was unconditionally and completely guaranteed by respondents and the manufacturers of every article of merchandise in their catalogues. In fact such guarantees were subject to certain conditions and limitations which were not disclosed either in the catalogues or in the sales flyer in which the guarantee was set forth. The terms, conditions and extent to which such guarantee applied to the merchandise sold by respondents, and the manner in which respondents and the manufacturers would perform thereunder were and are not clearly and conspicuously disclosed in close proximity to the statement of guarantee. As a result of respondents' failure to disclose the limitations in their guarantees, persons receiving respondents' catalogues, and purchasing merchandise through them were led to believe and did believe, contrary to the fact, that each and every item purchased from respondents was unconditionally guaranteed by respondents and the manufacturers.

44. In their 1962–1963 catalogue, in evidence as RX 13, the guarantee is omitted. Respondents assert they have abandoned the use of false guarantees in connection with the sale of their merchandise, but the evidence in the record does not support a finding that there is no reasonable likelihood that respondents' misrepresentations as to the guarantee attaching to their merchandise might not, at a later date, be reasserted. It is appropriate, therefore, that a cease and desist order as to the guarantee be issued, particularly in view of respondents' stipulation that the complaint allegations relating to the guarantee are true, and the total absence of evidence to support a finding that deceptive representations as to the nature of the guarantees, unless enjoined, will not be made in the future. In *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F. 2d 838, 841, the court, *inter alia*, stated:

* * * Voluntary discontinuance of an unfair trade practice does not necessarily preclude issuance of a cease and desist order. The order to desist from an abandoned unlawful practice is in the nature of a safeguard for the future. Other than the mere discontinuance at an undisclosed time of their practice relating to the guarantee of their merchandise, petitioners have shown no facts before the Commission which would require that this portion of the order be set aside.

Based upon the above and foregoing findings, the hearing examiner makes the following

CONCLUSIONS

1. Respondents, David Mann and Morris Appleblatt, are individuals trading as a copartnership under the name of Name Brand Distributors. Their office and place of business is located at 37–42 58th Street, Woodside, Queens, New York.

2. Respondents are now and for some time last past have been engaged in advertising, offering for sale and selling in interstate commerce articles of general merchandise, including but not limited to typewriters, electric shavers, vacuum cleaners, electric mixers and rotisserie broilers.

3. Respondents are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding. This proceeding is in the public interest.

4. Respondents, trading as Name Brand Distributors, disseminate through the United States mails catalogues and other sales material for the purpose of selling their merchandise. These catalogues and other sales material were, during the period of time relevant to this proceeding, mailed out to various states of the United States and the District of Columbia, including Ohio, Michigan, Wisconsin, New Jersey, Connecticut, and to the trade areas of Trenton and Newark, New Jersey, and Bridgeport and New Britain, Connecticut.

5. In and by said catalogues and other sales material which has heretofore been more specifically described and set forth, respondents made false, misleading and deceptive representations concerning (a) the type of operation which they conduct, *i.e.*, they represent themselves to be wholesalers when in fact 99% of their sales are at the retail level—to the ultimate consumer; (b) the price savings available to persons who purchase their merchandise from them through their catalogues and other sales material; and (c) the nature and extent of the guarantee which attaches to the items of merchandise which they sell.

6. Each and all of the acts and practices of respondents, trading as Name Brand Distributors, which acts and practices have heretofore been set forth in detail under the Findings of Fact were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

7. Respondents' false, misleading and deceptive statements, representations, acts and practices, heretofore found to violate the Federal Trade Commission Act should be enjoined.

ORDER

It is ordered, That David Mann and Morris Appleblatt, individually and trading as copartners under the name of Name Brand Distributors, or under any other name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any article of merchandise, including but not limited to typewriters, electric shavers, vacuum cleaners, electric mixers, rotisserie broilers, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that they are wholesalers and sell at the wholesale level when in fact all or practically all of their sales are made to the general public—to the ultimate consumer;

2. Representing, directly or by implication, that any amount is the usual and customary retail or wholesale price of merchandise in any trade area to which the respondents distribute their catalogues and sales material when such amount is in excess of the generally prevailing retail or wholesale prices (as the case may be) at which such merchandise is sold in such trade area;

3. Representing in any manner that savings are made available to purchasers of respondents' merchandise when it is offered by them at prices which are identified with, placed in juxaposition to, or compared with prices or figures which purport to be the prices at which the same or similar merchandise is customarily sold by competitors or other vendors in the usual course of business in the trade area or areas where the offerings are made unless such other price or figures are, in truth and in fact, the actual prices or figures at which such merchandise is customarily sold in the usual course of business in such trade areas;

4. Representing directly or by implication that any savings from the usual and customary retail prices in the trade area is afforded in the purchase of respondents' merchandise unless the prices at which said merchandise is offered by respondents constitute a reduction from the price or prices at which such merchandise is generally sold at retail in the trade areas where the representations are made.

5. Misrepresenting in any manner savings available to purchasers of respondents' merchandise, or the amount at which

such merchandise has been reduced from the price at which it is usually and customarily sold at retail in the trade area or areas where the representations are made.

6. Representing, directly or indirectly, that said products are guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

Decision of the Commission and Order to File Report of Compliance

This case comes before the Commission on the cross-appeals of respondents and counsel supporting the complaint from the initial decision. It is another of the proceedings involving pricing claims of a catalog house. In addition, respondents are charged with having made deceptive guarantee claims. Specifically, it is alleged that respondents have falsely stated they are wholesalers, that the coded prices in their catalogs are not wholesale prices as they represent, and that they have misrepresented the "Retail" and suggested list prices in their catalogs as the price at which their merchandise is usually and customarily sold in the areas where the representations are made. The complaint charges further that the difference between the coded and the list price or retail price does not constitute a savings from the prevailing prices in the areas where such representations are made.

The Commission has reviewed the evidence and has determined that the charges relating to respondents' alleged misrepresentation of the nature of the retail and list prices set forth in the catalog, as well as the charge relating to their allegedly deceptive savings claims should be dismissed in the light of the revised Guides Against Deceptive Pricing issued January 8, 1964.

The record does show that respondents are not a wholesaler as they have represented, but the proof, as the hearing examiner found, is inadequate to permit an informed determination as to the truth or falsity of their claim that the coded prices in the Name Brand Distributors catalogs were wholesale prices. Whatever evidence there is on this point came into the record more by way of coincidence than design, and while suggestive of the deceptive nature of the claim, cannot be considered substantial. Under the circumstances, the charge alleging that respondents misrepresented their prices as wholesale prices will be dismissed for insufficient evidence. The provision in the order requiring respondents to refrain from representing that they are wholesalers and that they sell at the wholesale level when, in fact, all of, or practically all of, their sales are to the ultimate consumer will be deleted. Such a provision standing alone, if the order at the same time fails to reach respondents' claims that their prices are wholesale prices, would be at best ambiguous and of dubious value in protecting the consumer under the circumstances of this case.

At this time the public interest does not require a reopening of the proceeding for the purpose of receiving evidence on the truth or falsity of respondents' representations of their selling prices as wholesale prices. Should respondents persist, however, in labeling themselves as a wholesaler and representing their coded prices as wholesale prices, then the Commission will, of course, be free to initiate further proceedings, looking toward the protection of respondents' competitors and the consumer, should the facts warrant such further action. In the light of the foregoing considerations, complaint counsel's appeal will be denied and that of respondents granted. Accordingly,

It is ordered, That the order to cease and desist in the initial decision be modified to read as follows:

> *It is ordered*, That David Mann and Morris Appleblatt, individually and trading as copartners under the name of Name Brand Distributors, or under any other name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any article of merchandise, including but not limited to typewriters, electrical shavers, vacuum cleaners, electric mixers, rotisserie broilers, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or indirectly that said products are guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

It is further ordered, That the charges relating to respondents' pricing claims and their representation that they are selling at wholesale prices be, and they hereby are, dismissed.

It is further ordered, That the initial decision, as modified to conform to the views expressed in this order, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents David Mann and Morris Appleblatt, individually and as copartners trading as Name Brand Distributors, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

MIRACLE ADHESIVES CORPORATION

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

Docket 8575. Complaint, June 10, 1963—Decision, Apr. 24, 1964

Order requiring a manufacturer of adhesives, glues and related products with place of business in Bellmore, Long Island, N.Y., to cease representing falsely—in advertising, in point of sale material, on the tubes in which the product was sold, on the cards to which the tubes were attached, and in advertising matrices provided for dealer use—that its "MIRACLE SHEER-MAGIC" was an "epoxy adhesive" and had the adherent characteristics, strength and capabilities of epoxy adhesives, when in fact said "Sheer-Magic" contained only a small percentage of epoxy resin to serve as a stabilizer and not enough to significantly increase its qualities as claimed.

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

PARAGRAPH 1. Respondent Miracle Adhesives Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 250 Pettit Avenue, in the city of Bellmore, Long Island, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacturing, advertising, offering for sale, sale and distribution of adhesives, glues and related products to distributors, jobbers and others for resale to the public.

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

PAR. 4. In the course and conduct of its business, respondent sells and distributes an adhesive product which it designates as "MIRACLE SHEER-MAGIC". For the purpose of inducing the sale of said product, respondent has made certain statements and respresentations, in advertising, in point of sale material, on the tubes in which said product is sold, on the cards to which said tubes are attached, and in advertising matrices provided for retail dealer use, in respect to the composition, character, adhesive capabilities and nature of said product. Typical, but not all inclusive of these representations and statements, are the following:

MIRACLE SHEER-MAGIC

WITH EPOXY RESIN

(The word epoxy is featured in large, domineering and overwhelming letters, approximately three quarters of an inch high; the words "with" and "resin" in small, obscure letters of approximately one sixteenth of an inch high.)

SHEER-MAGIC, a true Jet Age development, will bond just about anything to anything. * * * Made with rugged epoxy and vinyl resins, * * *
SHEER-MAGIC IS NOT AFFECTED BY * * * WATER * * *
SHEER-MAGIC WILL BOND JUST ABOUT EVERYTHING TO ANYTHING—
CHINA—GLASS * * *—PORCELAIN * * *
REPAIR GLASSWARE
SEAL LEAKS IN HOUSEHOLD PLUMBING
MEND BROKEN CHINA AND DISHES

PAR. 5. By and through the use of the aforequoted statements and representations and others of similar import and meaning not specifically set out herein, respondent represents and has represented, directly or by implication, that:

a. "MIRACLE SHEER-MAGIC" is an epoxy adhesive and has the adherent characteristics, strength and capabilities of epoxy adhesives.

b. Epoxy resins present in "MIRACLE SHEER-MAGIC" contribute to and add significant strength and adherent capabilities to said product.

c. Said product with but few exceptions will effectively bond any material to any other material.

d. Said product will effectively repair leaks in plumbing, broken china, and glassware.

e. Said product is not affected by water regardless of the temperature of the water.

PAR. 6. In truth and in fact:

a. "MIRACLE SHEER-MAGIC" is not an epoxy adhesive and does not have the adherent characteristics, strength and capabilities of epoxy adhesives. Epoxy adhesives are derived from an epoxide or oxirane which when applied in use, chemically react with a hardener to form a substantially infusible and insoluble substance that has outstanding adherent capabilities. "MIRACLE SHEER-MAGIC" is a thermoplastic material, primarily polyvinylchloride, which can be repeatedly softened and hardened by a change of temperature. Its adherent capabilities are substantially less than those of epoxy type adhesives.

b. Epoxy resins, present in "MIRACLE SHEER-MAGIC" are inert, are not activated during the use of said product, and do not contribute to or add significant strength or adherent capabilities.

c. Said product will not, with few exceptions, effectively bond any material to any other material. There are many materials which said product will not effectively bond.

d. Said product will not effectively repair leaks in plumbing, broken china, and glassware.

e. Said product is affected by water when the temperature of the water reaches approximately 175° Fahrenheit. At such temperatures the adherent capabilities of said product are substantially reduced or eliminated.

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

PAR. 7. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of adhesives and other merchandise of the same general kind and nature as that sold by respondent.

PAR. 8. By the aforesaid practices respondent places in the hands of jobbers, retailers and dealers means and instrumentalities by and through which they may mislead and deceive the public as to the representations, statements and practices stated above.

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

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

Mr. Samuel J. Rozel supporting the complaint.

Mr. Lewis S. Bowdish of *Remsen, Millham, Bowdish & Spellman*, New York, N.Y. for respondent.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

JANUARY 9, 1964

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on June 10, 1963 issued its complaint charging Miracle Adhesives Corporation, a corporation, with violation of Section 5 of the Federal Trade Commission Act. The complaint alleges the respondent to be engaged in the manufacture and the interstate sale and distribution of adhesives, glues, and related products to distributors, jobbers and dealers for ultimate resale to the public.

For the purpose of inducing the sale of one of its family of adhesive products designated "Miracle Sheer-Magic", respondent is alleged to have caused to be placed in the hands of its resellers various advertising materials, the content of which is charged to be false, misleading and deceptive to the purchasing public. The advertising representations challenged by the complaint are the various repair strengths and capabilities attributed to the use of "Miracle Sheer-Magic" and, in particular, the representation allegedly made in such connection, directly or by implication, that "Miracle Sheer-Magic" is an epoxy adhesive having the adherent characteristics, strength and capabilities of epoxy adhesives.

The use of said advertising representations by the respondent is alleged to mislead the public into the erroneous and mistaken belief that they are true, and to cause the purchase of substantial quantities of respondent's said product, to the prejudice and injury of both the public and respondent's competitors. Said acts and practices by the respondent are charged by the complaint to constitute unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Respondent filed answer to the complaint on July 15, 1963. Said answer admits in part and denies in part the various allegations of the complaint, asserts various alleged special defenses, and asks that the complaint be dismissed. A prehearing conference,[1] by agreement of respective counsel, was held in Washington, D.C. on August 15, 1963, and the hearing on the merits was held in said city from October 14 through October 17, 1963, and then closed on the record.

The transcript of record consists of 534 pages. Marked for identification and received in evidence are Commission exhibits 1 through 7

[1] The prehearing conference, by agreement of counsel, was made part of the record herein (Tr. 82).

and 9 through 24. Respondent's exhibits marked for identification 7 through 13 and 17 through 22 were also received in evidence. Respondent's exhibits marked for identification 1 through 6 and 14 through 16 were rejected.[2] Respondent's rejected exhibits are subject to Section 3.14(g) of the Commission's Rules of Practice for Adjudicative Proceedings which provides that rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

No consumer or public witnesses were called to testify in this proceeding. Called to testify in support of the allegations of the complaint[3] were Dr. Robert D. Stiehler, Chief of the Polymer Evaluation and Testing Section, National Bureau of Standards, Washington, D.C.; Dr. Vincent F. Maturi, Plastics and Adhesives Specialist, Office of Technology Utilization, National Aeronautics Space Administration, Washington, D.C.; Mr. E. R. Falkenburg, Executive Vice-President and Marketing and Sales Director of the respondent, Miracle Adhesives Corporation.

Called to testify in opposition to the allegations of the complaint[4] were Mr. E. R. Falkenburg; Mr. Lawrence E. Muttart, Research Associate, Engineering Experiment Station, Ohio State University, Columbus, Ohio; Mr. Ralph F. Johnson, Technical Director of the respondent, Miracle Adhesives Corporation; Mr. Aldo A. Cheli, Staff Engineer, Duo-Assemblers, Inc., Brooklyn, New York, and formerly a staff engineer with the respondent, Miracle Adhesives Corporation.

Respective counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses, and to introduce such evidence as is provided for under Section 3.14(b) of the Commission's Rules of Practice for Adjudicative Proceedings.

Proposed findings of fact, conclusions, supporting briefs, and replies thereto were filed by respective counsel, and counsel supporting the complaint submitted a proposed order to cease and desist. Proposed findings and conclusions submitted and not adopted in substance or form as herein found and concluded are hereby rejected.

After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record and the observation of the witnesses testifying herein, the following Findings of Fact and Conclusions therefrom are made, and the following Order issued:

---

[2] CX no. 8 was withdrawn (Tr. 253). RX nos. 1 through 6 were household adhesive products marketed by respondent's competitors not advertised or showing the term or word "epoxy" on their tubes or display cards. (Tr. 281–283.) CX nos. 14 through 16 concerned statistics related only to the suppliers of various raw material components used in various adhesives. (Tr. 447–448.)

[3] The qualifications of Dr. Stiehler appear at Tr. 91–93; Dr. Maturi at Tr. 159–164.

[4] The qualifications of Mr. Muttart appear at Tr. 306–309; Mr. Johnson at Tr. 367–369; Mr. Cheli at Tr. 448–450.

FINDINGS OF FACT

1. Respondent Miracle Adhesives Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 250 Pettit Avenue, in the city of Bellmore, Long Island, State of New York.[5]

2. Respondent is now, and for some time last past has been, engaged in the manufacturing, advertising, offering for sale, sale and distribution of adhesives, glues and related products to distributors, jobbers and others for resale to the public.[6]

3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said products, when sold, to be shipped from its manufacturing subsidiary in the State of Ohio to purchasers thereof located in various other States of the United States, 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.[7]

4. Respondent, in the said course and conduct of its business, now manufactures, and for some time last past has manufactured, through its wholly owned subsidiary, The Ohio Adhesives Corporation, New Philadelphia, Ohio, an adhesive product which is designated "Miracle Sheer-Magic". Said product is sold through distributors, jobbers and retail dealers throughout the United States to the general public. Said product is ultimately sold to the public through retail paint, houseware, drug, hardware and grocery stores. Sales of said product were $28,741.62 in 1962.[8]

5. In the course and conduct of its over-the-counter business, respondent sells and distributes an adhesive product packaged in one tube, which it designates as "Miracle Sheer-Magic" and another adhesive product packaged in two tubes, which it designates as "Miracle Epoxy".[9] Respondent's product "Miracle Sheer-Magic" is sold to the public for some of the same purposes as respondent's "two-part" epoxy adhesive "Miracle Epoxy".[10] Respondent's "Miracle Sheer-

[5] Admitted in answer, paragraph one; CSC proposed finding one; Respt. proposed finding one.

[6] Admitted in answer, paragraph two; CSC proposed finding two; Respt. proposed finding two; Tr. 236–238.

[7] Admitted in answer, paragraph three; CSC proposed finding three; Respt. proposed finding four: Tr. 236–239: CX no. 7.

[8] CSC proposed finding four; Respt. proposed findings two and three; Tr. 236–239; CX no. 6.

[9] Respt. proposed finding five; Tr. 236–248.

[10] The complaint does not challenge this "two-part" product as being other than a true "epoxy adhesive", nor are respondent's repair representations made for this product challenged. RX no. 7. "Miracle Epoxy" is not manufactured by respondent, but is purchased from an outside source and then tubed by the respondent and sold under respondent's product name (Tr. 244).

Magic" and "Miracle Epoxy" are attached to individual display cards and are frequently displayed in retail stores on peg boards or in other fashion in immediate conjunction with adhesive products produced by competing manufacturers.[11] Respondent also markets two other similarly named single-tube adhesives attached to individual display cards, namely, "Miracle Black Magic" and "Miracle Brite Magic". Neither the cards nor the tubes for these products bear the word or the inscription "EPOXY". Another single-tube adhesive product sold by respondent, also attached to an individual display card, is "Miracle Adhesive Vinyl Plastic Repair Kit". This product or its card does not contain the inscription or word "EPOXY". The repair representations made by the respondent for these three latter products are not challenged by the complaint.[12]

6. Examination of the respondent's foregoing adhesive product sold to the public as "Miracle Epoxy" shows it to be packaged in two opaque tubes enclosed in a single transparent casing or blister attached to a paper card. Tube "A" is marked "Resin" and tube "B" is marked "Hardener", with the directions on the card calling for mixing in equal parts by volume before using (*i.e.*, 50% resin and 50% hardener). Its retail price is marked $1.00. "Miracle Sheer-Magic" is sold and packaged in a similar manner, except that it consists of only a single opaque tube in a transparent casing or blister attached to a paper card. Its retail price is marked $.59.

The card for "Miracle Epoxy", as well as each of the two attached tubes, bear in conspicuous large lettering the word "EPOXY", and the card makes various repair recommendations.[13] Similarly, the card and the attached tube of "Miracle Sheer-Magic" each also bear in conspicuous large lettering the word "EPOXY", and the card makes various repair recommendations.[14] Additionally, on the "Miracle Sheer-Magic" card and attached single tube are the words "no-mixing".[15]

7. Contained in the record in this proceeding are numerous articles from various magazines of wide circulation providing the basis for

[11] CSC proposed finding five; Tr. 236–248.

[12] See RX no. 10 showing the following:

"Miracle Black Magic Adhesive: Glue rigid materials, tile, metal, brick, pottery, concrete."

"Miracle Brite Magic: Glue all rigid materials, some flexible materials, to rigid surfaces."

"Miracle's new Vinyl Plastic Repair Kit: Patch vinyl plastic, swimming pools, other vinyl items.

[13] RX no. 7 and no. 10: "Miracle's Crystal-Clear Epoxy Adhesive: For metal, glass, china, masonry, wood, porcelain, hard plastics and all rigid surfaces."

[14] CX no. 1, 2, 3, 4; RX no. 9, 10: "Miracle Sheer-Magic Adhesive: Repair china, glassware, bric-a-brac, dishes."

[15] Respondent's Vice-President witness testified he knew of no other one-part adhesive product on the market advertised as containing "epoxy resin" (Tr. 247).

showing that the public is acquainted generally with the existence of epoxy resin adhesives.[16]

For example:

From the March 1961 issue of "Changing Times" an article entitled:

PICK THE RIGHT GLUE

Lots of Brands . . . How to Tell What to Buy

This article, among other matters, states:

Epoxy resin. Developed fairly recently, this is considered the most universal adhesive. It comes closest to the ideal of bonding anything to anything. However, it is more expensive than many other glues, and it may be somewhat tricky to use properly.[17]

From the May 1962 issue of "Consumer Reports" an article entitled:

EPOXY ADHESIVES

These unusually versatile glues produce joints of high strength, but they are expensive and have some limitations [18]

From the March 23, 1959 issue of "Life" magazine an illustrated article entitled:

A Mighty Glue—Epoxy [19]

From the July 1959 issue of "Popular Mechanics" an illustrated article entitled:

THE MIRACLE GLUE THAT WELDS ANYTHING [20]

From the July 1959 issue of "Popular Science" an illustrated article entitled:

You can bond almost anything to anything with—

THOSE
AMAZING
EPOXY ADHESIVES [21]

---

[16] [Hearing Examiner Schrup:] "Now your position on the public interest, as I understand it, Mr. Bowdish, is that you claim there is no public interest here, because purchasing members of the public are not injured by buying this?

