Lapeyre, Jr., individually, as copartners trading and doing business as The Peelers Company, and as representatives of all of the partners in The Peelers Company, and their agents, representatives, and employees, directly or indirectly, through any existing or succeeding corporation, partnership, sole proprietorship, or other device, in connection with the distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any shrimp peeling, cleaning and separating machinery or improvements thereto now or hereafter controlled by respondents, do forthwith cease and desist from:

(1) Discriminating between lessees of such machinery by charging higher rental or use rates to any lessee than are charged to any other lessee.

For the purposes of this proceeding, lease or rental terms which result in any lessee paying a higher rate than the rate charged any other lessee for use of respondents' machines for the same period of time or through the same number of mechanical revolutions or operations shall be deemed discriminatory.

(2) Discriminating between foreign and domestic shrimp processors by refusing to sell such machinery to domestic processors upon the same terms and conditions afforded to foreign processors.

*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 to cease and desist contained herein.

Commissioner Elman's views are stated in a separate opinion. Commissioner Reilly did not participate for the reason that he did not hear oral argument.

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IN THE MATTER OF

## GEORGIA-PACIFIC CORPORATION ET AL.

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

*Docket C-751. Complaint, June 4, 1964—Decision, June 4, 1964*

Consent order prohibiting the Nation's sixth largest producer of coarse paper—which, between 1947 and 1963 had acquired at least 45 lumber, plywood and paper companies—and its wholly owned subsidiary from acquiring, without prior Commission approval, any company engaged in producing, converting or selling (1) coarse paper or finished products thereof or (2) container-

board or its products for a period of 10 and 7 years, respectively, with exceptions as stated; and requiring them annually to make available or sell to independent jobbers and converters for 5 years at least 100,000 tons of coarse paper per year (the approximate amount produced at the Crossett, Ark. mill, acquired in 1962), and, for the succeeding 5 years, 75,000 tons annually, all at delivered prices offered by its named major competitors.

## COMPLAINT

The Federal Trade Commission has reason to believe that the above-named respondents have acquired the assets and stock of The Crossett Company, a corporation, in violation of Section 7 of the Clayton Act, as amended, (U.S.C. Title 15, Sec. 18); and therefore, pursuant to Section 11 of said Act, it issues this complaint, stating its charges in that respect as follows:

### I.

### DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

a. "Coarse paper" is a category of paper generally relating to the packaging and wrapping field, where a flexible type of packaging material is appropriate or desirable, including but not limited to, wrapping, bag and sack papers and converting paper.

b. "Kraft paper" is a high strength bleached or unbleached coarse paper made by the sulphate process, which constitutes the vast majority of all coarse paper.

c. "Grocers bags and sacks" are bags and sacks, made from Kraft coarse paper, used primarily by retail food stores to package groceries for customers.

### II.

### Respondents

2. Respondent Georgia-Pacific Corporation is a corporation organized and existing under the laws of the State of Georgia, with its principal office located in Portland, Oregon.

3. Respondent Georgia-Pacific Paper Corporation, a wholly owned subsidiary of Georgia-Pacific Corporation, is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at Crosset, Arkansas. Georgia-Pacific Corporation and its wholly owned subsidiaries are hereinafter sometimes referred to as Georgia-Pacific.

4. Georgia-Pacific is, and for many years has been, engaged in the manufacture and sale of various forest products, including but not

limited to, lumber and plywood, Kraft coarse paper, container board, grocers bags and sacks, corrugated products and hardboard.

5. In 1947, Georgia-Pacific had net sales of $24,075,982 and total assets of $6,466,844. By 1962, net sales had increased to $324,987,000 and total assets climbed to $476,996,000. The major part of the great increase in the sales and assets of Georgia-Pacific between 1947 and 1963 resulted from Georgia-Pacific's acquisition of at least 45 lumber, plywood and paper companies for which Georgia-Pacific paid a combined consideration of approximately $584,714,000.

6. Georgia-Pacific entered the paper industry in 1958 with the construction of a mill for the production of Kraft pulp, Kraft coarse paper, and container board at Toledo, Oregon. This mill represented an initial investment of approximately $21,000,000 and when completed had a daily capacity of 250 tons of such coarse paper and container board. In 1960, this capacity was enlarged to 600 tons daily, and is currently being expanded to 800 tons. In 1962 this mill produced about 47,000 tons of Kraft coarse paper and 143,579 tons of Kraft container board. Prior to July, 1962 coarse paper produced at this mill was marketed principally on the West Coast; however, regular and substantial shipments were made to the Midwest and to the East.

7. In 1961, Georgia-Pacific acquired the Imperial Bag and Paper Company (Imperial), a manufacturer of grocers bags and sacks, with its plant located at Pine Bluff, Arkansas. Imperial had been a purchaser of Kraft coarse paper. In 1961, sales of grocers bags and sacks manufactured at the former Imperial plant amounted to $3,037,841. Such sales were made principally in the Midwest.

8. In 1962, Georgia-Pacific maintained 58 manufacturing plants located in the western, midwestern and southern regions of the United States. It distributes its line of over 250 forest products through at least 74 company-owned distribution sales branches (warehouses) located in 33 states and 50 other sales offices located throughout the United States. Kraft coarse paper and other paper products accounted for about 22% of Georgia-Pacific's sales in 1962.

9. At all times relevant herein, Georgia-Pacific sold and shipped Kraft coarse paper, grocers bags and sacks, as well as other forest products, in interstate commerce.

## III.

### The Crossett Company

10. Prior to July 1962, The Crossett Company was a corporation organized and existing under the laws of the State of Arkansas with its principal offices in Crossett, Arkansas.

11. At the time of its acquisition, The Crossett Company and its subsidiaries (Crossett), were, and for many years had been, engaged in the manufacture and sale of various forest products, including but not limited to, Kraft coarse paper, grocers bags and sacks, variety bags, shopping bags, bleached foodboard, softwood lumber, and hardwood flooring.

12. Crossett sold Kraft coarse paper throughout the eastern and midwestern United States.

13. In 1961, the year prior to its acquisition, Crossett had total sales of $49,176,000 and total assets of $71,420,124. Kraft coarse paper and other paper products accounted for 72% of Crossett's annual sales.

14. In 1961, at its paper mill in Crossett, Arkansas, Crossett produced 132,000 tons of Kraft coarse paper. This mill has as its source of supply a 565,000 acre forest on the Arkansas-Louisiana border, containing an estimated 2.5 billion board feet of timber. Crossett further operated a bleached foodboard mill, a lumber mill, a newly constructed flakeboard mill, and three chemical plants in connection with this forest.

15. Through a wholly owned subsidiary at Covington, Kentucky, Crossett manufactured and sold grocers bags and sacks. Crossett's total sales of grocers bags and sacks, in 1961, were $4,659,383.

16. Crossett sold grocers bags and sacks to customers located principally in Ohio, Indiana, Illinois, Michigan, Kentucky, Tennessee and western Pennsylvania.

17. At all times relevant herein, Crossett sold and shipped Kraft coarse paper, grocers bags and sacks, as well as other forest products, in interstate commerce.

## IV.

## The Nature of Trade and Commerce

18. In general, grades of paper fall within the following categories: coarse, fine and newsprint. The production and sale of "coarse paper" and "grocers bags and sacks" are, respectively, the two relevant lines of commerce for the purposes of this case.

19. The coarse paper industry in the United States is substantial. In 1958 total shipments of 3,644,000 tons of coarse paper had a value of $712,491,000. In 1962, total production of coarse paper was 4,197,499 tons.

20. There has been a marked increase in concentration in the coarse paper industry in the United States since 1952. This increase in concentration is largely attributable to numerous mergers of coarse paper producers, and acquisitions by coarse paper producers of paper bag and sack manufacturers, the principal consumers of coarse paper.

21. Moreover, the coarse paper industry in the United States is highly concentrated. With the acquisition of Crossett in 1962, Georgia-Pacific ranked sixth among the producers of coarse paper. In that year, the eight largest companies accounted for approximately 58% of the total United States production of coarse paper; the largest twelve companies accounted for about 70% of such production.

22. For the purposes of this case, the relevant sections of the country are:

a. As to the manufacture and sale of coarse paper, the United States as a whole, or relevant sections thereof, and,

b. As to the manufacture and sale of grocers bags and sacks:

That section of the United States east of the Mississippi River, plus the States of Minnesota, Iowa, Nebraska, Missouri, Kansas, Arkansas, Oklahoma, Texas, and Louisiana, or that section of the country comprised of western Pennsylvania and the States of Ohio, Indiana, Illinois, Michigan, Kentucky and Tennessee, or both of them.

Violation of Section 7 of the Clayton Act

23. In July, 1962, Georgia-Pacific Paper Corporation, and through it, Georgia-Pacific Corporation, acquired in excess of 99% of the outstanding stock of Crossett for a cash consideration of approximately $125,356,386.

24. The effect of the acquisition of Crossett by respondents may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of coarse paper, and grocers sacks and bags, in the sections of the country set forth in Paragraph 22 above, in the following ways, among others:

a. Crossett has been eliminated as an independent competitive factor in the manufacture and sale of coarse paper, and of grocers bags and sacks;

b. Actual and potential substantial competition between Georgia-Pacific and Crossett in the manufacture and sale of coarse paper, and of grocers bags and sacks, has been eliminated;

c. Concentration in the coarse paper industry in the United States as a whole has been substantially increased;

d. Entry into the coarse paper industry may be inhibited or discouraged;

e. Concentration in the manufacture and sale of grocers bags and sacks has been substantially increased, and the entry of new manufacturers may be inhibited or discouraged;

f. The trend of acquisitions and mergers in the coarse paper industry has been or may be encouraged and stimulated;

g. The integration of coarse paper producers with converters of coarse paper has been or may be increased;

h. Georgia-Pacific's financial and market strength has been enhanced to the detriment of its smaller competitors.

*Now therefore*, The acquisition of Crossett by respondents, as above alleged, constitutes a violation of Section 7 of the Clayton Act, as amended.

## DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent, Georgia-Pacific Corporation is a corporation organized and existing under the laws of the State of Georgia with its office and principal place of business located at Equitable Building, Portland, Oregon.

Respondent, Georgia-Pacific Paper Corporation, is a corporation organized and existing under the laws of the State of Delaware with its principal office and place of business located at Crossett, Arkansas.

Georgia-Pacific Paper Corporation is a wholly owned subsidiary of Georgia-Pacific Corporation.

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

### ORDER

*It is ordered*, That (i) for a period of ten (10) years from the date of service upon them of this Order, respondents shall cease and desist from acquiring, directly or indirectly, through subsidiaries or other-

wise, without the prior approval of the Federal Trade Commission, any part of the share capital or assets of any corporation engaged in commerce and engaged in the United States in the production of coarse paper, or in the converting of coarse paper into finished products, including but not limited to paper bags and sacks, or a substantial part of whose business in the United States is the sale of such finished products; and (ii) for a period of seven (7) years from the date of service upon them of this Order, respondents shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, any part of the share capital or assets of any corporation engaged in commerce and engaged in the United States in the production of containerboard, or in the converting of containerboard, into finished products, including but not limited to corrugated products, or a substantial part of whose business in the United States is the sale of such finished products; provided, however, that nothing contained herein shall prohibit the purchase by respondents, in the ordinary course of business, of coarse paper or containerboard, or finished products converted from coarse paper or containerboard, or secondhand machinery or equipment, used or useful in the manufacture of coarse paper or containerboard or the conversion of coarse paper or containerboard into finished products, if such machinery or equipment does not constitute a major part of the assets of the seller.

*It is further ordered*, That, for the period ending December 31, 1973, respondents shall make available and affirmatively offer, in good faith at not more than the going delivered market price, to independent jobbers and converters of coarse paper in the United States, to be treated collectively as one class, and, to the extent such offers are accepted, sell (i) in each of the years 1964 through 1968, inclusive, at least 100,000 tons of coarse paper produced at the Crossett, Arkansas, mill acquired from The Crossett Company, which is the approximate tonnage of coarse paper sold by The Crossett Company to all customers in such class during the calendar year 1961 (or, if the total production of such mill in any such calendar year is less than 100,000 tons, at least 75% of the total production of such mill in such year, and (ii) in each of the calendar years 1969 through 1973, inclusive, at least 75,000 tons of coarse paper produced at such mill (or, if the total production of such mill in any such calendar year is less than 75,000 tons, then at least 75% of the total production of such mill in such year). The going delivered market price shall be determined by the average of the delivered prices offered by St. Regis Paper Company, Union Bag-Camp Paper Corporation, Hudson Pulp and Paper

Corporation and International Paper Company for similar grades of coarse paper in effect from time to time during the calendar year in question. Respondents' offers and sales shall be made on such terms and conditions of sale (including terms and conditions of credit) as respondents may establish in good faith from time to time.

*It is further ordered*, That respondents shall, within sixty (60) days after service upon them of this Order, file with the Federal Trade Commission a report, in writing setting forth in detail the manner and form in which they intend to comply, are complying or have complied with this Order.

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IN THE MATTER OF

## ELECTRA SPARK COMPANY ET AL.*

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

*Docket 8274. Complaint, Jan. 13, 1961—Decision, June 5, 1964*

Order requiring three corporations and their officers, engaged in the sale and distribution of automobile spark plugs under the trade name "Lectra Fuel Igniter", to cease representing falsely in advertising that their said "Fuel Igniter" was not a spark plug, would give better gas mileage and better engine performance than conventional spark plugs, enable the user to switch from premium to regular gasoline, and was unconditionally guaranteed; that salesmen and distributors could earn excessive amounts, and that the United States Government had field-tested the product and was a substantial purchaser.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that The Lectra Spark Company,** a corporation, and Fred P. Dollenberg and Harry Petrick, individually and as officers of said corporation; Lectra Sales Corporation, a corporation, and Jack Howard, Bernard L. Silver and Harry Petrick, individually and as officers of said corporation; Barilen Corp., a corporation doing business as Lectra Fuel Igniter Co. and Hyman Schlosberg and Laurence Serlin, 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

*Proceeding reopened and remanded to the hearing examiner on Jan. 8, 1965.

[**The correct name of this respondent is Electra Spark Company.]

interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Lectra Spark Company 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 in the Benson Building, Jenkintown, Pa.

Respondents Fred P. Dollenberg and Harry Petrick are officers of The Lectra Spark Company. They formulate, direct and control the acts and practices of said corporation. The address of respondent Fred P. Dollenberg is 3921 Eden Street, Philadelphia, Pa. The address of respondent Harry Petrick is Amoskeag-Lawrence Mills, Inc., 1407 Broadway, New York, N.Y.

Respondent Lectra Sales Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 222 Fourth Avenue, New York, N.Y.

Respondents Jack Howard, Bernard L. Silver and Harry Petrick are officers of Lectra Sales Corporation. They formulate, direct and control the acts and practices of said corporation. The address of respondent Jack Howard is 33 West Ninth Street, New York, N.Y. The address of respondent Bernard L. Silver is 4 Romola Drive, Kings Point, New York. The address of respondent Harry Petrick is Amoskeag-Lawrence Mills, Inc., 1407 Broadway, New York, N.Y.

Respondent Barilen Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 730 Third Avenue, New York, N.Y.

The business address of respondents Hyman Schlosberg and Laurence Serlin is located at 730 Third Avenue, New York, N.Y. They formulate, direct and control the acts and practices of the Barilen Corp.

The business address of respondent Barilen Corp. doing business as Lectra Fuel Igniter Co. is located at 730 Third Avenue, New York, N.Y.

PAR. 2. Respondents are now, and for several years last past have been, among other things, engaged in offering for sale, sale and distribution of automobile spark plugs under the trade name "Lectra Fuel Igniter", in commerce, between and among the various States of the United States.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, said spark plugs when sold, to be shipped from their places of business in the States of Pennsylvania and New York to purchasers thereof located in various other

States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business of respondents in said automobile spark plugs in commerce is now, and has been, substantial.

PAR. 4. The advertising and selling of respondents' automobile spark plugs designated Lectra Fuel Igniter is conducted through several mediums. The respondent Lectra Sales Corporation has solicited mail orders from the general public through the medium of advertising in newspapers, magazines and other periodicals having an interstate circulation.

The respondent Barilen Corp. for the purpose of soliciting mail orders was given permission to use the name Lectra Fuel Igniter Co. by the respondent Lectra Sales Corporation. The trade name Lectra Fuel Igniter Co. was formerly owned by respondent Jack Howard. Said respondent Barilen Corp. operating under the trade name Lectra Fuel Igniter Co. also employed direct mail order advertising in magazines, newspapers and periodicals having an interstate circulation for said automobile spark plugs. The material for said advertising copy was furnished by respondent Lectra Sales Corporation. Upon receipt of orders from consumers said respondent transmitted the orders direct to respondent Lectra Sales Corporation which then shipped the spark plugs to the purchasers.

Another method employed by the respondent Lectra Sales Corporation in the sale of said spark plugs is the solicitation of agents and salesmen. These advertisements were run by said respondent in magazines having an interstate circulation commonly known as Opportunity Magazines.

Respondent Lectra Sales Corporation also sold direct to catalog houses, mail order houses and automobile specialty outlets. In the case of retail outlets, respondent Lectra Sales Corporation pays a portion of advertising expense and material for newspaper copy which is submitted by said respondent Lectra Sales Corporation. In dealing with catalog houses, respondent Lectra Sales Corporation provides advertising copy and pays the printing costs of inserts.

Thus, in the course and conduct of their aforesaid business, and for the purpose of inducing the sale of their products, the respondents have caused advertisements to be placed in various publications having distribution in various States of the United States. Respondents have also caused advertisements of their products to be mailed to prospective purchasers in States other than the States of New York and Pennsylvania.

PAR. 5. In the course and conduct of their business, respondents have made, and are making false, deceptive and misleading statements with respect to said automobile spark plugs. These statements are, and have been, made in advertisements in magazines, newspapers, sales brochures, counter display cards and other promotional material supplied to distributors, retailers, dealers and to the purchasing public.

Among and typical, but not all inclusive of such statements, are the following:

DRIVE YOUR CAR WITHOUT SPARK-PLUGS

* * * * * * *

. . . NEVER USE SPARK-PLUGS AGAIN! That's right! Spark-Plugs Haven't Changed In 30 Years—They Are As Obsolete As A Model T.

* * * * * * *

DRIVE faster, further, cheaper without Spark-Plugs and get peak performance using non-premium gas! Save 6¢ per gallon or more!

* * * * * * *

Drive without Spark-Plugs * * * Lectra Fuel Igniters are not air-gapped in any sense of the word * * *

* * * * * * *

. . . We are also guaranteeing that the Fuel Igniter will squeeze up to 6—maybe 8—more miles out of every gallon of gas purchased in the first year and every year—or we will replace them free until they do. That's a saving of $40 per year. And it will do this using regular gas—economy gas—not the super gas bought at such walloping prices. That means a saving of $50 each year. And the igniters will do this every year of the car's life—they improve with age. They never wear out!

* * * * * * *

* * * by just replacing gas-wasting old-fashioned inefficient spark-plugs that you'll soon have to throw away and replace anyhow—you will now get new pep, power and performance from your car, and you'll save $100 a year or more as well!

4-Way GUARANTY

LECTRA FUEL IGNITERS are:

1. Guaranteed, unconditionally, against any manufacturing or mechanical defect.
2. Guaranteed, unconditionally, to function properly *for the life of your car.*
3. Guaranteed to:
   INCREASE miles per gallon of gas
   INCREASE horsepower
   INCREASE engine RPM
   IMPROVE ease of starting
   IMPROVE acceleration (pick-up)

(This Guaranty applies to ANY car tuned to factory specifications.)

4. Guaranteed not to damage your car at any time in any way. This Guaranty endorsed by American Excess Company of London, England.

* * * * * * *

EXCLUSIVE 4-WAY GUARANTEE

Every set of Lectra Fuel Igniters comes with this amazing 4-Way Guarantee, printed directly on each carton:

1. GUARANTEED against any manufacturing or mechanical defects
2. GUARANTEED to function properly for the life of the car
3. GUARANTEED to increase mileage, horsepower, engine RPM, improve ease of starting and acceleration
4. GUARANTEED for performance and endorsed by an internationally known insurance company

There's big money to be made here! Right now, Joe Jenkins of Point Marion, Pennsylvania has a big, growing business supplying dealers, service-stations, garages. He sells per month about $20,000 of Lectra Fuel Igniters, most of it re-order. His gross business this year will be in six figures!

* * * * * * *

We find selling 5,000 a week nothing unusual for us.

* * * * * * *

. . . These men, who answered the original ad, are making amazingly high income as LECTRA distributors! . . . Kenneth Frost, Ithaca, New York, says: "I sold $2300 worth in three weeks".

* * * * * * *

With this sensational offer you can create your own substantial business worth $50,000 or more!

. . . A U.S. Government Agency field-tested 5,000 in 727 vehicles, six months later ordered 25,000 more to use in 3,000 key vehicles.

* * * * * * *

Uncle is a LECTRA customer! Many military installations have field-tested the Fuel Igniter. As a result of these field tests, many thousand Fuel Igniters have been purchased by these Government units.

PAR. 6. Through the use of the foregoing statements and representations, respondents have represented directly or by implication that:

(a) The Lectra Fuel Igniter is not an automobile spark plug, is superior to the conventional automobile spark plug, and, the use thereof will give better gas mileage.

