IN THE MATTER OF

# DALE A. CARDNER DOING BUSINESS AS CARDNER SUPPLY COMPANY

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 6113. Complaint, Aug. 7, 1953—Decision, Feb. 4, 1954*

Where an individual engaged in the interstate sale and distribution of drug and cosmetic preparations for the treatment of the hair and scalp; in advertising a combination of his said preparations under the designation "Bash's Formula Eight" in circulars, leaflets, radio continuities, and other advertising matter, directly and by implication—

(a) Falsely represented that the use thereof would eliminate the cause of falling hair, prevent baldness or partial baldness, and cause the growth of hair on bald and partially bald heads;

(b) Falsely represented that baldness was caused only by fungus infection;

(c) Falsely represented through the use of the designation "Doctor" or the abbreviation "Dr." that said preparations had been made according to the formula or under the supervision, advice, or control of a doctor of medicine;

(d) Falsely represented that the manufacturer of said "Bash's Formula Eight" was an outstanding authority on fungus infections of the hair:

*Held*, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Earl J. Kolb*, hearing examiner.
*Mr. Michael J. Vitale* for the Commission.
*Mr. Don Marlin*, of Los Angeles, Calif., for respondent.

## DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated February 4, 1954, the initial decision in the instant matter of hearing examiner Earl J. Kolb, as set out as follows, became on that date the decision of the Commission.

## INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 7, 1953, issued and subsequently served its complaint in this proceeding upon respondent, Dale A. Cardner, an individual doing business as Cardner Supply Company, charging him with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. The respondent filed his answer which was later amended upon the record in which answer as amended, he admitted all material allegations of fact set forth in said complaint and waived all intervening procedure and further hearings as to the said facts. Thereafter, the proceeding regularly came on for final consideration by the above-named hearing examiner theretofore duly designated by the Commission upon said complaint and answer thereto, all intervening procedure having been waived and said hearing examiner having duly considered the record herein finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Dale A. Cardner is an individual, doing business under the name of Cardner Supply Company with his principal office and place of business located at 14516 South Ibex Avenue, in the city of Norwalk, State of California.

PAR. 2. Respondent for more than two years immediately prior to the filing of the complaint herein was engaged in the sale and distribution of drug and cosmetic preparations for the treatment of the hair and scalp of human beings as drug and cosmetic preparations are defined in the Federal Trade Commission Act. Subsequent to the issuance of the complaint herein respondent discontinued said business and is no longer disseminating or causing the dissemination of any advertisements by means of the United States mails or by any means in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. The designation used by respondent for the drug and cosmetic preparations for the hair and scalp sold and distributed by him as aforesaid and the formula and directions for said preparations are as follows:

Designation: "Bash's Formula Eight"
Formula: *Detergent Shampoo*
1 Gallon Acidolate
8 ounces Triacetin
*Solution No. 1.*
1 lb. Sodium Perborate
1 lb. Urea
1 qt. Triethanolamine Phenolphthalein used as color indicator.
5 gal. Distilled Water.
*Solution No. 2.*
1% Aminoacetic Acid
1% Acetylsalicylic

Formula: *Detergent Shampoo*—Continued

*Solution No. 2*—Continued

1% Glacial Acetic Acid

10 c. c. Thiamin Chloride (100 mgs. to 1 c. c.)

10 c. c. Ascorbic Acid (100 mgs. to 1 c. c.)

10 c. c. B Complex

(Vit. $B_1$ 10 mgs. to 1 c. c.

(Vit. $B_2$ 10 mgs. to 1 c. c.

(Niacin 10 mgs. to 1 c. c.

(Vit. $B_6$ 10 mgs. to 1 c. c.)

1 c. c. Pituitary Substance (Antuitrin 500 units per c. c.)

1 c. c. Anterior Pituitary Substance (Pituitrin 10 I units per c. c.)

1 gal. Solution 777 (an emulsion) and water sufficient to make one gallon Lotion 777;

| | |
|---|---|
| Cetyl alcohol | 30 grams |
| Urea | 10 grams |
| Benzoic Acid | 2 grams |
| Defatted Lanolin | 15 grams |
| Oil of sweet almonds | 10 c. c. |
| Mineral Oil | 10 c. c. |
| Water to make | 1000 c. c. |

*Solution No. 3.*

1 gal. of Emulsion 777

10 c. c. Rubramin (Vitamin $B_{12}$–30 Micrograms per c. c.)