"MR. BOWDISH: That is it.

"HEARING EXAMINER SCHRUP: That they are not deceived because they are getting a product that is worth while, is that it?

"MR. BOWDISH: That is my position, and these publications are not relevant to that issue. They may very well be relevant to the question of what an epoxy adhesive is, or what it may be implied to be, or something of that sort.

"HEARING EXAMINER SCHRUP: You have no objection on the basis of showing that the public is acquainted generally with the existence of epoxy resin adhesives?

"MR. BOWDISH: I have no objections.

"HEARING EXAMINER SCHRUP: There being no objections, the Exhibits will be received in evidence."

[17] CX no. 9.

[18] CX no. 10.

[19] CX no. 11.

[20] CX no. 13.

[21] CX no. 14.

From the October 1960 issue of "Popular Science" an article entitled:

The GOO with
a Million Uses
Fix anything? Sure—with epoxy [22]

From the June 1960 issue of "Sunset" magazine an article entitled:

Epoxy glue * * * for emergencies [23]

8. Respondent, for the purpose of inducing the sale of its "Miracle Sheer-Magic" adhesive, has made certain statements and representations in advertising, in point of sale material, on the tubes in which said product is sold, on the cards to which said tubes are attached, and in advertising matrices provided for retail dealer use, in respect to the composition, character, adhesive capabilities and nature of said product. Typical of these representations and statements are the following:

MIRACLE SHEER-MAGIC

with

EPOXY

RESIN

SHEER-MAGIC, a true Jet Age development will bond just about anything to anything. * * * Made with rugged epoxy and vinyl resins, * * *

SHEER-MAGIC IS NOT AFFECTED BY * * * WATER * * *
SHEER-MAGIC WILL BOND JUST ABOUT EVERYTHING TO ANYTHING-
CHINA-GLASS * * *—PORCELAIN * * *
REPAIR GLASSWARE
SEAL LEAKS IN HOUSEHOLD PLUMBING
MEND BROKEN CHINA AND DISHES [24]

9. Respondent, through the means and methods hereinbefore set forth in preceding finding number 8, has represented, directly and by implication, that "Miracle Sheer-Magic" adhesive is an "epoxy adhesive" and has the adherent characteristics, strength and capabilities of epoxy adhesives.[25] This is contrary to the truth and the fact. "Miracle Sheer-Magic" is not an epoxy adhesive.

Respondent's answer at Paragraph Five stated that respondent "Affirmatively alleges that 'Sheer-Magic' is in truth an epoxy adhesive". This position has been abandoned. Respondent's since submitted proposed finding number twenty-two, comprising but one single sentence, uequivocally states and admits "Sheer Magic is not an epoxy adhe-

[22] CX no. 15.
[23] CX no. 18.
[24] Admitted in answer, paragraph four; CSC proposed finding six; Respt. proposed finding six and seven; Tr. 235–248, 274–277; CX 1, 2, 3, 4, 5; RX 9, 10, 11, 12, 13.
[25] CSC proposed finding seven.

sive".[26] This is supported by the transcript of record at page 485 where, under direct examination by respondent's counsel, Mr. Cheli, the respondent's own expert witness, was asked his opinion as to whether "Miracle Sheer-Magic" is an epoxy adhesive, to which Mr. Cheli replied: "No, Miracle Sheer Magic definitely is not an epoxy adhesive."

Further, and while "Miracle Sheer-Magic" sold both under the old packaging and formula, and the subsequent new packaging and formula [27] contains a small percentage of epoxy resin, such ingredient does not give the said product, as respondent represents directly and by implication, the adherent characteristics, strength and capabilities of an epoxy adhesive. The record in this proceeding is clear that the presence of said epoxy ingredient in such minor amount is only to serve as a stabilizer in aid or help of the retarding of any degradation of the adhesive bond created by the product. Its presence in such a minor amount is not sufficient to significantly further increase the adherent characteristics, strength and capabilities of the product so as to in any manner qualify it to be properly described as an epoxy adhesive.[28]

10. Respondent's additional sales representations to the public as hereinbefore set forth in preceding finding number 8, are to be judged in the context in which they are set forth, namely that they are made with reference to an adhesive represented directly and impliedly by respondent to be an epoxy adhesive having the adherent characteristics, strength and capabilities present in such an adhesive.

The record contains a test report [29] conducted by the respondent's witness Muttart recording the capabilities of 13 different formulas, including those of "Miracle Sheer-Magic" sold in both the old and subsequent new packaging for said product.[30] This, however, shows only the capabilities of respondent's formulas, each against the other, and not in comparison with the capabilities present in formulas herein testified as being necessary to qualify as an epoxy adhesive.[31] Accord-

[26] Respondent's proposed finding and the testimony of its expert witness, Mr. Cheli, apply to "Miracle Sheer-Magic" marketed by the respondent under both the old packaging and formula (CX no. 1) and the subsequent new packaging and formula (RX no. 9). Both old and new packagings bear the inscription "with EPOXY resin" prominently displayed on the display cards and the attached single tubes being offered for sale to the purchasing public.

[27] Respondent's new packaging and cards were introduced in April 1963 (Tr. 241).

[28] See footnote 31 to finding number 10 following.

[29] RX no. 20—Adhesive Test Report to Miracle Adhesives Corporation from Ohio State University.

[30] The 13 formulas varied in their content from a low of 1.25% to a high of 4.0% of epoxy resin. "Miracle Sheer-Magic", as sold under the old packaging and formula contained the first percentage, and the new packaging and formula the latter and greater percentage of epoxy resin.

[31] Dr. Stiehler and Dr. Maturi testified in this proceeding that an adhesive must contain at least 20% epoxy resin to be an epoxy adhesive (Tr. 97, 206, 223). Respondent's witness. Mr. Cheli testified in essential agreement with the Commission witnesses Stiehler and Maturi, to wit:

"An epoxy adhesive would be a material compounded or mixed in such a way that epoxy resin presents its major component and this major component is the major adhesive material in the mixture." (Tr. 479) ingly, it throws little or no light on the validity of the respondent's representations in the context in which they are made. Also in the record is a series of test reports [32] on "Miracle Sheer-Magic" which include a comparison of the capabilities of respondent's product "Miracle Sheer-Magic" versus the capabilities of various epoxy adhesives. These shed considerable and significant light on the validity of respondent's representations in the context in which made.

These test reports, and particularly CX no. 21, contrast respondent's representations for "Miracle Sheer-Magic" in comparison with the capabilities of epoxy adhesives when "Miracle Sheer-Magic" is used for purposes where epoxy adhesives might otherwise have been used.

Commission exhibit no. 21 shows, in part, the following:

a. "Rugged epoxy" and "epoxy"—An epoxy glue or cement consists of two components which upon mixing react to form an insoluble and infusible product. "Miracle Sheer-Magic Epoxy Glue" is essentially a one component polyvinyl chloride cement which hardens upon loss of solvent but does not become infusible and insoluble. The following comparison of the adhesive strengths of typical epoxy cements, typical polyvinyl chloride (PVC) cements, and "Miracle Sheer-Magic Epoxy" Glue emphasizes the difference in performance between the two classes of adhesives and shows that the latter material resembles the PVC cements:

Adherend	Epoxy cements	PVC cements	Miracle sheer-magic Epoxy glue
	lb per sq in.	lb per sq in.	lb per sq in.
Aluminum	1230–2175	52–176	7
Steel	1380–2165	158–220	41
Glass	*1032–1100	8–81	18
Plastic	* 326–468	4–240	16
Wood	*310–1060	15–84	99

*Failure occurred in adherend rather than adhesive.

These findings show that "Miracle Sheer-Magic Epoxy Glue" is not an "epoxy" glue and does not have the adhesive strength of a "rugged epoxy" glue. Therefore, the claim is not valid.

"* * * will bond just about anything to anything." The product bonded a variety of test materials. However, it will not bond many plastics, such as teflon and polyethylene. Also, as pointed out in answer to claim "a", the bond strengths obtained with this product are much lower than those obtained with commercial and widely available two-component epoxy adhesives. Therefore, this claim is vague and cannot be substantiated.

11. Respondent would contend its "Miracle Sheer-Magic" product "is not in competition with two-tube epoxy adhesives but with water-

[32] CX nos. 21, 22 and 23 being National Bureau of Standards Test Reports on the adhesive composition and capabilities of "Miracle Sheer-Magic Epoxy Glue" to Federal Trade Commission under dates of January, March and July, 1963.

clear, one tube easy to use general purpose, versatile household glues usually containing polyvinyl chloride as a major ingredient".[33]

This contention is rejected. All of the above adhesives, both epoxy and non-epoxy, are shown by the record to be marketed generally side by side and offered for sale and sold over-the-counter to the purchasing public. Respondent's Executive Vice-President and Marketing and Sales Director testified at Tr. 237–238 as follows:

Q. What type of retail stores handle this product?
A. Quite a cross section—the same as the jobbers I described—hardware stores, houseware stores, paint supply stores—as a matter of fact, grocery stores, too, and right down the line, some drug stores.
Q. Now would the same follow with your two-part epoxy, which has been marked Respondent's Exhibit 7?
A. Yes.
Q. As far as sales and distribution?
A. The same thing.

Again, at Tr. 244–245, the witness further testified with regard to the product which is respondent's exhibit 7:

Q. Now is this product good for repairing glass?
A. Oh, yes.
Q. China?
A. Yes.
Q. Masonry?
A. Yes.
Q. Wood?
A. Yes, anything that it says on there, I would say, is correct.
Q. Repairing leaks in pipes and radiators?
A. Yes.
Q. In general, the same things that your Miracle Sheer Magic is?
A. Yes.

Finally at Tr. 246–247, the witness testified:

Q. Now, Mr. Falkenburg, are you generally familiar with competing brands of adhesive products, which are on the market, which compete with your products?
A. I try to keep abreast of it.
Q. Do you know of any other one-part adhesive product on the market today which contains epoxy resin?
A. I do not know of any, no.
Q. Do you know of any that advertises?
A. None, that advertise. Whether their product contains it or not, I do not know. I don't have any that advertise it, that's right.

The record is therefore clear that respondent's "Miracle Sheer-Magic" is the only non-epoxy adhesive that is marketed competitively against both epoxy and non-epoxy adhesives and represented to the

[33] Respt. proposed finding eighteen. See respondent's proposed finding five (footnote 9, *supra*) to the contrary of respondent's present contention.

purchasing public as being a one-part or single-tube epoxy adhesive which, as stated on its display card and tube, requires no mixing.[34]

12. Respondent, in the context of the representation to the purchasing public that "Miracle Sheer-Magic" is an epoxy adhesive, also makes the further representations for said product set forth herein in preceding finding number 8. The record contains a test report [35] comparing the adherent capabilities of "Miracle Sheer-Magic" under both its old and new formulas with relation to said representations, but no comparisons are therein shown as between the adherent capabilities of "Miracle Sheer-Magic" and those of an epoxy adhesive such as respondent's "Miracle Epoxy".[36]

With relation to the test report comparing the adherent capabilities of "Miracle Sheer-Magic" versus those of epoxy adhesives as set forth herein at preceding finding number 10, the witness Dr. Stiehler further testified in part as follows:

Q. In your opinion, based on your testing and your knowledge of the field, do the epoxy resins present in Miracle Sheer Magic, either the original formula or what has been marked on Commission Exhibit 19, contribute any substantial adhesive capability to the product?

A. No.[37]

* * * * * * *

Q. As part of your work conducted on this product in your section, was the adhesive strength of this product evaluated?

A. Yes.[38]

* * * * * * *

Q. Did you have occasion to evaluate the bind strength of the two-part epoxy?

A. Yes.

Q. Doctor, in comparison to Miracle Sheer Magic, how does it compare with the various two-part epoxy adhesives that you tested?

A. Well, the adhesive strength that we obtained with the epoxy cement on aluminum we obtained values between 1,230 and 2,175 pounds per square inch.

Q. As against 7 pounds per square inch?

A. That is right. On steel we found 1,380 to 2,165 pounds per square inch for epoxy as against 21 pounds for Miracle Sheer Magic. On glass 1,032 to 1,100 pounds per square inch and the break came in the glass. It did not come in the adhesive whereas the Miracle Sheer Magic, we had only 18 pounds per square inch.

---

[34] CX nos. 1, 2, 3, 4, 5 and RX nos. 9, 10, 11, 12. For convenience of the reader, CX no. 3 (the old card and tube) and RX no. 11 (the new card and tube) are reproduced and attached as an appendix to this initial decision. [Pictorial exhibits CX no. 3 and RX no. 11 are omitted in printing.]

[35] RX no. 20.

[36] RX no. 7. See the following at Tr. 365:

"HEARING EXAMINER SCHRUP: It would be my understanding that no tests were performed with relation to the product which is Respondent's Exhibit No. 7?

A. THE WITNESS: No."

[37] Tr. 106.

[38] Tr. 108.

In plastic we had values 326 to 428 pounds per square inch. Again, the break came in the plastic rather than the adhesive, as opposed to 16 pounds per square inch Miracle Sheer Magic.

In wood we obtained 3 to 160 per square inch with failure occurring in the wood rather than in the adhesive as compared to 99 pounds per square inch for Miracle Sheer Magic.[39]

* * * * * * *

Q. Now, Doctor, are two epoxy adhesive binds subject to any loss of adhesive strength because of heat?

A. There may be slight loss in heat.

Q. What about Miracle Sheer Magic?

A. It lost essentially all of its adhesive strength when the material was heated to slightly above the boiling point of water, about 220 degrees Fahrenheit.

Q. Did you have occasion to subject this product to hot water?

A. Yes.

Q. Would you state what test was conducted on that?

A. The same specimens were emerged in water at 150 degrees Fahrenheit and within 10 minutes time they would not withstand a force of about one pound per square inch.

Q. Would one pound per square inch be a very low force?

A. It would be a very low force.

Q. Based on your testing and evaluation, are you of the opinion that Miracle Sheer Magic Adhesive would be an effective repairing agent for dishware around the house?

A. No, if you would subject it to hot water.

Q. Are you familiar with the temperature of hot water in the average household?

A. Yes, most of them are set between 140 and 160 Fahrenheit.

Q. They would fall within the 150 degrees you mentioned previously?

A. Yes.

Q. What about in a commercial restaurant?

A. The temperatures would generally be higher because the health regulations make them use hotter water.

Q. Based on your testing examination of this, do you feel this product would be effective for the repair of hot water pipe?

A. No.

Q. How about any kitchen utensils that came in contact with heat?

A. No.[40]

With regard as to whether or not the test methods applied in the laboratory could be related to conditions one experiences in the household, Dr. Stiehler testified, in part, as follows:

Q. Which of the two types of materials, of adhesive materials, would require the better preparation before application, the Miracle Sheer Magic material or the so-called two parts that you testified about?

A. Well, in my own experience, I have done and found better results with the epoxies. That is in my own experience at home.

Q. That is at home. How long have you been using the two-part epoxy?

A. Oh, about two years.

[39] Tr. 110–111.
[40] Tr. 112–113.

Q. Of course, you are an expert in this field, Doctor?

A. But the parts that I have to join together are generally broken parts where it is not possible to prepare a nice smooth surface. You have a rough fracture and you just put it together. In putting them together I have generally found epoxies are easier to use to produce a much better bind.[41]

On redirect examination, Dr. Stiehler further testified to the following:

Q. You also made reference to a number of products that were tested at the Bureau of Standards that had epoxy in their composition. Now, did you test concurrently with these tests that you mentioned a product known as Devcon Epoxy Glue?

A. Yes.

Q. Would you describe this Devcon Epoxy Glue as to whether or not it was a two-part adhesive?

A. Yes, it was a two-part adhesive and it was a clear material.

Q. And by a two-part adhesive, what do you mean?

A. One tube contained epoxy resin and the other tube contained a hardener and these were mixed in essentially equal portions to form the epoxy adhesive.[42]

Q. Now, this Devcon product, would this product be suitable for repairing glassware?

A. Yes.

Q. And crockery?

A. Yes.

Q. And china?

A. Yes.

Q. Bricabrac and figurines?

A. Yes.

Q. In other words, you would say the Devcon two-part product is suitable for making such repairs as you have just mentioned, whereas the product known as Miracle Sheer Magic is not, is that correct?

A. Well, the Miracle Sheer Magic, the bind that would be formed there would not be suitable for use, where the product would be subjected (to) elevated temperatures or to certain solvents.

Q. Is this Devcon product, was it affected by water?

A. No.[43]

CX no. 22, the March 1963 test report by the National Bureau of Standards, shows the following results with regard to the effect of hot water on the bonding strength of respondent's product "Miracle Sheer-Magic":

	Steel	Glass	Phenolic plasti
Adherent, adhesive strength, psi, at 75° F	27	188	17
Adhesion in water at 150° F	(1)	(1)	(1)

1 Failure of the bond occurred after less than ten minutes immersion.

These results indicate that Miracle-Sheer Magic Epoxy Glue is useless in the repair of hot water pipes as well as chinaware and other kitchen utensils which would normally come in contact with very hot water.

41 Tr. 137–138.

42 Tr. 146; RX no. 7, "Miracle Epoxy', is a similar product.

43 Tr. 147–148.

It is here again to be emphasized that the thrust of the complaint in the instant proceeding is that respondent represents its product "Miracle Sheer-Magic" as an epoxy adhesive and, in such context, recommends its use for the various applications both stated and pictured for the benefit of the purchasing public on the front and back of the display cards on which said product is being offered for sale.[44] The similarity of these statements and pictured applications for "Miracle Sheer-Magic", when contrasted with many of the statements and pictured applications shown on respondent's display card in the offering for sale of its true epoxy adhesive "Miracle Epoxy", cannot help other than to further the confusion of the buying public in any attempt to distinguish between the two products. In such a situation, the additional appeal of the apparent convenience and the lower price for "Miracle Sheer-Magic" could well be determinative of the purchaser's choice of what appear to be two products of represented like adherent capabilities.

That the adherent capabilities of "Miracle Sheer-Magic" and a true epoxy adhesive are not equivalent, and that the adherent capabilities of "Miracle Sheer-Magic" are substantially inferior to those of a true epoxy adhesive is clearly shown by the record in this proceeding. Respondent's test report on "Miracle Sheer-Magic" as hereinbefore found in preceding finding number 10, does not attempt to show a comparison of the adherent capabilities of said product in comparison with respondent's epoxy adhesive "Miracle Epoxy" or any other true epoxy adhesive, and no evaluation in such connection can therefore be made from said report.[45]

13. Respondent has been and is now in substantial competition, in commerce, with corporations, firms and individuals in the sale of adhesives and other merchandise of the same general kind and nature as that sold by respondent.[46] Respondent places in the hands of jobbers, retailers and dealers the means and instrumentalities by and through which they may mislead and deceive the public as to the representations, statements and acts and practices herein shown of record.[47]

---

[44] CX no. 1; RX no. 9.

[45] Respondent's witness Muttart, who performed RX 20, this test report, testified at Tr. 366 as follows:

"HEARING EXAMINER SCHRUP: What I am trying to understand is, if I am correct, that the test for example, on page 2, 1 through 13, shows variations of different formulas of respondent's products—

"THE WITNESS: Yes.

"HEARING EXAMINER SCHRUP: How can I compare those variations against something else to see whether it is good or bad?

"THE WITNESS: I don't know."

See also, the testimony of respondent's Technical Director, the witness Johnson, at Tr. 401.

[46] Admitted in answer, paragraph seven; CSC proposed finding twenty.

[47] CSC proposed finding twenty-one.

In evaluating the effect of respondent's hereinbefore described acts and practices on both the purchasing public and respondent's competitors, consideration must be given to the two-fold aspect of using the word or term "epoxy" in the way the respondent has chosen to do business.

By using the said word or term in the aforesaid manner, respondent tends to acquire customers who want a true epoxy adhesive for its recommended uses, and think or are led to believe that respondent's single tube "Miracle Sheer-Magic" is, in truth, a pre-mixed epoxy adhesive made for such uses and that the necessity of the purchase of the customary two-tube unmixed package usually offered at a higher price has been eliminated.

Respondent thereby causes unfair diversion of purchasers from true epoxy adhesives offered for sale by competitors, and, further, the obtaining of the sale in such manner of an inferior substitute product for a true epoxy adhesive is clearly an unfair act and practice to the prejudice and injury of the purchasing public.

Secondly, by using the word or term "epoxy" in the manner described, respondent tends to acquire customers who desire an adhesive for the numerous varied uses recommended by the respondent for "Miracle Sheer-Magic", and think or are led to believe that said product is an epoxy adhesive suitable for all such uses with the further accompanying greater adherent capabilities attributed to epoxy adhesives.

Respondent thus causes unfair diversion of purchasers from competitors' adhesives offered for sale for the corresponding recommended uses of "Miracle Sheer-Magic", but not represented as being an epoxy adhesive. This is further an unfair act and practice to the prejudice and injury of the purchasing public, for it misleads the purchaser into buying a product other than the expected superior epoxy adhesive which he or she is led to believe is being purchased. The fact that the product purchased might later be found sufficiently adequate and the greater adherent capabilities of an epoxy adhesive unnecessary, is not a circumstance which would excuse respondent's foregoing false representations for "Miracle Sheer-Magic".

Respondent would contend that the required test to be applied in construing respondent's representations for "Miracle Sheer-Magic" is whether or not what it terms a "reasonably prudent" buyer could thereby be given the false impression or belief that said product is an epoxy adhesive, and, further, whether or not such a buyer would associate the adherent strengths and capabilities claimed for "Miracle Sheer-Magic" as being made for an epoxy adhesive, rather than being made by respondent for only a one-tube household adhesive not represented as being an epoxy adhesive.[48]

This "reasonably prudent" buyer test is rejected for the law is to the contrary and protects even the most unsophisticated of buyers, which is not to say that a "reasonably prudent" buyer could not or would not be given the foregoing false and erroneous impression or belief alleged in the complaint to be created by respondent's challenged representations. To the contrary, it is herein found that a reasonable reading of respondent's representations for "Miracle Sheer-Magic", as a whole and in their complete context, as hereinbefore set forth and described, convincingly shows that even a "reasonably prudent" buyer could and would be given the impression, belief or understanding that respondent's said product is not only a one-tube, pre-mixed epoxy adhesive selling at a low price, but that the adherent strengths and capabilities claimed for it are to be interpreted and read by the buyer as those associated with the performance of epoxy adhesives.