(b) The use of the Lectra Fuel Igniter will enable the user to switch from premium or high-octane gasoline to regular gasoline irrespective of the automobile engine's requirements.

(c) The use of the Lectra Fuel Igniters will result in better engine performance, power, or acceleration than conventional automobile spark plugs.

(d) The 4-Way Guaranty is unconditional.

(e) The earnings of distributors or salesmen of Lectra Fuel Igniters are in excess of the actual potential earnings.

(f) The United States Government is a substantial purchaser of Lectra Fuel Igniters or that its agencies have field-tested said products.

PAR. 7. The foregoing statements and representations are false, misleading and deceptive. In truth and in fact:

(a) The Lectra Fuel Igniter is a type or kind of automobile spark plug and is not superior to conventional automobile spark plugs in fuel economy.

(b) The use of the Lectra Fuel Igniter will not enable the user to switch from premium, high-octane gasoline to regular gasoline with equal or better performance, when the automobile engine specifications require such high octane fuel.

(c) The use of the Lectra Fuel Igniter will not result in better performance, acceleration of power than conventional automobile spark plugs.

(d) The 4-Way Guaranty is not unconditional but has definite conditions attached thereto which are not set out in some of respondents' advertising.

(e) The offer that potential distributors or salesmen can create their own business in the sale of Lectra Fuel Igniters worth $50,000 or more is exaggerated and misleading.

(f) The statement that one of respondents' distributors sells $20,000 worth of Lectra Fuel Igniters per month and that his gross business from the sale of such products annually runs into six figures is untrue.

(g) The statement that one of respondents' distributors sells $2,300 worth of Lectra Fuel Igniters in three weeks is likewise untrue.

(h) The United States Government is not a substantial purchaser of Lectra Fuel Igniters and said products have not been field-tested by any of its agencies.

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

PAR. 9. The use by the respondents of the aforesaid false, misleading and deceptive statements and 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 Lectra Fuel Igniters by reason of said erroneous and mistaken belief. Furthermore, respondents, by supplying said advertising literature and the material for said sales talks, have furnished their distributors and the agents and representatives of their distributors, means and instrumentalities by and through which the purchasing public may be misled and deceived with respect to the representations set out in Paragraph Five hereof. As a con-

sequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

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

*Mr. Terral A. Jordan* supporting the complaint.

*Mr. R. Gettinger* and *Mr. M. Gettinger* of New York, N.Y. by *Mr. Irving J. Kaufman* for respondents.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER **

MARCH 31, 1964

PRELIMINARY STATEMENT

The complaint in this proceeding was issued January 13, 1961, and duly served on all respondents.* It charges respondents with misrepresentation in the sale of automobile spark plugs designated "Lectra Fuel Igniter", in violation of the Federal Trade Commission Act.

After being served with the complaint, respondents appeared by counsel and filed answer making certain admissions but denying generally any violation of law.

After previous assignment to two other hearing examiners, the matter was duly assigned to the present hearing examiner November 30, 1961. There followed a series of negotiations between counsel designed to obviate the necessity of hearings in this matter. After various unavoidable delays, the negotiations have now culminated in the submission of a "Stipulation as to Facts and Proposed Order."

In that document (admitted in evidence as Commission Exhibit 3), counsel supporting the complaint and counsel for respondents have agreed that the stipulation, together with certain other exhibits admitted in evidence by agreement, shall constitute the evidentiary record. On the record thus made, counsel also have agreed, the hearing examiner may "make his findings of fact and conclusions" without further intervening procedure. The parties have, in effect, waived the filing of proposed findings and conclusions, the submission of briefs and the presentation of argument.

*Respondent Electra Spark Company is incorrectly designated in the complaint as The Lectra Spark Company. See Par. 1, Findings of Fact.

**The effective date stayed until further order of the Commission by order dated May 4, 1964.

Counsel further stipulated and agreed that a form of order attached to and made a part of the stipulation "constitutes an adequate and appropriate disposition of the allegations of the complaint and may be entered by the hearing examiner in disposition of this proceeding."

The examiner has taken the agreed order into account in reaching his decision in this matter. However, he is of the opinion that the order proposed by counsel is not, in all respects, an appropriate order in the light of the findings made and the conclusions reached, and he has accordingly modified it.

As the examiner interprets the stipulation, the parties have not conditioned the entry of the stipulation of facts on the acceptance of the order recommended by both counsel. In the caption of Commission Exhibit 3, the text of the order is denominated as a "Proposed Order", and the examiner has considered it merely as a joint recommendation of counsel supporting the complaint and counsel for respondents. The stipulation provides only that such order "may be entered", but does not purport to require its entry.

The considerations leading the examiner to enter a different form of order are set forth in the findings and conclusions that follow.

After carefully reviewing the entire record, the hearing examiner finds that this proceeding is in the interest of the public, and makes the following findings of fact and conclusions drawn therefrom, and issues the following order:

## FINDINGS OF FACT

On the basis of the stipulation (CX 3), the following facts have been established:

1. Respondent Electra Spark Company is incorrectly designated in the complaint as The Lectra Spark Company and is one and the same corporation. Respondent Electra Spark Company is a corporation which was organized, existed and did business under and by virtue of the laws of the State of New Jersey. Prior to November 1959, the stock of Electra Spark Company was owned as follows: 60% by respondent Fred P. Dollenberg, 40% by respondent Lectra Sales Corporation and 20% by other individuals who are not parties to this proceeding.

During November 1959, the stock of Electra Spark Company was transferred to Amoskeag-Lawrence Mills, Inc., 1407 Broadway, New York, New York. This transfer of stock was made to facilitate various financing arrangements entered into at that time.

Respondents Fred P. Dollenberg and Harry Petrick were officers of Electra Spark Company and formulated, directed and controlled its acts and practices.

Beginning about November 1961, the business operations of Electra Spark Company had diminished to a point where it ceased doing business. Although the corporate charter has not been revoked, respondent Electra Spark Company is not now, and for a number of months has not been, engaged in any kind of business operations. At the time during which the Electra Spark Company was actively engaged in business, its office and principal place of business was in the Benson Building, Jenkintown, Pennsylvania.

The address of respondent Fred P. Dollenberg is 3921 Eden Street, Philadelphia, Pennsylvania. The address of respondent Harry Petrick is Amoskeag-Lawrence Mills, Inc., 1407 Broadway, New York, New York.

Respondent Lectra Sales Corporation is a corporation which was organized, existed and did business under and by virtue of the laws of the State of New York. At the time when it was actively engaged in business, its office and principal place of business was at 222 Fourth Avenue, New York, New York.

Prior to June 1959, the stock of Lectra Sales Corporation was owned by the following named respondents in the shares indicated: Jack Howard—40%, Bernard L. Silver—40% and Electra Spark Company—20%.

During June 1959, Lectra Sales Corporation was sold in its entirety to Amoskeag-Lawrence Mills, Inc., as part of a financing arrangement.

In November 1961, Lectra Sales Corporation was declared bankrupt and soon thereafter was formally adjudged bankrupt. The corporate charter has not been formally revoked, but respondent Lectra Sales Corporation is not now, and for many months has not been, engaged in any kind of business operations.

Both respondent Electra Spark Company and respondent Lectra Sales Corporation presently exist as corporate entities only in the sense that their respective charters of incorporation have not been formally revoked.

During the time of the actual business operations of Lectra Sales Corporation, its officers were respondents Jack Howard, Bernard L. Silver and Harry Petrick, and they formulated, directed and controlled its acts and practices. The address of respondent Jack Howard is 33 West 9th Street, New York 11, New York. The address of respondent Bernard L. Silver is 4 Romola Drive, Kings Point, New York. The address of respondent Harry Petrick is as above stated.

Respondent Barilen Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business at 730 3rd Avenue, New York, New York.

Hyman Schlosberg and Laurence Serlin are individuals and officers of Barilen Corp. They formulate, direct and control the acts and practices of the Barilen Corp. Their business address is 730 3rd Avenue, New York, New York.

The business address of respondent Barilen Corp., doing business as Lectra Fuel Igniter Co., is 730 3rd Avenue, New York, New York.

In or about November 1960, and subsequent to the bankruptcy of respondent Lectra Sales Corporation, respondents Fred P. Dollenberg and Bernard L. Silver organized and incorporated Electra Industries under the laws of the State of Delaware. The purpose and present activities of Electra Industries are to promote the sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of "Lectra Fuel Igniters." None of the other respondents are concerned or connected with the operation of Electra Industries. The office and principal place of business of Electra Industries is 381 Park Avenue South, New York, New York.

2. For several years before the issuance of the instant complaint, and subsequent thereto in the manner previously described, respondents were engaged in offering for sale, selling and distributing automobile spark plugs under the trade name "Lectra Fuel Igniters", in commerce, between and among the various states of the United States.

3. In the course and conduct of their business, in the manner and to the extent and for the periods of time described, respondents now cause, and for some time prior to the issuance of the complaint, have caused, such spark plugs, when sold, to be shipped from their places of business in the States of Pennsylvania and New York to purchasers located in various other states of the United States and in the District of Columbia, and maintain, and have maintained, a substantial course of trade in such products, in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business of respondents in such automobile spark plugs in commerce, in the manner described, is now, and has been, substantial.

4. In the course and conduct of their business, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale and distribution of automobile spark plugs of the same general kind and nature as those sold by the respondents.

5. A spark plug bearing the words "Lectra HD Fuel Igniter" and a spark plug carrying the words "Champion H-12" were received in evidence as Commission Exhibits 1 and 2, CX 1 is typical of respondents' products sold under the trade name "Lectra Fuel Igniter." CX 2 is typical of the conventional automobile spark plug commonly referred to as a "J plug." CX 1 is typical of the kind of spark plug which is the subject of this complaint and is designed and intended by re-

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2. For several years before the issuance of the instant complaint, and subsequent thereto in the manner previously described, respondents were engaged in offering for sale, selling and distributing automobile spark plugs under the trade name "Lectra Fuel Igniters", in commerce, between and among the various states of the United States.

3. In the course and conduct of their business, in the manner and to the extent and for the periods of time described, respondents now cause, and for some time prior to the issuance of the complaint, have caused, such spark plugs, when sold, to be shipped from their places of business in the States of Pennsylvania and New York to purchasers located in various other states of the United States and in the District of Columbia, and maintain, and have maintained, a substantial course of trade in such products, in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business of respondents in such automobile spark plugs in commerce, in the manner described, is now, and has been, substantial.

4. In the course and conduct of their business, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale and distribution of automobile spark plugs of the same general kind and nature as those sold by the respondents.

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spondents to be used in lieu of conventional spark plugs of the so-called "J" type of which CX 2 is illustrative.

6. Respondent Electra Spark Company participated primarily in the production and distribution of spark plugs. Respondent Lectra Sales Corporation was concerned primarily with the advertising and sale of spark plugs. Through and by virtue of the joint and mutual ownership of the stock of respondent Electra Spark Company and of respondent Lectra Sales Corporation, and because of the activities of the individual respondents, particularly Fred P. Dollenberg, Jack Howard and Bernard L. Silver, the operation of the two corporate respondents was basically and essentially but a single business enterprise.

7. The advertising and selling of respondents' automobile spark plugs designated "Lectra Fuel Igniter" were conducted through several media:

(a) Respondent Lectra Sales Corporation has solicited mail orders from the general public through advertising in newspapers, magazines and other periodicals having an interstate circulation.

(b) Respondent Barilen Corp., for the purpose of soliciting mail orders, was given permission to use the name Lectra Fuel Igniter Co. by the respondent Lectra Sales Corporation. The trade name Lectra Fuel Igniter Co. was formerly owned by respondent Jack Howard. Respondent Barilen Corp., operating under the trade name Lectra Fuel Igniter Co., also employed direct mail order advertising in newspapers, magazines and periodicals having an interstate circulation. The material for such advertising copy was furnished by respondent Lectra Sales Corporation. Upon receipt of orders from consumers, respondent Barilen Corp. transmitted the orders direct to respondent Lectra Sales Corporation which then shipped the spark plugs to the purchasers.

(c) Another method employed by respondent Lectra Sales Corporation in the sale of spark plugs was the solicitation of agents and salesmen. These advertisements were run by respondent Lectra Sales Corporation in magazines having an interstate circulation which are commonly known as "opportunity magazines."

(d) Respondent Lectra Sales Corporation also sold direct to catalog houses, mail order houses and to automobile specialty outlets. In the case of retail outlets, respondent Lectra Sales Corporation paid a portion of the advertising expense and material for newspaper copy which was submitted by respondent Lectra Sales Corporation. In dealing with catalog houses, respondent Lectra Sales Corporation provided advertising copy and paid the printing cost of inserts.

8. Thus, in the course and conduct of their business, and for the purpose of inducing the sale of their products, the respondents have caused advertisements to be placed in various publications having distribution in various states of the United States. Respondents have also caused advertisements of their products to be mailed to prospective purchasers in states other than the States of New York and Pennsylvania.

9. In the course and conduct of their business, and for the purpose of inducing the purchase of Lectra Fuel Igniter spark plugs, respondents have made numerous statements and representations concerning them, in advertisements in magazines, newspapers, sales brochures, counter display cards and other promotional materials supplied to distributors, retailers, dealers and to the purchasing public.

Among and typical, but not all inclusive, of such statements are the following:

DRIVE YOUR CAR WITHOUT SPARK-PLUGS

. . . NEVER USE SPARK-PLUGS AGAIN! That's Right! Spark-Plugs Haven't Changed In 30 Years—They Are As Obsolete As A Model T.

* * * * * * *

Drive faster, further, cheaper without Spark-Plugs and get peak performance using non-premium gas! Save 6¢ per gallon or more!

* * * * * * *

Drive without Spark-Plugs . . . Lectra Fuel Igniters are not air-gapped in any sense of the word . . .

* * * * * * *

. . . We are also guaranteeing that the Fuel Igniter will squeeze up to 6—maybe 8—more miles out of every gallon of gas purchased in the first year and every year—or we will replace them free until they do. That's a saving of $40 per year. And it will do this using regular gas—economy gas—not the super gas bought at such walloping prices. That means a saving of $50 each year. And the igniters will do this every year of the car's life—they improve with age. They never wear out!

* * * * * * *

. . . by just replacing gas-wasting old-fashioned inefficient spark-plugs that you'll soon have to throw away and replace anyhow—you will now get new pep, power and performance from your car, and you'll save $100 a year or more as well!

4-way GUARANTY

LECTRA FUEL IGNITERS are:

1. Guaranteed, unconditionally, against any manufacturing or mechanical defect.
2. Guaranteed, unconditionally, to function properly *for the life of your car.*
3. Guaranteed to:

INCREASE miles per gallon of gas
INCREASE horsepower
INCREASE engine RPM

IMPROVE ease of starting
IMPROVE acceleration (pick-up)
(This Guaranty applies to ANY car tuned to factory specifications.)
4. Guaranteed not to damage your car at any time in any way. This Guaranty endorsed by American Excess [*sic*] Company of London, England.

* * * * * * *

EXCLUSIVE 4-WAY GUARANTEE

Every set of Lectra Fuel Igniters comes with this amazing 4-way Guarantee, printed directly on each carton:

1. GUARANTEED against any manufacturing or mechanical defects.
2. GUARANTEED to function properly for the life of the car.
3. GUARANTEED to increase mileage, horsepower, engine RPM, improve ease of starting and acceleration.
4. GUARANTEED for performance and endorsed by an internationally known insurance company.

There's big money to be made here! Right now, Joe Jenkins of Point Marion, Pennsylvania has a big, growing business supplying dealers, service-stations, garages. He sells per month about $20,000 of Lectra Fuel Igniters, most of it re-order. His gross business this year will be in six figures!

* * * * * * *

We find selling 5,000 a week nothing unusual for us.

* * * * * * *

. . . These men, who answered the original ad, are making amazingly high income as LECTRA distributors! . . . Kerneth Frost, Ithaca, New York, says: "I sold $2300 worth in three weeks".

* * * * * * *

With this sensational offer you can create your own substantial business worth $50,000 or more!

. . . A U.S. Government Agency field-tested 5,000 in 727 vehicles, six months later ordered 25,000 more to use in 3,000 key vehicles.

* * * * * * *

Uncle is a LECTRA customer! Many military installations have field-tested the Fuel Igniter. As a result of these field tests, many thousand Fuel Igniters have been purchased by these Government units.

10. By and through the use of the quoted statements, and others of similar import, the respondents have represented, directly or by implication, that:

(a) The Lectra Fuel Igniter is not an automobile spark plug.

(b) The use of Lectra Fuel Igniters in place of conventional automobile spark plugs will result in and give better starting, performance, power, acceleration and gas mileage in automobiles.

(c) The use of Lectra Fuel Igniters will enable the user to switch from premium or high-octane gasoline to regular gasoline irrespective of the automobile engine's requirements.

(d) The four-way guarantee is unconditional.

(e) One of respondents' distributors sold $20,000 worth of Lectra Igniters per month and his gross business from the sale of such products annually ran into six figures; that one of respondents' distributors usually sold 5,000 Lectra Fuel Igniters each week; that one of respondents' distributors sold $2,300 worth of Lectra Fuel Igniters in three weeks; and that potential distributors or salesmen could create their own business worth $50,000 or more from the sale of Lectra Fuel Igniters.

(f) The United States Government is a substantial purchaser of Lectra Fuel Igniters and that its agencies have field tested the product.

11. In truth and in fact:

(a) The Lectra Fuel Igniter is a sparking device designed to ignite gasoline in an internal combustion engine. The spark emitted by the Lectra Fuel Igniter which ignites the gasoline is created by the surface discharge method. Lectra Fuel Igniters may be used as replacements for and in lieu of conventional spark plugs which create the spark required to ignite the gasoline in an internal combustion engine by sparking through the air space between two attracting electrodes. The function of both the Lectra Fuel Igniters and conventional spark plugs in internal combustion engines is to emit an electrical spark which ignites the fuel in the combustion chamber.

(b) The use of the Lectra Fuel Igniter will not enable the user to switch from premium, high-octane gasoline to regular gasoline with equal or better performance when the automobile specifications require such high-octane fuel.

(c) New Lectra Fuel Igniters and new conventional spark plugs operate in the same internal combustion engine with substantially the same level of operating efficiency with respect to starting, performance, power, acceleration and gas mileage. This approximately equivalent level of operating efficiency continues for a substantial number of miles or period of use but varies widely between different engines depending upon the age and condition of the engine, operating conditions, kind of fuel and other factors to which engines are subjected.

If respondents called Fred Labansky, Frenat Service Corp., 543 West 57th Street, New York 19, New York, as a witness, he would testify that his company used Lectra Fuel Igniters in its fleet of 84 New York City taxicabs. The company used both Studebaker Econ-O-Milers and Lark models with six-cylinder engines from May 1958 until March 1960. Company records would show that Igniters were installed in the Studebaker cabs and used over a period of 21 months with a

total accumulation of 125,000 miles on the Lectra Fuel Igniters. The only service necessary was an occasional inspection. Conventional spark plugs when used in taxicabs must be cleaned and adjusted each two to three weeks, which means approximately 3 to 4 thousand miles to Frenat Corporation, and replaced completely every four to six weeks. Lectra Fuel Igniters continued to perform without deterioration in the quality of performance for over 80 weeks.

If Leonard Schaffran, Secretary, Jofran Maintenance Corp., 509–11 West 55th Street, New York 19, New York, was called by respondents to testify, he would state that this company operated a fleet of taxicabs in New York City, that it has used the Lectra Fuel Igniters in its taxicabs and had put over 50,000 miles on the Igniters and that they still were giving peak performance at that mileage. He would further state that as of October 15, 1960, the company has equipped 30 of its fleet of 100 Ford six-cylinder 1960 cabs with Lectra Fuel Igniters and was installing Lectra Fuel Igniters in the other 70 cabs as fast as they came in for service.

If Frankie Sotto, Clyde Cab Corp., 409 East 94th Street, New York 28, New York, was called by respondents to testify, he would state that his company is engaged in the operation of taxicabs in New York City, that as of October 15, 1960, it had Lectra Fuel Igniter test sets which had gone over 35,000 miles and were still giving peak performance, which meant that the company did not have to clean, gap or replace spark plugs. Mr. Sotto would further state that his company has ordered 100 Lectra Fuel Igniters and was installing them in its taxicabs.

(d) Respondents' 4-Way Guarantee is not unconditional but has definite conditions and limitations which are not set out in certain of respondents' advertisements of the guarantees.

(e) One of respondents' distributors did not sell $20,000 worth of Lectra Fuel Igniters each month and his gross business from the sale of such Igniters did not run into six figures each year. Respondents' salesmen and distributors do not usually sell 5,000 Lectra Fuel Igniters each week. One of respondents' distributors did not sell $2,000 worth of Lectra Fuel Igniters in three weeks. All prospective or potential distributors or salesmen of respondents' Lectra Fuel Igniters cannot expect to create their own business, worth $50,000 or more, from the sale of Lectra Fuel Igniters.

(f) The United States Government is not a substantial purchaser of Lectra Fuel Igniters, and such Igniters have not been field tested by any of its agencies.