8 oz. Wheat Germ Oil

4 oz. Triacetin

Directions:

First: Use Special Shampoo twice weekly. Moisten hair first, then rub a little Special Shampoo in well. Allow to dry for 2 to 3 minutes, then rinse with warm water.

Second: Apply Solution No. 1 of Formula Eight to the scalp each morning. Apply directly to the scalp with medicine dropper, fingertips, or dab of cotton and allow to dry.

Third: Apply thin coat of Special Booster every day, any time between morning and night solutions, over thinning and denuded areas and massage gently until completely absorbed. Best results obtained if steamed in with warm towels for approximately 15 minutes.

Fourth: Apply Solution No. 2 of Formula Eight to the scalp at night before retiring. Apply directly to the scalp with medicine dropper, fingertips or dab of cotton and allow to dry.

PAR. 4. Respondent caused said drug and cosmetic preparations designated "Bash's Formula Eight," when sold, to be transported from his place of business in the State of California to purchasers thereof located in various other States of the United States. At all times mentioned herein respondent has maintained a course of trade in said preparations in commerce between and among the various States of the United States.

PAR. 5. In the course and conduct of the aforesaid business, the respondent has disseminated and has caused the dissemination of advertisements concerning his said preparations "Bash's Formula Eight" by the United States mails, and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to circulars, leaflets, radio continuities and other advertising matter for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of said preparation; and the respondent has also disseminated, and has caused the dissemination of advertisements concerning said preparations, by various means, including but not limited to the means aforesaid for the purpose of inducing, and which were and are likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in said advertisements, disseminated and caused to be disseminated as hereinabove set forth, are the following:

Almost beyond belief, at the end of the six months' contest, was the announcement that hair had started to grow again on every one of the bald heads.

Formula Eight has caused hair to grow again on thousands of bald heads in all age groups, both men and women!

Actually, we have yet to find a condition of baldness that has failed to respond to proper application of Formula Eight. * * * Then you will understand why we sincerely believe that Formula Eight holds a promise of hope to millions afflicted with baldness—Why we believe that Formula Eight will restore normal, healthy hair to bald scalp areas.

Bash's Formula Eight is so compounded that it not only arrests incipient baldness but can help recovery from partial or complete baldness regardless of how long the condition has existed.

It will, properly used, eliminate the cause of falling hair very promptly, and by faithful and continued use will help nature regain its proper balance and help promote the regrowth of hair.

* * * a substance that will actually grow hair on bald heads.

* * * my barber gave my new hair its first "haircut" last week!

The Bash theory—that baldness is caused by an invisible fungus infection of the scalp—now establishes that baldness is not hereditary—that falling hair and other scalp conditions leading to baldness can be quickly stopped and hair cells helped to grow hair again.

Yes; Bash's Formula Eight holds a promise of hope to millions now afflicted with partial or complete baldness, regardless of how long the condition has existed.

The story of Dr. Bash's Formula Eight.

Dr. I. J. Bash has, through intensive research in Bio-chemistry, emerged as an outstanding authority on the subject of fungus infection of the hair.

Dr. Bash's Formula Eight is the revolutionary new product that actually helps nature restore hair oils to function as nature intended—to grow healthy hair again!

PAR. 6. Through the use of the aforesaid statements and representations and others of similar import and meaning, not specifically set out herein, respondent represented, directly and by implication, that the use of his preparations will eliminate the cause of falling hair; will prevent baldness or partial baldness and cause the growth of hair on bald and partially bald heads; and that baldness is caused only by fungus infection.

PAR. 7. The aforesaid representations are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, the use of respondent's hair preparations will not eliminate the cause of falling hair, will not prevent baldness or partial baldness and will not cause the growth of hair on bald or partially bald heads. Baldness is not caused solely by fungus infection.

PAR. 8. Respondent, by the use of the designation "doctor," or the abbreviation thereof "Dr.," in advertisements and representations referring to the manufacturer of his preparations designated as "Bash's Formula Eight" thereby represents or implies that such preparations have been made according to the formula or under the supervision, advice or control, of a doctor of medicine. In truth and in fact, the manufacturer of the preparations designated as "Bash's Formula Eight," is not a physician or doctor of medicine duly licensed as such to practice medicine by a recognized governmental authority, and does not possess any degree, or title of doctor, nor have the preparations designated as "Bash's Formula Eight" been made according to the formula or under the supervision, advice or control, of a doctor of medicine or any doctor. Further, respondent's statement that the manufacturer of "Bash's Formula Eight" is an outstanding authority on fungus infections of the hair is false for the reason that the person referred to is not an authority in any sense on said subject.