Illustrative, in part, of this is the testimony of the witness Dr. Maturi with reference to respondent's product "Miracle Sheer-Magic":

Q. Now, Doctor, if you didn't have your technical background and training and experience, and you walked into a hardware store or a drug store, and you saw this package which is Commission's Exhibit 1, with the tube attached, hanging on a rack or so on, would you know the difference between this product and a true epoxy adhesive?

A. Well, if I sent my wife out to buy an epoxy resin in a hardware store, I am sure that she would be fooled by that word "epoxy". She wouldn't go through the mental gymnastics and say, "There is just a tiny bit of epoxy here". She would think this was epoxy resin, as I am thinking of, and as the industry is thinking of, that would have the bonding, so that would fool her. It would fool my wife. It wouldn't fool me, because I am familiar with the art.

Q. And you are saying "epoxy resin"?

A. Epoxy adhesive, I mean.

If I sent her for epoxy adhesive to glue the furniture and came home with that, I would say that she misunderstood.

Now I don't say that that product—it is a good product for the purpose, but if I am thinking of epoxy adhesive, knowing what their strengths are, I wouldn't want her to come back with that.

But if I am thinking of something else, this may be fine for the job. It is a good product, but for the epoxy—what I understand as epoxy—that is not it.[49]

* * * * * * *

Q. I would like to ask, Dr. Maturi, if your wife saw the so-called two-part epoxy card, and the other one, side by side, and she had the choice, then what do you think she would have done?

I mean, after all, you must discuss your work with her? (Handing.) Would she still be fooled?

---

[48] Point II, brief in support of proposed findings and conclusions on behalf of respondent.
[49] Tr. 223–224.

A. I would say she—if I didn't train her, or if I didn't talk with her, or if she had a husband other than one technical, to bring out the difference between the two-tube and the one-tube—I would say she would bring either one. She would think these two are equivalent, but actually they are not.

I mean, in terms of strength and of good properties of a bond, this is much superior. (Indicating.)

Q. Which one is that?

A. The two-tube.[50]

* * * * * * *

Q. Doctor, if you sent your wife to the store to buy epoxy adhesive, and she saw epoxy adhesive with the price tag of one dollar, and the Miracle Sheer Magic labeled "epoxy" with the price tag of fifty-nine cents, which one would she buy?

A. I would guess she would buy the fifty-nine cents—my wife is frugal.[51]

The conclusion would appear inescapable that respondent's representations as herein found are but an attempt to enhance and promote the sale of its lower priced "Miracle Sheer-Magic" product under the cloak of the popularity and the desire by the purchasing public for true epoxy adhesives.[52]

14. The major ingredient in both the old formula and the new formula used in the marketing of "Mircle Sheer-Magic" is polyvinyl chloride, a vinyl resin. Both formulas contain an epoxy resin, Epon 828, manufactured by Shell Chemical Company. The old formula contained by weight 1.25% of the epoxy resin, the new 4% by weight. After application and when "Miracle Sheer-Magic" is dry, the weight proportions of the epoxy resin content are approximately doubled.[53]

The record in this proceeding is clear that the minor amount of epoxy resin contained in both the old and the new formula for "Miracle Sheer-Magic" contributes no added adhesive value, and its presence in either formula in such amount would not permit "Miracle Sheer-Magic" to be properly described or represented as being an epoxy adhesive.[54] The strongly emphasized and dominant portrayal of the

[50] Tr. 225.

[51] Tr. 233.

[52] See preceding finding number 7 and the descriptive magazine articles therein set forth.

[53] Respt. proposed finding number twelve; Tr. 125–126.

[54] Dr. Stiehler, at Tr. 97, 104 and 106, testified:

"Q. In your opinion, would a two-part epoxy adhesive product with the epoxy resin content of 1.25 percent be of any value?

"A. No.

"Q. What about four per cent?

"A. No."

* * * * * * *

"Q. Based on your analysis of Miracle Sheer Magic, would you describe this product as an epoxy adhesive?

"A. No."

* * * * * * *

"Q. In your opinion, based on your testing and your knowledge of the field, do the epoxy resins present in Miracle Sheer Magic, either the original formula or what has been marked on Commission Exhibit 19, contribute any substantial adhesive capability to the product?

"A. No."

term or word "Epoxy" on the display cards and attached tubes of the said product is not for the adhesive value of its epoxy resin content, as respondent's representations to the prospective purchasers would and do indicate,[55] for, in truth and in fact, its presence is only to act as a stabilizer tending to retard the degradation of the initial adhesive quality of the basic vinyl resin ingredient of the said product.[56]

The term "epoxy", as herein used, denotes the molecular structure of a substance, and the term "epoxy resins" refers to a class of substances which contain the epoxy molecular structure.[57] Epoxy resins in the uncured state have no significant or substantial adhesive capabilities.[58] Epoxy adhesives, as sold over-the-counter to the purchasing public, presently consist of two containers or tubes, one tube containing the epoxy resin ingredient, and the other or second tube the hardener or curing agent.[59] Before application, the contents of both tubes are intermixed shortly prior to use.[60] When applied in use, the hardener or curing agent causes the epoxy resin to react and form a substantially infusible and insoluble bond between the two substances or parts being joined. The minor amount of epoxy resin in "Miracle Sheer-Magic" does not so react.[61]

---

[55] Testimony of Dr. Maturi at Tr. 195–196; 206–208; 221–223.

[56] Respondent's proposed finding number thirteen; testimony of Dr. Maturi at Tr. 183–192 and that of Mr. Cheli at 492–493, 526.

[57] Tr. 94.

[58] RX no. 8, product specifications of the epoxy resin contained in "Miracle Sheer-Magic"; testimony of Dr. Maturi at Tr. 182–183:

"Q. Well, Doctor, Maturi, to avoid any ambiguity that may be in this record on an epoxy resin in a two-part epoxy adhesive, before they are mixed, do these epoxy resins have any substantial adhesive capability by themselves, in their uncured state?

"A. No.

"Q. You must have the hardener added to it?

"A. Yes.

"Q. In order to cause the reaction?

"A. You must have the hardener added to it in order to cause the chemical reaction.

"Q. Is this chemical reaction what gives it its inherent capabilities?

"A. Yes, this chemical reaction gives it its unusual bonding strength, low shrinkage, that one skilled in the art would expect in an epoxy resin.

"Q. Is this what gives it its insolubility?

"A. Yes.

"Q. Its infusibility?

"A. Yes.

"Q. Without——

"A. It also gives it its high temperature water resistance.

"Q. Without this reaction, you wouldn't have these various properties we have enumerated?

"A. Right."

[59] RX no. 7, "Miracle Epoxy"; testimony of Dr. Stiehler at Tr. 96–97; Dr. Maturi at Tr. 176–180; Mr. Cheli at Tr. 468.

[60] Some epoxy adhesives for special industrial use are sold in pre-mixed quantity. The chemical reaction to be expected from this mixing does not occur and the product is not operative, however, until and following its application at substantially elevated temperatures. Tr. 95–96; 179–180.

[61] Tr. 152–153.

15. The complaint in the instant proceeding alleges in Paragraph Six that, in truth and in fact:

"MIRACLE SHEER-MAGIC" is not an epoxy adhesive and does not have the adherent characteristics, strength and capabilities of epoxy adhesives. Epoxy adhesives are derived from an epoxide or oxirane which when applied in use, chemically react with a hardener to form a substantially infusible and insoluble substance that has outstanding adherent capabilities. "MIRACLE SHEER-MAGIC" is a thermoplastic material, primarily polyvinylchloride, which can be repeatedly softened and hardened by a change of temperature. Its adherent capabilities are substantially less than those of epoxy type adhesives.

The proposed order to cease and desist submitted by counsel supporting the complaint would, among other things, prohibit the respondent from:

2. Using the term "epoxy," directly or indirectly, to refer to any adhesive or similar product, unless it is derived from an epoxide or oxirane and when applied in use, chemically reacts with a hardener to form a substantially infusible and insoluble substance.

3. Representing, directly or by implication, that any adhesive or similar product is an epoxy adhesive, unless it is derived from an epoxide or oxirane and when applied in use, chemically reacts with a hardener to form a substantially infusible and insoluble substance.

Respondent asserts that the examination of the experts and the testimony of the witness Cheli on behalf of the respondent show clearly that the use of epoxies is a fast developing field and proposes that:

The term epoxy adhesive cannot be limited to adhesives derived from an epoxide or oxirane which when applied chemically react with a hardener to form a substantially infusible and insoluble substance that has outstanding adherent characteristics.[62]

Respondent particularly excepts to the requirement in paragraphs two and three of Commission counsel's proposed order to cease and desist which would restrict use of the term "epoxy" or representing that an adhesive is an "epoxy adhesive" unless it is "derived from an epoxide or oxirane". Respondent urges that the testimony of the witness Cheli shows paracetic acid to be another derivative source and that such a restricted definition is unjustified by the proof, unnecessary to the case, and not in the public interest.[63]

Respondent's expert witness, at Tr. 479–481, testified as follows:

Q. Mr. Cheli, how would you define an epoxy adhesive?

A. An epoxy adhesive would be a material compounded or mixed in such a way that epoxy resin presents its major component and this major component is the major adhesive material in the mixture.

---

[62] Respondent's proposed finding number twenty-three.

[63] Page 7 of answering memorandum by respondent, to proposed findings and conclusions of counsel supporting the complaint.

Q. Did you derive that definition from any particular source?

A. No, I just feel that this is a common sense approach to the definition, when one might be asked the categorical question regarding any material.

Q. Do you have any authorities that you have studied, in forming that opinion as to a definition of an epoxy adhesive?

A. I think, in my contact with authorities of all categories, when we speak of epoxy adhesive, we generally understand it to mean a material whose major component is epoxy, and this is the material whose adhesive properties we are dealing with.

* * * * * * *

Q. Then would you be able to express an opinion as to whether all epoxy adhesives are derived from an epoxide or oxirane?

A. Definitely I can make a statement that this is definitely not true. These are only one sort of epoxy or epoxide materials which could be used, and are used as adhesives.

Q. Could you give me an example of an epoxy adhesive that is not derived solely from an epoxide or oxirane, in its major component?

A. Well, paracetic acid could be one so used, not to introduce others—we have already mentioned that one.

Q. I think we have already mentioned—

A. Paracetic acid.

Q. But could you bring this a little nearer home with an example of an epoxy adhesive?

A. I don't believe there are any commercial epoxy adhesives of paracetic acid in the tube form, at the present time. This is a rather new material, but I only illustrate that to show that this particular definition you have presented me with is restrictive and there is no reason to believe that that should be the accepted definition for the only epoxy adhesive which could be compounded.

Upon cross-examination, the witness further testified at Tr. 525:

Q. Mr. Cheli, isn't it true that paracetic acid has never been offered for sale to the householder as an adhesive?

A. I couldn't be sure. I intimated previously that I thought it might not have.

Q. But to the best of your knowledge it never has been.

A. That is correct.

In contrast, the Commission's expert witnesses, Dr. Stiehler and Dr. Maturi, testified to the following:

Q. I show you what has been marked as Commission Exhibit No. 20 for identification, which has been taken from the complaint, which is paragraph 6 of the complaint and paragraphs 2 and 3 of the proposed order. And it reads it is derived from epoxy and when applied in use chemically it reacts with a hardener to form substantially an infusible and insoluble substance.

I show you this for your examination. In your opinion, is this an accurate definition of an epoxy adhesive?

A. Yes.

Q. What is an epoxide?

A. An epoxide is this ring with this membered ring containing oxygen and two other atoms.

Q. What is oxirane?

A. It is the equivalent of epoxide.

Q. Are you aware of any epoxy adhesive presently on the market today or under development that did not fall within that definition?

A. I am not.

Q. Would the Respondent's product, Miracle Sheer Magic Adhesive, which I have shown you previously, would that fall within that definition, sir?

A. No.[64]

Under cross-examination, Dr. Stiehler testified:

Q. Now, you testified that the definition of epoxy adhesives was as stated in the complaint, is that so?

A. That is right.

Q. That epoxy adhesives are derived from epoxide or oxirane which when applied reacts to form a substantial infusible or insoluble substance. Is that the definition of an epoxy adhesive?

A. That is right.

Q. Did you have anything to do with the preparation of this definition?

A. No.

Q. Do you know where it was derived from?

A. I imagine from various texts.

Q. Have you ever seen a text with such a definition? Such a definition in it of epoxy adhesive?

A. No.

Q. Is it not possible that an epoxy adhesive is derived from other than epoxide or oxirane?

A. No.

Q. Is it possible that epoxy adhesive could consist of more than two substances, two ingredients?

A. Yes.

Q. Well, this definition only includes two ingredients, does it not, the catalyst and epoxy resins?

A. There also can be fillers, such as steel.

Q. Can there also be other substances which are more than fillers?

A. What do you mean by that?

Q. Is it possible that epoxy adhesive would contain another ingredient other than a filler and a catalyst and the epoxy resin?

A. It is possible, yes.

Q. Could you give me an example?

A. I do not know of any offhand.[65]

Following are excerpts from the testimony of Dr. Maturi:

Q. Doctor, I show you what has been marked as Commission Exhibit 20 for identification, which purports to be an extract of the definition for epoxy adhesive contained in the complaint, which the Commission has issued, and in the proposed order. I ask you if you consider that definition a correct definition of an epoxy adhesive?

A. I would consider this a correct definition, and I note, as I noted before, the textbook, Golding, previously referred to, as well as the text by Lee on epoxies, as well as the plastic encyclopedia, which usually speaks for the trade—this definition concurs with that.

[64] Tr. 114–115.
[65] Tr. 118–119.

The difference here is that—it is not a difference; instead of saying infusible and insoluble, these texts agreeing with me, use the word "thermosetting", which is the equivalent of infusible and insoluble, and in this definition you substitute equals for equals, the thermosetting.

Q. Doctor, do you know of any epoxy adhesive now on the market or under development, that does not fit in this definition?

A. No, I know of no product on the market that does not fit the definition.

As I mentioned before, there are products being worked on, or no, I want to strike that—there was no product that doesn't fit that definition on the market, or any product in research that doesn't fit that definition, as far as I know.

* * * * * * *

Q. Now, Doctor, is it possible that in addition, that an epoxy adhesive, being derived from an epoxide or oxirane, and when applied in use, chemically reacts with a hardener to form a substantially infusible and insoluble substance, and does this adhesive product also have additional ingredients, such as a filler?

A. Yes.

Q. Such as a pigment to give it color?

A. Right.

Q. And this definition merely sets forth the requirements, is that right?

A. Yes.

Q. All epoxy adhesives have to be derived from an epoxy of oxirane, and have to, in use, be applied with a hardener to form a substantially infusible substance?

A. Yes.

Q. They could also have additional substances, such as fillers and colors?

A. Yes, and modifiers, et cetera.

Q. As a matter of fact, they usually do have additional substances in there?

A. Yes.[66]

Accordingly, and for the purpose of the order to cease and desist in this particular proceeding, the statement of facts contained in subparagraph (a) of Paragraph Six of the complaint, as hereinbefore set forth, and the definition of an epoxy adhesive stated in CX number 20, must be found to be true and controlling.[67] This is particularly so in the light of the further testimony of respondent's witness Cheli:

Q. Do you know of any polyvinyl chloride adhesives other than Miracle Sheer Magic that use Epoxy resins as stabilizers?

A. No, sir. The only one that I presently know about is Miracle Sheer Magic.

Q. Are there not as many as twenty and possibly more stabilizers that might be used in polyvinyl chloride adhesives?

A. Oh yes, possibly more.[68]

Respondent's witness Johnson:

Q. Now, Mr. Johnson, do you know of any other polyvinylchloride on the market that uses epoxy resin as a stabilizer?

A. I do not.

---

[66] Tr. 192–194.

[67] Comm. Rules of Practice, Section 3.28(b)(2) provides that an order to cease and desist may be altered, modified or set aside in the event of changed conditions of fact.

[68] Tr. 526.

Q. Sir, is the use for which you testified that your employer puts epoxy resin in these polyvinylchloride adhesives, is this patented? Do you have any exclusive right to the use of this product in this way?

A. We have not applied for any patent on the system as yet.

Q. You have had this product or this product has been on the market for over a year now. Is that correct?

A. The present product came out in June of 1963.

Q. No, sir. I am speaking about the use of epoxy resins in this product, Formula One.

A. Formula One? That is right.

Q. It has been on the market over a year.

Now, I call your attention to Respondent's Exhibit 8(b) for identification which purports to be a product specification, of the Shell Chemical Company, for Epon Resin 828. I read on the back here, a statement: "Epon 828 yields products with high physical strength; excellent chemical resistance and good electrical properties by chemical reaction with curing agents, such as Amines, polyanide resins; polysulfide resins; anhydrides; metalic hydroxides".

Is there anything contained in Formulation One which falls into any of those categories, if you know?

THE WITNESS: None of those would cover this.

Q. Then it is your testimony sir that you people have developed a use for this epoxy other than what Shell Chemical Company is aware of?

A. No, we don't claim that.[69]

Further, that again of the witness Cheli:

Q. Do you think you can make a complete comparison between a material such as Sheer Magic, described in Commission's Exhibit No. 1, the—and the epoxy miracle adhesive, Respondent's Exhibit No. 7, in uses and applications around the house?

A. Did you say you want a comparison?

Q. Yes.

A. These two materials are both adhesives. Let's start on that premise first, and understand that adhesives of this character are being sold to people who will use them around the house, since they are normally found in places where a housewife or a hobbiest or a home do-it-yourselfer will be able to purchase them, and I believe from my examination of the cards that they indicate that this is the scope of both.

Now, there was some discussion in previous testimony regarding this, and it was indicated, I believe, that there is a considerable amount of overlapping in these two products. This is not unusual for many products that are on the market are by the same company or by two different companies. There are different categories of materials, but generally there is some reason for both of them being on there that makes it quite important to have both in evidence.[70]

Finally, that again of Dr. Maturi:

Q. Doctor, what would be required to make Miracle Sheer Magic a true epoxy adhesive under your definition?

A. Make the epoxy a major component, make the epoxy resin a major component of the composition, instead of a small, insignificant component.

[69] Tr. 429–430.
[70] Tr. 513–514.

Q. And you would have to add a hardener, sir?
A. Yes.
Q. A separate hardener, in addition to the epoxy?
A. Yes.[71]

The order to cease and desist to be entered herein is not intended to, and does not, prohibit the respondent from truthfully stating the amount of epoxy resin contained in "Miracle Sheer-Magic", and the actual purpose for which it is therein used. Creating confusion in the mind of the purchasing public by misrepresentation, however, is not to be allowed and should effectively be prevented.

It is noted and found that in the sale of respondent's product "Miracle Epoxy", a two-tube, true epoxy adhesive, each tube bears the prominently shown term or word "EPOXY" and that the display card states "Sticks Just About Everything to Anything".[72] It does not appear to be mere coincidence that respondent's "Miracle Sheer-Magic" single-tube, non-epoxy adhesive also bears the equally more or less prominent term or word "EPOXY" and the statement "no-mixing", while the display card further states "Will Bond Just About Everything to Anything".[73] In truth and in fact, the epoxy resin contained in "Miracle Sheer-Magic" is inert in the sense of adding to its adhesive strength, and it is used for an entirely different purpose, that of a stabilizer of which there are various others existent.[74] This is not to say respondent should be prohibited from the use of epoxy resin as a stabilizer, but only that its use must not be represented, either directly or impliedly, as being for other than its true purpose.

The record in this proceeding shows that "Miracle Sheer-Magic" and competitive adhesives, including true epoxy adhesives such as respondent's "Miracle Epoxy", are generally sold side by side in the over-the-counter sale to the purchasing public. These adhesives have many overlapping recommended uses, for example, those for "Miracle Sheer-Magic" and those for a true epoxy adhesive, respondent's "Miracle Epoxy".[75] Respondent's claims for "Miracle Sheer-Magic" must be interpreted and judged as to their validity in the context of the representation directly or impliedly made for "Miracle Sheer-Magic" that it is a true epoxy adhesive and will perform as such. This it is not and will not do. Most succinctly put, and in the words of respondent's wit-

[71] Tr. 196.
[72] RX no. 7.
[73] RX no. 9. It will also be noted that the above representation for (RX no. 7) "Miracle Epoxy", as well as that for (RX no. 9) "Miracle Sheer-Magic", each contain the limiting words "Just About" everything to anything.
[74] See RX no. 20, the Ohio University test report.
[75] Compare the statements and illustrations on the front and reverse sides of the display cards for "Miracle Sheer-Magic" (RX no. 9) and for "Miracle Epoxy" (RX no. 7).

ness Johnson at Tr. 440, in speaking of respondent's exhibit number 7 "Miracle Epoxy", a true epoxy adhesive:

THE WITNESS: For real high strength, we cannot equal the epoxy.

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

CONCLUSIONS

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

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

3. The aforesaid acts and practices of respondent, as herein found in the foregoing Findings of Fact, 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.

ORDER

It is ordered, That respondent Miracle Adhesives Corporation, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of adhesives, glues or related products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any adhesive, glue or related product is an epoxy adhesive, where its epoxy component is not derived from an epoxide or oxirane which, when applied in use, chemically reacts with a hardener or curing agent to form a substantially infusible and insoluble bond.

2. Representing, directly or by implication, that the adherent characteristics and the degree and extent of the strength and capabilities of any adhesive, glue or related product are those of an epoxy adhesive, where the epoxy component present is in an amount not sufficient to produce the adherent characteristics and the degree and extent of strength and capabilities being represented.

3. Representing, directly or by implication, that the epoxy component in any adhesive, glue or related product is therein present to produce the adherent characteristics, strength and capabilities of an epoxy adhesive where such component is not productive of the foregoing and is present for a different purpose and use.