CONCLUSIONS OF LAW

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

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

3. The statements and representations of respondents regarding their "Lectra Fuel Igniter", as found herein, were and are false, misleading and deceptive in material respects.

4. The acts and practices of respondents, as found herein, have had and may have the capacity and tendency to mislead members of the purchasing public with respect to their "Lectra Fuel Igniter" and into the purchase of substantial quantities of such products as a result.

5. By supplying dealers, distributors and others with advertising, literature and material for sales talks, respondents have placed in their hands means and instrumentalities by and through which the purchasing public may be misled and deceived with respect to respondents' products.

6. As a consequence, substantial trade in commerce has been and may be unfairly diverted to respondents from their competitors, and substantial injury thereby has been or may be done to competition in commerce.

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

8. The order being entered is designed to halt the misrepresentations found and at the same time permit appropriate truthful representations.

As indicated in the Preliminary Statement, *supra*, the examiner has made some changes in the form of order proposed by the parties.

First, the product coverage of Paragraphs A–1 and A–3 has been broadened, consistent with Paragraph A–2, so as to make the prohibitions of those paragraphs applicable not only to the Lectra Fuel Igniter, but also to any other product "of substantially similar design or construction."

Second, Paragraph A–2 has been revised to specify the nature of the claims permissible under the order. That section of the order, as jointly recommended by counsel, would have forbidden respondents to represent

> That internal combustion engines equipped with * * * Lectra Fuel Igniters or any other product of substantially similar design or construction will start faster, give better performance, have more power, accelerate faster or give better gas

mileage than such engines equipped with conventional spark plugs *without clearly and conspicuously revealing in immediate connection with such representations the circumstances and conditions of use necessary to achieve such performance.* [Italic added.]

For the qualification indicated by the underlined words, the examiner has substituted a proviso that "nothing herein contained shall prevent truthful and non-deceptive representations that such Igniters, under specified conditions, give longer service than conventional spark plugs."

Under the order proposed by the parties, respondents would have been allowed to represent that engines equipped with Lectra Fuel Igniters "will start faster, give better performance, have more power, accelerate faster [and] give better gas mileage" than engines equipped with conventional spark plugs, provided only that they appropriately disclose "the circumstances and conditions of use necessary to achieve such performance."

In the opinion of the examiner, such a qualification is not appropriate on the basis of the agreed facts. The facts contained in the stipulation do not warrant a qualification of such breadth, nor do they provide an appropriate basis for a determination of the validity of the claims so qualified.

The agreed facts, as set forth in Paragraph Eight (C) of the stipulation [Findings of Fact, Paragraph 11(c)], are that:

New Lectra Fuel Igniters and new conventional spark plugs operate in the same internal combustion engine with substantially the same level of operating efficiency with respect to starting, performance, power, acceleration and gas mileage. This approximately equivalent level of operating efficiency continues for a substantial num[b]er of miles or period of use but varies widely between different engines depending upon the age and condition of the engine, operating conditions, kind of fuel and other factors to which engines are subjected.

Since initially Lectra Fuel Igniters give "substantially the same level of operating efficiency" as conventional spark plugs "with respect to starting, performance, power, acceleration and gas mileage", respondents cannot properly be permitted to represent that the Igniters are superior in those respects. As far as new Igniters and new conventional spark plugs are concerned, such superiority does not exist.

The attempted qualification apparently has reference to the claimed ability of the Lectra Fuel Igniter to *continue* such performance beyond the ordinary life of conventional spark plugs. The purpose of the qualifying language recommended by the parties in Paragraph A–2 of the proposed order was designed to give recognition to such claimed longer utility of the Lectra Fuel Igniter.

Although rejecting the recommended qualification as inappropriate, the examiner has inserted a substitute proviso to carry out the clear

intent of the parties and to reflect the factual situation established by the record.

Despite the advertising quoted in Paragraph Five of the complaint (to the effect, for example, that the Igniters "function properly for the life of the car"), the question of the validity of respondents' claim that the Lectra Fuel Igniter has a longer useful life than conventional spark plugs is not squarely raised by the pleadings, nor is it definitively resolved by the stipulated evidence. Accordingly, a definitive finding on this matter cannot be made other than that counsel supporting the complaint has not met his burden of proving that claim to be false and misleading.

As a matter of fact, the stipulated evidence points the other way. There is a generalized statement in Paragraph Eight (C) of the stipulation [Paragraph 11(c) of the Findings] to the effect that the operating efficiency of the Igniters continues at a level approximately equivalent to the operating efficiency of new spark plugs "for a substantial number of miles or period of use." That statement is qualified by language to the effect that such performance "varies widely between different engines", depending upon a variety of factors.

Against that background, the stipulated testimony of several taxicab fleet operators [Findings, Paragraph 11(c)] seems to establish some basis for a claim that the Lectra Fuel Igniters may have a longer useful life than conventional spark plugs. In any event, the stipulated evidence does not provide a basis for prohibiting such a claim; in fact, it requires, in the examiner's opinion, a proviso specificially permitting truthful and non-deceptive representations as to the useful life of respondents' product.

The order proposed by the parties has been modified as indicated. Otherwise, except for minor editorial changes, the proposed order is adopted as providing an appropriate remedy in the public interest.

ORDER

*It is ordered*, That respondents Electra Spark Company, a corporation (incorrectly designated in the complaint herein as The Lectra Spark Company), and its officers, and Fred P. Dollenberg and Harry Petrick, individually and as officers of such corporation; Lectra Sales Corporation, a corporation, and its officers, and Jack Howard, Bernard L. Silver and Harry Petrick, individually and as officers of such corporation; Barilen Corp., a corporation, doing business as Lectra Fuel Igniter Co., or under any other name, and its officers, and Hyman Schlosberg and Laurence Serlin, individually and as officers of such corporation, and respondents' representatives, agents and employees,

directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of their Lectra Fuel Igniter or any other product of similar design or construction or any other articles of merchandise, do forthwith cease and desist from:

A. Representing, directly or indirectly:

1. That Lectra Fuel Igniters or any other products of substantially similar design or construction are not internal combustion engine spark plugs: *Provided, however*, That nothing herein contained shall prevent the non-deceptive use of the brand name, "Lectra Fuel Igniter."

2. That internal combustion engines equipped with Lectra Fuel Igniters or any other product of substantially similar design or construction will start faster, give better performance, have more power, accelerate faster or give better gas mileage than such engines equipped with conventional spark plugs: *Provided, however*, That nothing herein contained shall prevent truthful and non-deceptive representations that such Igniters, under specified conditions, give longer service than conventional spark plugs.

3. That the use of Lectra Fuel Igniters or any other product of substantially similar design or construction will enable the user to switch from premium or high-octane gasoline to regular gasoline with equal or better performance irrespective of the automobile engine's requirements.

4. That any product is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed and respondents do in fact fulfill all of their obligations under the terms of the guarantee.

5. That respondents' distributors or salesmen have received earnings or profits in excess of those actually received or earned by such persons; or that the earnings or profits derived by distributors or salesmen of respondents' products will be any amount greater than that usually and customarily earned by distributors or salesmen of such products.

6. That the United States Government has purchased substantial numbers of respondents' products or has field tested such products.

B. Furnishing to, or otherwise placing in the hands of, retailers or dealers the means or instrumentalities by or through which they may mislead or deceive the public in the manner or as to the things prohibited by this order.

FINAL ORDER

The hearing examiner having filed his initial decision herein on March 31, 1964, and no appeal having been taken therefrom; and

The Commission, on May 4, 1964, having issued an order staying the effective date of the decision herein, and now having determined that the case should not be placed on its own docket for review; and

The Commission having considered the request of respondent Harry Petrick, set forth in a letter dated May 1, 1964, that his name be excluded from any order which might be filed by the Commission, and having determined that the grounds advanced by respondent are not sufficient to support the relief requested:

*It is ordered*, That the request of respondent Harry Petrick be, and it hereby is, denied.

*It is further ordered*, That the initial decision of the hearing examiner, filed March 31, 1964, be, and it hereby is, adopted as the decision of the Commission.

*It is further ordered*, That respondents Electra Spark Company, a corporation (incorrectly designated in the complaint as The Lectra Spark Company), Lectra Sales Corporation, a corporation, Barilen Corp., a corporation, and Fred P. Dollenberg, Harry Petrick, Jack Howard, Bernard L. Silver, Hyman Schlosberg, and Laurence Serlin shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist set forth in the initial decision.

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IN THE MATTER OF

## POCKET BOOKS, INC.

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

*Docket C-752. Complaint, June 11, 1964—Decision, June 11, 1964*

Consent order requiring a New York City distributor of books and other publications, phonograph records, etc., to cease representing falsely to delinquent customers that delinquent accounts will be turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." a bona fide collection agency, for collection, and customers' credit ratings will be adversely affected, if payments are not made.

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 Pocket Books, Inc., 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 Pocket Books, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 630 Fifth Avenue in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of books, publications, phonograph records and other merchandise to the general public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said books, publications, phonograph records and other merchandise, when sold, to be shipped from its place of business and sources of supply in the State of New York to purchasers thereof located in the 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 books, publications, phonograph records and other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, respondent through its Affiliated Publishers Division, offers for sale to the general public certain phonograph records known as Golden Records and Golden Record Library. Sales of said records are solicited through advertising disseminated in the United States mails. Said records are sold, shipped and payment made therefor through the United States mails. Respondent sells said records throughout the United States.

For the purpose of inducing the payment of purportedly delinquent accounts that have arisen from the sale of the aforesaid records, respondent has made certain statements and representations in letters, notices and other materials sent through the United States mails to purportedly delinquent customers.

Typical, but not all inclusive of said statements and representations are the following:

a. On the letterhead of the "GOLDEN RECORD LIBRARY":

* * * PLEASE NOTE: Normally delinquent accounts are turned over to a collection agency at the end of three months. I am instructing our accounting department to hold your account for another ten days before taking further action. I do hope that you will make it unnecessary for me to take such a drastic step. * * *

YOUR ACCOUNT IS BEING TURNED OVER TO A COLLECTION AGENCY UNLESS WE HEAR FROM YOU IMMEDIATELY! IMPORTANT—LEGAL NOTICE

* * * * * * *

Unless we hear from you within the next ten days, your account will be turned over to the Mail Order Credit Reporting Association which is a professional collection agency.

* * * * * * *

If there is any question about the enclosed bill, you can save yourself and us the embarrassment of settling the account through the collection agency by writing us immediately.* * *

b. On the letterhead of:

THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC., CREDIT REPORTS—SPECIAL INVESTIGATIONS—COLLECTIONS, NEW YORK 18, N.Y.

We have been notified by one of our members, The Golden Record Library of your failure to pay a past-due account. A duplicate of their statement is enclosed. They have engaged us to take whatever legal steps are necessary to secure payment.

*SECOND NOTICE*

A duplicate statement of your account with The Golden Record Library is enclosed herewith. We have been instructed to take any necessary legal steps to effect collection.

* * * * * * *

Before we proceed further, we are giving you a final opportunity to make payment. Although the sum involved is small, it is our business to collect our client's delinquent accounts regardless of size, and we are organized for this purpose. In the event of legal action, you may be aware that court costs and attorney fees must be paid by the person against whom judgment is rendered. Legal action against you may result in considerable additional expense to you. If you doubt this statement, we suggest that you consult your own attorney. * * *

PAR. 5. By and through the use of the aforesaid statements, representations and practices, and others of similar import not specifically set out herein, respondent represents and has represented that:

a. If payment is not made, the delinquent customer's name is transmitted to a bona fide credit reporting agency with the result that the customer's general or public credit rating will be adversely affected.

b. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." is a separate, bona fide collection and credit reporting agency located in New York City.

c. Respondent has turned over to said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", the delinquent account of the customer for collection and with instructions to institute suit or other legal action to collect amounts purportedly due.

d. The letters and notices on the letterhead of said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." have been prepared and mailed by said organization.

PAR. 6. In truth and in fact:

a. If payment is not made, the delinquent customer's name is not transmitted to a bona fide credit reporting agency and the customer's general or public credit rating is not adversely affected.

b. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." is not a separate, bona fide collection agency or credit reporting agency. Said organization is a fictitious name utilized by respondent and others for the purpose of disseminating collection letters.

c. Respondent has not turned over to said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION INC." the delinquent account of the customer for collection and has not instructed said organization to institute suit or other legal action to collect amounts purportedly due.

d. The letters and notices on the letterhead of the said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." have not been prepared and mailed by said organization. Said letters and notices have been prepared and mailed or caused to be mailed by respondent. Replies in response to said letters and notices are forwarded unopened to respondent.

Therefore, the statements and representations as set forth in paragraphs four and five hereof were and are false, misleading and deceptive.

PAR. 7. 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 payment of substantial sums of money to respondent by reason of said erroneous and mistaken belief.

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

## DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with

violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent Pocket Books, 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 630 Fifth Avenue, in the city of New York, State of New York.

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

ORDER

*It is ordered*, That respondent Pocket Books, Inc., a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of books, publications, phonograph records or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that:

1. A customer's name will be turned over to a bona fide credit reporting agency or that a customer's general or public credit rating will be adversely affected unless respondent establishes that where payment is not received, the information of said delinquency is referred to a separate, bona fide credit reporting agency;

2. Delinquent accounts will be or have been turned over to a bona fide, separate collection agency unless respondent in fact turns such accounts over to such agencies;

3. Delinquent accounts have been or will be turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." for collection or any other purpose;

4. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." any other fictitious name, or any trade name owned in whole or in part by respondent or over which respondent exercises direction or control, is an independent, bona fide collection or credit reporting agency;

5. a. Delinquent accounts have been or will be turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." with instructions to institute suit or other legal action to collect amounts purportedly due;

b. Respondent intends to turn delinquent accounts over to any other organization, attorney or firm of attorneys, or person with instructions to institute suit or other legal action unless in fact at the time such representation is made, respondent intends to take such action;

c. Delinquent accounts have been turned over to any other organization, attorney, firm of attorneys or person with instructions to institute suit or other legal action unless respondent establishes that such is the fact;

6. Letters, notices or other communications in connection with the collection of respondent's accounts which have been prepared or originated by respondent have been prepared or originated by any other person, firm or agency.

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

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IN THE MATTER OF

## GROLIER ENTERPRISES INC.

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

*Docket C-753. Complaint, June 11, 1964—Decision, June 11, 1964*

Consent order requiring a New York City distributor of books and other publications to cease representing falsely to purportedly delinquent customers that delinquent accounts will be transferred to an attorney for collection. and through the use on letterheads of the fictitious name "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," that past-due accounts have been referred to a separate agency of that name for collection.

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 Grolier Enterprises Inc., 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 Grolier Enterprises Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 845 Third Avenue in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of books, publications and other merchandise through the United States mails and by other means to the general public.

PAR. 3. In the course and conduct of its business, respondent now causes and for some time last past has caused its said books, publications and other merchandise, 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 books, publications and other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, respondent offers for sale, sells and distributes certain books and publications through the United States mails. Said merchandise is delivered and payment made therefor through the mails.

For the purpose of inducing payment of purportedly delinquent accounts that have arisen from the aforesaid transactions, respondent has made certain statements and representations in letters and materials sent through the mails to purportedly delinquent customers.

Typical, but not all inclusive of said statements and representations are the following:

a. On the letterhead of Grolier Enterprises, Inc.:

Dear Customer:

We don't want to place your account with an attorney or collection agency. But, what are we to do? It is seriously overdue and our requests for payment remain ignored.

Legal work means added cost and you will be liable for those costs. * * *

b. On another letterhead:

THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.
CREDIT REPORTS—COLLECTIONS
NEW YORK 18, N.Y.

We have been notified by one of our members, Grolier Enterprises, Inc., of your failure to pay a past-due account. * * *

URGENT

Your failure to settle your account leaves our client no choice but to take immediate action per our previous letters.

If, within fifteen days from this date, settlement in full has not been received, our client has stated that they will unconditionally turn your account over to their attorneys with instructions to proceed with the necessary legal steps to enforce collection.

You realize, of course, that such action may result in court costs payable by you in addition to the amount due. * * *

PAR. 5. By and through the use of the aforesaid statements, representations and practices and others of similar import not specifically set out herein, respondent represents and has represented that:

a. If payment is not made, the delinquent customer's account will be transferred to an attorney with instructions to institute suit or take other legal steps to collect the outstanding amount due.

b. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." is a separate, bona fide collection and credit reporting agency located in New York City.

c. Respondent has turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", the delinquent account of the customer for collection and other purposes.

d. If payment is not made, the customer's general or public credit rating will be adversely affected.

e. The letters on the letterhead of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." have been prepared and mailed by said organization.

PAR. 6. In truth and in fact:

a. If payment is not made, the delinquent customer's account is not transferred to an attorney to institute suit or other legal steps unless the amount of indebtedness is substantial.

b. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." is not a separate bona fide collection agency or credit reporting agency. Said organization is a fictitious name utilized by respondent and others for the purpose of disseminating collection letters.

c. Respondent has not turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." the delinquent account of the customer for collection or any other purpose.

d. If payment is not made, the customer's general or public credit rating is not adversely affected.

e. The letters on the letterheads of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." have not been prepared and mailed by said organi-

zation. Said letters and notices have been prepared and mailed or caused to be mailed by respondent. Replies in response to said letters and notices are forwarded unopened to respondent.

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

PAR. 7. 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 payment of substantial sums of money to respondent by reason of said erroneous and mistaken belief.

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

## DECISION AND ORDER

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

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

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

1. Respondent Grolier Enterprises Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 845 Third Avenue, in the city of New York, State of New York.

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

ORDER

*It is ordered*, That respondent, Grolier Enterprises Inc., a corporation and its officers, agents, representatives and employees, successors or assigns, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of books, publications or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication that:

1. Delinquent accounts will be turned over to an attorney to institute suit or other legal action where payment is not made, unless respondent establishes that such is the fact;

2. (a) Delinquent accounts will be turned over to a bona fide, separate collection agency for collection unless respondent establishes that a prior determination had been made in good faith to make such referral;

(b) Delinquent accounts have been turned over to a bona fide, separate collection agency for collection unless respondent establishes that such is the fact;

3. Delinquent accounts have been turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." for collection or any other purpose;

4. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", any other fictitious name, or any trade name owned in whole or in part by respondent or over which respondent exercises any direction or control, is an independent bona fide collection or credit reporting agency;

5. A customer's name will be or has been turned over to a bona fide credit reporting agency or that a customer's general or public credit rating will be adversely affected, unless respondent establishes that where payment is not received, the information of said delinquency is referred to a separate, bona fide credit reporting agency;

6. Letters, notices or other communications which have been prepared or originated by respondent have been prepared or originated by any other person, firm or corporation.

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

IN THE MATTER OF

# THE CONDE NAST PUBLICATIONS INC.

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

*Docket C-754. Complaint, June 11, 1964—Decision, June 11, 1964*

Consent order requiring a New York City distributor of "Glamour" and "House and Garden" magazines to the public to cease representing falsely to purportedly delinquent customers on letterheads of the fictitious name "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", that delinquent accounts had been turned over to an independent collection agency of that name with instructions to take legal action and that the customer's credit rating would be adversely affected if payment was not made.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Conde Nast Publications Inc., 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 The Conde Nast Publications Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business at 420 Lexington Avenue in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale and sale of "Glamour" and "House and Garden" magazines and other merchandise to the general public by and through the United States mails.

PAR. 3. In the course and conduct of its business, respondent now causes and for some time last past has caused its said magazines and merchandise, when sold, to be shipped from its place of business and sources of supply in the States of New York and Connecticut 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 magazines and merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business and for the purpose of inducing the payment of purportedly delinquent accounts that have arisen from the sale of subscriptions to the aforesaid magazines, respondent has engaged in the practice of disseminating certain correspondence on the letterhead of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," of New York. In said correspondence, respondent has made certain statements and representations for the purpose of inducing payment of the purportedly delinquent accounts.

Typical, but not all inclusive of the statements and representations are the following:

THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC., CREDIT REPORTS—COLLECTIONS
NEW YORK 18, N.Y.

We have been notified that one of our members, House & Garden, Incorporating Living For Young Homemakers, of your failure to pay a past-due account for a subscription to this magazine which you ordered some time ago. A duplicate of their statement is enclosed. They have engaged us to take whatever steps are necessary to secure payment.

SECOND NOTICE

A duplicate statement of your account with House & Garden, Incorporating Living For Young Homemakers is enclosed herewith. We have been instructed to take any necessary steps to effect collection. * * * We are giving you a final opportunity to make payment. Although the sum involved is small, it is our business to collect our clients' delinquent accounts regardless of size, and we are organized for this purpose. In the event that House & Garden takes legal action, you may not be aware that court costs and legal fees must be paid by the person against whom judgment is rendered. Legal action against you may result in considerable additional expense to you. If you doubt this statement we suggest that you consult your own attorney. * * *

FINAL NOTICE

Your account with House & Garden Incorporating Living For Young Homemakers was turned over to us sometime ago for collection. * * * This is the last request for payment which we shall send. * * *

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

(a) "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." is a separate bona fide collection and credit reporting agency in New York City.

(b) Respondent has turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." the delinquent account of the customer for collection and with instructions to institute suit or take other legal action to collect the amount purportedly due.

(c) If payment is not made, the customer's general or public credit rating will be adversely affected.