PAR. 9. The use by the respondent of the foregoing false, deceptive and misleading statements and representations, disseminated as aforesaid, has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and into the purchase of substantial quantities of respondent's preparations because of such erroneous and mistaken belief.

## CONCLUSION

The acts and practices of respondent, as herein found, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

## ORDER

*It is ordered*, That the respondent, Dale A. Cardner, an individual, doing business as Cardner Supply Company or under any other name, and his representatives, agents or employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the preparations known as "Bash's Formula Eight," or any other preparations of substantially similar composition or possessing substantially similar properties, whether sold under the same name or under any other name, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication:

(a) That the use of said preparations will eliminate the cause of falling hair; will prevent baldness or partial baldness; or will promote growth of hair on bald or partially bald heads.

(b) That baldness or partial baldness is caused only by fungus infection.

2. Disseminating, or causing to be disseminated, by any means, any advertisement, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations prohibited in paragraph 1 of this order.

*It is further ordered*, That the respondent, Dale A. Cardner, an individual, doing business as Cardner Supply Company or under any other name, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the preparations known as "Bash's Formula Eight," or any other drug or cosmetic preparation for treatment of the hair or scalp, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Using the word "Doctor," or any abbreviation or simulation thereof, to designate, describe or refer to any such preparation not made in accordance with the formula or under the supervision of a member of the medical profession; or otherwise representing, directly or by implication, that any such preparation has been so made.

(2) Representing, directly or by implication, that the manufacturer of said preparations is an authority on fungus infections of the hair.

ORDER TO FILE REPORT OF COMPLIANCE

*It is ordered*, That the respondent, Dale A. Cardner, an individual, doing business as Cardner Supply Company, 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 [as required by said declaratory decision and order of February 4, 1954].

IN THE MATTER OF

# U. S. PRINTING & NOVELTY CO., INC., ET AL.

## MODIFIED CEASE AND DESIST ORDER

*Docket 5647. Order, Feb. 5, 1954*

Order, following per curiam decision of the Court of Appeals and order of said Court dated June 4, 1953, 204 F. 2d 737, modifying the Commission's order issued on Sept. 4, 1952, Docket 5647, 49 F. T. C. 190, by substituting the words "*which are to be used, or which, due to their design, are suitable for use*" for the words "*which are designed or intended to be used*" in the sale or distribution of merchandise to the public by means of a game of chance, etc.

Before *Mr. Clyde M. Hadley* and *Mr. Abner E. Lipscomb*, hearing examiners.

*Mr. J. W. Brookfield, Jr.*, for the Commission.

*Nash & Donnelly*, of Washington, D. C., for respondents.

## MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by a hearing examiner of the Federal Trade Commission upon the complaint of the Commission and respondents' substituted answer waiving the taking of testimony and other procedure; and said hearing examiner having filed his initial decision; and counsel for respondents having filed with the Commission an appeal from said initial decision; and the Commission having considered the proceeding upon the record herein, including briefs in support of and in opposition to the appeal; and the Commission, after granting said appeal in part and denying it in part, having made its findings as to the facts and conclusion drawn therefrom and on September 4, 1952, issued an order to cease and desist against respondents U. S. Printing & Novelty Co., Inc., Benjamin Blush, and Jack Blush, and an order dismissing the complaint as to respondent Hyman Abramowitz; and

Respondents U. S. Printing & Novelty Co., Inc., Benjamin Blush, and Jack Blush, having filed in the United States Court of Appeals for the District of Columbia Circuit their petition to review and set aside said order to cease and desist; and the Court having heard the matter on briefs and oral argument and having thereafter, on October 22, 1953, served upon the Commission an order dated June 4, 1953 (petition for writ of certiorari filed by respondents having been denied by the Supreme Court of the United States on October 12, 1953), modifying said order to cease and desist, and having thereafter, on November 18, 1953, entered another order enforcing, as modified, said order to cease and desist; and

The Commission being of the opinion that its order should be modified so as to accord with the aforesaid orders of the United States Court of Appeals for the District of Columbia Circuit:

*It is ordered*, Therefore, that respondent U. S. Printing & Novelty Co., Inc., a corporation, its officers, and respondents Benjamin Blush and Jack Blush, individually and as officers and directors of said corporate respondent, U. S. Printing & Novelty Co., Inc., and their respective representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, push cards, punchboards, or other lottery devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

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

*It is further ordered*, That the complaint herein be, and it hereby is, dismissed as to respondent Hyman Abramowitz.