4. Representing, directly or by implication, that the product designated "Miracle Sheer-Magic" is an epoxy adhesive or that it has the adherent characteristics, strength and capabilities of an epoxy adhesive, or that the said product will:

a. Produce an adhesive bond as effective as that of an epoxy adhesive where an epoxy adhesive is either susceptible of or necessary of being used.

b. Repair plumbing leaks, broken china, dishes or glassware to the degree and extent of the strength and capabilities of an epoxy adhesive.

c. Resist and is not affected by hot water or other high heat temperatures to the degree and extent of the strength and capabilities of an epoxy adhesive.

5. Misrepresenting in any manner, directly or impliedly, pictorially or otherwise, the true adhesive characteristics, effective degree of strength, or the extent of the effective capabilities of any adhesive, glue or related product advertised and sold to the purchasing public for any stated or recommended purpose and use.

6. Placing in the hands of wholesalers, jobbers, retailers, dealers and others, means and instrumentalities by and through which they may deceive and mislead the purchasing public in the respects set out above.

Final Order

This case has been heard by the Commission on respondent's appeal from the initial decision of the hearing examiner. Upon examination of the record and after full consideration of the issues of fact and law presented, the Commission has concluded that the initial decision is correct in all respects. Accordingly,

It is ordered, That the initial decision of the hearing examiner, including the findings, conclusions, and order, be, and hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent shall, within sixty (60) days after service of the order herein upon it, file with the Commission a report in writing, signed by such respondent, setting forth in detail the manner and form of its compliance with the order to cease and desist.

IN THE MATTER OF

MARCHESSA OF ITALY, INC., ET AL.

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

Docket C-736. Complaint, Apr. 24, 1964—Decision, Apr. 24, 1964

Consent order requiring New York City manufacturers of wool products to cease violating the Wool Products Labeling Act by such practices as labeling as "50% mohair, 45% wool, 5% nylon", sweaters which contain substantially different fibers and amounts than so represented; by failing to disclose on sweater labels the percentage of the total fiber weight of wool and other fibers and the manufacturer, and using the word "mohair" in place of the word "wool".

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 Marchessa of Italy, Inc., a corporation, and Irving Rosenthal, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of the said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, 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 Marchessa of Italy, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondent Irving Rosenthal is an officer of the said corporation and cooperates in formulating, directing and controlling the acts, policies and practices of the corporate respondent including the acts and practices hereinafter referred to.

Respondents are manufacturers of wool products with their office and principal place of business located at 519 Eighth Avenue, New York, New York.

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

PAR. 3. Certain of said wool products were misbranded by respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were sweaters stamped, tagged, labeled or otherwise identified as containing 50% mohair, 45% wool, 5% nylon, whereas in truth and in fact, said sweaters contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 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 certain sweaters with labels on or affixed thereto, which failed to disclose:

1. The percentage of the total fiber weight of the wool product, exclusive of ornamentation, not exceeding 5 percentum of said total fiber weight of, (1) woolen fibers; (2) each fiber other than wool if said percentage by weight of such fiber is 5 percentum or more; (3) the aggregate of all other fibers.

2. The name of the manufacturer of the wool product or the name of one or more persons subject to Section 3 with respect to such wool product.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939, in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder, in that the term "mohair" was used in lieu of the word "wool" in setting forth the required fiber content information on labels affixed to wool products without setting forth the correct percentage of the mohair present, in violation of Rule 19 of the Rules and Regulations under the Wool Products Labeling Act of 1939.

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

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Wool Products Labeling Act of 1939 and the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent, Marchessa of Italy, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 519 8th Avenue, New York, New York.

Respondent, Irving Rosenthal is an officer of said corporation and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Marchessa of Italy, Inc., a corporation, and its officers, and Irving Rosenthal, 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 or manufacture for introduction into commerce, or the offering for sale, sale, transportation, distribution or delivery for shipment, or shipment in commerce, of sweaters or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

Misbranding such products by:

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

3. Using the term "mohair" in lieu of the word "Wool" in setting forth the required information on labels affixed to wool products without setting forth the correct percentage present.

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

In the Matter of

LEO MERVIS ET AL. DOING BUSINESS AS SOUTHERN SIDING COMPANY, ETC.

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

Docket C-737. Complaint, Apr. 24, 1964—Decision, Apr. 24, 1964

Consent order requiring New Orleans sellers to the public of aluminum and insulated siding products to cease representing falsely, through their salesmen, that they would promote the houses of purchasers as models for the demonstration of their products, that purchasers would receive commissions from sales resulting from such use of their houses, and that the commissions would offset all or a substantial amount of the cost of installation of the siding.

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 Leo Mervis and Celia Mervis, individually and as copartners, trading and doing business as Southern Siding Company and as Housecraft, 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 Leo Mervis and Celia Mervis are individuals and copartners, trading and doing business as Southern Siding Company and as Housecraft, with their principal office and place of business located at 3601 Pine Street, New Orleans, Louisiana.

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

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

PAR. 4. In the course and conduct of their business and for the purpose of inducing the purchase of their siding products, respondents, through their salesmen and representatives, have represented, directly or by implication, that respondents would establish and promote the houses of purchasers as models for the demonstration and advertising of respondents' products; that purchasers would receive commissions from sales resulting from the use of such houses as models, and that such commissions would offset all or a substantial part of the cost of installation of such siding.

PAR. 5. In truth and in fact, respondents did not establish and promote the houses of purchasers as models for the demonstration and advertising of their products and made no efforts to utilize the houses of purchasers to sell their products to others. As a result, purchasers did not receive commissions to offset any part of the cost of the installation of respondents' siding.

Therefore, the statements and representations set forth in Paragraph Four above, were and are false, misleading and deceptive.

PAR. 6. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of aluminum and insulated siding products of the same general kind and nature as those sold by respondents.

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

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

DECISION AND ORDER

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

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

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

1. Respondents, Leo Mervis and Celia Mervis, are individuals and copartners trading and doing business as Southern Siding Company and as Housecraft, with their office and principal place of business located at 3601 Pine Street, New Orleans, Louisiana.

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

ORDER

It is ordered, That respondents Leo Mervis and Celia Mervis, individually and as copartners, trading and doing business as Southern Siding Company and as Housecraft, or under any other name or names, 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 aluminum and insulating siding products, or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that respondents will use the house or building of any purchaser as a model for demonstration or advertising purposes.

2. Representing, directly or by implication, that purchasers will receive commissions from sales made as a result of the use of their houses or buildings as models or for demonstration or advertising purposes.

3. Misrepresenting, in any manner, the amount of compensation or other financial benefits which will be realized by or is being afforded to any purchaser of respondents' products for cooperating with or assisting them in the resale of such products.

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

IN THE MATTER OF

STERLING PLASTICS CO. ET AL

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

Docket C-738. Complaint, Apr. 24, 1964—Decision, Apr. 24, 1964

Consent order requiring Union, N.J., importers of a complete line of school supplies, some from Japan, which they sold to wholesalers, jobbers and retailers for resale, to cease selling products such as rulers and compasses so packaged—in plastic pouches and cardboard boxes—or otherwise assembled as to obscure or conceal the mark of foreign origin appearing thereon, and selling them with the words "Sterling Plastics Co. Union, N.J." on the pouches and boxes, thus representing falsely that they were of domestic origin.

COMPLAINT

Pursuant to the provision 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 Sterling Plastics Co., a corporation, and George J. Staab and Mary D. Staab, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sterling Plastics Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 1140 Commerce Avenue, in the city of Union, State of New Jersey.

Respondents George J. Staab and Mary D. Staab are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the importation, advertising, offering for sale, sale and distribution of a complete line of school supplies, including, but not limited to, rulers and compasses. Respondents sell their school supplies to wholesalers, jobbers and retailers for resale to the public.

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

PAR. 4. Certain of the school supplies sold and distributed by respondents are manufactured in and imported from Japan. Certain of said school supplies are packaged in plastic pouches and others are packaged in cardboard boxes. In many instances, said foreign made school supplies are so packaged or otherwise assembled so as to obscure or conceal the mark of foreign origin appearing thereon. In said instances there is no adequate disclosure to the public that such school supplies are not made in the United States.

PAR. 5. Certain of the Japanese school supplies sold and distributed by the respondents are packaged in plastic pouches and cardboard boxes upon which appears the words "Sterling Plastics Co. Union, N.J." The words "Sterling Plastics Co. Union, N.J.," imprinted on said pouches and boxes constitute an affirmative representation that the school supplies contained in said pouches and boxes are of domestic rather than foreign origin. Such representation is false, misleading and deceptive as certain of said school supplies are of Japanese origin.

PAR. 6. In the absence of a clear and conspicuous disclosure that products, including school supplies, such as rulers and compasses, are of foreign origin, the public believes and understands that they are of domestic origin, a fact of which the Commission takes official notice.

As to the aforesaid articles of merchandise, a substantial portion of the purchasing public has a preference for said articles which are of domestic origin, of which fact the Commission also takes official notice. Respondents' failure to clearly and conspicuously disclose the country of origin of said articles of merchandise is, therefore, to the prejudice of the purchasing public.

PAR. 7. By the aforesaid practices, respondents place in the hands of wholesalers, distributors and retailers, the means and instrumentalities by and through which they may mislead the public as to the country of origin of said products.

PAR. 8. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals, in the sale of products of the same general kind and nature as those sold by respondents.

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

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

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission, having reason to believe that the respondents have violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent Sterling Plastics Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 1140 Commerce Avenue, in the city of Union, State of New Jersey.

Respondents George J. Staab and Mary D. Staab are officers of said corporation, and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Sterling Plastics Co., a corporation, and its officers, and George J. Staab and Mary D. Staab, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of school supplies, or any other products, 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 any product which is in whole, or which contains a substantial part or parts, of foreign origin or fabrication without affirmatively disclosing the country or place of foreign origin or fabrication thereof on the products themselves, by marking or stamping on an exposed surface or on a label or tag affixed thereto, of such degree of permanency as to remain thereon until consummation of consumer sale of the product, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making a casual inspection of the product.

2. Offering for sale, selling or distributing any such product packaged, or enclosed in a container, or mounted on a display card, without disclosing the country or place of foreign origin of the product, or substantial part or parts thereof, on the front or face of said package or container, so positioned as to clearly have application to the product so packaged, and of such degree of

permanency as to remain thereon until consummation of the consumer sale of the product, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the product.

3. Representing, directly or indirectly, in any manner or by any means, that their products are of domestic origin when said products are in whole or contain a substantial part or parts which is or are, of foreign origin.

4. Placing in the hands of jobbers, retailers, dealers and other, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning any merchandise in respect to the origin of respondents' merchandise.

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

IN THE MATTER OF

KAISER JEEP CORPORATION ET AL.

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

Docket C-739. Complaint, Apr. 27, 1964—Decision, Apr. 27, 1964

Consent order requiring two corporations engaged in the manufacture and distribution of "Jeep" motor vehicles and its parts and accessories to cease attempting to prevent its franchised dealers from stocking or selling items of special equipment supplied by other manufacturers by such acts or practices as threatening to cancel dealers' franchises, to install an additional dealer in a dealer's area, to refuse to honor warranty claims on Jeeps on which unfavored manufacturers' equipment had been installed, and to delay deliveries to a franchised dealer; policing activities of dealers in connection with the handling of special equipment they did not sponsor, setting an unreasonably high yearly quota for sales of special equipment they handled to keep dealers from selling other items, and cooperating with favored manufacturers of special equipment to prevent dealers from stocking that of others; and to cease coercing or intimidating any vendor of their products to prevent his buying special equipment not sold by them.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. Sec. 41, *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents named in the caption hereof and more particularly described hereinafter, have been, and are now violating, the provisions of said Act, and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in respect thereto as follows:

PARAGRAPH 1. Respondent Kaiser Jeep Corporation is a corporation organized and existing under the laws of the State of Nevada, with headquarters located at plant site, 940 Cove Avenue, Toledo, Ohio. Until March 18, 1963. respondent Kaiser Jeep Corporation was named Willys Motors, Inc. Respondent Kaiser Jeep Corporation is a wholly owned subsidiary of Kaiser Industries Corporation, which has headquarters in Kaiser Center, 300 Lakeside Drive, Oakland 12, California.

Respondent Kaiser Jeep Sales Corporation is a corporation organized and existing under the laws of the State of Michigan. Until March 12, 1963, Kaiser Jeep Sales Corporation was named Willys Sales Corporation. Kaiser Jeep Sales Corporation is a wholly owned subsidiary of Kaiser Jeep Corporation and has its headquarters at the same address as Kaiser Jeep Corporation, 940 Cove Avenue, Toledo, Ohio.

PAR. 2. Respondent Kaiser Jeep Corporation since on or about 1953 has been and is now engaged in the business of the manufacture, sale and distribution in the United States and foreign countries of two and four wheel drive motor vehicles marketed under the trade name "Jeep". Respondent Kaiser Jeep Corporation also manufactures, sells and distributes parts and accessories for said vehicles. In addition, respondent Kaiser Jeep Corporation purchases certain equipment, hereinafter referred to as "special equipment", used on or in connection with said vehicles for specialized tasks and functions. Said "special equipment" is resold or otherwise distributed by respondent Kaiser Jeep Corporation to its franchised dealers, as more fully hereinafter set forth.

For many years Kaiser Jeep Corporation and its predecessor corporation, Willys-Overland Motors, was the sole manufacturer of such type vehicles and presently remains as the largest and predominant manufacturer in the field. Total domestic sales of vehicles, parts and accessories, and special equipment reached $70,670,000.00 in 1959, a 24% increase over 1958.

Respondent Kaiser Jeep Sales Corporation was organized in 1955 by its parent corporation Kaiser Jeep Corporation. Under the direction and control of Kaiser Jeep Corporation, it handles dealer relationships and promotes the sale of "Jeep" vehicles, parts and accessories and "special equipment". Kaiser Jeep Sales Corporation conducts its operations through eight regions (sometimes referred to as zones) each with an office, and a regional manager in charge of operations and personnel attached thereto. Each region is divided into districts, each district, encompassing approximately 30 retail dealers, is serviced by a district manager directly responsible to his regional manager. The regional officers and district managers maintain close association with the dealers in their regions and districts, working constantly on improvement of all aspects of the dealership and especially to increase or attempt to increase the sales of "Jeep" vehicles, parts and accessories, and "special equipment" through its franchise dealers. Kaiser Jeep Sales Corporation enters into agreements, commonly called a "franchise," with retail dealers throughout the United States for the distribution and sale of "Jeep" vehicles, parts and accessories, with the exception of four small areas wherein agreements are with wholesaler distributors, who in turn distribute said goods through retail dealers.

PAR. 3. The respondents in the course and conduct of the aforesaid businesses sell and transport or cause to be transported the aforementioned vehicles, parts and accessories and "special equipment" to their franchised dealers or customers in States other than the States in which said vehicles, parts and accessories and "special equipment" are manufactured. There has been and is now a continuous and substantial trade in commerce in said products between and among the several States of the United States and the District of Columbia within the intent and meaning of the Federal Trade Commission Act.

PAR. 4. Respondents, in the course and conduct of their businesses, in commerce, as aforesaid, are now and have been at all times mentioned herein in competition with other corporations, individuals, partnerships and firms likewise engaged in the sale and distribution of similar products as described herein.

PAR. 5. There are more than 30 items of "special equipment" which are adaptable to the basic "Jeep" vehicles, and which are produced by manufacturers other than Kaiser Jeep Corporation. Examples of said items are devices which modify the vehicles' capabilities and body (*e.g.* selective drive hubs and body cabs or bumpers) or devices which enable the performance of numerous specialized functions (*e.g.* snow plows and street sweepers), or devices which take advantage of the vehicles' power take-off features (*e.g.* post hole diggers and winches).

Respondents, pursuant to agreements or other arrangements with certain manufacturers, are appointed the exclusive sales outlet for certain items of "special equipment" produced by such manufacturers which respondents promote and advertise to its dealers and the public as "Approved 'Jeep' Equipment" (sometimes hereinafter referred to as "approved special equipment"). In return for every order the dealers place with respondents for an item of approved "special equipment", the manufacturer pays respondents a sum of money equal to a percentage of the manufacturer's selling price of said equipment (sometimes hereinafter referred to as an "override commission"). However, respondents do not receive an override commission on purchases of "special equipment" by its dealers from manufacturers who have not entered into the above described arrangements or agreements with respondents.

The retail dealers are restricted under their franchise agreements to solicit retail sales for "Jeep" vehicles, parts and accessories supplied to the dealers exclusively by respondents only within a specified territory designated by respondents. However, said dealers are not required under the franchise agreement to resell "special equipment" supplied the dealers by respondents.

Respondents' retail dealerships represent the most effective and productive outlets for the display, sale and distribution of "special equipment" to consumers and therefore they are solicited for orders by manufacturers of equipment which is adaptable to the "Jeep" in the same manner as the approved "special equipment" supplied by respondent to these dealerships.

The total dollar sales by respondents of "special equipment" in 1961 was $5,719,575. The total manufacturer's override commission received by respondents from manufacturers of said "special equipment" in 1961 was $314,732.

PAR. 6. In order to increase override commissions, respondents, on or about 1955 and continuing to the present time, adopted and placed into effect a policy or program designed to restrict, prevent, restrain, hamper, hinder, pressure or discourage their franchised retail dealers from buying "special equipment" from any supplier other than respondents. This is hereinafter designated and referred to as "non-approved special equipment". For the purpose of carrying out and successfully effectuating such policy or program respondents engaged, and now engage in various acts and practices to coerce, influence, harass and intimidate respondents' franchised dealers to purchase "approved special equipment" from respondents, as follows:

(1) Threatened to cancel the franchise of dealers who did not discontinue the handling of "non-approved special equipment" and in

some cases did cancel the franchises of dealers who refused to discontinue the handling of "non-approved special equipment".

(2) Threatened to install additional dealers in an established dealer's market area who refused to discontinue the handling of "non-approved special equipment" and in some instances did install additional dealers where established dealers refused to discontinue handling "non-approved special equipment".

(3) Threatened to refuse to honor warranty claims made with respect to vehicles with "non-approved special equipment" installed thereon and in some instances did actually refuse to honor said warranty claims because of this fact.

(4) Planned and keyed advertising programs, and promotional sales efforts and sales and promotion literature to the exclusive promotion and sale of approved "special equipment" to the exclusion of "non-approved special equipment" and cooperated extensively with one particular manufacturer of "special equipment" to effectuate such a restrictive and exclusive practice.

(5) Kaiser Jeep Sales Corporation regional and district managers, acting pursuant to instructions by respondents, made and do now make frequent visits or calls on the franchised dealers for the purpose of determining whether the franchised dealers are selling only "special equipment" approved by respondents to the exclusion of "non-approved special equipment" and for the purpose of exerting pressure on said dealers to conform to this policy.

(6) Delayed the delivery of vehicles and threatened to delay the delivery of vehicles ordered by franchised dealers who would not discontinue the sale of "non-approved special equipment".

(7) Set unreasonably high yearly quotas for unit sales of "approved special equipment" in order to prevent the franchised dealer from selling "non-approved special equipment".

(8) Coerced, intimated or otherwise compelled franchised dealers to buy only "approved special equipment" from respondents, and deprived said dealers of their right to deal with any other supplier of such special equipment.

Par. 7. The aforesaid acts and practices of respondents as hereinbefore alleged have had and are now having the capacity, tendency and effect of:

(1) Restraining, lessening and eliminating competition between manufacturers of "approved special equipment" and manufacturers of "non-approved special equipment".

(2) Depriving respondents' franchised dealers of their rights and privileges as independent businessmen to purchase "special equipment" from the manufacturer of their choice.

(3) Causing respondents' franchised dealers substantial monetary loss by cancelling their franchises in reprisal for their handling of "non-approved special equipment".

(4) Creating an arbitrary division of customers and allocation of territories as between cooperating and non-cooperating dealers, and favored and non-favored manufacturers of "special equipment".

(5) Foreclosing, preventing, restricting, restraining, hampering, hindering, and discouraging manufacturers of "non-approved special equipment" from making sales of their products to respondents' dealers, thereby restricting their markets and restraining the free flow of trade.

PAR. 8. Respondents' acts and practices as hereinabove alleged are all to the prejudice of the public and have a dangerous tendency to, and are now, unduly frustrating, hindering, suppressing, lessening, restraining, preventing and eliminating competition in the purchase and sale of various items of special equipment in commerce and constitute unfair methods of competition and unfair acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Kaiser Jeep Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 940 Cove Avenue, in the city of Toledo, State of Ohio.

Respondent Kaiser Jeep Sales Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 940 Cove Avenue, in the City of Toledo, State of Ohio.

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

ORDER

I. *It is ordered*, That respondents Kaiser Jeep Corporation, a corporation, and Kaiser Jeep Sales Corporation, a corporation, and their officers, agents, representatives, employees, successors and assigns, directly or through any corporate or other device, in connection with the promotion, offering for sale, sale or distribution of special equipment in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist, directly or indirectly, as a means of preventing or attempting to prevent any of its dealers or distributors or other vendors from stocking or selling any item of special equipment not manufactured or sold by respondents, from engaging in any of the following acts or practices:

1. Threatening to cancel or cancelling the franchise of any dealer or distributor.

2. Threatening to install or installing an additional dealer or distributor in a franchised dealer's or distributor's area.

3. Threatening to refuse or refusing to honor a warranty claim made on a vehicle manufactured and sold by respondents on which had been installed equipment not approved, sponsored, recommended or favored by respondents unless respondent's produce substantial evidence showing that such claim arose because of the installation, operation or use of such special equipment.

4. Policing or otherwise engaging in any investigation of the activities of any dealer or distributor in connection with the handling or selling of special equipment not approved, sponsored, recommended or favored by respondents.

5. Threatening to delay or actually delaying the delivery of any vehicles, parts or accessories to any franchised dealer or distributor.

6. Setting an unreasonably high yearly quota for dollar or unit sales of special equipment approved, sponsored, recommended or favored by respondents for the purpose or with the effect of preventing any franchised dealer or distributor from handling and selling any other item of special equipment.

7. Cooperating or agreeing to cooperate in any way with any manufacturer of special equipment to prevent or attempt to pre-

vent any dealer or distributor or other vendor from stocking or selling any item of special equipment not manufactured or sold by respondents by means of any of the foregoing acts or practices.