(d) The letters on the letterhead of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." have been prepared and mailed by said organization.

PAR. 6. In truth and in fact:

(a) "THE MAIL ORDER CREDIT REPORTING ASSOCIATION INC." is not a separate bona fide collection agency or credit reporting agency. Said organization is a fictitious name utilized by respondent and others for purposes of disseminating collection letters.

(b) Respondent has not turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." the delinquent account of the customer for collection or any other purpose and has not instructed said organization to institute suit or take other legal action or collect the amount purportedly due.

(c) If payment is not made, the customer's general or public credit rating is not adversely affected.

(d) The letters on the letterhead of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." have not been prepared and mailed by said organization. Said letters have been prepared and mailed or caused to be mailed by respondent.

Replies in response to said letters and notices are forwarded unopened to respondent.

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

PAR. 7. 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 payment of substantial sums of money to respondent by reason of said erroneous and mistaken belief.

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

## DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation

of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent The Conde Nast Publications Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 420 Lexington Avenue, in the city of New York, State of New York.

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

ORDER

*It is ordered*, That The Conde Nast Publications Inc., 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 magazines or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that:

1. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," any fictitious name, or any trade name over which respondent exercises any direction or control, is an independent, bona fide collection or credit reporting agency;

2. Delinquent accounts have been or will be turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." with instructions to institute suit or take other legal action to collect amounts purportedly due; or that any accounts have been or will be turned over to any organization, attorney, firm of attorneys, or person with instructions to institute suit or other legal action unless respondent establishes that such is the fact;

3. Delinquent accounts have been or will be turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." for collection or any other purpose;

4. A customer's name has been turned over to a bona fide credit reporting agency or that a customer's general or public credit rating will be adversely affected unless respondent establishes that where payment is not received, the information of said delinquency is referred to a bona fide credit reporting agency;

5. Delinquent accounts have been turned over to a bona fide, separate collection agency for collection or any other purpose unless respondent in fact has turned such accounts over to such agencies.

6. Letters, notices or other communications in connection with the collection of respondent's accounts which have been prepared or originated by respondent, have been prepared or originated by any other person, firm or agency;

*Provided, however*, That the words "agents" and "representatives" as used herein in the preamble to the numbered provisions of the order shall not be deemed to include a bona fide and independent collection agency or attorney.

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

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IN THE MATTER OF

## SIMON & SCHUSTER, INC.

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

*Docket C-755. Complaint, June 11, 1964—Decision, June 11, 1964*

Consent order requiring a New York City distributor of books and other publications to cease representing falsely on letterheads of the fictitious "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", that a bona fide collection agency of that name had delinquent accounts for collection and that, if payment was not made, the customer's credit rating would be adversely affected.

### 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 Simon & Schuster, Inc., 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 Simon & Schuster, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 630 Fifth Avenue, in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of publications, books and other merchandise to the general public directly through the United States mails and through distributors, jobbers and dealers.

PAR. 3. In the course and conduct of its business, respondent now causes and for some time last past has caused its said publications, books and other merchandise, when sold, to be shipped from its place of business in the State of New York to purchasers thereof located in the 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 publications, books, and other merchandise in commerce, as "commerce," is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business and for the purpose of inducing the payment of purportedly delinquent accounts that have arisen from the mail order sale of certain publications, books and other merchandise, respondent has engaged in the practice of disseminating certain correspondence on the letterhead of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," of New York. In said correspondence, respondent has made certain statements and representations for the purpose of inducing payment of the purportedly delinquent accounts.

Typical, but not all inclusive, of the statements and representations are the following:

THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.
CREDIT REPORTS—COLLECTIONS
NEW YORK 18, NEW YORK

Re: Claim of:
SIMON AND SCHUSTER, INC.

Your past due account has been turned over to us for collection by our client.

* * * * * * *

With credit assuming an ever increasing role in our economy, the importance *of a good credit record* cannot be stressed too strongly. * * *

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

a. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." is a separate, bona fide collection and credit reporting agency located in New York City.

b. Respondent has turned over to said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." the delinquent account of the customer for collection and other purposes.

c. If payment is not made, the customer's general or public credit rating will be adversely affected.

d. The letters on the letterheads of the said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." have been prepared and mailed by said organization.

PAR. 6. In truth and in fact:

a. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." is not a separate, bona fide collection agency or credit reporting agency. Said organization is a fictitious name utilized by respondent and others for the purpose of disseminating collection letters.

b. Respondent has not turned over to said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." the delinquent account of the customer for collection or any other purpose.

c. If payment is not made, the customer's general or public credit rating is not adversely affected.

d. The letters on the letterhead of the said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." have not been prepared and mailed by said organization. Said letters have been prepared and mailed or caused to be mailed by respondent. Replies in response to said letters and notices are forwarded unopened to respondent.

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

PAR. 7. 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 payment of substantial sums of money to respondent by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and prac-

tices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Simon & Schuster, 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 630 Fifth Avenue, in the city of New York, State of New York.

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

ORDER

*It is ordered*, That respondent Simon & Schuster, Inc., a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of publications or books in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that:

1. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", any other fictitious name, or any trade name owned in whole or in part by respondent or over which respondent exercises direction or control, is an independent, bona fide collection or credit reporting agency;

2. Delinquent accounts have been or will be turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." for collection or any other purpose;

3. A customer's name has been turned over to a bona fide credit reporting agency or that a customer's general or public credit rating will be adversely affected unless respondent establishes that where payment is not received the information of said delinquency is referred to a separate, bona fide credit reporting agency;

4. Delinquent accounts have been turned over to a bona fide, separate collection agency for collection unless respondent in fact has turned such accounts over to such agency;

5. Letters, notices or other communications in connection with the collection of respondent's accounts which have been prepared or originated by respondent have been prepared or originated by any other person, firm or corporation.

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

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IN THE MATTER OF

## TIMED ENERGY, INC., ET AL.

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

*Docket C-756. Complaint, June 11, 1964—Decision, June 11, 1964*

**Consent order requiring Bellmore, Long Island, N.Y., distributors to the general public of vitamins and other merchandise to cease representing falsely that delinquent customers' accounts were transmitted to an independent collection agency and, through the use on letterheads of the fictitious name "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", or "John J. Murphy, ATTORNEY AT LAW", that a bona fide collection agency or an outside attorney was handling the account and that the customer's credit rating would suffer if payment was not made.**

### 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 Timed Energy, Inc., a corporation, and James E. True, Patricia M. Gallehr and Leon

Weiss, 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. Respondents Timed Energy, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 2750 Merrick Road, Bellmore, Long Island, in the State of New York.

Respondents James E. True, Patricia M. Gallehr and Leon Weiss are individuals and officers of said corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of vitamins and other merchandise to the general public. Said vitamins and merchandise are advertised, sold and payment made therefor through the United States mails.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said 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 in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business and for the purpose of inducing the payment of purportedly delinquent accounts, respondents have made certain statements and representations through letters and materials sent through the United States Mails to purportedly delinquent customers who have purchased vitamins or other merchandise.

Typical, but not all inclusive of said statements and representations, are the following:

(a) On the letterhead of "TIMED ENERGY, 419 Park Ave. South, N.Y. 16, N.Y."

Dear Friend:

**Is there some reason why you have not paid the enclosed bill? Please don't** consider this a "collection letter," but rather a friendly note to find out if there is some reason why you have not paid the enclosed statement. * * *

Dear Member:

When we wrote to you a few weeks ago we asked you to please pay our bill "in the hat" because our bill was long over due. So far we have not heard from you, nor have we received your payment * * *

Dear Friend:

Before sending your file to a professional collection agent who may call on you personally to collect this long past due account, I have instructed our Credit Manager to let me appeal to you once more.

Let's face the facts. It will be embarrassing to you, and this method of collecting is expensive.

From your standpoint the bill must be paid eventually, so why delay and risk this embarrassment and expense? * * *

(b) On the following letterhead:

THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.
CREDIT REPORTS—COLLECTIONS
NEW YORK 18, N.Y.

Dear Friend:

We have been notified by one of our members, Timed Energy, Inc., of your failure to pay a past due account. A duplicate of their statement is enclosed. They have engaged us to collect this balance due. * * *

SECOND NOTICE

A duplicate statement of your account with Timed Energy Inc. is enclosed herewith.

Our client states that you have been given every opportunity to pay this honest debt, and we have already offered you this same opportunity.

Please be advised that we are giving you another chance to make payment. Although the sum involved is small, it is our business to collect our clients' delinquent accounts regardless of size, and we are organized for this purpose. * * *

(c) On the following letterhead:

John J. Murphy
ATTORNEY AT LAW 15 WEST 38TH ST., NEW YORK 18, N.Y.

TAKE NOTICE THAT:

I have been consulted by my client in connection with their claim against you for goods sold and delivered, in the amount shown on the enclosed statement.

My client advises that this claim arises from an order placed by you, shipped to you, but not paid for despite several demands by my client.

I have been requested to write you to offer one final opportunity to pay this bill. May I strongly urge you to pay this outstanding obligation immediately. * * *

PAR. 5. By and through the use of the aforesaid statements, representations and practices, and others of similar import not specifically set out herein, respondents represent and have represented directly or by implication that:

(a) If payment is not made, the delinquent customer's name is transmitted to a bona fide independent collection agency.

(b) "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", is a separate, bona fide collection and credit reporting agency located in New York City.

(c) Respondents have turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." the delinquent account of the customer for collection and other purposes.

(d) If payment is not made, the customer's general or public credit rating will be adversely affected.

(e) Mr. John J. Murphy is an outside attorney at law, located in New York City, to whom the delinquent customer's account has been transferred for collection.

(f) Letters and notices on the letterheads of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION INC.", and "John J. Murphy, Attorney at Law" have been prepared and mailed by said organization or named attorney.

PAR. 6. In truth and in fact:

(a) If payment is not made, the delinquent customer's name is not transmitted to a bona fide independent collection agency.

(b) "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." is not a separate, bona fide collection or credit reporting agency. Said organization is a fictitious name utilized by respondents and others for purpose of disseminating collection letters.

(c) Respondents have not turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.," the delinquent account of the customer for collection or any other purpose.

(d) If payment is not made, the customer's general or public credit rating is not adversely affected.

(e) The delinquent customer's account has not been transferred to Mr. John J. Murphy for collection or for any other purpose.

(f) The letters and notices on the letterheads of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." and "John J. Murphy, Attorney at Law" have not been prepared or mailed by said organization or named attorney. Said letters and notices have been prepared and mailed or caused to be mailed by respondents. Replies in response to said letters and notices are forwarded unopened to respondents.

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

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 payment of

substantial sums of money to respondents 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 constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Timed Energy, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 2750 Merrick Road, Bellmore, Long Island, in the State of New York.

Respondents James E. True, Patricia M. Gallehr, and Leon Weiss 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 Timed Energy, Inc., a corporation, and its officers, and James E. True, Patricia M. Gallehr and Leon Weiss, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any

corporate or other device, in connection with the offering for sale, sale and distribution of vitamins or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that:

(1) a. Delinquent accounts will be turned over to a bona fide, separate collection agency or attorney for collection unless respondents establish that a prior determination had been made in good faith to make such referral;

b. Delinquent accounts have been turned over to a bona fide, separate collection agency or attorney for collection unless respondents establish that such is the fact;

(2) Delinquent accounts have been or will be turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." for collection or any other purpose;

(3) "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", any other fictitious name, or any trade name owned in whole or in part by respondents or over which respondents exercise any direction or control is an independent, bona fide collection or credit reporting agency;

(4) A customer's name will be or has been turned over to a bona fide credit reporting agency or that a customer's general or public credit rating will be adversely affected unless respondents establish that where payment is not received, the information of said delinquency is referred to a separate, bona fide credit reporting agency;

(5) "John J. Murphy" or any other person or firm is an outside, independent attorney at law or firm of attorneys representing respondents for collection of past due accounts unless respondents establish that a bona fide attorney client relationship exists between respondents and said attorney or attorneys, for purposes of collecting such accounts;

(6) Letters, notices or other communications which have been prepared or originated by respondents have been prepared or originated by any other person, firm or corporation.

*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

# GOLDEN PRESS, INC.

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

*Docket C-757. Complaint, June 11, 1964—Decision, June 11, 1964*

Consent order requiring New York City distributors of books and other merchandise to the public to cease representing falsely to purportedly delinquent customers that if payment was not made, their name would be referred to a bona fide credit reporting agency and the customer's credit rating would be adversely affected; and, through use on letterheads of the fictitious "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", that an independent collection agency of that name was handling the account.

## 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 Golden Press, Inc., 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 Golden Press, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 850 Third Avenue, in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of books and other merchandise to the general public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said books and other merchandise, when sold, to be shipped from its places of business and sources of supply in the State of New York to purchasers thereof located in the 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 books and other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, respondent offers certain books and other merchandise for sale through the United

States mails. Said books are sold, shipped and payment made therefor through the United States mails.

For the purpose of inducing the payment of purportedly delinquent accounts that have arisen from the sale of the aforesaid books and other merchandise, respondent has made certain statements and representations in letters and other notices sent through the United States mails to purportedly delinquent customers through the United States.

Typical, but not all inclusive of said statements and representations are the following:

a. On the letterhead: "GOLDEN PRESS INC."

Dear Subscriber:

We extended you credit—the amount is small. We would appreciate it if you would send us your check now.

This will relieve you of an obligation and it will keep your credit in good standing. * * *

We have reminded you several times and asked you to send us your check for the amount shown on the attached invoice. I know you will want to keep your credit in good standing. * * *

IMPORTANT

Dear Customer:

More than two months ago, we mailed you an attractive book with the understanding that you would either return the book within two weeks or else pay a special reduced price.

But despite the fact that we have sent you four notices, we have not received any payment from you.

* * * * * * *

PLEASE NOTE: Normally delinquent accounts are turned over to a collection agency at the end of three months. I am instructing our accounting department to hold your account for another ten days before taking further action. I do hope that you will make it unnecessary for me to take such a drastic step. * * *

* * * Unless we hear from you within the next ten days, your account will be turned over to the Mail Order Credit Reporting Association which is a professional collection agency. * * *

b. On the letterhead:

THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC. CREDIT REPORTS—COLLECTIONS NEW YORK 18, N.Y.

We have been notified by one of our members, GOLDEN PRESS, of your failure to pay a past-due account. * * *

*IMMEDIATE ACTION REQUIRED*

* * * * * * *

We are giving you a final opportunity to make payment. Although the sum is small, it is our business to collect our client's delinquent accounts regardless of size. * * *

PAR. 5. By and through the use of the aforesaid statements, representations and practices, and others of similar import not specifically set out herein, respondent represents and has represented that:

a. If payment is not made, the delinquent customer's name is transmitted to a bona fide credit reporting agency with the result that the customer's general or public credit rating will be adversely affected.

b. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." is a separate, bona fide collection and credit reporting agency located in New York City.

c. Respondent has turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", the delinquent account of the customer for collection and other purposes.

d. The letters and notices on the letterhead of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." have been prepared and mailed by said organization.

PAR. 6. In truth and in fact:

a. If payment is not made, the delinquent customer's name is not transmitted to a bona fide credit reporting agency and the customer's general or public credit rating is not adversely affected.

b. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." is not a separate, bona fide collection or credit reporting agency. Said organization is a fictitious name utilized by respondent and others for the purpose of disseminating collection letters.

c. Respondent has not turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." the delinquent account of the customer for collection or any purpose.

d. The letters and notices on the letterhead of "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." have not been prepared and mailed by said organization. Said letters and notices have been prepared and mailed or caused to be mailed by respondent. Replies in response to said letters and notices are forwarded unopened to respondent.

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

PAR. 7. 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 payment of substantial sums of money to respondent by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondent, are herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, 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 respondent named in the caption hereof, and the respondent 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 respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the 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 respondent 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 respondent has 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. Golden Press, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 850 3rd Avenue, in the city of New York, State of New York.

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

ORDER

*It is ordered*, That respondent Golden Press, Inc., 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 books or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that:

1. A customer's name will be turned over to a bona fide credit reporting agency or that a customer's general or public credit rating will be adversely affected unless respondent establishes that where payment is not received, the information of said delin-

quency is referred to a separate, bona fide credit reporting agency;

2. Delinquent accounts will be or have been turned over to a bona fide, separate collection agency unless respondent in fact turns such accounts over to such agencies;

3. Delinquent accounts have been or will be turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." for collection or any other purpose;

4. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", any other fictitious name, or any trade name owned in whole or in part by respondent or over which respondent exercises direction or control, is an independent, bona fide collection or credit reporting agency;

5. Letters, notices or other communications in connection with the collection of respondent's accounts which have been prepared or originated by respondent have been prepared or originated by any other person, firm or agency.

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

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IN THE MATTER OF

## UNIVERSAL-RUNDLE CORPORATION

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

*Docket 8070, Complaint, Aug. 4, 1960—Decision, June 12, 1964*

Order requiring a manufacturer of plumbing fixtures with main office in New Castle, Pa., and sales offices in 24 States and Canada and with net sales in 1957 approximating $24,000,000, to cease discriminating in price between competing resellers of its "U-R" line of plumbing fixtures in violation of Sec. 2(a) of the Clayton Act, and dismissing charges of discrimination relative to the sale of its "Homart" brand of products to Sears and Roebuck Company.

### COMPLAINT

The Federal Trade Commission, having reason to believe the respondent named in the caption hereof, and more particularly designated and described hereinafter, has violated and is now violating the provisions of Section 2(a) of the Clayton Act, as amended, (U.S.C.

Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Universal-Rundle Corporation, sometimes referred to as respondent U–R, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located in the city of New Castle, Pennsylvania.

PAR. 2. Since about 1949, respondent U–R has been and is now engaged in the production, sale and distribution of plumbing fixtures and equipment, including vitreous-enameled cast iron and china fixtures.

It operates plants and warehouses in Milwaukee, Wisconsin; Camden, New Jersey; Redlands, California; and Hondo, Texas, in addition to New Castle, Pennsylvania. It also maintains warehouses in Boston, Chicago, Minneapolis and Los Angeles. Said respondent maintains sales offices in 24 States of the United States and in the Dominion of Canada.

Respondent's total net sales for all products for the fiscal year ending January 31, 1957, amounted to approximately $24,000,000.

PAR. 3. Respondent U–R, in the course and conduct of its said business, has been and is now, engaged in commerce, as "commerce" is defined in the Clayton Act, in that it has sold and distributed its products throughout the United States to purchasers thereof in States other than the State of origin of shipment and either directly or indirectly has caused such products, when sold, to be shipped and transported from the State of origin to purchasers located in other States. There is now and has been a constant course and flow of trade and commerce in such products between said respondent in the State of origin and purchasers located in other States.

PAR. 4. In the course and conduct of its said business in commerce, respondent U–R has sold, and now sells, its products to purchasers thereof, some of whom have been and are in competition with each other and with customers of competitors of respondent, in the purchase, resale and distribution of such products.

PAR. 5. Respondent U–R, either directly or indirectly, has been for more than three years last past, and is now, discriminating in price between different purchasers of its products by selling such products to some purchasers at substantially higher prices than the prices at which respondent sells such products of like grade and quality to other purchasers, some of whom are engaged in competition with the less favored purchasers in the resale of such products.

For example, respondent U–R has sold its products to some favored customers at prices less than the prices charged to unfavored competing

customers in amounts ranging percentage-wise from 2% to 20% or more.

As a further example, said respondent has sold its products to Sears, Roebuck and Co. at prices less than those charged to other competing customers, such preferential prices ranging from 5% to 45% less than the prices charged to others who compete with Sears in the resale of such products.

PAR. 6. The effect of the said discriminations in price may be substantially to lessen competition or tend to create a monopoly in the respective lines of commerce in which respondent and the purchasers receiving the preferential prices are engaged, or to prevent, injure or destroy competition between and among the purchasers of such products from respondent.

PAR. 7. The discriminations in price, as hereinbefore alleged, are in violation of the provisions of Section 2(a) of the Clayton Act, as amended.

*Mr. Lewis F. Depro* and *Mr. Stanley M. Lipnick* for the Commission.
*Kahn, Adsit & Arnstein* of Chicago, Ill., for respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

OCTOBER 28, 1963

This complaint, issued on August 4, 1960, alleges in part that respondent Universal-Rundle Corporation, a manufacturer of plumbing fixtures, violated section 2(a) of the amended Clayton Act, by selling plumbing fixtures to Sears, Roebuck and Co. under the Sears' brand name Homart, at lower prices than plumbing fixtures of like grade and quality were sold by respondent under the Universal-Rundle brand name.

In answering this part of the complaint, respondent denied that plumbing fixtures sold under the two brands were of like grade and quality.[1]

Trial of this proceeding commenced on October 15, 1962, following the Commission's rejection of an initial decision reached by consent in which the allegations of the complaint pertaining to prices charged Sears, Roebuck and Co. for plumbing fixtures purchased under the Homart brand name were dismissed.[2]

At the completion of the Commission's *prima facie* case, respondent orally made a motion to dismiss this charge of illegal price discrimination with respect to the sale of plumbing fixtures sold to Sears,

[1] Paragraph Five of respondent's answer.
[2] *Sears, Roebuck & Co.* v. *FTC*, 210 F. Supp 67 (1962).