II. *It is further ordered*, That respondents Kaiser Jeep Corporation, a corporation, and Kaiser Jeep Sales Corporation, a corporation, and their officers, agents, representatives, employees, successors and assigns, directly or through any corporate or other device, in connection with the promotion, offering for sale, sale or distribution of special equipment in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist, directly or indirectly, by any means or methods, from coercing or intimidating a franchised dealer, distributor, or any other vendor of respondents' products, as a means of preventing, in any way, such dealer, distributor or other vendor from buying or selling any item of special equipment not manufactured or sold by respondents.

III. *It is further ordered*, That respondents Kaiser Jeep Corporation and Kaiser Jeep Sales Corporation, corporations, shall within sixty (60) days after service upon them of this Order, inform and advise their appropriate personnel that, pursuant to this Order, dealers and distributors are not under any restriction, requirement, restraint or limitation to handle or sell only items of special equipment approved, sponsored, recommended or favored by respondents, and in so doing, forward to such personnel a true and correct copy of this Order.

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

IN THE MATTER OF

STIFEL AND TAYLOR'S VALUE CITY, INC., ET AL.

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

Docket 8440. Complaint, June 28, 1961—Decision, Apr. 30, 1964

Order requiring the operator, to all intents and purposes, of a retail "discount house" in Wheeling, W. Va., under the trade name "Value City"—actually the lessor of a building in which it subleased space to 10 or 12 firms who operated different departments and sold their merchandise at discount prices, all under the management and supervision of aforesaid lessor—and two responsible individuals, to cease misrepresenting prices of merchandise offered for sale in "Value City" by using such fictitious retail price representations in newspaper advertising as

"Reg. $399.95	2-pc Living Room	Discount Price $278.00,"
"Reg. Price $269.95	Magic Chef Gas Range	Discount Price $178.00,"

when the higher prices were not their usual prices and the purchaser did not realize a saving of the difference between the higher and lower prices.

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 Stifel and Taylor's Value City, Inc., a corporation, and Henry Krouse, David E. Kahn and Meyer Denmark, individually and as officers of said corporation, Top Value Furniture and Appliance Corporation, a corporation, doing business as Top Value Furniture and Appliance, and Top Value Furniture and Appliance Corp. of Wheeling, a corporation, and Harry A. Sigesmund, Phillip Brown, Shirley Sigesmund and Roberta Brown, individually and as officers of Top Value Furniture and Appliance Corporation and Top Value Furniture and Appliance Corp. of Wheeling, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Stifel and Taylor's Value City, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of West Virginia, with its principal office and place of business located at 1156 Main Street, in the city of Wheeling, State of West Virginia.

Respondents Henry Krouse, David E. Kahn and Meyer Denmark are officers of said corporate respondent. They formulate, direct and control the acts and practice of said corporate respondent, including those hereinafter set forth. Their address is the same as that of the corporate respondent.

Respondent Top Value Furniture and Appliance Corporation doing business as Top Value Furniture and Appliance, is a corporation organized, existing and doing business under and by virtue of the laws of the State of West Virginia, with its principal office and place of business located at 3047 Main Street, in the City of Weirton, West Virginia.

Respondent Top Value Furniture and Appliance Corp. of Wheeling is a corporation organized, existing and doing business under and by virtue of the laws of the State of West Virginia, with its principal office and place of business located at 1156 Main Street, in the city of Wheeling, West Virginia. It is a wholly owned subsidiary of respondent Top Value Furniture and Appliance Corporation.

Respondents Harry A. Sigesmund, Phillip Brown, Shirley Sigesmund and Roberta Brown are officers and directors of the last two named corporate respondents. They formulate, direct and control the acts and practices of said corporate respondents, including those hereinafter set forth. Their address is the same as that of said corporate respondents.

All of the aforesaid respondents have cooperated in and acted jointly in the advertising practices hereinafter set forth and referred to.

PAR. 2. Respondents Top Value Furniture and Appliance Corporation and Top Value Furniture and Appliance Corp. of Wheeling, are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of general merchandise, including furniture and household appliances, to the public.

PAR. 3. In the course and conduct of their businesses the respondents named in Paragraph Two hereof, now cause, and for some time last past have caused, some of their said products, when sold, to be shipped from their respective places of business in the State of West Virginia to purchasers thereof located in other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their businesses, at all times mentioned herein, the respondents named in Paragraph Two hereof have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of general merchandise, including furniture and household appliances, of the same general kind and nature as that sold by said respondents.

PAR. 5. Respondent Stifel and Taylor's Value City, Inc., owns a building in the city of Wheeling, West Virginia. It leases space in said building to various mercantile establishments, including Top Value Furniture and Appliance Corp. of Wheeling, which pay a fixed percentage of their gross dollar volume of sales to said lessor respondent as rental and other charges, including a designated portion thereof for advertising costs. The lessees submit to the lessor the price figures with reference to their articles of merchandise to be advertised and the lessor prepares and places the said advertising matter for publication in newspapers. Said lessor respondent thereby acts not only as the advertising agent for said lessees, including the other named respondents, but also, shares in the gross proceeds accruing from the sale of the merchandise sold by said lessees.

PAR. 6. In the conduct of its business, at all times mentioned herein, respondent Stifel and Taylor's Value City, Inc., has been in substantial competition, in commerce, with other corporations, firms and individuals engaged in the advertising business.

PAR. 7. Respondents named in Paragraph Two hereof, and their officers, for the purpose of inducing the purchase of their aforesaid merchandise, have engaged in the practice of using fictitious retail price representations in connection with the sale thereof, in advertisements prepared and placed by respondents named in Paragraph One hereof in newspapers that have an interstate circulation. Among and typical, but not all inclusive, of said representations are the following:

Reg. $399.95 2-pc Living Room—Discount Price $278.00
Reg. Price $269.95 Magic Chef Gas Range
Discount Price $178.00
$79.95 Modern Swivel Rocker Discount Priced $50.80
Reg. Price $159.95 Gas Range with Griddle
Discount Price $108.00

PAR. 8. Respondents, through the use of the aforesaid statements, and others of similar import not specifically set out herein, represented, directly or by implication, that the higher stated prices were the usual and customary retail prices charged by the selling respondents for said merchandise in their recent regular course of business and that they had reduced said prices from the stated higher prices to the stated lower prices and that purchasers of the merchandise so advertised realized a saving of the differences between the said higher and lower prices.

PAR. 9. Said statements and representations were false, misleading and deceptive. In truth and in fact, the higher prices appearing in said advertisements were fictitious. Said selling respondents had no usual or customary retail prices at which their products were sold in the usual course of business and they did not customarily sell said articles of merchandise at said advertised higher prices. Therefore, the purchasers of said respondents' merchandise did not realize a saving of the differences between the said higher and lower prices.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead 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 said selling respondents' products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to said respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. DeWitt T. Puckett supporting the complaint.

Mr. Thomas Hollander of *Evans, Ivory and Evans*, Pittsburgh, Pa., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

FEBRUARY 28, 1964

Under date of June 28, 1961, the Federal Trade Commission issued a complaint charging Stifel and Taylor's Value City, Inc., a corporation, and Henry Krouse, David E. Kahn, and Meyer Denmark, individually and as officers of said corporation; Top Value Furniture and Appliance Corporation, a corporation doing business as Top Value Furniture and Appliance, and Top Value Furniture and Appliance Corp. of Wheeling, a corporation, and Harry A. Sigesmund, Phillip Brown, Shirley Sigesmund and Roberta Brown, individually and as officers of said corporations, hereinafter called respondents, with false advertising and fictitious pricing in violation of Section 5 of the Federal Trade Commission Act.

Subsequent to the issuance of the complaint, some of the respondents answered and requested that the matter be settled by consent order procedure. Accordingly, on August 29, 1961, the matter was referred to the Office of Consent Orders for disposition under the Consent Order procedure, and the undersigned hearing examiner was relieved of all further responsibility in the proceeding. An agreement containing a consent order not having been negotiated, on May 14, 1963, the proceeding was returned to the Office of Hearing Examiners for appropriate action. The undersigned was again designated as hearing examiner.

Pursuant to notice, a hearing was held in Wheeling, West Virginia, on October 22 and 23, 1963. At this hearing, both documentary evidence and oral testimony were received in support of and in opposition to the allegations of the complaint. Proposed findings have been filed by respective counsel, and the matter is now before the hearing examiner for initial decision. All proposed findings of fact and conclusions of law not found or concluded herein are rejected. Upon the basis of the entire record, the hearing examiner makes the following findings of fact and conclusions based thereon, and issues the following order:

FINDINGS OF FACT

1. The respondent, Stifel and Taylor's Value City, Inc., is a corporation organized and doing business under the laws of the state of West Virginia, with its office and place of business located at 1156 Main Street, Wheeling, West Virginia. The individual respondent David E. Kahn is president, and the individual respondent, Meyer Denmark is one of the vice presidents of the corporation. The individual respondent Henry Krouse is no longer an officer of said corporation. He was formerly president and served in said capacity until January or February, 1963, when he ceased to be president. He was never a stockholder in said corporation. The business address of the individual respondent David E. Kahn is the same as that of the corporation. Mr. Kahn resides in Columbus, Ohio. The individual respondent Meyer Denmark resides in Steubenville, Ohio.

2. The respondent Top Value Furniture and Appliance Corp. of Wheeling was formerly a corporation incorporated under the laws of the state of West Virginia in April 1960. The individual respondent Harry A. Sigesmund was president of said corporation. The other officers of said corporation were Shirley Sigesmund, wife of respondent Harry A. Sigesmund, and Roberta Brown and Phillip Brown, sister and brother-in-law, respectively, of respondent Harry A. Sigesmund. The principal office and place of business of said corporation was at 1156 Main Street, Wheeling, West Virginia. Said corporation was dissolved sometime during the month of August or September 1963, prior to the hearing herein.

3. The named respondent Top Value Furniture and Appliance Corporation was a corporation incorporated in 1961 under the laws of the State of West Virginia. It too was dissolved during the month of August or September 1963. There is no evidence in the record to establish the allegation that said corporation participated in or had any connection with the acts or practices complained about in this proceeding. For this reason, counsel for respondents moved that the complaint be dismissed as to that respondent. Counsel supporting the complaint did not oppose said motion. Accordingly, the complaint is being dismissed as against that respondent.

4. Stifel and Taylor's Value City, Inc., a corporation, leases a building located at 1156 Main Street in the city of Wheeling, West Virginia, where, to all intents and purposes, it operates what is commonly called a retail "discount house" under the trade name "Value City". However,

Stifel and Taylor's merely rents or sub-leases space in the building at 1156 Main Street in Wheeling to ten or twelve firms or corporations who operate different departments in said discount house, such as clothing, furniture and appliances, drugs, hardware, etc., for the sale of merchandise at retail at so-called "discount" prices. Mr. Kahn, president of Stifel and Taylor's Value City, Inc., who testified at the hearing, termed operators of these different departments as "licensees" rather than lessees. Mr. Kahn further testified as follows: That the lessees or "licensees" of the different departments in "Value City" sell all merchandise at discount prices, which prices are below the retail prices charged by competitors in Wheeling, West Virginia; the "licensees" pay a basic minimum rental based on a percentage, approximately 5 percent, of their gross volume of retail sales to Stifel and Taylor's as rent for use of their space and an additional percentage, approximately 3 percent, for advertising costs. Stifel and Taylor's Value City, Inc., manages and supervises the operation of "Value City", including the advertising (Tr. 26–35). The respondent Top Value Furniture and Appliance Corp. of Wheeling was the "licensee" or operator of the Furniture and Appliance Department in "Value City" from approximately May 1960, to May 1, 1961. This department sold articles of furniture, stoves, refrigerators, and the usual household appliances. It was during the time that the respondent Top Value Furniture and Appliance Corp. of Wheeling was operating the Furniture and Appliance Department in "Value City" that the alleged fictitious newspaper pricing advertisements appeared.

5. The evidence shows and it is found that, in the operation of "Value City", it was the practice of the particular department, in this instance Top Value Furniture and Appliance Corp. of Wheeling, to select the merchandise and the price thereof to be advertised in the newspaper, a so-called "regular" price and a "discount" price, and submit this to Stifel and Taylor's (Tr. 88–89). Stifel and Taylor's advertising department then prepared the copy for the advertisement and placed the advertisement in either or all of three newspapers, the *News-Register*, an evening newspaper, and the *Wheeling Intelligencer*, a morning newspaper, both published in Wheeling, West Virginia, and/or the *Times-Leader*, a newspaper published in Martins Ferry, Ohio. Stifel and Taylor's would pay the bill for the advertisement to the newspaper and then bill the said department "licensee", in this instance Top Value Furniture and Appliance Corp. of Wheeling, for its proportionate cost of the advertisement (Tr. 36–38). At the hearing, counsel stipulated that the circulation of these three named newspapers cross state lines and circulate in interstate commerce (Tr. 162–163).

6. The essence of the violations charged in the complaint are that the corporate respondents and their officers have used fictitious retail price representations in newspapers of interstate circulation to induce the sale of their merchandise, such as the following:

Reg. $399.95 2-pc. Living Room Discount Price $278.00
Reg. Price $269.95 Magic Chef Gas Range
Discount Price $178.00
Reg. Price $79.95 Modern Swivel Rocker
Discount Price $50.80
Reg. Price $159.95 Gas Range with griddle
Discount Price $108.00

The complaint further alleges that the higher prices appearing in said advertisements were fictitious and were not the usual or customary retail prices at which respondent corporations sold their merchandise in the regular course of business and the purchaser did not realize a saving of the difference between the said higher price and the lower price.

7. To establish the allegations of the complaint with respect to the alleged fictitious newspaper advertising, counsel supporting the complaint offered several newspaper advertisements from the Wheeling *News-Register*, the *Wheeling Intelligencer*, and the Martins Ferry, Ohio, *Times-Leader*, which had been published during the period 1960–1961, when respondent Top Value Furniture and Appliance Corp. of Wheeling was operating the Furniture and Appliance Department in "Value City". Mr. Kahn, president of the corporate respondent Stifel and Taylor's Value City, Inc., identified the advertisements as having been placed in said newspapers on behalf of "Value City". Certain pages of these newspaper advertisements were received in evidence as CX 2–7, inclusive. The newspaper advertisements purport to be on behalf of "Value City" and list various articles of merchandise for sale, including men's, women's, and children's clothing, furniture, floor coverings, stoves, refrigerators, household appliances, hardware, automobile accessories, drugs, toilet articles, etc. It is only those portions of these advertisements which list "reg." and "discount" prices for certain articles of merchandise that Commission counsel claims are fictitious. Some examples of this alleged false advertising will be set out.

8. For instance CX 2 is a one-page advertisement on behalf of "Value City" which appeared in the Wheeling *News-Register* on January 12, 1961. Near the bottom of the page of this advertisement, under the heading "Basement Furniture Department", appear the following:

Reg. $399.95	2-pc. Living Room	Discount Price $278.00
Reg. $299.95	3-pc. Bedroom	Discount Price $153.00

9. CX 3 is an advertisement on behalf of "Value City" which appeared in the Martins Ferry, Ohio, *Times-Leader* on November 25, 1960. In this advertisement, under the heading "Famous Brands Furniture & Appliances", various articles of furniture, refrigerators, stoves, etc., are advertised with two prices listed for each article, the "Reg." price and "Discount" price, such as:

Reg. Price $79.95 Swivel Rocker, foam rubber
Discount Price $50.80

10. CX 5 is a newspaper advertisement which appeared on behalf of "Value City" in the Wheeling *News-Register* on October 2, 1960. Under the heading "Furniture Super Buys", all articles are listed at two prices, "Reg." and "Discount", among them being:

Reg. Price		*Price Discount*
$429.95	Admiral 13-cu. ft. Refrigerator	$239
$159.95	Gas Range, with griddle	$108

11. It was the testimony of both Mr. Kahn and Mr. Harry A. Sigesmund, the latter being the former president of Top Value Furniture and Appliance Corp. of Wheeling, that the articles listed in the advertisements were never sold in "Value City" at the "Reg. Price", but were always sold at the "Discount Price" listed in the advertisement. Thus, said advertised "Reg. Price" was not the price at which the particular item of merchandise was regularly and usually sold by "Value City", as represented in the advertisement, but the item of merchandise was sold at a lower price, called the "Discount Price". Consequently, purchasers of said merchandise did not realize a saving of the difference between the higher and the lower listed price. Said so-called advertised "Reg. Price" was, therefore, fictitious and an unfair act and practice in violation of Section 5 of the Federal Trade Commission Act. *J. Fiddleman & Son, Inc.*, *et al.*, Docket 8043 [58 F.T.C. 31]; *Arnold Constable Corp.*, Docket 7657 [58 F.T.C. 49] and *Baltimore Luggage Corporation*, 296 F.2d 608.

12. One of the contentions of respondents was that they are and were engaged in the local retail trade in Wheeling, not in interstate commerce and, therefore, the Federal Trade Commission does not have jurisdiction over this proceeding. In fact, Mr. Kahn testified that "Value City" was a "cash and carry" operation and did not make delivery of merchandise purchased at the store. To rebut this contention, counsel supporting the complaint offered certain so-called sales invoices, CX 14–25, issued under the name "Value City" which purport to show the sale of various items of furniture and appliances at "Value City" to customers with addresses located outside the state of West Virginia. Mr. Sigesmund, formerly president of Top Value Furniture and Appliance Corp. of Wheeling, identified each of these

sales invoices as having been issued by his company's salesman Al Zimbroy for merchandise sold at "Value City". For instance, CX 14 is a sales invoice dated January 16, 1961, purporting to show the sale of a 2-piece living room suite to a customer whose address was listed in Rayland, Ohio, at a price of $278. This invoice shows on its face a deposit of $20 toward the purchase price with the designation "C.O.D. $258.00". The "C.O.D. $258.00" indicates that the merchandise was to be delivered to the customer at the address shown in Rayland, Ohio, at which time the customer would pay the balance of the purchase price, to wit $258. This 2-piece living room suite meets the description of the 2-piece living room suite previously advertised in the Wheeling *News-Register* on January 12, 1961, referred to in CX 2, Paragraph 8, above.

13. CX 17 is another sales invoice dated October 10, 1960, listing the sale of an Admiral Refrigerator at a price of $239, and a gas range at a price of $108. The address of the customer shown on the sales invoice was Route 2, Clarington, Ohio. The sales invoice also lists an additional charge of $10 for delivery of the merchandise to the customer. These articles of merchandise appear to be the same articles of merchandise as those advertised in the Wheeling *News-Register* on October 2, 1960, referred to in CX 5, above, set out in Paragraph 10.

14. CX 15, 16, 19, 20, 22, 24, and 25 are additional sales invoices for merchandise sold at "Value City" which list the address of the customer at some location in the state of Ohio. Also, these invoices either list a specific sum as an additional charge for delivery of the merchandise or list a specific sum as a "down payment" toward the total purchase price and the balance "C.O.D.", thus indicating that the merchandise was delivered to the customer at the address in Ohio. Although Mr. Sigesmund admitted that Top Value Furniture and Appliance Corp. of Wheeling made it a practice to deliver bulky items of merchandise to purchasers in the State of Ohio, nevertheless, he contended that the sales invoices (CX 14–25) do not show that the merchandise described in the invoice was delivered to the named customers in Ohio because the invoices do not bear the "signed receipt" by the customer. This argument has no merit. The evidence shows that, at the time of a sale at "Value City", it was the practice for the salesman to make four copies of each sales invoice. One copy was given to the customer, one copy given to Stifel and Taylor's Value City, Inc., one copy was given to the delivery man, and one copy was kept by Top Value Furniture and Appliance Corp. of Wheeling, the actual seller of the merchandise. CX 14–25 are the copies of the sales invoices kept by Top Value Furniture and Appliance Corp. of Wheeling in its office files. Naturally, these copies do not bear the signature of the customer. If the customer signed a receipt for delivery of the merchandise, it was the copy presented to

him by the delivery man. A preponderance of the evidence shows that Top Value Furniture and Appliance Corp. of Wheeling made it a practice to deliver merchandise to customers in Ohio. It is found, therefore, that respondents' plea to the jurisdiction of the Federal Trade Commission in this proceeding is without merit.

15. The evidence shows that the sales of furniture and appliances in the department operated by Top Value Furniture and Appliance Corp. of Wheeling during the approximate one-year period of its operation was approximately $76,000, of which amount approximately 40 to 50 percent was in interstate commerce, being delivered to customers in the State of Ohio. The combined dollar volume of business done by all of the departments or so-called "licensees" in "Value City" amounted to approximately $3,000,000 annually. Of this amount, approximately 40 to 50 percent was in sales and deliveries of merchandise to customers located in the State of Ohio, located across the Ohio River, immediately to the west of Wheeling, West Virginia.

CONCLUSIONS

The use by the respondents of the false and deceptive advertisements and practices found herein had the capacity and tendency to mislead members of the purchasing public into the mistaken belief that said representations were true and into the purchase of substantial quantities of respondents' products by reason of said mistaken belief. Said acts and practices, herein found, were and are to the prejudice and injury of the public and respondents' competitors and constitute unfair and deceptive practices and unfair methods of competition, in "commerce", within the intent and meaning of the Federal Trade Commission Act. The public interest requires that a "cease and desist" order be issued to stop such practices.

Commission counsel has requested that the order be issued against Stifel and Taylor's Value City, Inc., and its officers, and Henry Krouse, David E. Kahn and Meyer Denmark, individually and as officers of said corporation, and Top Value Furniture and Appliance Corp. of Wheeling, and its officers, and Harry A. Sigesmund, Phillip Brown, Shirley Sigesmund and Roberta Brown, individually and as officers of said corporation, and respondents' agents, representatives and employees, etc. Commission counsel does not object to the granting of respondents' motion to dismiss the complaint against Top Value Furniture and Appliance Corporation. He agrees that the evidence does not establish the allegation in the complaint that Top Value Furniture and Appliance Corporation participated in the violations alleged and found herein. Also, that corporate respondent no longer is in existence.

However, upon the basis of the entire record, the hearing examiner does not believe that it is necessary to issue a cease and desist order against each of the other respondents named in the complaint, both in their individual and corporate official capacities, in order to stop the violations complained about.

With respect to the officers of Stifel and Taylor's Value City, Inc., the evidence shows that Mr. Henry Krouse was president of Stifel and Taylor's Value City, Inc., from the time of its incorporation in 1958 or 1959 until January or February 1963, when he was replaced by Mr. David E. Kahn. Mr. Krouse is not now an officer of the corporation. He was never a stockholder. The evidence does not show that he ever participated in the formulation of policy or the advertising practices of Stifel and Taylor's Value City, Inc. During the time Mr. Krouse was president, the respondent David E. Kahn was vice-president-secretary and general manager of Stifel and Taylor's Value City, Inc. As such, Mr. Kahn directed the advertising practices and policies of Stifel and Taylor's Value City, Inc. With respect to the last named officer of Stifel and Taylor's Value City, Inc., Mr. Meyer Denmark, the evidence shows that Mr. Denmark is and has been treasurer of Stifel and Taylor's since the corporation was organized in 1958 or 1959. As such, he does not perform any duties. Mr. Denmark resides in Steubenville, Ohio, and, insofar as the evidence shows, he has not visited the store "Value City", more than four or five times. The evidence does not establish that he participated in the formulation of advertising policies of Stifel and Taylor's Value City, Inc.

With respect to the respondent Top Value Furniture and Appliance Corp. of Wheeling, and its named officers, the evidence shows that this corporate respondent was dissolved in August or September 1963, prior to the hearing herein. Were it now in existence, an order would be directed against it and its officers. Since that corporation is not now in existence, no useful purpose would be served in issuing an order against a non-existing respondent. The evidence shows that the respondent Harry A. Sigesmund was the president of Top Value Furniture and Appliance Corp. of Wheeling during its corporate life. As president, Mr. Sigesmund controlled and directed the policies and advertising practices of Top Value Furniture and Appliance Corp. of Wheeling. An order will be directed against Mr. Sigesmund in his capacity as an individual. There is no evidence in the record to show that the respondents Shirley Sigesmund, Phillip Brown, and Roberta Brown participated in the formulation of policy or advertising practices of Top Value Furniture and Appliance Corp. of Wheeling. For these reasons, no order against these respondents is required.

ORDER

It is ordered, That respondent Stifel and Taylor's Value City, Inc., a corporation, and its officers, and David E. Kahn, individually and as an officer of said corporation, and Harry A. Sigesmund, individually and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of general merchandise, including furniture and household appliances or any other article of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words or expressions "Reg." or "Reg. Price", or either of them, or any other term of similar import or meaning to describe or refer to the retail price of any article of merchandise when the amount so described is in excess of the price at which such article of merchandise has been usually and customarily sold by respondents, or any of them, in the recent, regular course of business.

2. Using the words or expressions "Discount price" or any other word or term of similar import or meaning, to describe or refer to the price of merchandise unless such price represents a reduction from the price at which such merchandise has been sold by respondents, or any of them, in the recent, regular course of business or represents a reduction from the price at which such merchandise has been sold at retail by others in the recent, regular course of their business in the trade area in which the representation is made.

3. Representing, directly or by implication, that any amount is the usual and customary retail price of merchandise in a trade area or areas when such amount is in excess of the price at which said merchandising is usually and customarily sold at retail in the trade area or areas where the representation is made.

4. Misrepresenting, in any manner, the amount of savings available to purchasers of respondents' merchandise or the amount by which the price of said merchandise has been reduced from the price at which it is usually and customarily sold at retail by the respondents, or by others, in the trade area or areas wherein the representations are made.

It is further ordered, That the complaint be, and the same hereby is, dismissed, as to Top Value Furniture and Appliance Corp. of Wheeling and Top Value Furniture and Appliance Corporation, formerly corporations incorporated under the laws of the State of

West Virginia; and, also dismissed as to the individual respondents Henry Krouse, Meyer Denmark, Phillip Brown, Roberta Brown and Shirley Sigesmund.

Decision of the Commission and Order to File Report of Compliance

The complaint in this proceeding charges respondents with misrepresenting the so-called "Reg. [regular] Price" as the usual and customary retail price at which they sold their merchandise in the recent regular course of their business, and this matter is before the Commission upon the initial decision of the hearing examiner filed February 28, 1964. The examiner found the charge sustained by the evidence, holding individual respondents David E. Kahn and Harry A. Sigesmund and corporate respondent Stifel and Taylor's Value City, Inc., responsible for the challenged practices. He issued an order against these respondents, ordering them in effect to refrain from representing a price as the regular or usual price of their merchandise when it is in excess of the price at which respondents have usually and customarily sold such products in their recent regular course of business. To that extent the order is supported by the findings in the initial decision. The examiner went further, however, and prohibited respondents from representing directly or by implication that any amount is the usual and customary retail price of the merchandise in a trade area or areas when such amount is in excess of the price at which such merchandise is usually and customarily sold at retail in the trade area or areas where such representations are made. The findings in the initial decision do not support the issuance of an order containing a prohibition of this nature. The order, therefore, will be revised. Accordingly,

It is ordered, That the order to cease and desist in the initial decision be modified to read as follows:

ORDER

It is ordered, That respondents Stifel and Taylor's Value City, Inc., a corporation, and its officers, and David E. Kahn, individually and as an officer of said corporation, Harry A. Sigesmund, individually, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of general merchandise, including furniture and household appliances or any other article of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that the regular or usual price of any item of their merchandise is any amount which is in excess of the price at which respondents or any of them have usually and customarily sold such products in the recent and regular course of business.

2. Misrepresenting in any manner the savings available to purchasers or prospective purchasers from the prices at which respondents or any of them have usually and customarily sold such products in the recent regular course of business.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to Top Value Furniture and Appliance Corp. of Wheeling, and Top Value Furniture and Appliance Corporation, formerly corporations incorporated under the laws of the State of West Virginia; and that the complaint be also dismissed as to the individual respondents Henry Krouse, Meyer Denmark, Phillip Brown, Roberta Brown, and Shirley Sigesmund.

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

It is further ordered, That respondents Stifel and Taylor's Value City, Inc., David E. Kahn and Harry A. Sigesmund, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

NATIONAL MACARONI MANUFACTURERS ASSOCIATION ET AL.

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

Docket 8524. Complaint, Aug. 2, 1962—Decision, Apr. 30, 1964

Order requiring a trade association of macaroni manufacturers and its members to cease carrying out any common course of action to establish the kinds and proportions of ingredients to be used in producing macaroni and related products or take any action to fix or manipulate the price of such ingredients.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest hereby issues its complaint, charging as follows:

PARAGRAPH. 1. Respondent, National Macaroni Manufacturers Association, is a corporation organized and existing under and by virtue of the laws of the State of Illinois with its principal office and place of business located at 130 N. Ashland Avenue, Palatine, Illinois.

The membership of respondent Association is composed of corporations, partnerships and individuals who are engaged in manufacturing, selling or handling macaroni, spaghetti and related products.

Respondent Association functions as a medium for collective action by its members.

As of December, 1961, respondent Association had more than 140 members, of which those named in the caption and hereinafter described are representative. Membership in respondent Association is too numerous and too variable to allow for the naming and describing of each individual member.

The corporate Respondents named in Paragraph Two hereafter are fairly representative of the entire membership of respondent Association and are named in their capacity as members and as representative of all of the members of respondent Association as a class so that those members not specifically named are also made parties respondent herein.

PAR. 2. Respondent Ronzoni Macaroni Company is a corporation organized and existing under and by virtue of the laws of the State of New York with its principal office and place of business at 59-02 Northern Blvd., Long Island, New York. Respondent Emanuele Ronzoni, Jr. is President of respondent Ronzoni Macaroni Company and President of respondent Association.

Ravarino & Freschi, Inc., is a corporation organized, and doing business under and by virtue of the laws of the State of Missouri with its principal office and place of business at 4651 Shaw Blvd., St. Louis, Missouri. Respondent Albert Ravarino is president of respondent Ravarino Freschi, Inc., and first vice president of respondent Association.

Superior Macaroni Company is a corporation organized, existing under and by virtue of the laws of the State of California with its principal office and place of business at 704 Clover Street, Los Angeles. Respondent Fred Spadafora is president of respondent Superior Macaroni Company and second vice president of respondent Association.

Respondent Robert I. Cowen is third vice president of respondent Association.

Respondent Robert M. Green is secretary of respondent Association and editor of the Macaroni Journal which is the official publication of respondent Association.

PAR. 3. Respondent members of respondent Association are now and for several years last past have been engaged in commerce as "commerce" is defined in the Federal Trade Commission Act in that they manufacture macaroni, spaghetti and related products in their respective factories and sell and ship or cause to be sold and shipped said products between and among the several States and territories of the United States. Respondent members constitute most of the manufacturers of macaroni products in the United States. They produce and sell products annually having a valuation in excess of $100,000,000.

PAR. 4. In the course and conduct of their businesses in commerce as described in Paragraphs Two and Three above, respondent members of respondent Association are in active competition with other corporations, firms and individuals engaged in the manufacture, distribution and sale of macaroni and related products and with other corporations, firms and individuals similarly engaged and with other corporations, firms and individuals engaged in the manufacture, sale and distribution of products competitive with macaroni and related products.

The Macaroni Industry

PAR. 5. Quality macaroni and spaghetti are made from semolina which is produced from durum (wheat). Semolina is prized for its amber color and the wheaty, almost "nut-like" flavor it gives to spaghetti, macaroni and noodles. Macaroni and spaghetti are also made from mixtures of semolina and wheat flour in various proportions, and from farina, a grind of flour from ordinary wheat. Respondent manufacturers produce most of the macaroni products consumed in the United States.

Durum is a very hard amber colored grain. It is grown in several states of the United States, the highest concentration of production being in the state of North Dakota which annually produces over 80% of the Nation's crop. Durum produced in North Dakota is recognized in world markets as being of the highest quality. Other durum growing areas in the world are in Italy, France, Algeria, India, South America, particularly in Argentina and Chili, and in Russia. The primary use for durum is for making macaroni, spaghetti and noodles.

PAR. 6. Durum is traded on the Minneapolis Grain Exchange in which demand and supply factors operate to establish price levels. Growers of durum and grain merchants, who buy from growers, constitute the supply factor; macaroni manufacturers and the millers from whom they buy semolina and durum flour, constitute the demand factor. Since the demand for durum products stems almost entirely from macaroni manufacturers, the extent of their demand has a direct bearing on the price of durum and any agreement which affects that demand is an agreement relative to the price of durum.

PAR. 7. For several years last past and continuing to the present time respondents have acted and are now acting collectively between and among themselves and through and by means of respondent National Macaroni Manufacturers Association to suppress, lessen, eliminate and frustrate competition in the manufacture, sale and distribution of macaroni and related products and to fix or rig the prices of durum, semolina and durum flour by the use, among others, of the following acts, practices and methods:

Entering into and carrying out agreements and understandings between and among themselves and with others to fix and determine the quality of macaroni, spaghetti, noodles and related products to be offered for sale. For example, on or about August 16, 1961, at the Durum conference in Minneapolis, sponsored by the National Macaroni Manufacturers Association, respondents adopted a resolution effective September 1, that durum millers should offer a blend of 50% durum and 50% other types of wheat and that macaroni manufacturers should use these 50–50 blends in producing their products during the current crop year.

PAR. 8. Respondent's practices herein alleged and described have a dangerous tendency unduly to lessen competition and create monopoly; have the effect of eliminating quality competition in macaroni products; have tended to and do tend to prevent prices for durum from becoming established by free competition, as for example, the resolution to use a 50–50 blend of semolina and other flours had the effect of doubling the available supply of durum or reducing by one half the demand for it so that the growers of durum were deprived of the benefit of interaction between the actual supply of durum and the normal demand for it; tend to and do destroy the market for macaroni products by lowering the quality thereof; to deprive the consuming public of the high quality macaroni products to which they are entitled under a free competitive system; and are unfair within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Lynn C. Paulson and *Mr. Hugh B. Helm* supporting the complaint.

Mr. Edward H. Hatton, Thompson, Raymond, Mayer & Jenner of Chicago, Illinois, for respondents.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

FEBRUARY 8, 1963

A complaint was issued against the National Macaroni Manufacturers Association, and its members, as well as certain of its officers by name, and three corporate respondents as members of, and representative of the entire membership of, the Association. In the complaint, issued August 2, 1962, the respondents were charged with acting collectively over the past years, through the medium of the Association, to lessen competition in the manufacture, sale and distribution of macaroni and related products and to fix or rig the prices of durum, semolina and durum flour with the result of depriving the consuming public of the high quality macaroni products to which they are entitled under a free competitive system and preventing prices for durum from becoming established by free competition, all in violation of Section 5 of the Federal Trade Commission Act.

Counsel filed its appearance on behalf of the Association and its members, as well as each of the named respondents. Answer was duly made and a prehearing conference held on September 27, 1962, following which certain conclusions were reached as noted in the prehearing conference order issued October 3, 1962. Hearings were held in St. Paul, Minnesota, and Washington, D.C., and concluded on November 8, 1962. Briefs and reply briefs were filed by January 8, 1963. Proposed findings have been submitted and carefully considered. To the extent they differ from the findings hereinafter made, they are deemed rejected.

FINDINGS OF FACT

1. Respondent National Macaroni Manufacturers Association, hereinafter sometimes referred to as the Association, is a not-for-profit corporation, organized and existing under and by virtue of the laws of the State of Illinois since 1921, with its principal office and place of business located at 139 N. Ashland Avenue, Palatine, Illinois.

2. The membership of respondent Association is organized into three classes: The active membership consists of corporations, partnerships, and individuals who are engaged in the manufacture of macaroni and/or egg noodles; the associate membership is composed of those actually engaged in lines or services essential to and/or connected with the macaroni producing industry; honorary membership is limited to persons or organizations who have rendered distinguished service to the industry.

3. The respondent Association functions as a medium for collective action by its members in a number of ways: for example, it publishes

a magazine, the Macaroni Journal, devoted to the promotion of the welfare of the industry. It exchanges information about the price of raw materials, the quality of the products, the quantities of the products sold, exports and imports, machinery and methods of operation, and so forth. It employs a full-time secretary, Robert M. Green, respondent herein, to gather this information and prepare the Journal, as well as issue a weekly newsletter. It has employed a research director and the services of a laboratory. It has also employed the services of an advertising and publicity expert through the National Macaroni Institute, an organization created by the Association. There is also a Durum Relations Committee, set up by the Association to promote the growth of durum wheat. It has also combined to fight the ravages of Rust disease. The Association often holds meetings attended by the miller-suppliers of the active members to discuss and exchange views on common problems of the macaroni industry. Through the medium of the Association, the members have collectively retained legal services and set up a Standards Committee to work with the United States Department of Agriculture, as well as the Food and Drug Administration and the Quartermasters Corps. Similarly they have organized a Trade Practices Rules Committee to work with the Federal Trade Commission. They have collectively arranged for the production of films promoting the use of macaroni products. The members have also considered through the medium of the Association the collective importation of durum in 1954 and 1961.

4. As of December 1961 and as of the date of issuance of the complaint, respondent Association had 84 active members and 31 associate members. Membership in the Association is too numerous and too variable over the past years to permit the naming and describing of each individual member conveniently. In 1962, however, and as of the date of issuance of the complaint herein, the officers of the respondent Association were:

President, Albert Ravarino, named respondent herein; First Vice-President, Fred Spadafora, named respondent herein; Second Vice-President, Robert I. Cowen, named respondent herein; Secretary, Robert M. Green, named respondent herein.

5. As of August 2, 1962, the active members of the respondent Association were as follows:

American Beauty Macaroni Co	Los Angeles, Calif.
American Beauty Macaroni Co	Denver, Colo.
American Beauty Macaroni Co	Kansas City, Kans.
American Beauty Macaroni Co	St. Louis, Mo.
Quality Macaroni Div., American Beauty	St. Paul, Minn.
American Home Foods	Milton, Pa.
Angelus Macaroni Co	Los Angeles, Calif.

Anthony Macaroni Co	Los Angeles, Calif.
Asien Noodle Co	Wheeling, Ill.
Bay State Macaroni Co	Lawrence, Mass.
W. Boehm Co	Pittsburgh, Pa.
Bravo Macaroni Co	Rochester, N.Y.
Brice Foods	Omaha, Nebr.
California Paste Co	San Jose, Calif.
California Vulcan Macaroni Co	San Francisco, Calif.
John B. Canepa Co	Chicago, Ill.
Catelli Food Products	Montreal, Canada
Charbonneau, Ltd	Montreal, Canada
Cicero Macaroni Manufacturing Co	Cicero, Ill.
Constant Macaroni Co	St. Boniface, Canada
Costa Macaroni Co	Los Angeles, Calif.
Conte Luna Foods, Inc	Norristown, Pa.
The Creamette Co	Minneapolis, Minn.
The Creamette Co. of Canada	Winnipeg, Canada
Crescent Macaroni Co	Davenport, Iowa
Cumberland Macaroni Manufacturing Co	Cumberland, Md.
Delmonico Foods, Inc	Louisville, Ky.
Delmonico Foods of Florida	Tampa, Fla.
DeMartini Macaroni Co	Brooklyn, N.Y.
Dutch Maid Food	Allentown, Pa.
Florence Macaroni Manufacturing Co	Los Angeles, Calif.
Fresno Macaroni Co	Fresno, Calif.
Gioia Macaroni Co	Buffalo, N.Y.
Golden Grain Macaroni Co	San Leandro, Calif.
Golden Grain Macaroni Co	Seattle, Wash.
Gooch Food Products	Lincoln, Nebr.
A. Goodman & Sons	Long Island City, N.Y.
I. J. Grass Noodle Co	Chicago, Ill.
Horowitz & Margareten	Long Island City, N.Y.
Ideal Macaroni Co	Bedford Heights, Ohio
Inn Maid Products	Millersburg, Ohio
Jenny Lee, Inc	St. Paul Minn.
Kellogg Co	Lockport, Ill.
Kientzel Noodle Co	St. Louis, Mo.
V. La Rosa & Sons, Inc	Brooklyn, N.Y.
La Premiata Division	Connellsville, Pa.
Russo Division	Chicago, Ill.
Tharinger Division	Milwaukee, Wis.
Luso-American Macaroni Co	Fall River, Mass.
Megs Macaroni Co	Harrisburg, Pa.
D. Merlino & Sons	Oakland, Calif.
C. F. Mueller Co	Jersey City, N.J.
National Food Products	New Orleans, La.
New Mill Noodle Co	Chicago, Ill.
Noody Products	Toledo, Ohio
Oakland Macaroni Co	Oakland, Calif.
OB Macaroni Co	Fort Worth, Tex.
Paramount Macaroni Manufacturing Co	Brooklyn, N.Y.
Philadelphia Macaroni Co	Philadelphia, Pa.

Porter Scarpelli Manufacturing Co	Portland, Oreg.
Prince Macaroni Manufacturing Co	Lowell, Mass.
Prince Macaroni Manufacturing Co	Brooklyn, N.Y.
Prince Macaroni Manufacturing Co	Schiller Park, Ill.
Prince-Michigan Macaroni Co.	Detroit, Mich.
Procino-Rossi Corp	Auburn, N.Y.
Ravarino & Freschi, Inc	St. Louis, Mo.
Refinde Macaroni Co	Brooklyn, N.Y.
Roma Macaroni Co	San Francisco, Calif.
Romi Foods, Ltd	Weston, Canada
Ronco Foods	Memphis, Tenn.
Ronzoni Macaroni Co	Long Island City, N.Y.
Peter Rossi & Sons, Inc	Braidwood, Ill.
San Diego Macaroni Co	San Diego, Calif.
San Giorgio Macaroni Inc	Lebanon, Pa.
St. Louis Macaroni Co	St. Louis, Mo.
Schmidt Noodle Co	Detroit, Mich.
Shreveport Macaroni Manufacturing Co	Shreveport, La.
Skinner Macaroni Co	Omaha, Nebr.
Superior Macaroni Co	Los Angeles, Calif.
U.S. Macaroni Manufacturing Co	Spokane, Wash.
Vivison Macaroni Manufacturing Co	Detroit, Mich.
Weber Food Products	Bell, Calif.
Weiss Noodle Co	Cleveland, Ohio
West Coast Macaroni Co	Oakland, Calif.
Western Globe Products	Los Angeles, Calif.
A. Zerega's Sons, Inc	Fairlawn, N.J.

6. As of August 2, 1962, the associate members were as follows:

ADM—Commander Larabee Mills	Minneapolis, Minn.
Amaco, Inc	Chicago, Ill.
Amber Milling Division, GTA	St. Paul, Minn.
Ambrette Machinery Corp	Brooklyn, N.Y.
Ballas Egg Products	Zanesville, Ohio
V. Jas. Benincasa Co	Zanesville, Ohio
Braibanti Co	New York, N.Y.
Buhler Corp	Minneapolis, Minn.
N. J. Cavagnaro & Sons	Brooklyn, N.Y.
Clermont Machine Corp	Brooklyn, N.Y.
DeFrancisci Machine Corp	Brooklyn, N.Y.
Dobeckmun Co	Cleveland, Ohio
Doughboy Industries, Inc	New Richmond, Wis.
E. I. DuPont Co	Wilmington, Del.
Faust Packaging Corp	Brooklyn, N.Y.
Fisher Flouring Mills Co	Seattle, Wash.
General Mills, Inc	Minneapolis, Minn.
Hoffman-LaRoche, Inc	Nutley, N.J.
Hoskins Co	Libertyville, Ill.
International Milling Co	Minneapolis, Minn.
Lawry's Foods, Inc	Los Angeles, Calif.
D. Maldari & Sons, Inc	Brooklyn, N.Y.

Merck & Co	Rahway, N.J.
Munson Bag Co	Cleveland, Ohio
North Dakota Mill & Elevator	Grand Forks, N. Dak.
Wm. H. Oldach, Inc	Philadelphia, Pa.
Rossotti Lithograph Corp	North Bergen, N.J.
Russell Miller-King Midas Mills	Minneapolis, Minn.
Schneider Brothers, Inc	Chicago, Ill.
U.S. Printing & Lithograph	New York, N.Y.
Vitamins, Inc	Chicago, Ill.
Wallace & Tiernan, Inc	Belleville, N.J.

7. The corporate respondents named in the complaint as members of, and representative of the entire membership of, the Association are and have been among the active members of the Association for the past several years. Respondent Ronzoni Macaroni Company is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of business at 59–02 Northern Boulevard, Long Island, New York. Respondent Ravarino & Freschi, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business at 4651 Shaw Boulevard, St. Louis, Missouri. Respondent Superior Macaroni Company is a corporation organized under the laws of the State of California, with its principal office and place of business at 704 Clover Street, Los Angeles, California. These corporate respondents, like the other active members of the Association, manufacture macaroni, spaghetti, and related products.