Roebuck and Co., relying primarily on the failure of Commission counsel to prove by substantial evidence that such fixtures are of like grade and quality as the plumbing fixtures sold under the Universal-Rundle brand. The hearing examiner reserved decision on respondent's motion pending completion of respondent's defense evidence on this issue. (Tr. 2094.)

By order dated April 17, 1963, the hearing examiner severed the foregoing issue of like grade and quality from all other issues in this proceeding [3] since it then appeared that a resolving of this issue might eliminate the need for the presentment of extensive proof and a lengthy check of the basic cost data by Commission's attorneys and accountants incident to respondent's cost justification defense which was not completed. In view of the severance and since respondent's cost evidence was not completed by reason of the hearing examiner's severance order and completion of cross-examination and a check of the cost data was thereby precluded, all of the evidence relating to respondent's cost justification defense (*i.e.*, cost by computations and allocations accompanied by expert accounting testimony) is stricken as irrelevant to the issue of "like grade and quality" without prejudice to its reinstatement as a part of the record on respondent's motion in the event the hearing examiner's decision on the severed issue of like grade and quality is not affirmed.

Prior to trial, an amended bill of particulars was filed by counsel in support of the complaint.[4] At trial, counsel supporting the complaint stated that the Commission's proof of violation of section 2(a) by respondent in selling plumbing fixtures to Sears, Roebuck and Co. would be limited to sales of the specific plumbing fixtures set forth in the amended bill of particulars (Tr. 157–160) made in the year 1957 in the Philadelphia—Camden area (Tr. 3) and there was no intention "to introduce proof or to contend in this case that the sales of products other than the products listed in the (amended) bill of particulars were made at unlawful low prices". (Tr. 160.)

The only plumbing fixtures at issue under the severance order are vitreous china and enameled cast-iron bathroom fixtures and cast-iron kitchen sinks. Each Homart plumbing fixture listed in the amended bill of particulars is directly compared by the Commission to a specific trade fixture sold under the U–R brand. In all, seven different product comparisons are set forth, although since white and color plumbing fixtures are separately compared as to three of these products a total of ten comparisons are made. Aside from the color ques-

[3] This issue severed pursuant to respondent's motion of April 10, 1963, was unopposed by counsel in support of the complaint.

[4] Amendment to Bill of Particulars filed October 21, 1961.

tion, the only plumbing fixtures contended to be of like grade and quality are one recess enameled cast-iron bathtub, one enameled cast-iron corner bathtub, one one-piece vitreous water closet, two cast-iron kitchen sinks and one vitreous china water closet tank plus a vitreous water closet bowl from each respective brand.

The hearing examiner, after severing the issue of "like grade and quality" of the fixtures sold to Sears under the Homart brand name from all other issues in this proceeding, granted respondent's motion to dismiss the charges pertaining to the sale of fixtures to Sears, Roebuck and Co. upon a finding that such fixtures were not of like grade and quality as the fixtures sold under the U–R brand name. (Tr. 2628, 2629.) Findings and conclusions with respect to this issue are made a part of this initial decision, in Part I hereof.

Pursuant to stipulation of counsel (Tr. 2629, 2630) at a hearing held on July 29, 1963, the remaining issue in this proceeding is whether sales by respondent of plumbing fixtures under the U–R brand to customers in Philadelphia, Pennsylvania, and Camden, New Jersey, violated section 2(a) of the act at the buyer level of competition. In this connection respondent is charged with selling identical plumbing fixtures under the respondent's U–R brand at different prices to competing purchasers. Counsel in support of the complaint has conceded that no injury to competition on the primary line or seller level of competition has been established in connection with the sale of respondent's U–R branded fixtures. (Tr. 2628, 2632.) The two issues aforesaid are discussed separately in Parts I and II hereof, respectively.

The hearing examiner has carefully considered the proposed findings of fact and conclusions submitted by counsel in support of the complaint and counsel for the respondent, supplemented by extensive oral argument thereon, and such proposed findings and conclusions if not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case the hearing examiner makes the following findings of fact and conclusions:

## PART I

*Alleged Discriminatory Prices to Sears, Roebuck—Homart Line*

*Nature of Respondent's Business and Products*

1. Respondent Universal-Rundle Corporation 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 in the city of New Castle, Pennsylvania.[5]

2. Since about 1949, respondent Universal-Rundle Corporation, sometimes referred to as "Rundle", has been and is now engaged in the production, sale and distribution of plumbing fixtures and equipment, including enameled cast-iron and vitreous china fixtures.[6]

3. Respondent operates plants, warehouses, and sales offices in various cities throughout the United States, including New Castle, Pennsylvania, and Camden, New Jersey.[7]

4. Respondent Rundle, in the course and conduct of its said business, has been and is now engaged in commerce, as "commerce" is defined in the Clayton Act, in that it has sold and distributed its products throughout the United States to purchasers thereof located in States other than the State of origin of shipment, and either directly or indirectly has caused such products, when sold, to be shipped and transported from the State of origin to purchasers located in other States, and there is now and has been a constant course and flow of trade and commerce in such products between said respondent in the State of origin and purchasers located in other States.[8]

5. In the course and conduct of its said business in commerce, respondent Rundle has sold, and now sells, its products to purchasers thereof, some of whom have been and are in competition with each other and with customers of competitors of respondent, in the purchase, resale and distribution of such products.

Rundle's principle competitors have been American Radiator & Standard Sanitary Corp., The Kohler Company, Crane & Co., Eljer Division of Murray Corp., and Rheem-Richmond. All of these companies were in competition with Rundle in 1957 in the Philadelphia-Camden area.

The plumbing fixtures of the above-named companies together with Rundle's own branded products, are substantially similar in grade and quality and are comparable in marketability and in price.[9]

6. Respondent Rundle sells its plumbing fixtures under its own name and brand of "Universal-Rundle", hereinafter referred to as "U–R", and sells and distributes such products on a nation-wide basis, generally to wholesalers of plumbing and heating supplies. Such wholesalers also sell to some extent at retail. In 1957, Rundle also sold its products to a class of customers known as "DTU's", *i.e.*, direct-to-you, which class also did some wholesale business.

[5] Answer.
[6] *Id.*
[7] Answer and Tr. 6.
[8] Answer.
[9] Answer to complaint; Tr. 23, 24, 44, 362, 363, 525, 526, 1465, 1466.

The products made by Rundle and sold under its own brand name to its various customers, numbering approximately 8,000 in 1957, are of like grade and quality, there being no difference in those products sold by Rundle to its various customers, some of whom compete with each other in the resale of such products.[10]

7. In addition to selling to wholesalers, respondent also manufactures and sells a line of plumbing fixtures to Sears, Roebuck and Company, pursuant to contract. Such products are resold and distributed through the various retail outlets of Sears under the Sears' private brand and trade name of "Homart" and are used for the same purposes as Rundle's own branded products.

Such products are resold by Sears in competition with many purchasers of Rundle's own brand of plumbing fixtures.[11]

8. The plumbing fixtures produced by Rundle for sale to Sears and marketed under Sears' brand name of Homart are manufactured in the same plant or plants in which Rundle's own branded merchandise is produced. Nevertheless, different molds are used resulting in different pouring weights.

The specifications covering both the Sears' Homart line and Rundle's U–R line are not the same and vary in height, width and weight of various items of the respective lines as hereinafter set forth. Such differences are substantial and affect the function or usefulness of the fixtures.

However, the raw material used by Rundle in the production of the Homart line for Sears is the same as that used by Rundle in the production of its U–R branded fixtures. In the production of cast-iron fixtures, the quality of the metal used in the production of the Homart line is the same as that used for the Rundle trade line. The same clay for the production of the china is used by Rundle in making the Homart line as that used in producing the U–R line. The same kind of enamel and glaze used in connection with the U–R line is also used in producing the Homart line. Also, the manufacturing operations employed by Rundle in connection with the U–R line sold to its trade customers are likewise used in producing the Sears line.[12]

9. Product Comparisons.

A. The Homart product 1102, 1103 enameled cast-iron bathtub is not of like grade and quality as U–R product 2100, 2101.[13]

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[10] Tr. 5, 7, 9, 13, 16, 1465, 1466.

[11] CX 2; Tr. 7, 224, 238, 239. 312, 663, 666, 1065.

[12] Tr. 1443, 1460, 1464, 1483, 1484; CX 14A–C, 41A–F, 15A–C, 42A–D, 16A–C, 43A–D 17A–B, 44A–B, 18A–B, 46A–B, 19A–C, 54A–C, 21A–B, 55A–D.

[13] Double numbers are given to identify bathtubs, the first three digits indicate the model number, the fourth digit indicates whether the water outlet of the bathtub is to the left or right, and where there is a fifth digit the bathtub is in color.

(1) Differences in physical dimensions

| *Homart Product 1102, 1103* [14] | *U–R Product 2100, 2101* |
|---|---|
| Length 54½ inches (CX 14C)_____ | 54 inches (CX 41F). |
| Height 15 inches (CX 14C)_____ | 16 inches (CX 41F). |
| Weight 320.6 lbs. (CX 14A)_____ | 324.7 lbs. (CX 41A). |
| Enamel Area 3442 sq. in. (CX 14A)___ | 3762 sq. in. (CX 41A). |
| Width 30 inches (CX 14C)_____ | 32¾ inches (CX 41F). |
| Water Level to Overflow 11¾ inches (14¼ inches less 2½ inches, per CX 14C)_____ | 12½ inches (16 inches less ½ inch less 3 inches, per CX 41F). |

The difference in height was frequently referred to throughout the course of the testimony by purchasers of the U–R brand of fixtures. These purchasers, consisting of wholesalers, dealers and plumbers, none of whom carried the U–R brand to the exclusion of other manufacturers' plumbing fixtures, testified without exception that it is an accepted industry practice for the price of a bathtub to be dependent upon the height of the tub. Most manufacturers,[15] including Universal-Rundle, sold bathtubs in heights of 16 inches and 14 inches. The taller tub is purchased by the manufacturer's customer at a higher price than the 14-inch tub and resold to the consumer at correspondingly higher price levels (Tr. 243–245, 269–271, 409, 978–984, 1137, 1139).[16] The

[14] Throughout these findings plumbing fixtures sold under respondent's brand will be described as "U–R" while plumbing fixtures distributed to Sears will be referred to under the Sears' brand "Homart". "CX" identifies Commission's Exhibit, "RX" respondent's exhibit.

[15] Two principal competitors of respondent called by Universal-Rundle confirmed the industry pricing method of price variations for bathtubs dependent upon heights of tubs. (Tr. 1595–1597, 1619.) This evidence was primarily based upon the standard 5-foot tub representing 90% of the sales other than the off size 4½-foot tub. It would appear, however, that the same principle should apply to the height variations of 4½-foot tubs even though the height differential is one inch as compared to the 2-inch differential in standard 5-foot tubs (*i.e.*, 14-inch and 16-inch). (See Tr. 244, 991, 992, 1139.) It is also apparent from the evidence that the Homart line tubs are not standard in that they are 15-inch in height as distinguished from the standard 14-inch and 16-inch tubs.

[16] Commission Witness Schreibstein (Dealer of U–R Line).

"Hearing Examiner Buttle: Well, insofar as your prices are concerned, do you charge the customers——.

The Witness: More.

Hearing Examiner Buttle:—more for the 16-inch bathtub than you do the 14-inch bathtub?

The Witness: Naturally. Yes, sir, because I pay more.

Hearing Examiner Buttle: And do they give it to you?

The Witness: They give it to me gladly." (Tr. 271.)

Commission Witness Rodgers (Plumber, installer of various brands of plumbing fixtures) "—if I set one of the builder (14-inch) models on a display and put a regular (16-inch) model next to it, the customer probably would take the regular model because of the difference in cost which was around $15, and I don't think that customers we deal with rather than a developer picking for the customer, I don't think $15 would deter them from buying the larger tub." (Tr. 597.)

Commission Witness Schreibstein (Dealer, U–R Line) "—what we call the best tub, it is always 16 inches in height." (Tr. 243.)

testimony of these witnesses also suggests that the taller bathtub is a superior product.[17]

The evidence further discloses that 15-inch cast-iron tubs purchased by Sears were unique and not standard in the sense that only Homart cast-iron bathtubs were manufactured in that height. (Tr. 170.) The commercial standards adopted by the industry (RX 10, Pg 8, 9) specify 14-inch and 16-inch as the acceptable heights for tubs. All other manufacturers, including U–R with regard to its own brand line, manufacture cast-iron tubs only in those heights. (Tr. 169–170, 243, 418, 1595–1597, 1619 and RX4A through 8B.)

(2) Differences in functional features—The U–R 2100, 2101 bathtub has two functional features which are not a part of the Homart 1102, 1103 bathtub; on the U–R bathtub there is a wide front apron (6½ inches in width as shown on CX 41F) forming a seat (Tr. 234–237, 348, 349, 1151; CX 74, p3), and two built-in soap dishes (CX 41E and F). The front apron of the Homart bathtub 1102, 1103 contains no seat but presents one continual straight line along the floor for its entire length, and has no soap dishes. (CX 14C.)

U–R model 2100, 2101 has two soap dishes in the form of recesses impressed directly into the body of the tub. (See picture and diagram on page 3 of CX 74.) There are no soap dishes on Homart model 1102, 1103. One advantage of this functional feature on the U–R model is that a prospective purchaser need not have a recess for soap built into the wall (Tr. 200, 201) nor buy and install a soap dish such as are sold by the dealer-witnesses in the proceeding. (Tr. 368, 900.) Several witnesses testified that periodically consumers commented on or inquired about soap dishes built into the tub. (Tr. 233, 758.) The absence of such built-in soap dishes on Homart tubs, although recognized by Sears sales personnel as a decided disadvantage in selling bathtubs, is purposely minimized in attempting to sell a purchaser a Homart product. (Tr. 758, 759, 830, 831, 900.)

Another distinguishing functional feature of the U–R 2100, 2101 bathtub as evidenced is the presence of a seat or bench on the front apron of this bathtub. (Tr. 191, 234, 345, 349, 365, 366, 1594 and CX 74, diagram pg. 3.) This feature, is absent on the Homart 1102, 1103 model sought to be compared. The evidence establishes that the seat or bench feature of the U–R bathtub is of significant value (Tr. 236, 237, 759, 760, 1594–1596) and improves the marketability of these bathtubs. The Commission's witnesses, including merchants and plumbers who were actually selling U–R branded bathtubs containing this seat

[17] Commission Witness Block (Plumber, installer of U–R fixtures). "Well, it (the 16-inch bathtub) is a different tub altogether. It is a much nicer tub. The design of the tub is much nicer than a 14-inch tub." (Tr. 1153, 1154.)

feature, indicated they stressed this feature in marketing such tubs to their customers. (Tr. 237, 365, 366, 1151.) A Sears, Roebuck and Co. sales manager testified that when a prospective purchaser raised the question of a seat with regard to Homart bathtubs that he and his salesmen "steered around" such questions (Tr. 759, 760) and were on the "defensive" once a customer inquired about the lack of a seat on Homart tubs. (Tr. 827-830.) Other witnesses were of the view that the seat or bench feature on a bathtub gave rise to a significant advantage in the marketing of such a product over a bathtub without this feature. (Tr. 1594–1596, 1617, 1618.) [18]

(3) Differences in style—The U–R product 2100,2101 bathtub has impressed into the metal a recessed panel design which complements and blends with the design of all bathroom plumbing fixtures (*i.e.*, water closets and lavatories) in the U–R line. The Homart 1102,1103 bathtub has impressed into the metal a "fluted" design which blends with the unique design of the bathroom fixtures in the Homart line. (Compare CX 41E and CX 74 with CX 14C and RX 2 and 3.)

One striking feature of the Homart bathtub 1102,1103 is that it presents one unbroken straight line along the floor line of the front apron which facilitates the ease with which tile may be set on the floor. This makes the installation of this particular product easier, as evidenced, for the "do-it-yourself" class of ultimate consumer in remodeling of bathrooms, the principal market in which Sears resells plumbing fixtures. (Tr. 1441.)

The styling of these two bathtubs is entirely different. The Homart bathtub has impressed into it a "fluted" design consisting of a series of three vertical curved indentations (CX 14C) which readily identify the bathtub as being part of the Homart line (RX 2 and 3; Tr. 607, 628.) The same design is carried through the rest of the Homart fixtures as an examination of CX 19C (reverse trap water closet), CX 20B (one-piece water closet), CX 32B (Lavatory) will readily reveal. The harmonizing or blending effect achieved by this design is apparent from an examination of RX 2 and 3.[19] This fluted design on this bath-

[18] Thus, the witness Donnelly, the Philadelphia area manager for the Kohler Company (Tr. 1587) explained that when his company first came out with the bench (seat) bath, Kohler marketed it simultaneously with their straight-front bathtub without a seat until they were assured of its market acceptability and very shortly thereafter discontinued their straight-front bathtub. Later when Kohler first came out with a 14" high bathtub with a straight-front or seatless tub they had to abandon this model in the face of a competitor's bench (seat) type model because their sales were suffering due to the fact that the market "demanded" the seat type bathtub. (Tr. 1594–1596.) That a second competitor, Eljer, had much the same experience, in this regard is demonstrated by the testimony of its regional sales manager, Mr. Brown. (Tr. 1617, 1618.)

[19] Also note that in these exhibits the bathroom display featuring a steel bathtub which is not made by respondent and which does not incorporate this distinctive design is accompanied by other fixtures (washdown closet and lavatory) which also do not incorporate this design.

tub is unique to the Homart line (Tr. 174–176, 632, 1589, 1590) and, as the testimony indicates, this fixture is not suitable for installation in the same bathroom with other fixtures incorporating other styles or designs (Tr. 611.) [20] The U–R 2100,2101 model incorporates a recess panel styling which is also carried through to other bathroom fixtures in the U–R line. (CX 74.) The blending effect resulting from this design is revealed by an examination of the groups of fixtures displayed on the back inside cover of CX 74.[21]

Style is important with regard to plumbing fixtures (Tr. 648, 697, 1590, 1591) and the styles incorporated in these two bathtubs are quite different.[22]

B. Homart product 1122,1123, an enameled cast iron corner bathtub, is not of like grade and quality as U–R product 2120,2121.

(1) Differences in dimensions—

| *Homart, 1122,1123* | *U–R 2120,2121* |
|---|---|
| Length 61⅛ inches (CX 15C)---------- | 60½ inches (CX 42D). |
| Height 15 inches (CX 15C)---------- | 16 inches (CX 42D). |
| Weight 386.5 (CX 15A)---------- | 392.2 (CX 42A). |
| Enameled area 4241 sq. in. (CX 15A)--- | 4435 sq. in. (CX 42A). |
| Width 30 inches (CX 15C)---------- | 30¾ inches (CX 42D). |
| Water level to overflow 11¾ inches (14¼ inches less 2½ inches (CX 15C)- | 12½ inches (16 inches less 3 inches less ½ inch (CX 42D)). |

The significance of these physical differences between these two model corner bathtubs heretofore considered in connection with the 4½-foot recess bathtubs is equally applicable to these corner tubs. Thus, the difference in height and the significance thereof between the two models is the same as prevailed in the prior comparison. The U–R branded tub as to height falls into the 16-inch category, whereas the Homart model is in the 15-inch class.

(2) Difference in functional features—The U–R model 2120,2121 has impressed into it two soap dishes, one at either end, as is illustrated on CX 42D and depicted on CX 42C. The Homart bathtub to which it is sought to be compared does not have any soap dishes. A wide seat

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[20] See the testimony of Commission witness Greenfield that a water closet of the Homart design should not be used with fixtures bearing the U–R design in the same bathroom ensemble as it would look "out of place". (Tr. 471, 472.)

[21] Also note the statement concerning harmony of style appearing on page 13 of CX 74 in connection with the "Castle" U–R brand water closet.

[22] The importance of style or design of bathroom plumbing fixtures, aside from any difference in physical dimensions, is demonstrated by the testimony of Plumber Scranton, a Commission witness. Scranton testified he had visited the Plumbing Department of a Sears store in 1957. The witness displayed complete disinterest in the technical details of the Homart fixtures but on cross-examination expressed the view that his interest in Homart fixtures was limited to the design or style, "I was more interested in looking at the design of them. That is what I was looking at * * *" (Tr. 697.)

ledge runs along the entire length of the U–R tub. (See statement and illustration on CX 42C and dimension thereof on CX 42D.) [23]

(3) Differences ni style—The U–R model 2120,2121 bathtub, just as the previously discussed U–R bathtub, has impressed into the metal a recessed panel design which blends with the balance of the fixtures (*i.e.*, the various water closets and lavatories) in the U–R line. The Homart model 1122,1123 has impressed into the metal the same "fluted" design as has been previously referred to in connection with the Homart 1102, 1103 model. This model is also specially designed to blend with other fixtures in the same line and will not blend with the fixtures in the U–R line. (Compare CX 42C and CX 74 with CX 15C and RX 2 and 3.)

One further distinction in styling between these two corner bathtubs is the fact that while the Homart model has a rounder corner, the corner on the U–R model is "chamfered" or "squared off". (See CX 42C and D and CX 15C.)

C. Neither the compared Homart product 13001 and U–R product 23001, nor the compared Homart product 13541 and U–R product 23501, cast-iron kitchen sinks, are of like grade and quality.