8. Respondent Emanuele Ronzoni, Jr., was and is the President of Ronzoni Macaroni Company, and was President of the respondent Association in 1961 and its immediate past President in 1962, as well as a member of the Board of Directors. He has also held various committee positions within the Association.

9. Respondent Albert Ravarino is the President of Ravarino & Freschi, was the First Vice-President of the Association in 1961, and its President in 1962. He has also been on the Board of Directors of the Association, as well as a member of various committees.

10. Respondent Fred Spadafora is President of Superior Macaroni Company, was the Second Vice-President of the Association in 1961 and First Vice-President in 1962. He, too, has been a member of the Board of Directors of the Association and of various committees of the Association.

11. Respondent Robert I. Cowen was the Third Vice-President of the Association in 1961 and its Second Vice-President in 1962. He has also been a member of the Board of Directors of the Association and on various committees.

12. Respondent Robert M. Green is now and has been for 10 years Secretary of the respondent Association as well as Secretary of the National Macaroni Institute. During the same period of time he was Editor of the Macaroni Journal.

13. The Association is governed by a Board of Directors which elects the officers of the Association, with the exception of the Secretary-Treasurer, from among their own numbers. The Board is composed of active members of the Association and chosen by a majority vote of the active members.

14. There are approximately 125 macaroni manufacturers of commercial importance in the United States. The Association's active membership accounts for 84 of that number. Its members normally purchase about 70 percent of the total volume of durum wheat products produced by the mills.

15. The Association is the only trade association representing the macaroni industry and for the past 10 years has spoken for the industry. Its publication, the Macaroni Journal, is the official organ of the Association.

16. Respondent members of the Association are and have been engaged in commerce as "commerce" is defined in the Federal Trade Commission Act in that they manufacture macaroni and related products in their respective factories, and sell or ship, or cause to be sold or shipped, said products between and among the several states and territories of the United States. They produce and sell products having an annual valuation in excess of $100,000,000.

17. In the course and conduct of their business in commerce, respondent members of the Association are in active competition with other corporations, firms, and individuals engaged in the manufacture and sale of macaroni and related products, as well as with corporations, firms and individuals engaged in the manufacture and sale of products competitive with macaroni and related products. Respondent members of the Association are also in competition with each other in the manufacture and sale of macaroni products.

18. Macaroni products are food products made from dry dough manufactured from semolina, durum flour, farina flour or any combination of the foregoing. Semolina is the middling of durum wheat with a tolerance of 3 percent flour. Semolina is a granulated product, whereas durum flour is a powder form of durum wheat. Farina is the middlings of any variety of hard wheat other than durum, with farina flour the powder form. The highest quality macaroni products are made from 100 percent semolina and such products have the best consumer acceptance of all macaroni products. The manufacturers in the macaroni industry prefer to use 100 percent durum in their prod-

ucts because of the greater consumer acceptance of such macaroni products. This consumer acceptance arises from the fact that durum has superior cooking tolerances and color. To reduce the durum content of a macaroni product is to make the product inferior and lower its quality. Nevertheless, at times, macaroni manufacturers engage in some blending and some manufacturers use farina regularly. The industry as a whole, however, believes that its success depends upon the greater use of durum in its products and has consistently encouraged the greater production of durum wheat as the necessary ingredient of a quality macaroni product.

19. Durum is grown mainly in the North-Central states of the United States, and is a spring crop harvested in the latter part of August. It commands a premium price over other classes of wheat. Despite the premium price, however, most macaroni manufacturers prefer to use durum unless its cost rises beyond a level they consider reasonable.

20. Durum is traded on the Minneapolis Grain Exchange, in which demand and supply factors operate to establish price levels. Growers of durum and grain merchants who buy from the growers constitute the supply factor; macaroni manufacturers, millers and exporters constitute the demand factor. Demand has an effect on the price of durum, and any agreement that affects demand affects price.

21. Nearly all of the durum wheat ground in the United States is ground by seven mills in the Minneapolis, Minnesota, area. These mills are associate members of respondent Association and have been for the past 10 years.

They are:

1. ADM—Commander Larabee Mills, Minneapolis, Minn.
2. Amber Milling Division, G.T.A., St. Paul, Minn.
3. Doughboy Industries, Inc., New Richmond, Wis.
4. General Mills, Inc., Minneapolis, Minn.
5. International Milling Company, Minneapolis, Minn.
6. North Dakota Mill & Elevator, Grand Forks, N. Dak.
7. Russell Miller-King Midas Mills, Minneapolis, Minn.

22. Macaroni manufacturers usually contract with mills for their durum wheat requirements. These contracts vary in length, but customarily are 120 days in duration. The mills in turn seek to cover contractual commitments through the purchase of durum wheat, and then confirm the sale which is made subject to confirmation by the miller. The seven durum mills produce blends reluctantly since they are located where the durum is and not where the other wheat is, and also because of their added investment in durum grinding equipment. They go to blending only upon the insistence of their customers, the macaroni manufacturers.

23. Over the past 10 years the demand for durum has stemmed almost entirely from domestic macaroni manufacturers inasmuch as the demand from exporters has been negligible except for the years 1956/57, 1960/61, 1961/62.

[In thousand bushels]

Year	Mill grind	Feed and other use	Seed	Exports	Total disappearance
1952–53	23, 668	1, 703	2, 940	3, 075	31, 386
1953–54	11, 915	1, 603	2, 287	41	15, 846
1954–55	5, 862	687	1, 803	0	8, 352
1955–56	8, 500	2, 285	3, 067	239	14, 091
1956–57	14, 984	4, 212	3, 022	10, 580	32, 798
1957–58	21, 463	4, 923	1, 307	293	27, 986
1958–59	22, 713	4, 225	1, 740	0	28, 687
1959–60	21, 844	2, 078	2, 270	0	26, 192
1960–61	23, 438	3, 022	2, 389	5, 256	34, 105

1961–62	*Durum (million bushels)*
Carryover, July 1, 1961	20
Production	19
Imports	--
Supply	39
Exports, including shipments	16
Domestic disappearance	18
Carryover, June 30, 1962	5

24. On or about August 14, 1953, at the industry durum conference in Chicago, Illinois, sponsored by the respondent Association, the members adopted a resolution, reported by the Macaroni Journal as follows:

> * * * that the durum millers extend available durum supplies during the coming year by offering (1) a 50–50 blend of semolina and farina, made from a mixture of durum and hard wheat. By definition this product will contain not more than 3% flour; (2) a 50–50 blend of durum and hard wheat in grain form. The flour content of this product will have to be determined when there is more information on the milling qualities of the new crop durum.
>
> Durum patent flour will also be a 50–50 blend. *Semolina is not to be offered to any buyer after August 14*, although existing contracts, of course, are to be filled. [Emphasis supplied.]

The Marcaroni Journal for December 1953 also refers to the August 14 meeting as "It was decided at this meeting that all durum mills should produce a blend of 50% durum wheat and 50% hard spring wheat or hard winter wheat to make the best possible use of available durum."

In March 1954, the then President of the Association spoke of the August 14 meeting, saying: "In August the prompt action of the industry, at a meeting called by the Association to put the industry on a

50-50 blend to make the best possible use of the available durum, won universal approval." The August 14 resolution was voted upon by a show of hands on the question whether the macaroni manufacturers wanted the mills to offer a blend. It was stated that unless the mills held to a blend they would run out of wheat in December or January and would stand idle thereafter. Both the millers and the manufacturers wanted to know what was going to be done and the vote taken upon the resolution was a clear signal to the millers that their customers, the macaroni manufacturers, would order blends instead of 100 per cent durum, as well as a clear signal to the manufacturers that such blends would be available from the millers.

25. In September 1957, respondent Green reported that:

> * * * the industry was approached by grain importers in the spring of 1954 with the proposition that durum wheat from abroad was available to this country and an exchange of surplus varieties of wheat held by the United States would be accepted in payment, with the difference in market value made up in dollars. The durum millers preferred to wait to see what the 1954 crop would produce before they would make any commitments to attempt to get imported wheat.

26. Over the past 10 years the Association through its official organ, the Macaroni Journal, has reflected the acute awareness and the motivation of its members respecting the cost of durum. In the Journal for October 1953, we read:

> Albert Ravarino of Ravarino & Freschi, St. Louis, stated that he had just returned from Europe and had observed that Italian manufacturers use blends of wheat for macaroni products. He questioned why this country let so much durum be exported last year when it was known then that durum was in short supply. The answer given to this question was that *exporters had entered the open market and purchased durum supplies at prices higher than American millers were willing to pay,* and that stocks from the surplus supplies of the Commodity Credit Corp. that were exported were secondary grades not wanted by the millers.
>
> Some manufacturers felt that blending durum with hard wheat should be their own prerogative and should not be done by the mills, but the great majority of manufacturers felt that a uniform product from the durum mills would give the industry greater stability in quality *and price* and make the best use possible of the available durum. [Emphasis added.]

In the Journal for October 1954, in an article entitled "Industry Meets to Consider Durum Problem," it was reported:

> The premium for semolina-farina blend may run much higher than the 50¢ differential which generally prevailed last year.

In the Journal for April 1957, it was reported that a delegation of the manufacturers stated to the Department of Agriculture that:

> The milling industry would undoubtedly have ground much more durum through the current crop year *had not the price of durum wheat been maintained at such a high level.* This high level resulted because of the very liberal export subsidies which took so much of our durum wheat out of the domestic market.

Had the price of durum wheat averaged around $2.59 per bushel, Minneapolis, which is the Government loan level, the macaroni industry would have used a much more liberal percentage of durum. *There is a limit to how much premium the macaroni manufacturers can and will pay for durum,* and because of the high export subsidies on durum wheat, the price of durum was kept so high that as a result domestic consumption was seriously curtailed. [Emphasis added.]

In January 1956, the Journal reported:

The macaroni industry is interested in the production of macaroni products at the highest level of quality possible, and, therefore, will undoubtedly revert back to production of macaroni products from 100% durum *when durum wheat sells at not too great a premium over breadwheats.* Like any other industry, the macaroni industry is competitive. Macaroni products compete with low cost items such as rice, beans and potatoes. *The macaroni industry at most times in the past has paid a slight premium* for durum products over breadwheat products because of their ability to produce quality macaroni products. [Emphasis added.]

In May 1956, the Journal quoted the Association's then president:

If the industry had not used this wisdom and caution, but instead had impulsively rushed into the general use of 100% durum, *prices of durum would have skyrocketed,* forcing increases in macaroni prices which the keenly competitive retail food market would not tolerate.

* * * * * * *

Like any other industry, the macaroni industry is competitive. Its products compete with low cost items such as rice, beans and potatoes, and today it further competes with many new convenience foods. It has in the past paid a *slight* premium for durum products over breadwheat products and it will continue to do so. [Emphasis added.]

In February 1957, the Journal reported that the greatest number of manufacturers thought that 50 cents was the premium durum should command. In December 1955, the Journal carried an article which in part said:

* * * The present durum price range of $2.85–3.00 per bushel allows durum semolina to compete favorably with hard wheat farina which will gradually rebuild the macaroni market for the durum grower. This could not be accomplished if durum prices were $3.50 and higher, as was the situation in 1954.

This "ceiling" of $3.50 is apparently, however, not an absolute one. As the Journal reported in November 1961, with durum selling at between $3.25 and $3.42 per bushel, only a slight increase in the macaroni price resulted:

* * * The sharp increases in raw material costs have brought about the first general price advance in macaroni products in five years. Across the country the average increase has amounted to about one and one-half cents a pound for macaroni products, one cent a pound for noodle products.

27. One hundred percent durum went off the market in 1953 and the 50–50 blend became the best product available. The industry continued to use blends throughout the rest of 1953, the whole of 1954 and

1955, and until June 1956. The Macaroni Journal reported in February 1956:

> But the improvement in supply inevitably forced durum prices down. From a high of $4.40 at the start of 1955, durum prices slid steadily to a range of $2.57/$2.72 at the end of the year.

The industry action of 1953 also had the effect of lowering the quality of the macaroni product made from the grind available.

28. In January 1956, the industry "* * * unanimously expressed its intent to revert to the use of 100% durum as quickly as supply and price would make it possible." The then President of the Association stated:

> If the industry had not used this wisdom and caution, but instead had impulsively rushed into the general use of 100% durum, prices of durum would have skyrocketed, forcing increases in macaroni prices which the keenly competitive retail food market would not tolerate.

Similarly, in the January 1956 Macaroni Journal a representative of the millers reported:

> The macaroni industry is interested in the production of macaroni products at the highest level of quality possible, and, therefore, will undoubtedly revert back to production of macaroni products from 100% durum when durum wheat sells at not too great a premium over breadwheats.

In June 1956 at an industry conference sponsored by the Association it was resolved that the manufacturers be urged to discontinue the use of blends. The 1956 resolution in effect told the millers what the manufacturers wanted to buy thereafter and foretold what they did in effect, with few exceptions, buy thereafter. Thereafter, the industry went back to the 100 percent durum standard throughout the rest of 1956, the whole of 1957, 1958, 1959, 1960, and until August 1961.

29. In 1954 during the height of the durum shortage and the use of limited amounts in macaroni products, per capita consumption of macaroni products fell to 6.3 pounds. With the resumption of the use of 100 percent durum subsequently, the per capita consumption rose to 7.3 in 1958 and continued at around that level until August 1961.

30. The carryover of durum wheat on July 1, 1960, from the crop year 1959/60, was 18 million bushels. During the ensuing year, July 1960 through June 1961, 34 million bushels of durum wheat were produced, making a total supply of 52 million bushels during that year. Of this amount, 6 million were exported and 26 million used domestically, leaving an actual carryover as of June 30, 1961, of 20 million bushels. Such a large carryover, however, was not known in 1961 by Government sources or the industry. Instead, the carryover as of June 30, 1961, was reported to be only around 12 million bushels.

31. In January 1961, the Macaroni Journal reported that Italy had bought substantial amounts of American and Canadian wheat. France, also, was reported as having harvested a poor crop of durum wheat in 1960 and as having purchased very large quantities in Canada. In March 1961, the first signs of a drought condition in the domestic durum crop appeared, and in May and June serious fears were expressed for the crop. According to the testimony of the manager of one of the mills, there was a durum shortage in the foreign markets apparent in the "spring of 1961" and the mills knew that such markets would be "looking to the United States for supplies." The time was pinpointed to April, May, and June of 1961. In the month of June, exporters bought some 6 million bushels of durum wheat from the Commodity Credit Corporation. This was followed on July 1 by a Government crop estimate of only 16 million bushels instead of the 26 million bushels previously estimated for 1961/62.

The unusual export activity in durum was duly noted in the Macaroni Journal which, in May 1961, reported a substantial sale of durum during the last week of March for export to France and Germany. The June issue of the Journal reported the export sale of some 2 million bushels, as well as the complete sell-out of Canadian durum.

The impending shortage of durum wheat was also recognized by the mills. One of them made test runs of blends in June 1961. Others similarly made early tests.

32. At the annual meeting of the Association in July 1961, the shortage of durum was discussed and the importation of some 5 million bushels of Canadian durum considered. Reference was made to the higher price of durum because of the prospects of a crop shortage. A resolution was approved, asking the Secretary of Agriculture to curtail further exports of durum, stating that the domestic market might "be forced to use wheats of inferior quality other than durum, thereby placing the domestic macaroni industry at a competitive disadvantage to imported products made with 100% durum semolina." Since the industry knew that foreign supplies of durum were scant, they must have realized that imported macaroni would be made from durum or semolina exported from this country to such foreign countries. Apparently, therefore domestic macaroni manufacturers were assuming that the foreign manufacturers would get the domestic durum crop. Plans were made for an industry meeting of growers, millers, and manufacturers in August.

33. A meeting of growers, millers, and manufacturers was held in Minnesota on August 15, 1961, sponsored in part by the Association. The meeting was open to anyone who wanted to attend, and was attended by all sorts of people and organizations involved in the

industry. The durum millers attended the August 1961 meeting in order to learn the manufacturers' plans for coping with the shortage. Similarly, the manufacturers attended the meeting to learn what sort of raw materials they could expect from their miller-suppliers in the event of shortage. The durum carryover as of July 1961 was reported as 12 million bushels. Of this carryover, export sales were reported to have taken 6 million bushels, practically all in June. Another two million bushels were expected to be sold for export and were actually sold to France while the meeting was in session. The balance of four million bushels was expected to be used up by the mills by the time the new crop came in. The new crop was estimated at around 18 million bushels, against a normal domestic disappearance of about 29 million bushels leaving a shortage for the crop year of 1961/62 of about 11 million bushels.

The reporter of the above figures, a Mr. Von Blon, of a milling company, also outlined several alternatives in view of the prospective shortage. One was to continue 100 percent durum as long as possible, saying, "If a few manufacturers decided to do this and others were forced to compete, we would have something approximating this situation. The result would be that by early in 1962 we would have exhausted our supplies of durum wheat completely and would undoubtedly be paying astronomical prices during the winter months for dwindling supplies." A second alternative would be to eliminate durum completely, which was felt to be unwise in the light of industry's experience with consumer dissatisfaction with durum substitutes. The third and preferred course of action was to stretch out the supplies as long as possible by using blends of 50 percent durum and 50 percent other wheat, saying "Not only will this third alternative provide the best products available to macaroni manufacturers this year, but it will minimize price fluctuations for raw materials. The more we can spread out the buying of durum wheat, the better the possibility that the fluctuation in the price of durum wheat will be held within reasonable limits." Mr. Von Blon concluded his remarks by requesting that the macaroni manufacturers there present provide the millers with an "expression of opinion." Pursuant thereto, the manufacturers met and exchanged views on the shortage. At least one participant argued that the manufacturers pass a resolution making a 50–50 blend mandatory. Association records show that this participant was a member of the Association in 1961. After the record was closed and briefs in this proceeding filed, counsel for the respondents asked to introduce evidence purporting to show that the participant became a member at least a month after the meeting. This request was refused for the reasons noted in the order denying the motion, but it is of little consequence in the determination of this issue.

It is of not great significance whether the person making such a suggestion was a member or not. The important issue for determination is whether the Association, through its membership embarked upon the course of conduct suggested by that participant, pursuant to an agreement.

34. A resolution was adopted by the manufacturers and by the Association in due course:

> Effective September 1, durum millers should offer a blend of 50% durum and 50% other types of wheat whose characteristics most closely resemble durum and that macaroni manufacturers should use this 50–50 blend to maintain the highest quality possible to best utilize the available supply of durum during the current crop year.

Several of the participants voting for the resolution nevertheless expressed the opinion that they did not feel bound by it. One of the manufacturers, having secured an ample supply of durum during the spring of 1961, continued to use 100 percent durum during the crop year 1961/62; another manufacturer having used up its supply of semolina, went to a straight farina usage without any durum.

By and large, however, the macaroni manufacturers went to a 50–50 blend in line with the resolution adopted at the meeting in 1961, calling upon durum mills to offer a 50–50 blend of durum and other wheat, and macaroni manufacturers to use such 50–50 blends. Mills having commitments to produce semolina fulfilled such contracts, even after the August 1961 meeting, before switching to blends.

35. During the crop years 1959/60 and 1960/61, the seven durum mills used about 95 percent durum wheat to 5 percent other wheat. In 1961/62, however, they used about 50 percent of each. Much of the durum used in 1961/62, however, went to complete contracts made before the August resolution. Some of it also was processed by the mills and exported as semolina. Some of the durum was also blended at the mills instead of being sold as 100 percent semolina. As a result the amount of 100 percent semolina sold by the mills pursuant to contracts made after August 1961 was quite small. From reports filed by these mills, it appears that they produced about 25 percent pure semolina to 75 percent blends and other wheat products, and of the 25 percent semolina, about half may have been pursuant to contracts made before August 1961 [1] and some went for export instead of domestic use. As respondent Green stated in a letter to the Agricultural Stabilization and Conservation Service in October 1961, "100% semolina is still being quoted in Minneapolis but there are very, very few takers because of the extremely high prices." It appears, therefore, that the

[1] For example, one of the largest mills reported that 73 percent of the 1961/62 pure semolina production went to fulfill contracts made prior to the August resolution.

amount of 100 percent semolina sold domestically after August 1961 was negligible.

36. The October 1961 letter to the Agricultural Stabilization and Conservation Service from respondent Green characterized the August 1961 resolution as a "general agreement." The letter also stated that close to 14 million bushels of some 30 million bushels available for crop year 1961/62 had already been exported or bought for export as of October 1 and that "the trade reports that the exporters are still in the market." The total purchases by exporters during the crop year 1961/62 actually exceeded 16 million bushels but at the end of that crop year, as of June 30, 1962, there was a domestic durum carry over of five million bushels nevertheless. It thus appears that the mills failed to use over 21 million bushels of durum during the crop year 1961/62 either because it was not bought (five million bushels) or because it was bought by exporters (16 million bushels). These 21 million bushels, if used by domestic macaroni manufacturers in addition to the 4 million actually used, would have provided a domestic supply of some 35 million bushels, or more than the amount normally needed for domestic quality production.

37. The cash price of durum during the first half of 1961 (corresponding to the last half of the crop year 1960/61) averaged $2.26 per bushel. In June 1961, the price advanced to $2.41; in July, to $2.83; in August, to $3.11, and rose steadily the rest of that calendar year until December when the price reached $3.65 per bushel. By June 30, 1962, however, the price of durum had dropped to $2.70.

38. During the crop year 1961/62, approximately 14 million bushels of durum were milled for domestic use. (Plus about 4 million bushels for seed, etc.) This represented a drop of some 9 million bushels from the 23 million bushels milled in the previous crop year. Such a decline in the mill use of durum would normally have a negative or depressing effect on the price of durum.

39. There is a low price elasticity for bread and other final forms of wheat, such as macaroni products. This causes relatively small declines in consumption with any increase in prices. This relationship is estimated to be approximately 10 to 1; that is, a price increase of 10 percent will cause a consumption decline of 1 percent. It is further estimated that the cost of the wheat in a wheat product is approximately 10 percent of the latter's price. Consequently, in a macaroni product selling for 20 cents, the wheat cost would be about 2 cents, and a 100 percent increase in such wheat cost would result in a 2 cent or 10 percent increase in the price of a macaroni product. This in turn would result in the decline of such macaroni products' consumption of about 1 percent. The evidence of such relationship is uncontroverted.