Homart product 13001 and U–R product 23001 are single compartment flat rim cast-iron kitchen sinks. The U–R 23501 and the Homart 13541 are also flat rim ledge type cast-iron kitchen sinks but have double rather than single compartments.

In each set of sinks the over-all dimensions are similar; [24] however, a distinct difference exists in the spacing of the holes through which the faucets necessary to operate these fixtures are affixed. Thus, as shown on CX 44B and CX 46B, the faucet holes on these U–R fixtures are on 8-inch centers, that is, they are drilled 4 inches to either side of the center spout hole. This is the standard manner of drilling these holes throughout the plumbing fixture industry. (RX 10, pg. 18 of U.S. Dept. of Commerce, Commercial Standards for Cast-Iron Plumbing Fixtures.) The Homart kitchen sinks have these drillings spaced on 6-inch centers (3 inches to either side of center hole) which is not in conformity with the Department of Commerce Standard, but is designed to accommodate faucets made specifically for Sears, Roebuck as

[23] The width of the ledge on the Homart model 1122,1123 does not appear in the record but as can be noted from the picture on CX 15C it is narrow and rounded and has no seat.

[24] There is variation, however, in sump and ledge dimensions between the U–R 23001 and the Homart 13001. Thus, the back ledge on the U–R model is 3½ inches wide (see CX 44A and diagram and picture on page 26 of CX 74) whereas the back ledge of the Homart model is 2¾ inches wide and flat (see CX 17A and CX 17B for picture and diagram). A corresponding difference exists in the depth of the sump (*i.e.*, 14½ inches as compared to 15⅜ inches (see CX 44A and CX17A).

has been evidenced by the testimony of several witnesses.[25] It is obvious that if a kitchen sink with Homart size drillings were sold a U–R dealer or wholesaler, it would be of limited value, since such a purchaser would not have faucets to install a serviceable unit.

Furthermore, it appears from the evidence that cast-iron kitchen sinks are obsolete items and being replaced by steel kitchen sinks. (Tr. 478–483.) One Commission witness stated that at the time of the hearing his sales were running approximately 95% steel as opposed to 5% cast iron. (Tr. 483.) The obsolescence of cast-iron kitchen sinks assumes primary importance in view of the fact that at the time respondent allegedly discriminated in price in favor of Sears on the sale of *cast-iron* kitchen sinks (1957), Universal-Rundle was offering kitchen sinks of equivalent size in steel to its customers of the U–R brand at prices not only *substantially lower* than the prices it was charging such customers for their cast-iron counterparts but also *lower* than the prices charged Sears, Roebuck for Homart cast-iron kitchen sinks.[26] Respondent did not sell steel plumbing fixtures to Sears, Roebuck. (CX 3A through 3Z–2.)

D. Homart product 3010, a one-piece vitreous china water closet, is not of the same grade and quality as U–R product 4010.

U–R product 4010 and Homart product 3010 are both one-piece reverse trap water closets. The physical dimensions are:

| *Homart Product 3010* | *U–R Product 4010* |
|---|---|
| Height 19½ inches (CX 20A and B) | 18¾ inches (CX 53A and D). |
| Length 20 inches (CX 20A and B) | 20¾ inches (CX 53A and D). |
| Pouring weight 154.55 (CX 20A) | 170.89 (CX 53A). |
| Float ball—"Toughbouy" (CX 20A) | "Amerline" (CX 53A). |
| Flange assembly—two (CX 20A) | None (CX 53A). |
| Seat—none (CX 20A) | Mother-of-Pearl (CX 53A). |

The foregoing evidence establishes by reason of the physical differences shown that the two types of plumbing fixtures described are not of like grade and quality. The evidence also fails to establish a price differential between those two fixtures, due to the fact that no accurate price appears in this record for the U–R model 4010.

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[25] Commission's witness Greenfield, a U–R brand dealer testified he sold some faucets with 6-inch spreads which would fit Homart sinks, but on cross-examination it was brought out that he was selling "seconds" in such size faucets made expressly for Sears, Roebuck. (Tr. 507.) Cf. also (Tr. 1014, 1015) where Commission witness Arensberg states Sears 6-inch drilling is distinctly different than the Industry's standard 8-inch drilling.

[26] The equivalent fixture in steel to the U–R 23501 model, is the "Fleetwing" model 6503, described and depicted on CX 74, p. 27, which was priced at $16.28 (see CX 79, p. 21) as compared to $16.50 on the Homart 13541. The steel equivalent of U–R model 23001 is the "Concourse" model 65241, priced at $8.93 (see CX 79, p. 21) as compared to $9.50 on the Homart 13001.

As to the U–R model, the evidence shows (CX 53C, CX 74, p. 12) that no sales of this plumbing fixture were in fact made without a toilet seat. (Tr. 1456–1459.) This plumbing fixture is always sold in the U–R line equipped with a seat which was especially designed for use with this particular fixture. At no place in the record do the prices of this seat or the fixture itself appear separately stated.[27] The Homart one-piece toilet is always sold without a seat. (Tr. 1459; CX 20A and B). As a result, there is neither a basis for a price comparison in this record on sales of these fixtures, nor any validity to the contention that a water closet sold without a seat is of like grade and quality to one so equipped.[28]

Commission exhibits 53C and 74 establish that the U–R fixture in question has among other features the following:

(1) It is completely anti-siphon through the use of an air gap principal (*i.e.*, no contact between outside water supply and water in the tank).

(2) It has automatic regulator for flow of water supply.

(3) It has a nylon valve seat.

(4) It has a nonoverflow bowl.

However, there is no evidence as to whether or not the Homart product 3010 possesses all, some, or none of these features. Apparently they are considered to be features relevant to grade and quality by Commission's counsel, since evidence with respect thereto was offered as part of the Commission's case. (CX 53C and CX 74, p. 12.)

The evidence (CX 20A and CX 53A) establishes that the U–R 3010 model has an "Amerline" float ball, whereas the Homart 3010 model is outfitted with a "Toughbouy" float ball. What the value of the respective float balls are, or how these different types of parts affect the functional operation of the two water closets, is not shown in the record, although a Commission witness stated that a customer will inquire as to the brand of the float ball used in a water closet. (Tr. 370.) Such evidence suggests consumer interest in the type of float ball as a measure of quality.

Another difference existing between these water closets is the difference in pouring weight. (CX 20A and 53A.) Pouring weight refers to the amount of raw material necessary to fill the molds from which

[27] On page 3 of the amended bill of particulars complaint counsel assign a price of $9.19 to the seat and $81.16 to the fixture itself. These figures are wholly unexplained and appear to be without foundation in the record.

[28] In fact, the seat, sold only as a part of the U–R brand 4010, is of special design with check hinges attached to the seat to prevent the seat when raised from hitting the lid of the water closet. (Tr. 1457.)

these fixtures are cast. (Tr. 1460.) The evidence discloses it takes 16.44 lbs. more of raw material (170.89 less 154.55) to fill the mold from which the U–R 4010 model is cast. (CX 20A and 53A.)

Just as is the case of the bathtubs, the styling of these two water closets is completely different. The Homart model incorporates the fluted styling featured on the balance of the Homart bathroom fixtures. (Note tank top fluting and point on pedestal as pictured on CX 20B and see RX 2 and 3 for similar design on balance of Homart fixtures.) The U–R model 4010 features the distinctive panel design which matches the U–R fixtures. The use of both designs in one bathroom would not result in a harmonious ensemble. (CX 74, p. 12.)

E. Homart products 3222, a water closet bowl, and 3443, a water closet tank, are not of like grade and quality as U–R brand bowl 4222 and tank 4445.

The physical dimensions of the Homart and U–R tanks are:

| *Homart 3443 (CX 19B)* | *U–R 4445 (CX 54B)* |
|---|---|
| Pouring weight 53.43 | 62.64. |
| Enamel weight: | |
| 1.43—White | 1.64—White. |
| 4.67—Color | 3.37—Color. |
| Mold—Sears | U–R. |
| Flange assembly—two | None. |
| Float ball—"Toughbouy" | "Amerline." |
| Tank lever—Sears design | U–R Design. |
| Length 19½ inches | 21 inches. |
| Volume 44 lbs | 43 lbs. |

The physical dimensions of the Homart and U–R bowls are:

| *Homart 3222 (cf CX 19A)* | *U–R 4222 (cf CX 54A)* |
|---|---|
| Pouring weight 56.84 | 63.32. |
| Enamel weight: | |
| White—3.22 | 3.66. |
| Color—6.66 | 7.86. |
| Mold—Sears | U–R. |
| Height 14½ inches | 14¾ inches. |
| Depth 23¾ inches | 24 inches. |
| Sump area 10 x 12 | 9¾ x 11⅝. |

There are a number of physical distinctions between the foregoing reverse trap fixtures. The most apparent difference is in styling. (Compare CX 54C to CX 19C.) [29] The Homart 3222 and 3443 fixtures are

[29] Commission Exhibit 74, p. 13, shows that respondent manufactures and sells two distinct models of a *wash down* water closet under the U–R brand (note model 4075 "Commando" and model 4080 "Trailerette", Commission Exhibit 79, p. 7) at different prices and the basic difference between these U–R washdowns is design. These exhibits prove that the same type of water closets are of *unlike* grade and quality because of design since it is inconceivable that any manufacturer could offer to its customers functionally identical products of *like* grade and quality and receive a premium in price for one or the other.

molded with the unique Homart fluted design (note top of tank and pedestal of bowl) which not only tends to blend these units together but also harmonizes with the balance of the bathroom fixtures of the Homart line. (RX 2 and 3.) Both the U–R 4222 bowl and the U–R 4445 tank bear the U–R brand panel styling as is evident upon examination of both the front of the tank and the pedestal of the bowl. Here again the styling serves to match the tank to the bowl as well as blend the combination of both to the balance of the fixtures in the U–R line. (See CX 74, p. 13 concerning the harmony of style of this particular water closet combination.)[30]

Another difference between these water closets is in the pouring weight (the amount of raw material necessary to fill the molds from which these fixtures are cast). Thus, CX 19A and B indicate the combined pouring weight of the Homart closet is 110.27 (56.84 plus 53.43) lbs., whereas CX 54A and B indicate that the combined pouring weight of the U–R water closet in question is 125.96 (63.32 plus 62.64 lbs.).

The evidence also establishes a difference in the float balls contained in the tanks of these water closets. Thus, the Commission's proof (CX 19B and CX 54B) indicates that the Homart model is equipped with a "Toughbouy" float ball, whereas the U–R model is outfitted with an "Amerline" float ball. The foregoing exhibits (CX 19B and CX 54B) also establish that two flange assemblies are included with the Homart model, whereas none are included with the U–R model. However, there is no proof these differences are of significance with regard to the grade and quality of the fixtures.

The significance of the differences in the height of the tanks and the sump or surface area of the bowls is the resulting better flushing action of the water closet and the elimination of exposed surface area within the bowl and its consequent reduction of the incidents of soiling. (Tr. 430–432, 698, 699.)

*Application of Criteria Determinative of Like Grade and Quality*

Prior to the Robinson-Patman Act amendments to the Clayton Act, Section 2 of the original Clayton Act did not require as a part of the Commission's *prima facie* case proof of the grade or quality of the commodities sold at different prices. Under the original act, a person charged with violation could defend a difference in price by an affirma-

[30] Commission's Witness Greenfield (Tr. 471–473) testified that while it was possible to substitute a "Castle" (the trade name of the U–R brand combination under discussion) closet for the U–R brand one-piece closet depicted on the cover of CX 74 and have it blend with the other fixtures thereon depicted, this could not be done with the Homart reverse trap closet because it would look out of place. See also Tr. 508, 611 for similar testimony.

tive defense showing a variance in grade or quality of the commodities.[31]

In amending section 2 of the act by the provisions of the Robinson-Patman Act, the Congress required the Commission *to prove* the commodities sold at different prices were in fact of like grade and quality before the act applied to any transaction.[32] There is *no* burden imposed upon a respondent to prove the unlikeness of grade and quality. It is therefore encumbent upon Commission counsel, once the record indicates that variations or differences between the products exist, to affirmatively prove that the differences are of no consequence. The record herein clearly reveals the Commission's failure to prove by substantial evidence the essential prerequisite of the grade and quality. Furthermore, it is apparent from the evidence that the compared commodities sold under the Homart and U–R brands are not of like grade and quality. Each of the plumbing fixtures sought to be compared by counsel in support of the complaint within the U–R and Homart lines of fixtures are substantially different in dimensions, style, design, functional features, amounts of raw materials, and manufacturing molds.

Both prior and subsequent to the enactment of the Robinson-Patman Act amendments to the Clayton Act, it has been held that actual, genuine, physical differentiations which are not merely decorative or fanciful are sufficient to make commodities of unlike grade and quality.

The Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) concluded:

* * * the primary function of the like grade and quality criterion is reasonably to confine the price discrimination statute to comparable private business transactions. * * * It must have been obvious that any anti-price discrimination statute designed to check unfair disparity in commercial treatment must * * * short of enacting a comprehensive system of universal price control * * * come into play only in reasonably equivalent business transactions involving the sale of nearly identical goods. * * *

Actual and genuine physical differentiations between two different products adapted to the several buyers' uses, and not merely a decorative or fanciful feature, probably remove differential pricing of the two from the reach of the Robinson-Patman Act. To that extent, we believe, the decisions take realistic account of the limitations which must qualify the scope of the Statute.[33]

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[31] Section 2 of the original Clayton Act provided in pertinent parts that it was illegal to discriminate in price between purchasers of commodities where the effect of such discrimination may be to substantially lessen competition provided, "That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in grade, quality or quantity—". (15 U.S.C. §13.)

[32] Section 2 of the act, subsequent to the Robinson-Patman Act amendments, provides in part, "—it shall be unlawful for any person—to discriminate in price between different purchasers of commodities of like grade and quality—where the effect—." (15 U.S.C. 13a.)

[33] See complete guide to the Robinson-Patman Act by Congressman Wright Patman, 1963, at 34–35 to the same effect.

Under some interpretations, even minor *physical* variations in the composition or external appearance of a seller's product may refute a conclusion of "like grade and quality," and hence permit price differentials in the sale of the particular product [34] without regard for the substantive clauses of the act.

The first price discrimination proceedings informally terminated by the Federal Trade Commission between 1936 and 1937 recognized minor product variations to negative the statutory requirement of "like grade and quality".[35] Several of these concerned discriminatory pricing by handbag and millinery manufacturers said to favor their large chain and department store accounts. One dismissal ruled that a lot of lower-priced handbags was not "of the same grade and quality" as the more expensive merchandise since it contained "bags of various grades and qualities, particularly with respect to market values"; [36] another determined that the lower-priced bags were "not like" other bags because they bore the "chain store's private brand or trademark" *and* were "specially designed to match the shoes which it sells"; [37] and a third deemed the lower-priced millinery of different "grade" comprising "slow-moving styles, small sizes, less-expensive trimmings, and dyes which are less expensive to apply." [38]

By contrast, one district court decision in 1949 applied a broad test of "functional interchangeability" to conclude that cans of varying sizes were nevertheless of "like grade and quality." Thus, in *Bruce's Juices*,

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[34] But cf. *Moog Industries, Inc.* v. *FTC,* 238 F. 2d 43 (8th Cir. 1956), *aff'd,* 355 U.S. 411 (1958), rejecting contentions by suppliers of automotive parts that volume discounts for a *line* of supplies sold as a *unit* did not give rise to discriminations as between goods of "like grade and quality," inasmuch as these items within the line differed from each other and were not mutually "interchangeable." Moog properly held that "the question here is not related to uniform different prices for different items, nor, hence, to the like grade and quality concept." 238 F. 2d at 50. If the "like grade and quality" test *had* applied, the court continued, the same manufacturer's automotive parts for a 1947 Ford *was* sufficiently different from parts for a 1950 Chevrolet to be lawfully sold at different prices by reason of the "like grade and quality" test. Ibid.

However, a price differential *as between* a seller's combination sale and his sales of a single item does not constitute a discrimination among goods of "like grade and quality." *Package Closure Corp.* v. *Sealright Co.,* 1941–1943 CCH Trade Reg. Serv. ¶52,969 (S.D.N.Y. 1943), *aff'd,* 141 F. 2d 972, 979–980 (2d Cir. 1944). A treble damage plaintiff who sold milk bottle hoods had charged that competing manufacturers drove him out of business by quoting unconscionably lower prices for a cap and hood combination than for hoods sold alone. The court dismissed the complaint as alleging only "a discrimination by defendants between purchasers of caps and purchasers of hoods sold in combination with caps. Obviously, such discrimination was not between purchasers of commodities of like grade and quality." Compare *General Shale Products Corp.* v. *Struck Construction Co.,* 132 F. 2d 425 (6th Cir. 1942), *cert. denied,* 318 U.S. 780 (1943).

[35] At the request of Representative Patman, the Chairman of the Federal Trade Commission compiled a summary of issues and disposition in early Robinson-Patman investigations. 81 Cong. Rec. App. 2336–2341 (1937).

[36] *Id.* at 2337.

[37] *Id.* at 2339.

[38] *Ibid.*

*Inc.*, v. *American Can Co.*,[39] the District Court invalidated American Can Company's pricing of ISCANS, a line of juice containers, upon Bruce's private damage complaint that it had to pay a discriminatory high price for the $3\frac{14}{16}$ inch ISCAN after being refused the $3\frac{12}{16}$-inch can at the lower net price its competitors were paying. These several ISCANS were adjudged of "like grade and quality" since the court was "satisfied" they "were all of commercial grade and quality and gave substantially identical performance. Certainly all of the cans were adapted for the function for which they were sold and purchased, to wit, as containers of juice, and they were 'the same kind of goods.'" [40] On appeal, the Fifth Circuit upheld the District Court's conclusion, without appraising its rationale for adjudging "like grade and quality."

But this rationale was ignored by the Federal Trade Commission's 1953 *Champion Spark Plug* decision, which dismissed one phase of a price discrimination charge because of minute physical distinctions between differently branded products.[41] Champion was charged with selling "special brand spark plugs to Montgomery Ward & Company at approximately 18 cents per plug while it sells it regular Champion brand spark plugs to its distributors at approximately 26 cents per plug." [42] The special brand plugs varied slightly from Champion's regular product, containing different insulators and "ribs".[43] The FTC trial staff conceded that the differentiated plugs were not of "like grade and quality", and the Commission dismissed these charges for lack of proof.

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[39] 87 F. Supp. 985, 987 (S.D. Fla. 1949), *aff'd*, 187 F. 2d 919, 924 (5th Cir. 1951), *modified*, 190 F. 2d 73, 74 (5th Cir. 1951), *cert. dismissed*, 342 U.S. 875 (1951).

[40] 87 F. Supp. at 987; cf. 187 F. 2d at 924. See also the expansive dicta in *Columbia Broadcasting System, Inc.* v. *Amana Refrigeration, Inc.*, 295 F. 2d 375, 378 (7th Cir. 1961) ("Although no two programs present the same artistic, educational or entertainment value to all persons it may well be that so-called prime-time programs which have demonstrated comparable audience drawing power would be of like grade and quality from a commercial standpoint to prospective sponsor-advertisers").

[41] 50 F.T.C. 30, 47 (1953). This phase was part of a broader attack on Champion's pricing and distribution practices which resulted in partial findings of violation and an order to cease and desist. On the Champion case generally, see Dirlam and Kahn, Fair Competition: The Law and Economics of Antitrust Policy 216–225 (1954); Rowe, Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman, 60 Yale L.J. 929, 951–955 (1951).

[42] Amended Complaint, par. 7 (June 27, 1947). The complaint followed a claim in the Montgomery Ward mail-order catalogue that its "Riverside" and "Ward Standard" brand plugs were manufactured by "one of America's leading spark plug manufacturers, using the same materials as in its own well known plugs."

[43] Transcript of Hearings, F.T.C. Dkt. 3977, pp. 682–745. The functional significance, if any, of this physical variation was not revealed.

On the other hand, the Commission's 1956 *General Foods* decision does not appear to be compatible with its *Champion* ruling.[44] The company marketed its household groceries through conventional wholesalers, but simultaneously adapted a lower-price line of specially packaged commercial groceries for distribution through Institution Contract Wagon Distributors, who specialized in aggressive promotional selling to the "institution trade" comprising restaurants and hotels. The several versions of General Foods cereals and dessert preparations were differentiated largely by size and wrapping, and the institution-pack coffee boasted an "additional kind of bean" for longer freshness and a distinct coloration and aroma. The Commission viewed General Foods' program of product differentiation inadequate to overcome the "presumption that the two packs are of like grade and quality" arising from the marketing of both under the single Maxwell House brand.[45]

However, the Court of Appeals' important *Atalanta Trading* Decision in 1958 disapproved the Commission's doctrines.

*Atalanta* [46] concerned promotional allowances granted by the supplier only to the distributors of a specially packaged version of his meat products. Finding a violation of section 2(d), the Commission's Initial Decision held that "ham is ham"—and of "like grade and quality" whether cooked, smoked, or raw, and regardless of size of packaging, so long as the variations uniformly carried the producer's brand.[47] The final Commission decision affirmed that the requirements for the grant of promotional allowances were not "limited to sales of identical products",[48] and held the statute applicable to goods sold under a single trade name "in competition with each other." [49]

The Second Circuit set this doctrine aside. While the court confirmed that the "like grade and quality" test was evolved to prevent emascu-

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[44] General Foods Corp., 52 F.T.C. 798 (1956). Cf. also the Initial Decision in the Edelmann case, rejecting the pertinent charges on other grounds, which expounded a concept of "substantially like grade and quality" and asserted that automotive parts differentiated only by brand met this test because "interchangeable" and reflecting "no basic functional difference." 51 F.T.C. 978, 983 (1955).

[45] 52 F.T.C. at 817. The Initial Decision also discarded as "without relationship to" and of "no effect upon the grade and quality of the coffee" the "variations in the kinds of grind of both types of Maxwell House coffee—fine, regular, drip, glassmaker, pulverized—and [the] variety of packs suitable for convenient use in various sizes and types of coffee-making equipment." *Id.* at 816.

[46] *Atalanta Trading Corp.* v. *FTC,* 258 F. 2d 365 (2d Cir. 1958), *setting aside* 53 F.T.C. 565 (1956).

[47] 53 F.T.C. at 568. Seen by the Initial Decision, such differentiations created "a distinction without a difference, more fanciful than real," and amounted to "no more than the distinction between sizes of the same shoe or the same dress." *Ibid.*

[48] 53 F.T.C. at 571.

[49] 53 F.T.C. at 572.

lation of the section by "a supplier's making artificial distinctions in his product", *Atalanta* held that this did not mean that "all distinctions are to be disregarded." [50] In the court's view,

> Such a holding would lead to the conclusion that all articles of food are competitive, each with the other—an obvious absurdity. Merely because various articles of food are derived from a common source (in this case, the pig), should not force the vendor of a broad line of such products to market or promote all simultaneously and in an identical fashion.[51]

Moreover, the court disapproved a product "interchangeability" test which relied on the presence of so-called "cross-elasticity of demand" between various products. Although such tests might be relevant in other antitrust contexts, to so interpret "like grade and quality" would expand the law "into a device to regulate the entire business of a supplier." [52]

Instead, the court noted several indicia which, in its view, would *disprove* the "like grade and quality" of similar products. Even products coming from a "common source", such as bacon and pork, were not of "like grade and quality" without a "showing that they are in the same price range" were consumed by the same people for the same purpose, and were competitive "price-wise".[53]

More recently, a district court absolved a supplier's price differentials in the sale of ice cream, where the product sold to one customer at lower prices was made to its "special formula" and differed in grade and quality.[54]

These rulings confirm the statement of prevailing law by the Report of the Attorney General's Committee in 1955 heretofore stated: "Actual and genuine physical differentiations between two different products adapted to the several buyers' uses, and not merely a decorative or fanciful feature, probably remove differential pricing of the two from the reach of the Robinson-Patman Act." [55]

Applying the foregoing concept to the facts in the within case before the hearing examiner, it appears that the test of like grade and quality has not been met. Actual and genuine physical differentiations adapted to variant buyer uses are apparent. This is simply and significantly

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[50] *Atalanta Trading Corp.* v. *FTC,* 258 F. 2d 365, 371 (2d Cir. 1958).

[51] *Ibid.*

[52] *Ibid.* Compare *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) (interchangeability of product as criterion defining relevant market in Sherman Act monopolization case.)

[53] 258 F. 2d at 371 n. 5.

[54] *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 184 F. Supp. 312 (N.D. Ill. 1960), *aff'd,* 287 F. 2d 265 (7th Cir. 1961). See also pages 66–69 of Rowe, Price Discrimination Under the Robinson-Patman Act, to the same effect as stated in this opinion at pages 941–944 hereof.

[55] Report of the Attorney General's National Committee to Study the Antitrust Laws 158 (1955).

demonstrated by the evidence reflecting that U–R manufactured tubs sold by Sears under the trade name of Homart are only 15 inches in height without seats or soap dishes, whereas tubs sold in a less price-conscious market by Universal-Rundle under its own name are 16 inches in height with seats and soap dishes. Differences between other products in these two lines as hereinbefore set forth are also notable. Absence of evidence as to the significance of the differences in some does not establish likeness since there is no presumption of like grade and quality.

So extreme are the differences in the basic design of the U–R and Homart lines that their combined use is unrealistic. Therefore, even assuming that some items of a bathroom set are of like grade and quality aside from design, they are not adaptable to a use inconsistent with the original design selected. Thus, design under the facts of this case becomes an important physical feature, rather than merely an insignificant, decorative, or fanciful feature, within the interpreted meaning of the Robinson-Patman Act.

From the foregoing, despite the commendable and thorough presentation of evidence by counsel supporting the complaint, it must be concluded that the available evidence before the hearing examiner does not establish that the Homart products manufactured by Universal-Rundle for Sears and Roebuck, pursuant to Sears and Roebuck's specifications and the Universal-Rundle line of products sold under respondent manufacturer's name, are of like grade and quality. In fact, the evidence overwhelmingly establishes the compared products aforesaid are not of like grade and quality. Incident to this conclusion, it must be assumed that resultant competitive injury cannot be anticipated.

## PART II

*Discriminatory Prices to Certain U–R Line Customers*

10. In 1957, Rundle has sold its plumbing fixtures under its own brand name of "Universal-Rundle", sometimes referred to as "U–R", to certain customers in the Philadelphia-Camden market area at prices substantially higher than it has sold the same identical products to other customers who have been and are in competition with the unfavored customers in the resale of such products in said area. [That Rundle's trade products are of like grade and quality has been conceded by counsel for respondent. (Tr. 2629.)]

For example, in the Philadelphia-Camden area in 1957, respondent sold a particular type of lavatory, 22040, to Henry Supply Company of Camden, New Jersey, at a unit price of $23.80, and also at about the same time sold an identical product to Central Supply of Camden at

$21.28, a price differential of about $2.50 each, or approximately a 10% discount to Central. Both Central and Henry are in competition with each other in the resale of such products. (CX's 83Z–42, 84Z–57.)

Also, in 1957, Black & Brown, Incorporated, purchased from respondent a 5-foot, 14-inch recessed tub, 21152, at $55.48. At the same time, respondent sold to Mars Supply Company, competing with Black & Brown, the identical product at $49.10, or a percentage differential in favor of Mars of approximately 11%. (CX's 82Q, 85Z–52.)

Respondent sold a 19 x 17 inch lavatory, 22040, to Black & Brown at $23.80, and at about the same time it sold the identical product of identical grade and quality to Mars Supply Company at $21.28, amounting to approximately a 10% advantage over Mars. (CX's 82R, 85Z–51.)

Another illustration is shown by a Rundle sale to Hajoca in Camden, New Jersey, of a 5-foot recessed tub, 21110, at a net wholesale price of $60.91, although at the same time respondent also sold an identical tub to Mars Supply in Philadelphia for $51.12, or a differential of 16% in favor of Mars. (CX's 86N, 85Z–52.)

In May 1957, Rundle sold a "Castle" water-closet combination, 40350, to Henry Supply at $25.25, and also in May 1957, respondent sold an identical product to Central Supply at $21.45, or a price differential in Central's favor of approximately 17%. (CX's 83Z–26, 84Z–34.)

The following sales are also illustrative of discriminatory prices granted by respondent in the Philadelphia-Camden market area: [56]

(1) On February 28, 1957, tub 21106 to Mars at $70.23. (CX 85Z–6.)
On February 21, 1957, tub 21106 to Henry Supply at $73.93. (CX 83–R)—
approximately 5% advantage to Mars.

(2) On February 28, 1957, "Castle" comb. 40356 to Mars at $28.39 (CX 85Z–9) and to Henry at $31.55. (CX 83V)—
approximately 10% advantage to Mars.

(3) On May 15, 1957, 19 x 17" lavatory 22040 to Mars at $21.28 (CX 85Z–51) and to Henry at $23.80 (CX 83Z–30)—
approximately 10% advantage to Mars.

(4) On May 15, 1957, 24 x 21" sink 23101 to Mars at $16.39 (CX 85Z–53) and to Henry at $17.25 (CX 83Z–30)—
approximately 5% advantage to Mars.

(5) On May 15, 1957, "Castle" comb. blue 40352 to Mars at $26.85 (CX 85Z–56.)
On May 19, 1957, "Castle" comb. green 40353 to Henry at $31.55 (CX 83Z–31)—
approximately 15% advantage to Mars.

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[56] The witness Blackman indicates this competitive market area to be within a radius of 30 or 40 miles from Philadelphia in Pennsylvania and New Jersey. (Tr. 1101.)

(6) On September 4, 1957, tub 21145 to Mars at $46.27 (CX 85Z–97.)
On August 30, 1957, tub 21145 to Henry at $51.59 (CX 83Z–100)—
approximately 10% advantage to Mars.

(7) On September 4, 1957, tub 21140 to Mars at $41.94. (CX 85Z–97.)
On September 6, 1957, tub 21140 to Henry at $46.19. (CX 83Z–103)—
Slightly less than 10% advantage to Mars.

(8) On February 28, 1957, tub 21206 to Mars at $77.81. (CX 85Z–7.)
On February 15, 1957, tub 21206 to Nat Friedman Sons at $81.90. (CX 89F)—
approximately 5% advantage to Mars.

11. Competition in the *sale* of plumbing fixtures has been keen in the year 1957, and thereafter. (Tr. 1607, 1608, 1624–1627.) Competition in the *resale* of such products has also been keen, particularly in the Philadelphia-Camden area. (Tr. 534, 535, 546, 1042, 1055, 1106.) The evidence also establishes that price is a very important competing factor in the plumbing fixture business, and was in 1957. (Tr. 232, 244, 248, 249, 319, 320, 518, 936, 937, 1042, 1043, 1066, 1601, 1627.) In fact, one witness testified that price was the only important factor in the competition between his company and others in the area. (Tr. 1066, 1067.)

12. Furthermore, the margin of profit in the resale of plumbing fixtures appears to be small. (Tr. 530, 531, 534, 535, 1045, 1046, 1109, 1110.) The amount of cash discount of 2% allowed to customers of respondent from various suppliers is an important item to such customers and is essential to a showing of a profitable operation. Such cash discount is important to the purchasers of plumbing fixtures and they take advantage of same as a matter of policy. (Tr. 248, 249, 282, 527, 528, 529, 957, 958, 1045, 1046, 1068, 1069, 1109.)

As illustrative of the foregoing, an official of a wholesaler of plumbing fixtures testified that in the resale of U–R products price was "the important factor". (Tr. 1042.) He also replied to a question as to why his company took advantage of the 2% cash discount that "* * * it meant a lot of money to us. It was very important that we discount our bills because that is probably where our profit lies". (Tr. 1045, 1046.)

Another wholesaler of plumbing fixtures located in Philadelphia testified that his company, as a matter of policy, always took advantage of the 2% cash discount, and when asked to explain why, he stated:

It entered into our profit policy. We needed that two percent. (Tr. 1069.)

13. The evidence indicates that purchasers to whom respondent has sold its products in the year 1957 in the Philadelphia-Camden area have been in competition with each other in the resale of such

products. (Tr. 222–225, 263, 264, 309–312, 516–518, 520, 540–542, 934, 935, 939, 1038, 1042, 1062, 1064–1066, 1099–1101.) (See also footnote 56.)

14. Respondent is engaged in the production and sale and distribution in commerce, on a nation-wide basis, of its various products, including its U–R line.[57] It maintains plants in California in the West, New Jersey in the East, Wisconsin in the North, and Texas in the South, as well as in Pennsylvania. Its principal place of business is located in Pennsylvania. (Answer to complaint.) It also maintains a number of district sales offices, one of which is in Philadelphia. (CX 74.) In 1975, the sales office covering Philadelphia was located in Camden, New Jersey. (CX 1.)

In the sale of its products respondent invoices its customers from the main office at New Castle, Pennsylvania, and insofar as this record shows, all remittances are made to the New Castle office where the general office account is maintained. (See CX 80, as example.)

Respondent is not a series of separate companies operating plants in five different states, but it is one corporation engaged in the interstate business of manufacturing and selling plumbing fixtures. Sales to Camden purchasers are transactions that clear in the general offices in Pennsylvania as a part of the over-all interstate operations of the corporation as it is engaged in commerce. These operations include U–R line interstate sales in the Philadelphia-Camden area as well as Homart.

For example, when respondent sold to Mars Supply Co. (Tr. 303, 304, 309, 310), the complete transaction was an order received usually by or through a salesman of respondent (CX 85A–Z–144) and an invoice was submitted from respondent's home office and the merchandise ordered was usually shipped from the Camden plant of respondent or picked up by Mars at the plant or at a warehouse. An examination of the invoices of sales to Mars during 1957 establishes that the majority of the sales provided for shipment to Mars in Philadelphia. Of approximately 175 invoice transactions shown in the record, about 35 were directed to be shipped to or picked up for the New Jersey store, the remainder covering shipments destined for the Philadelphia address. (CX 85A–Z–144.)

*Analysis of Evidence Relating to the Sale of Respondent's U–R Products and Conclusions*

Respondent urges dismissal of the charges set forth in Part II hereof relating to the U–R line of products as distinguished from the Homart line of products on the following grounds:

[57] Findings 1–6 are also applicable to Part II involving U–R line sales.

1. There is a lack of substantial evidence to sustain the charges in the complaint because (a) in many instances no evidence of actual sales at different prices was introduced, (b) in many other instances none of the compared sales were in interstate commerce, and (c) in still other instances the compared sales transaction did not involve competing purchasers.

2. There is no evidence upon which to base a conclusion that competition has been or may be, adversely affected as a result of such price differentials that have shown to exist.

Apparently, the respondent assumes that if in some instances no evidence of actual sales at different prices was introduced, in other instances, none of the compared sales were in interstate commerce, and in other instances the compared sales transactions did not involve competing purchasers, these reasons represent appropriate grounds for not holding that there is no substantial evidence to sustain the charges in the complaint. The Commission is not required to adduce evidence of each and every actual sale at different prices. It is sufficient if a substantial number of sales reflect discriminatory pricing. Similarly, with regard to the compared sales being in interstate commerce it is unessential that every sale be in commerce. As regards respondent's argument that some compared sales transactions did not involve competing purchasers, it is sufficient if a substantial number of sales involve competing purchasers. Indeed, as indicated by the findings, there is substantial evidence of actual sales at different prices; there is substantial evidence of compared sales being in interstate commerce and substantial evidence of the fact that sales transactions involve competing purchasers in the Philadelphia-Camden market area. There is no merit to the respondent's position that each and every purchaser must be specifically identified as the competitor of another although some are. Presumptively purchasers are competitors if they market their products within the same geographical competitive market area (*i.e.*, the Philadelphia-Camden area).

The evidence herein, as demonstrated by the findings, clearly indicates that within the Philadelphia-Camden market area there were purchasers selling wholesale and retail who were receiving preferential prices in amounts below those received by others in the same market area from Universal-Rundle. In this connection, on the issue of jurisdiction, interstate sales and interstate clearances of intrastate sales were demonstrated by the evidence. Also evidenced was the seeking of interstate sales in the Philadelphia-Camden area through newspapers having circulation in that area. See *Progress Tailoring Co., et al.* v. *Federal Trade Commission*, 153 F. 2d 103 and *Ford Motor Company* v. *Federal Trade Commission*, 120 F. 2d 175, 314 U.S. 668.

The ultimate substantive issue to be decided is whether or not the evidence supports the charge that Rundle has violated section 2(a) of the Clayton Act in the sale of its U–R brand plumbing fixtures to its various trade customers by selling to some at lower prices than to others, who are in competition with those receiving the preferential prices.

The record discloses as heretofore found that particularly during the year 1957, respondent sold its U–R products to some purchasers in the Philadelphia-Camden area at prices substantially below those charged by respondent for products of like grade and quality to other competing purchasers in the same market area.

The statute does not require that there be a finding of injury actually having resulted from respondent's different prices, but only that the effect of the prohibited price discriminations may be substantially to lessen competition or to injure, destroy or prevent competition. *FTC* v. *Morton Salt Co.* 334 U.S. 37, 46 (1948).

Also in *Moog Industries, Inc.* v. *FTC*, 238 F. 2d 43, 51 (8th Cir. 1956), the court said in part:

> The Commission was not required to show that petitioners' rebate system has in fact adversely affected competition. The language—in the "effect" clause of the statute—is *may be* substantially to lessen competition * * * [Italic supplied.] The Supreme Court has repeatedly held that Section 2(a) of the act does not require a finding that the discriminations in price *have in fact* had an adverse effect on competition. *Corn Products Refining Co.* v. *Federal Trade Commission* 324 U.S. 726, 738, 742; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 46; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 356, 357. It has also held that: The statute is designed to reach such discriminations "in their incipience" before the harm to competition is effected. It is enough that they "may" have the prescribed effect. *Corn Products* case, 324 U.S. at 738.

The court stated further that: "With competition so keen, margins so small, and over-all net profits so low, it was clearly open to the Commission to find that rebates denied to some purchasers (well more than half in all lines) but granted to others, ranging up to 19%, may probably result in substantial injury to competition." (p. 51.)

The evidence further indicates as heretofore set forth in the findings, that the margin of profit is small and the market is highly competitive in selling the product at issue under these circumstances competitive injury may be anticipated if the respondent's pricing practices with regard to the sale of its U–R line of products are allowed to continue. In this connection, however, it should be pointed out that although injury to secondary line competition may properly be inferred from the substantial evidence adduced, there is an absence of substantial evidence indicative of injury to primary line competition. Therefore,

the hearing examiner is compelled to dismiss the complaint insofar as it relates to injury to primary line competition in the sale of U–R products.

It must be concluded, therefore, with regard to respondent's sale of its U–R line of products that the effect of respondent's discriminatory pricing may be to substantially lessen competition or tend to create a monopoly in violation of section 2(a) of the Clayton Act as amended.

As heretofore indicated in Part I hereof, the evidence does not establish that respondent, in selling its Homart line to Sears and Roebuck pursuant to Sears and Roebuck specifications, violated section 2(a) of the Clayton Act, since the U–R line and the Homart line are not products of like grade and quality.

*The Scope of the Order Relative to Respondent's U–R Brand Products*

Respondent urges that a limited order be issued in view of the fact that if there is a holding by the hearing examiner that discriminatory prices have been granted in the Philadelphia-Camden market area, there is no basis for assuming that discriminatory pricing practices are existent in other markets where the respondent does business. Under this theory, it would be necessary for the Commission to prove discriminatory prices in every market in which the respondent did business in order to issue a broad order covering all markets.

It appears to this hearing examiner that the most realistic approach in determining whether or not a broad or narrow order should be issued is to assume that if discriminatory pricing practices in one geographical market area are substantial, it should be assumed that they are representative of the conduct of a respondent in all the areas in which it does business, unless the circumstances show or the respondent goes forward with the evidence and shows that such a practice in the market area (or areas) selected by the Commission is (or are) not typical or representative of its practices elsewhere. In the instant case the respondent has not offered any evidence indicative of the fact that the particular market area selected by the Commission represents uncommon or isolated circumstances in the pricing practices of the respondent and it is not otherwise apparent.

In a section 2(a) case, *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. at page 473, the Supreme Court states:

> In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has

traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity. Moreover, "[t]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed * * * Congress placed the primary responsibility for fashioning such orders upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices. Therefore we have said that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." [58]

Accordingly, it is

ORDER

*Ordered*, That respondent Universal-Rundle Corporation, a corporation, and its officers, directors, agents, representatives and employees either directly, or through any corporate or other device, in conection with the sale of plumbing fixtures in commerce, as "commerce" is defined by the Clayton Act, do forthwith cease and desist from:

> Discriminating in price by selling "Universal-Rundle" brand or Universal-Rundle manufactured plumbing fixtures (exclusive of the "Homart" brand sold to Sears, Roebuck & Co.) of like grade and quality to any purchaser at prices higher than those granted any other purchaser, where such other purchaser competes in fact with the unfavored purchaser in the resale or distribution of such products.

and it is

*Further ordered*, That that part of Paragraph Six of the complaint which by alleging competition between respondent and respondent's competitors, may be deemed to allege primary injury as a result of alleged discrimination in price is herein and hereby dismissed, and it is

*Further ordered*, That the charges set forth in the complaint relative to the sale by respondent of its "Homart" brand of products to Sears & Roebuck Company are herein and hereby dismissed.

OPINION OF THE COMMISSION

JUNE 12, 1964

By Reilly, *Commissioner:*

The complaint herein charges respondent, a manufacturer of plumbing fixtures, with violating Section 2(a) of the amended Clayton Act.

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[58] This case has been recently cited in *Waltham Watch Company, et al.* v. *Federal Trade Commission*, U.S. Court of Appeals, 7th Circuit, June 5, 1963 [7 S.&D. 705], in a case involving a deceptive practice.

The matter is now before the Commission on cross appeals from the hearing examiner's initial decision.

Specifically, the complaint alleges that respondent violated Section 2(a) by:

1. Selling plumbing fixtures to Sears, Roebuck and Co. under Sears' "Homart" brand at lower prices than it sold plumbing fixtures under its own "U–R" brand to competitors of Sears, and

2. Selling plumbing fixtures under its own brand at different prices to purchasers competing in the resale of such fixtures.