Discussion

The law against price-fixing is so clearly defined that an extended discussion of it here is needless. It is well established that collective action to tamper with price is illegal per se. *United States* v. *Socony-Vacuum Oil Company, Inc.* 310 U.S. 150 (1940). It is equally well-settled law that the Federal Trade Commission can deal with price-fixing under its power to prevent unfair methods of competition. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948).

If the purpose and practice alleged runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition. *Fashion Originators Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941).

It is not only an outright agreement upon prices that the Commission may reach, but any and all concerted action to eliminate, lessen or restrain price competition. The device of curtailing production is rarely if ever employed by itself, but usually in conjunction with price fixing activities and also with restrictions of distribution. But any agreements to limit the number of producers in an industry, impose production quotas or suspend the production of a commodity are illegal per se. *American Column & Lumber Co.* v. *United States*, 257 U.S. 377 (1921); *Salt Producers Association* v. *F.T.C.* 134 F. 2d 354 (7th Cir. 1943).

Concerted efforts to raise, depress, fix, peg or stabilize prices are conclusively presumed to be undertaken in order to lessen or eliminate competition. Other motivations are immaterial.

It makes no difference whether the motives of the participants are good or evil; whether price fixing is accomplished by express contract or some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of agreement is to raise or to decrease prices. *United States* v. *McKesson & Robbins*, 351 U.S. 305 (1956).

The respondents urge dismissal of the camplaint for three primary reasons:

(1) There was no agreement made by the respondents.

(2) If there were an agreement made by the respondents, it was not for the purpose and with the effect of affecting prices.

(3) The corporate respondents in this proceeding are not representative of the Association members.

The Agreement

As the Court stated in *United States* v. *Morgan*, 118 F. Supp. 621, 634 (S.D.N.Y. 1953):

Either there is some agreement, combination or conspiracy or there is not. The answer must not be found in some crystal ball or vaguely sensed by some process of intuition, based upon a chance phrase used here or there, but in the evidence adduced in the record of the case which must be carefully sifted, weighed and considered in its every aspect. This is an arduous but necessary task.

Respondents emphasize the fact that the language of the 1961 resolution was not binding in its terms. In fact, the urging of one participant to that effect was specifically rejected at the meeting. In addition, some of the members at the meeting testified that the resolution was not considered to be binding. It was referred to by some as "consensus of opinion" or a "recommendation."

The language used to describe the alleged agreement, however, is not controlling. In *Advertising Specialty National Association et al.* v. *Federal Trade Commission*, VI S. & D. 76, 238 F. 2d 108 (1st Cir. 1956), the court upheld a Commission finding of an agreement to maintain prices despite the respondents' resolutions and discussions represented as "recommendations or a 'consensus of opinion' as to good practice in the industry, a consensus which involved 'absolutely no obligation' and which was not binding on anyone * * * petitioners point to evidence that the secretary of the Association on two occasions cautioned the membership that they should not participate in 'collusive action' to fix prices. * * * and the Association's constitution and the member's creed * * * 'were not taken seriously.' "

The respondents' argument on that point, in any event, appears contradicted by the statements and behavior of the respondents. Respondent Green in a letter to the Agricultural Stabilization and Conservation Service in October 1961 spoke of "an agreement." The minutes of the July 1961 meeting refers to the unwillingness of the millers to *commit* themselves on blending. As in the *Advertising Specialty* case, *supra*, it is to be expected that the respondents would deny that there was an agreement, coupled with the argument that this was merely parallelism in business behavior. That is, that each individual miller and manufacturer independently decided to abandon the 100 percent durum standard in favor of a 50–50 blend or less, in view of the impending shortage of durum. If it were merely business parallelism, there could be no finding of conspiracy.

One of the tests enunciated by the courts to differentiate conspiracy from parallelism is the test of self-interest. As the court said in *Independent Iron Works, Inc.*, v. *United States Steel Corp.* 177 F. Supp. 743 (N.D. California S.D. 1959) :

"Reasonable businessmen will act similarly when presented with the same problem." The anti-trust laws were not made to prohibit businessmen from adopting sound business policies merely because competitors had already adopted the same or a similar policy.

An inference of conspiracy is permissible only where the conduct is adopted by a competitor "in apparent contradiction to its own self-interest." *Milgram*

v. *Loew's Inc.* 3 Cir., 1951, 192 F. 2d 579, 583. An inference of conspiracy would only arise from similar business conduct if it appeared more to the interest of competitors to adopt different practices. *Chorak* v. *RKO Radio Pictures* 9 Cir., 1952, 196 F. 2d 225, 229, *certiorari denied*, 1952, 344 U.S. 887, 73 S. Ct. 329, 97 L. Ed. 702.

Applying this test of self-interest here, we find that the respondents were confronted with an apparent durum shortage in the summer of 1961. The threat of a shortage was apparent as early as January 1961. The self-interest of each macaroni manufacturer would have compelled each of them to go into the durum market and obtain whatever durum they could lay their hands on while there was still some durum available. That there was some durum available as late as October 1961 is reported by the respondents themselves. Instead, however, the respondents chose to wait until after August 1961 and then abandon the use of 100 percent durum, rendering their macaroni product inferior in quality. Such behavior is not consistent with self-interest.

It is argued that the macaroni manufacturers, being in competition with other macaroni manufacturers as well as with manufacturers of competitive grocery products such as potatoes, rice, beans, and other cereal foods, are compelled to keep the price of their product at reasonable levels and that any increase in price results in a decrease in consumption of the macaroni product. The record shows, however, that even with an increase in the cost of raw material (wheat) of as much as 100 percent, the wheat product's price would advance moderately, perhaps only about 10 percent; such a moderate increase in the price would cause only a negligible decrease in consumption. The respondents, being particularly involved in the marketing of macaroni products, must be taken to be aware of this. Similarly, they are admittedly aware of the consumer reaction resulting from the substitution of other wheats for durum in their products. The record shows that in previous years when the industry switched to a blend, per capita consumption was only about 6.3 pounds as against 7.3 pounds in 1961. Going to the use of blends, therefore, posed the threat of a consumption loss of about 14 percent. The alternatives were, therefore, quite clear: Sustain a consumption loss of 14 percent by going to a blend, or a consumption loss of one, two or three percent by buying durum at $4.50 per bushel, which would be roughly 100 percent higher than the "normal" price of about $2.25 per bushel, and raising the price of the macaroni product accordingly. Actually, however, the price never got as high as $4.50 so that the increased cost would have been even less than calculated above, with a smaller increase in price and a smaller drop in consumption. Self-interest should have dictated to each manufacturer the use of durum instead of a blend; instead, the industry went to a blend.

If, of course, there was no durum available, the reasoning applied above would not prevail. It must be conceded that the industry thought there was going to be a shortage. The carryover from the previous crop year, as reported in August 1961, was only 12 million bushels and the 1961/62 crop was estimated around 18 million bushels. In previous years the domestic disappearance per year was around 28 million bushels, with no exports. In 1961/62, however, the total disappearance reached 34 million bushels (not including the five million bushel carry over at the end of June 1962), with domestic users (manufacturers, seed, etc.) taking 18 million thereof. The exporters outbid the domestic users for the balance. The shortage, therefore, was not absolute as in 1953/54/55 when the total disappearance ranged between eight and 16 million bushels, with practically no exports. Instead, this was the result of a deliberate decision not to buy, thus permitting the exporters to take 16 million bushels at a price higher than the domestic industry was willing to pay. As demonstrated above, this unwillingness to pay was contrary to the interest of each manufacturer in the light of their own experiences.

Moreover, it is difficult to believe that any macaroni manufacturer would deliberately resort to the use of a blend, thus deteriorating the quality of his product and risking a substantial drop in consumer acceptance, unless he was reasonably sure that his competitors would do likewise. If there were a real shortage of durum, he could have that assurance, but since the shortage was only the result of a refusal to compete in price with the exporters, he could not be sure that his competitors would be similarly unwilling to pay the higher price for durum in order to maintain high per capita consumption of their product. It follows, therefore, that each macaroni manufacturer must have known that his competitors would not stay with the 100 percent durum standard, such knowledge being given to him at the August 1961 meeting. It is argued that the meeting was for the purpose of exchanging views and discussing the shortage. Such purpose, however, could be realized by the exchange of official statistical data that is available to the respondents through Government sources and otherwise. The meeting served the additional purpose, it seems, of acquainting all members of the industry with a program of behavior that was expected of each of them and resulting in what respondent Green termed a "general agreement."

There is another facet to this array of circumstances indicating an agreement. The industry was well aware of what happened in

1953 when a real shortage of durum occurred. At that time, also, there was a "consensus of opinion" that the industry used blends of durum. Then, however, we had one additional fact: The industry resolution of 1953 said specifically that "semolina is not to be offered to any buyer after August 14, although existing contracts are to be filled," and a 50–50 blend became the best available. Such a prohibition on the production of semolina was not spelled out in the 1961 resolution. The records of the mills, however, for crop year 1961/62 show that the results in 1961 were not much unlike the results of 1953, with relatively negligible amounts of 100 percent durum semolina sold to domestic users after the August resolution.

In summary, therefore, it appears, and the examiner so concludes, that both in 1953 and 1961 the industry met and reached an agreement that each manufacturer would use a blend rather than 100 percent durum, and that this program of use would continue for the rest of the crop year with relatively few exceptions.

The Purpose of the Agreement

Respondents argue further that even if they reached an agreement, that agreement was not motivated with the intent or purpose of establishing, fixing, or pegging the price of durum wheat, but that the action taken was in all respects reasonable under the circumstances. They argue that the purpose of the agreement was to preserve the quality of the product to the greatest extent possible consistent with the apparent available supply, citing the fact that the resolution so stated specifically and that several of the witnesses so testified. They cite *Maple Flooring Association* v. *United States*, 268 U.S. 563 (1925) in which the court held:

> * * * trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions, stocks of merchandise on hand, approximate cost of transportation from the principal point of shipment to the points of consumption * * * and who * * * meet and discuss such information and statistics without, however, reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce.

The court, however, recognized that the activities of a trade association were illegal if such activities resulted in "concerted action to lessen production arbitrarily or to lessen price beyond the levels of production and price which would prevail if no such agreement or concerted action ensued." This distinction was referred to in *United States Malsters Association* v. *FTC*, IV S. & D. 428, 152

F. 2d 161 (7th Cir. 1945) where the court referred to *United States* v. *Socony-Vacuum Oil Co.*, *supra*, wherein the court stated:

"For the systems there under attack were methods of gathering and distributing information respecting business operations. It was noted in those cases that there was not present any agreement for price-fixing."

See also, *Sugar Institute Inc.* v. *United States* 297 U.S. 553 (1936) where the court noted that although the dissemination of market information may have the effect of price and production stabilization, standing alone, it cannot be said to be unlawful. A combination, however, to make and supply information as a part of a plan to impose unwarrantable restrictions, as, for example, to curtail production and raise prices, is unlawful.

Respondents contend that the purpose of the resolution agreed upon among themselves was to encourage the use of durum so as to maintain the quality of the macaroni product and diminish the possibility of a decline in consumption. One of the witnesses testified that the purport of the resolution was to encourage the use of at least 50 percent durum in a blend. This interpretation, however, appears far-fetched. The minutes of the meeting and the subsequent reports thereof are replete with references to the shortage of durum. The keynote speaker at the meeting carefully outlined his estimates of the durum supply and noted that with the use of *not more* than 50 percent durum the expected supply of durum could be stretched out over the crop year. The use of any amount greater than 50 percent durum would have made the expected durum supply run short of the year's requirements. On the contrary, the recommendation seemed to be clearly maximum recommendations; that is, to see that manufacturers should use not more than 50 percent durum and in so doing conserve the supply for the industry's annual use estimate. As such it was not a recommendation for the preservation of quality, but for the deterioration of quality, since a reduction in the amount of durum used in a macaroni product lowers its quality and consumer acceptance. If, then, the resolution cannot be deemed a recommendation for the preservation of quality, we must consider what other purposes were exhibited by the participants at the meeting. The keynote speaker, Mr. Von Blon, referred to the industry payment of "astronomical prices during the winter months for dwindling supplies" if the industry did not resort to the use of blends. He also recommends the use of a 50–50 blend to "minimize price fluctuations * * * within reasonable limits." In everyone's mind was the industry's experiences of 1953 when the use of blends was resorted to during a crop shortage. The Macaroni Journal reported that exporters had entered the market (in 1956) and purchased durum at prices higher than American millers were willing to pay; a uniform product would give the industry greater stability in quality and price; that the price differential in favor of durum over other wheats might run higher than 50 cents; that more durum would have been ground if the price were not as high; that "if the industry had not used this wisdom and caution [the adoption of a 50–50 blend] but instead had impulsively rushed into the general use of 100 percent durum, prices of durum would have sky-rocketed"; that the greatest number of manufacturers felt that 50 cents was the premium durum should command; that a durum price of $2.85/$3.00 a bushel allows durum-semolina to compete favorably with hard-wheat farina; that a price of about $3.25/$3.50 for durum means a price increase of about 1½ cents a pound for macaroni products.

With this background of specific price discussions, together with the apparent unwillingness of the industry to pay much more than $3.00 a bushel for durum and the reference at the 1961 meeting to the effect upon prices that blending, as well as failure to blend would have, the conclusion is inescapable that at least one of the purposes for the resolution was the stabilization of price at what the industry regarded as reasonable levels. Whether or not other objectives were also present is immaterial. *United States* v. *McKesson & Robbins*, *supra*.

It matters not whether the respondents were in a position to control the market nor that the prices lacked uniformity. "* * * To the extent that the [respondents] raised, lowered or stabilized prices they would be directly interfering with the free play of market forces * * * Nor is it important that prices paid by the combination were not fixed * * *. In terms of market operation stabilization is but one form of manipulation." *United States* v. *Socony-Vacuum Oil Co.*, *supra*.

The Class Action

This proceeding is brought against the Association and its members, as well as against three corporate respondents as representative of the entire membership, and five individuals as officers of the Association. Respondents argue that the evidence does not disclose these corporate respondents to be representative of the entire membership of the Association, nor the connection of the officers to the challenged activities. Counsel supporting the complaint on the other hand cite *Advertising Speciality National Association, et al.* v. *FTC*, *supra*. That decision held a class action appropriate where the unnamed respondents were in fact represented by counsel who entered his appearance for "all respondents." With that jurisdictional question disposed of, the court went on to hold that the proceeding was a proper class suit. It found "that the members of the Association were so numerous as to make it impracticable to bring all of them before the Commission," citing *Tisa* v. *Potofsky*, 90 F. Supp. 175 (D.C.S.D. N.Y. 1950) where a membership of 50 rendered a joining impracticable. The court further found that the named respondents were representative of the entire class, citing 3 Moore's Federal Practice, 3425 (2d Edition 1948):

In determining the question [of adequate representation] the court must consider (1) whether the interest of the named party is co-extensive with the interest of the other members of the class; (2) whether his interests are antagonistic in any way to the interests of those whom he represents; (3) the proportion of those made parties as compared with the total membership of the class; (4) any other factors bearing on the ability of the named party to speak for the rest of the class.

The court found that the members of that association had common and consistent interests, had considered themselves part of an integrated industry within a common boundary, had an adequate proportion of parties, and no reasons had been presented which would detract from the ability of the named parties to speak for the entire class.

The parallel of this proceeding to the *Advertising Speciality* case cited above is remarkable. In this proceeding, counsel has entered an appearance for the Association, the corporate respondents, the named officers of the Association, and the Association members. There is, therefore no jurisdictional question involved and counsel for the respondents so concedes. As to the impracticability of naming all of the Association members, it should be noted that the membership varies from year to year and numbers at this time about 84, which brings it well within the decision of *Tisa* v. *Potofsky*, *supra*. As respects the representative character of the named respondents, it should be noted that the active membership of the Association is limited to persons engaged in the manufacture of macaroni and egg noodles. The named corporate respondents are admittedly so engaged. The members of the Association represent themselves as being part of an integrated industry with common interests. The presidents of the three corporate respondents have been representing the membership of the Association by virtue of the official posts they hold and have held in the Association over many years. Indeed, it is difficult to see how any more representative choice could have been made.

Finally, as respects the individual respondents named as officers of the Association, there appears to be little doubt as to their leadership within the Association. The Macaroni Journal of the Association is replete with their statements. There appears, therefore, no basis for excluding such individuals from an order which encompasses their activities as officers of the Association.

Conclusion of Law

The respondents named in this complaint, as well as the unnamed members of the respondent Association, have agreed upon a common course of action to fix and determine the quality of macaroni products and to thus fix, rig and manipulate the price of durum wheat. This behavior constitutes an unfair method of competition prescribed by Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent National Macaroni Manufacturers Association, a corporation, respondents Albert Ravarino, Fred Spadafora, Robert I. Cowen, and Robert M. Green, as officers of said Association; respondents Ronzoni Macaroni Company, Ravarino & Freschi, Inc., and Superior Macaroni Company, corporations, in their capacity as members of the respondent National Macaroni Manufacturers Association and as representative of the entire membership of the National Macaroni Manufacturers Association; said respondents' agents, representatives, employees, successors and assigns; and any and all members of respondent National Macaroni Manufacturers Association, in or in connection with the manufacture, sale, or distribution, in commerce as "commerce" is defined in the Federal Trade Commission Act, of macaroni and related products, do forthwith cease and desist from entering into or carrying out any planned or concerted course of action, understanding, or agreement between any two or more of said respondents or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts or things:

Fix or manipulate prices for durum, semolina or durum flour;

Fix or determine or establish the kind or kinds of flour or blends thereof, to be used in macaroni and related products or to otherwise fix or determine the quality or composition of macaroni and macaroni products.

OPINION OF THE COMMISSION

APRIL 30, 1964

The complaint in this matter charges, in essence, that the principal domestic manufacturers of macaroni products, acting through respondent trade association, entered into an agreement fixing the composition of such products at a 50% semolina-50% farina blend; that they did so in order to depress the price of durum wheat, from which semolina is produced; and that such an agreement violates Section 5 of the Federal Trade Commission Act. After full evidentiary hearings, the hearing examiner rendered his initial decision, upholding the complaint and entering an order to cease and desist. Respondents have appealed. We have concluded that the findings of fact and conclusions of law of the examiner are correct, but have modified the cease and desist order in minor respects.

"Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*" *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223. This rule applies to combinations among purchasers as well as among sellers (*Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 235); for sellers, as well as buyers, are entitled to the benefits of competition. *Id.*, at 236. Since respondents' action in fixing the composition of macaroni products was clearly the result of agreement, the critical question is whether the purpose and effect of the agreement were to manipulate the price of durum wheat.

Macaroni products are ordinarily made from 100% semolina; if they contain less semolina they are considered inferior. At the time the agreement challenged here was entered into, it appeared that durum wheat, from which semolina is produced, would be in short supply, and consequently that prices for durum would skyrocket if the macaroni manufacturers bid freely among themselves for the available supply. The record shows that the challenged agreement was intended to ward off such price competition by lowering total industry demand to the level of the available supply. Since the macaroni industry is the only market for durum, and since the parties to this agreement dominate the domestic macaroni industry, it seems clear that the agreement actually affected in a substantial degree the price of durum during the period in which the agreement was in effect.[1]

Respondents contend that the agreement was a reasonable response to a condition of shortage. However, fluctuations in the supply of raw materials occur continually, especially in agricultural industries. Fluctuations in supply ordinarily produce fluctuations in price. To permit concerted action designed to regulate or control such effects on the price structure would eliminate competition as a market regulator from large areas of the economy. We doubt whether respondents would concede that the durum producers, in periods of oversupply, could lawfully agree among themselves to limit production and thereby drive up the price of durum to the macaroni industry; but what the macaroni producers have done in the present case is in principle the same.

[1] The members of the respondent trade association normally purchase about 70% of the total volume of the durum wheat products produced in this country.

We do not hold that all efforts at product standardization, or all buying agencies or other cooperative buying arrangements, or all attempts to cope with scarcity or other conditions of economic dislocation, are unlawful under the antitrust laws. See Kaysen & Turner, Antitrust Policy 151–52 (1959). But where all or the dominant firms in a market combine to fix the composition of their product with the design and result of depressing the price of an essential raw material, they violate the rule against price-fixing agreements as it has been laid down by the Supreme Court.

Final Order

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having rendered its decision granting in part and denying in part the aforementioned appeal and directing modification of the initial decision:

It is ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

ORDER

It is ordered, That respondent National Macaroni Manufacturers Association, a corporation, respondents Albert Ravarino, Fred Spadafora, Robert I. Cowen, and Robert M. Green, as officers of said Association; respondents Ronzoni Macaroni Company, Ravarino & Freschi, Inc., and Superior Macaroni Company, corporations, in their capacity as members of the respondent National Macaroni Manufacturers Association and as representative of the entire membership of the National Macaroni Manufacturers Association; said respondents' agents, representatives, employees, successors and assigns; and any and all members of respondent National Macaroni Manufacturers Association, in or in connection with the manufacture, sale, or distribution, in commerce as "commerce" is defined in the Federal Trade Commission Act, of macaroni and related products, do forthwith cease and desist from entering into or carrying out any planned common course of action, understanding, or agreement between any two or more of said respondents or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts or things:

> Fix or establish the kinds or proportions of ingredients to be used in producing macaroni and related products, or take any other concerted action, for the purpose of fixing or manipulating the price of such ingredients.

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

IN THE MATTER OF

PLOUGH, INC., ET AL.

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

Docket 8563. Complaint, Mar. 19, 1963—Decision, Apr. 30, 1964

Order dismissing, in view of the Feb. 20, 1964, dismissal of a similar complaint in *Sterling Drug, Inc.*, Docket 8554, 64 F.T.C. 898, complaint charging the distributor of "St. Joseph Aspirin" and its advertising agency with representing falsely that "America's leading medical journal" reported that St. Joseph Aspirin was the best buy in pain relief.

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 Plough, Inc., a corporation, and Lake-Spiro-Shurman, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Plough, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3022 Jackson Avenue in the city of Memphis, State of Tennessee.

Respondent Lake-Spiro-Shurman, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located at Radio Center Building, Main and Union Streets, in the City of Memphis, State of Tennessee.

PAR. 2. Respondent Plough, Inc., is now, and for some time last past has been, engaged in the sale and distribution of a preparation which