The hearing examiner dismissed the allegation concerning sales to Sears, holding in his initial decision that counsel supporting the complaint had failed to prove that the plumbing fixtures sold to Sears for resale under the "Homart" brand were of like grade and quality with fixtures sold by respondent under its own brand.[1] He ruled that the allegation with respect to price discrimination in the sale of plumbing fixtures under respondent's own brand had been sustained by the evidence and he included in his initial decision an order prohibiting this practice.

*Appeal of Counsel Supporting the Complaint*

The principal question raised by this appeal is whether the examiner erred in holding that the evidence failed to establish that plumbing fixtures sold by respondent to Sears and those sold under respondent's own brand were of like grade and quality.

In presenting this phase of their case, complaint counsel selected seven "Homart" fixtures for comparison with their counterparts in the "U–R" line. These fixtures are one recess enameled cast-iron bathtub, one enameled cast-iron corner bathtub, one one-piece vitreous water closet, two cast-iron kitchen sinks, and one vitreous china water closet tank plus a vitreous water closet bowl from each brand.

The hearing examiner found, and these facts are undisputed, that the raw materials used by respondent in the production of the "Homart" line for Sears are the same as those used in the production of the "U–R" line of fixtures, although different amounts of such materials are used, and that the same manufacturing operations are employed in producing both lines. He nevertheless concluded, after making a detailed comparison of each pair of fixtures selected by counsel supporting the complaint, that because of the "actual and genuine physical differentiations" between the products in the two lines they could not be considered to be of like grade and quality.

[1] The issue of like grade and quality was severed from all other issues in the proceeding by order of the hearing examiner, and this is the only issue before the Commission insofar as respondent's transactions with Sears are concerned.

In comparing the 4½ foot enameled cast-iron bathtubs, for example, the examiner found that the "U–R" product was 16 inches in height, whereas the "Homart" was 15 inches. He noted in this connection that various purchasers of plumbing fixtures, including wholesalers, dealers and plumbers, had testified without exception that it is an accepted industry practice for the price of a bathtub to be dependent upon the height of the tub. The examiner also found that the "U–R" tub was 2¾ inches wider than the "Homart", that its enameled area was more than two square feet greater, and that it had a ¾ inch higher water level. He further found that the "U–R" tub conformed to commercial standards adopted by the industry, whereas the "Homart" tub did not.

The record also shows, and the hearing examiner has found, that the "U–R" tub was constructed with a wide front apron forming a 6½ inch seat and that it had two built-in soap dishes. The Sears product on the other hand had neither the seat nor the soap dishes. The examiner also took into consideration the difference in the design of the two bathtubs, pointing out that the "Homart" tub, unlike the "U–R", was constructed with an unbroken straight line at the floor level of the front apron so that it could be more easily installed by the "do-it-yourself" class of customers to whom Sears sold.

Relying upon the testimony of various members of the trade, the examiner found that certain of the characteristics of features found in the "U–R" line, but not in the "Homart", made the product more desirable to the consumer and hence enhanced its marketability. He also found on the basis of this testimony that certain features of some of the "U–R" products improved their functional utility. Having found that the physical differences between the two lines were not merely artificial or fanciful, he ruled that counsel supporting the complaint had the burden of proving that, notwithstanding these differences, the products were of like grade and quality, or stated differently, that these variations did not affect the grade and quality of the compared products. He held that counsel had failed to sustain this burden.

Counsel supporting the complaint do not challenge the examiner's findings that physical differences exist between the compared products nor do they deny that such differences affect the marketability of the products. They contend however that the fact that the differences in the products are such that one can command a higher price than the other does not create a difference in grade or quality. To support this argument they cite *In the Matter of The Borden Company*, Docket

7129 (Final Order 1–30–63) [62 F.T.C. 130] wherein the Commission rejected a contention that goods were not of like grade and quality because one item was regularly marketed at a higher price than another.[2]

Counsel's argument, as we understand it, is that physical differences which enhance the marketability of a product are not of sufficient importance to change or affect the grade or quality of that product since the Commission has held in the *Borden* case that branded and unbranded goods were of like grade and quality even though the branded article was regularly marketed at a higher price than the unbranded one. We find no merit in this argument. In the *Borden* case the compared products were physically identical and sold at different prices. Here the products are physically different and sell at different prices. The only similarity between the two cases is that the products compared in each sell at different prices.

The issue here is whether a showing of physical variations between two products of such a nature as to create a consumer preference for one over the other will support a conclusion that the two products are not of like grade and quality. Counsel supporting the complaint does not meet this issue but argues instead that the products should be considered of like grade and quality despite these physical differences claiming that under *Borden* a difference in marketability has no bearing on the question of like grade and quality. The fallacy of this argument however is that the holding in *Borden* related only to a comparison of intrinsically identical products. That case held that differences in brands affecting consumer preference or marketability of such products could be disregarded in applying the "like grade and quality" test. It does not support the contention of counsel supporting the complaint that physical differences in products which affect consumer preference or marketability can also be disregarded. Such an interpretation of the statute would ignore the physical test of like grade and quality and bring within the purview of Section 2(a) transactions involving goods which may be of completely different grade or quality. The argument of counsel supporting the complaint is therefore rejected.

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[2] Counsel also refer to the Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) wherein the majority expressed the view that branded and unbranded commodities should be considered of like grade and quality despite the fact that the public is willing to pay more for one than the other and that "tangible consumer preferences as between branded and unbranded commodities should receive due legal recognition in the more flexible 'injury' and 'cost justification' provisions of the statute".

*Respondent's Appeal*

As stated above, the examiner found that respondent had discriminated in price in the sale of plumbing fixtures under its "U–R" brand and that such discriminations had had the proscribed effect on competition at the buyer level. All evidence adduced by complaint counsel in support of this charge related to sales made by respondent to customers located in Philadelphia, Pennsylvania, and Camden, New Jersey.[3]

Respondent contends first of all that the examiner erred in holding that sales to purchasers located in Camden, New Jersey were "in commerce", pointing out that all products involved in these transactions were manufactured by respondent at its cast-iron and vitreous china manufacturing plants located in Camden and were either delivered directly to the purchaser's place of business or were picked up by the purchaser at respondent's Camden plants. The examiner's holding on this point is based upon the finding that all sales by the Camden plants to purchasers located in New Jersey are "cleared" through respondent's principal office in New Castle, Pennsylvania. We agree with respondent that this finding is not supported by the record. Insofar as we can determine from our review of the evidence, New Jersey purchasers place their orders directly with the Camden plants (sometimes for delivery on the same day) and are invoiced from respondent's Camden office. There is no proof that these transactions are cleared through New Castle nor does the record show, as contended by complaint counsel, that respondent's entire manufacturing and sales operations are subject to the direct supervision and control of respondent's main office.[4] We hold therefore that the examiner erred in finding that respondent's sales from its Camden plants to purchasers located in New Jersey were sales in interstate commerce.

The record shows, however, that sales were made from respondent's Camden plants to purchasers located in Philadelphia. Respondent does not deny that these sales were in commerce but contends that its customers located in Philadelphia did not compete with customers located in Camden and that the examiner erred in finding that Philadelphia and Camden were in the same market area. It is unnecessary for us to

[3] The period selected by complaint counsel to prove unlawful price discriminations was limited to the year 1957. Respondent agreed not to raise the defense that evidence relating to its activities during that time is moot.

[4] The principal evidence upon which counsel rely to support this argument is general testimony of respondent's vice president in charge of manufacturing that he was "charged with the responsibility of all manufacturing at Universal-Rundle" and that he participated with other industry members in drafting commercial standards for plumbing fixtures which, according to complaint counsel, "directly dictate the course of U–R's manufacturing operations."

determine whether all of respondent's customers in these two cities competed with each other or whether Philadelphia and Camden form one trading area insofar as the sale or resale of plumbing supplies is concerned since the record is clear, and respondent concedes, that its favored customer, Mars Supply Company, located in Philadelphia, competed with non-favored customers also located in Philadelphia.[5] The record is equally clear that Mars Supply Company also competed with respondent's non-favored purchasers in New Jersey through a branch outlet located in the Camden area.[6]

The next issue raised by this appeal is whether respondent's favored and non-favored customers were competing at the same distributional level. Respondent argues that its favored customer, Mars, was a "DTU", a trade term for a dealer or retailer selling directly to the ultimate consumer, whereas its non-favored customers were wholesalers selling to plumbers and plumbing contractors. Respondent contends therefore that it was incumbent upon counsel supporting the complaint to prove that the "DTU" was competing with plumbers purchasing from the non-favored wholesalers and that such competition was adversely affected by respondent's price discriminations.

We find no merit to this argument since it ignores the showing of substantial competition between "DTU's" and wholesalers in the resale of plumbing fixtures to the public. While it is true that Mars engaged in consumer advertising and the wholesalers did not, it is clear that consumer sales were an important segment of the wholesalers' business. Almost without exception, the various non-favored wholesalers testified that they sold plumbing fixtures directly to the public and, in some instances, most of their sales were of this type. As a matter of fact, there appears to be little difference between the "DTU's" and many of the so-called "wholesalers". The similarity between the two as shown in this record is perhaps best described by the following testimony of respondent's vice president, Blackner:

Many so-called DTU's who are wholesaler-retailers like to consider themselves wholesalers, because that is a step above the DTU. It carries more legitimacy;

[5] Respondent states in its brief that its contention with regard to the lack of competition due to the absence of geographic proximity is directed solely to the proposition that purchasers in Camden are not in competition with purchasers in Philadelphia and vice versa.

[6] Respondent contends that the plumbing fixtures resold by the New Jersey branch of Mars were invoiced separately by respondent and shipped directly from respondent's Camden plants to the Mars New Jersey location. The record reveals that the plumbing fixtures in question were invoiced to Mars Supply Company of Philadelphia for delivery in New Jersey. Whether or not these shipments were in commerce, it is clear that Mars was competing with respondent's non-favored customers in New Jersey through a branch outlet and that Mars' cost of acquiring its inventory of "U–R" fixtures was reduced by reason of the lower discriminatory prices it received on purchases which respondent concedes were made in interstate commerce.

so although a businessman in the plumbing supply business may sell a majority of his fixtures directly to the consumers and a very small percentage to a plumbing contractor, he still likes to be called a wholesaler. There is a very fine line of demarcation * * *.

The argument that there was no showing of competition in the resale of respondent's products is rejected.

Respondent has also taken exception to the examiner's finding of competitive injury, contending that the lower prices in question were not arbitrarily granted to certain purchasers and denied to others but were available to any purchaser choosing to order a truckload of respondent's plumbing fixtures. Since it emphasizes the fact that the only price differential involved in this matter was the difference between truckload and less than truckload prices and since it criticizes the examiner for failure to mention this fact in his initial decision, it is apparently respondent's position that truckload discounts are less likely to cause competitive injury than other types of discounts.

It also points out in this connection that with the exception of *Morton Salt* [7] there have been few cases involving violations of Section 2(a) by reason of truckload or carload discounts.

In determining whether respondent's price discriminations have had the requisite effect on competition, the fact that a truckload discount is involved is significant only because it is a type of discount offered to all purchasers and, theoretically at least, is available to all. As stated by the Court in *Morton Salt* "a 10-cent carload price differential against a merchant would injure him competitively just as much as 10-cent differential under any other name" and "[S]ince Congress has not seen fit to give carload discounts any favored classification we cannot do so." If, however, the non-favored customers were fully able to avail themselves of the truckload discount, as respondent contends, it would be difficult to infer competitive injury from the showing that they purchased in smaller quantities, and at a higher price, than competitors who took advantage of the discount. But, contrary to respondent's contention, the testimony of various non-favored wholesalers discloses that truckload quantities were beyond their buying capabilities.[8] As a matter of fact, the total annual purchases of "U–R" products by several of the non-favored customers were less than the smallest order shown in the record which qualified for a truckload discount.

[7] *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

[8] For example, one of the partners in Nat Friedman's Sons, a non-favored purchaser, testified as follows:

Q: Did you ever buy plumbing fixtures in truckloads?

A: We did not.

Q: Why not?

A: Lack of space and lack of money.

Respondent states in its reply brief that the witnesses representing such non-favored purchasers also testified that they purchased fixtures from other manufacturers in addition to respondent, thereby implying that these purchasers were not "small struggling concerns unable to take advantage of the discounts in question". The record shows, however, that during the relevant period many of the firms in question purchased all or most of their plumbing fixtures from respondent.

Another argument made by respondent in opposition to the examiner's finding of competitive injury is that favored customer Mars did not purchase all of its requirements in truckload quantities and consequently purchased some "U-R" products at the higher less-than-truckload price. We fail to see the relevance of this point since it is undisputed that most of respondent's sales to Mars during the period under consideration were made at lower prices than sales to non-favored purchasers competing with Mars.

Respondent also contends that the evidence does not support the conclusion that price differentials ranging up to 15%, as found by the hearing examiner, would have the defined effect on competition in the resale of plumbing fixtures. While respondent concedes that the probability of competitive injury may be inferred from a showing as to the substantiality of the price differences, it argues that there is no factual basis for finding that the differentials involved in this proceeding were substantial; i.e., of sufficient magnitude to give the favored purchasers a significant competitive advantage over their non-favored rivals.

One test for determining the substantiality of a price differential in a secondary line case is whether, in the competitive situation shown to exist, the differential is sufficient, if reflected in the resale price of the commodity, to divert business from one dealer to another. *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726 (1945). The record clearly shows, in this connection, the competitive conditions existing at the buyer level, and the testimony of numerous purchasers of respondent's plumbing fixtures establishes beyond question that price competition in the resale of such products was extremely keen. An official of one such customer, Henry Supply Company, testified as follows:

A. * * * There is a class of customer who wants the finest of merchandise, good quality, and they are willing to pay for it, and then we have a class of people who want the cheapest thing that they can get regardless of quality.

For instance, they brought a property and they want to put a bathroom in it and it is an investment and they want to get away with as small an investment as possible. They will come in and get my price on whatever it is, a three piece

bathroom, and if I am low enough, I will get the sale. And they are not afraid to tell me whether I am high.

Q. Are these—would these be consumers or plumbers?

A. Both. Both consumers or plumbers.

* * * * * * *

Q. Mr. Schreibstein, in dealing with your customers on the floor of your store, do you have any knowledge as to whether they were concerned about the price of the products?

A. Whether my customers were concerned with the price?

Q. Yes.

A. And how.

Q. Did they make any comparisons of the prices of your——

A. Yes, they do.

Q. —prices—with others?

A. Yes, they do. In most instances they do.

Another customer gave similar testimony:

Q. What factors were important in the sale of those fixtures?

A. Do you mean price?

Q. Well, was that one of the factors?

A. Well, that is the important factor.

* * * * * * *

Q. You testified on direct examination that price was one of the important factors in selling plumbing fixtures. What other factors are important other than price?

A. I don't know.

A partner in Nat Friedman's Sons, a non-favored purchaser, testified:

Q. * * * On the basis of the conversations which you had with these customers, did you form any opinion as to what the principal factors of competition were between your company and the other companies which were selling to similar people in your area?

A. Yes.

Q. What did you believe that those factors were, sir?

A. Merely price.

Q. Were there any other factors which were of significance in your judgment?

A. None whatsoever.

An official of Black and Brown testified:

A. It seems to be characteristic of our business that you are always in competition * * * on prices and from other situations. You may not always hear your competitor's name. But your customer may tell you "well, you are so and so much higher than your competition", or you don't get the order and you don't know why you didn't get the order.

The record shows in this connection that favored customer Mars received price differentials of up to $5.00 on items sold by Universal-Rundle at prices ranging from approximately $20 to $80. On the basis of the testimony as to the intensity of price competition at the dealer

level we find that these differentials if reflected in the resale price of the various plumbing fixtures would have been sufficient to divert business from non-favored customers to Mars.[9]

Respondent also challenges the examiner's reliance on evidence concerning the importance of the 2% cash discount in finding competitive injury. It points out in this connection that the record does not disclose the net profits realized by respondent's customers and contends that the "two percent inferred effect theory" is applicable only when the two percent is compared with the buyers' margin of profit. We do not agree. While the Commission has in some cases compared net profits with cash discounts to emphasize the importance of the latter, a similar showing can also be made by testimony of both favored and non-favored purchasers, who, being familiar with existing competitive conditions, are in a position to state whether the cash discount is important. In the final analysis a determination as to the probability of competitive injury from such a showing must be made by comparing the cash discount with the price differential.[10] Where, for example, the evidence reveals that purchasers consider the cash discount to be an important element insofar as their ability to compete is concerned, it may be readily inferred that a larger discount would have more than an inconsequential effect on competition among them if granted to some and denied to others.

As stated above, the differentials involved herein ranged up to 15% and averaged about 10%. One non-favored customer testified as follows in response to a question as to why his company took advantage of the 2% cash discount:

> Well, it meant a lot of money to us. It was very important that we discount our bills because that is probably where our profit lied.

Another customer testified that the cash discount "entered into our profit policy. We needed that 2%". Another non-favored customer testified that his company's gross profit on plumbing fixtures ran be-

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[9] See also *Morton Salt, supra,* (at page 47) wherein the Court stated: "That respondent's quantity discount did result in price differentials between competing purchasers sufficient to influence their resale price of salt was shown by the evidence. This showing in itself is adequate to support the Commission's appropriate findings that the effect of such price discriminations 'may be substantially to lessen competition * * * and to injure, destroy and prevent competition'."

[10] As was stated in the Commission's opinion in *Moog Industries, Inc.,* 51 F.T.C. 931 (1955), *aff'd,* 238 F. 2d 43 (1956): "The substantiality of respondent's price differences and the probability of injury to competition can best be shown by comparing it with the competitive effect of the amount represented by respondent's standard 2% discount for cash given to all customers. Distributors of respondent testified that they invariably took advantage of this 2% cash discount and that this discount was essential to the conduct of their respective businesses * * *."

tween 10% and 15% and testified as follows on cross-examination as to the importance of the cash discount:

Q. Mr. Tepper, is the reason you take the two per cent cash discount basically because if you do not take that discount, your lines of credit will be jeopardized?

A. No. That represents a margin of profit without moving a truck or doing any additional paperwork or handling, and two per cent in our line, which is very competitive, is a big item.

From our review of all the evidence we are convinced that the price differentials involved in this proceeding were sufficient to give the recipients of the lower prices a substantial advantage over their non-favored competitors. Consequently we find no error in the examiner's holding that these discriminations had the prescribed effect on competition. Respondent's argument is therefore rejected.

Respondent's final argument concerns the scope of the order to cease and desist contained in the initial decision. Respondent urges that the order be limited so as to prohibit only the granting of truckload discounts to purchasers located in Philadelphia and Camden. As to the request for geographic limitation, respondent does not dispute that its policy of granting truckload discounts applies to all sales throughout the nation, but argues that there is no evidence that the circumstances shown to exist in Camden and Philadelphia exist elsewhere in the country. In this connection, it contends that the purchasers in Camden and Philadelphia who bought in less than truckload quantities did so because they were so close to respondent's plants that they could use them as their warehouse. It may be inferred therefore, according to respondent, that purchasers farther away from these plants always buy in truckload quantities in order to maintain an adequate inventory of plumbing fixtures. The obvious error in this reasoning, however, is the premise that purchasers in Camden and Philadelphia bought less than truckload quantities solely because they had easy access to respondent's plants. As stated above, the record establishes that a number of respondent's non-favored customers purchased in less than truckload quantities because they were unable to buy in larger quantities. The argument that the order should be limited to transactions in the Philadelphia and Camden area is, therefore, rejected.

Respondent has offered no reason why the order should prohibit only differentials between truckload and less than truckload prices and we can think of none.

To the extent indicated herein respondent's appeal is granted and in all other respects it is denied. The appeal of counsel supporting the complaint is denied. The initial decision is modified to conform with the views expressed in this opinion and, as so modified, will be adopted as the decision of the Commission.

FINAL ORDER

Respondent and counsel in support of complaint having filed cross appeals from the initial decision of the hearing examiner, and the matter having been heard on briefs and oral argument; and the Commission, for the reasons stated in the accompanying opinion, having granted in part and denied in part respondent's appeal and having denied the appeal of counsel in support of complaint, and having modified the initial decision to conform with the views expressed in said opinion:

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

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

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IN THE MATTER OF

## KORBER HATS, INC., ET AL.

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

*Docket 8190. Complaint, Nov. 28, 1960—Decision, June 12, 1964*

Order modifying original desist order of March 28, 1962, 60 F.T.C. 642, in accordance with the direction of the First Circuit dated Dec. 31, 1962, 311 F. 2d 358 (7 S.&D. 611), to recognize that the word "Milan" has acquired a secondary meaning indicative of a type of weave or braid, in addition to its original use as descriptive of men's hats manufactured in Italy of wheat straw.

*Mr. Terral A. Jordan* for the Commission.

*Mr. Isador S. Levin* of *Levin and Levin*, Fall River, Mass; and *Weil, Gotshal & Manges*, New York, N.Y., by *Mr. Ira M. Millstein*, *Mr. Marshall C. Berger*, and *Mr. Irving Scher* for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

NOVEMBER 22, 1963

In the complaint, which was issued on November 28, 1960, the respondents are charged with mislabeling of hats manufactured and