IN THE MATTER OF

# I. Z. HARRIS AND PAULINE D. HARRIS DOING BUSINESS AS VELTEX COMPANY

## DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 6125. Complaint, Oct. 13, 1953—Decision, Feb. 7, 1954*

Where two partners engaged in the interstate sale and distribution of their "V–T" drug or medicinal preparation; in advertising, in newspapers, and by radio—

(a) Represented that said preparation, taken as directed, was an adequate and effective treatment for and gave fast relief from symptoms and conditions of aches and pains;

The facts being it possessed no analgesic properties; the only type of ache or pain for which it would have any value would be one caused by a deficiency of Vitamin $B_1$ or Vitamin $B_2$, niacinamide, or iron, in which event the deficiency and its resultant symptoms, including aches and pains, would not be corrected until after days or even weeks of administration of the preparation according to directions;

(b) Represented falsely that said preparation was an effective treatment for and gave fast relief from the symptoms and conditions of weakness, tiredness, loss of pep, nervousness, sleeplessness, nausea, headaches, and gas pains;

(c) Represented as aforesaid that it would cause the rebuilding of rich red blood and red blood cells, and that it was an adequate vitamin and mineral dietary supplement which provided all the essential vitamins and minerals;

The facts being that the formation of red blood and red blood cells would be stimulated by it only where such a deficiency resulted solely from iron deficiency anemia; it did not supply the adult minimum daily requirements or calcium or phosphorus, did not supply the required minerals, iodine, or such essential vitamins as A, C, or D, and could not therefore be properly characterized as such a supplement; and

(d) Falsely represented through reference to the yeast and liver extracts as ingredients, that the preparation contained sufficient quantities thereof to be of substantial therapeutic value;

(e) Failed to reveal with equal conspicuousness and in immediate connection with the symptoms and conditions enumerated that their preparation was of value only when the symptoms were caused by deficiencies of Vitamins $B_1$, $B_2$, niacinamide, or iron:

*Held*, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Everett F. Haycraft*, hearing examiner.

*Mr. Joseph Callaway* for the Commission.

*Leader*, *Tenenbaum*, *Perrine & Swedlaw*, of Birmingham, Ala., for respondents.

## Decision of the Commission

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated February 7, 1954, the initial decision in the instant matter of hearing examiner Everett F. Haycraft, as set out as follows, became on that date the decision of the Commission.

### INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on October 13, 1953, issued and subsequently served its complaint in this proceeding upon respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. On November 12, 1953, respondents filed their answer through their attorneys, Leader, Tenenbaum, Perrine and Swedlow, in which answer they admitted all the material allegations of facts charged in the complaint and reserved the right to submit proposed findings and conclusions of fact or law and the right to appeal. Respondents stated in their answer that they had ceased from using the advertisements described in the complaint and had not used some of the same for a period of three years and others for a period of eighteen months. Thereafter, the proceeding regularly came on for final consideration by the above-named hearing examiner, theretofore duly designated by the Commission, upon said complaint and answer thereto, proposed findings and conclusions submitted by counsel in support of the complaint, no proposed findings and conclusions having been filed by respondents although an opportunity was given them to do so, and said hearing examiner having duly considered the record herein finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom and order:

### FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents I. Z. Harris and Pauline D. Harris are individuals and copartners trading and doing business under the name of Veltex Company, with their office and principal place of business located at 1811 First Avenue North, Birmingham, Alabama.

PAR. 2. Respondents are now and, for several years last past have been, engaged in the business of selling and distributing a drug preparation as "drug" is defined in the Federal Trade Commission Act.

The designation used by respondents for said preparation, and the formula and directions for use thereof, as furnished by them, are as follows:

Designation: "The New Improved V–T Preparation"
Formula:

*Makes 500 Gallons.*

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|---|---|
| Ferrous Gluconate | 120 lbs. |
| Manganese Citrate | 8 lbs., 13 ozs., 263 grains. |
| Calcium Hypophosphite | 75 lbs., 9 ozs., 263 grains. |
| Copper Proteinate | 3 ozs., 288 grains. |
| Liver Fraction, #1 | 10 lbs. |
| Yeast Extract, powd | 10 lbs. |
| Thiamine Hydrochloride, ($B_1$) | 759.0 GRAMS. |
| Riboflavin, ($B_2$) | 166.1 GRAMS. |
| Niacinamide | 1100.0 GRAMS. |
| Glycerine | 2 Gals., 28½ fl. ozs. |
| Propylene Glycol | 21 Gallons, 3 pints. |
| Citric Acid | 32 lbs., 3 ozs., 88 grains. |
| Saccharine Soluble | 1 lb., 11 ozs., 243 grains. |
| Caramel Color | 6 Gallons, 12.8 fl. ozs. |
| Oil Sweet Orange Peel | 25 fl. ozs. |
| Benzaldehyde | 12 fl. ozs. |
| Butyl Parasept | 8 ozs., 372 grains. |
| Methyl Parasept | 22 ozs., 57 grains. |
| Hydrochloric Acid, Conc | 113.5 c. c. |

Distilled Water q. s. ad. 500 gallons.

pH. 3.2 to 3.5

Directions for use: One tablespoonful three times daily, preferably taken in a little water, before meals. This will provide 10 milligrams of Vitamin $B_1$ and 145 milligrams of Iron (from Ferrous Gluconate). Suitable for use by both adults and children.

Shake well—Keep in a cool place.

Note: Iron preparations can darken the teeth.

Be sure to brush your teeth after taking.

PAR. 3. Respondents cause said preparations, when sold, to be transported from their place of business in the State of Alabama to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain and at all times mentioned herein have maintained a substantial course of trade in said preparation, in commerce, between and among the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of their aforesaid business, the respondents, for several years last past, have disseminated and have caused the dissemination of advertisements concerning their said preparation by United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to newspapers of general circulation and radio continuities, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation; and respondents have also disseminated and caused the dissemination of advertisements concerning said preparation by various means including, but not limited to, the media aforesaid, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical, but not all inclusive of the statements and representations disseminated and caused to be disseminated, as hereinabove set forth, are the following:

IS YOUR BODY
DRAINED OF PEP
FEEL WEAK, ½ SICK,
TIRED, NERVOUS?

THEN TRY V–T.

Medical science knows certain vitamins and minerals are necessary for the body to function its best. You must have iron for the building of rich, red blood. You must have vitamins B–1, and B–2, copper for stimulation of red blood cells, phosphorous for metabolism of carbohydrates. Well, wonderful V–T contains all these PLUS yeast and liver extract, niacin, calcium, and manganese. When your system lacks its minerals and iron, and you feel pepless, have aches and pains, are nervous, can't sleep or eat, feel half sick, weak and rundown, the V–T balanced formula is your guarantee there's nothing finer nor faster.

ACHES, PAINS
FEELS
WEAK
RUNDOWN

It is a fact that the body must have the vitamins and minerals of V–T in sufficient amount to function properly. Lack of B–1 can cause weakness. Lack of B–2 may impair generally good health. Lack of niacin may bring nausea, headaches, nerves. Lack of iron prevents building of sufficient rich red blood. Now V–T contains not only these (including yeast and liver extract) but manganese, copper, calcium and phosphorous as well. V–T as you see is not a patent medicine, it is a most modern and efficient dietary supplement that has brought great hope to many sufferers. G. M. McCullum writes, "For several years I suffered from a weak and rundown condition. I suffered from gas pains and headaches. Nothing seemed to help me until I started taking V–T. Now I feel fine again". If your condition, like Mr. McCullum's is due to lack of V–T's vitamins and minerals, try V–T today on the guarantee of satisfaction or money back. There's nothing FINER or FASTER. That's why thousands say, "It's V–T for me".

FOR RUNDOWN
NEW TIRED, NERVOUS
HOPE WEAK, SICKLY

FIRST FEW DOSES MUST OVERJOY OR MONEY BACK

Here is why the wonderful V–T offers you so much new hope when your condition is due to the lack of V–T's great vitamins and minerals. V–T is not a patent medicine. Neither is it just an ordinary dietary supplement. In the scientifically balanced V–T formula are niacin, $B_1$, $B_2$, yeast and liver extract, rich red blood building, iron, calcium, phosphorus, manganese and copper. Compare this with whatever you are taking and you can see for yourself why V–T is used by thousands. Reverend E. E. Jones of Attala, Alabama, writes, "V–T has pepped me up so much I feel like a new person. I cannot praise V–T enough." Now why don't you too try V–T if you suffer from lack of V–T's vitamins and iron. You owe it to yourself and family to feel as fit as you can.

PAR. 6. Through the use of the statements and representations contained in the advertisements hereinabove set forth and others of similar import and meaning, but not specifically set out herein, respondents have represented directly and by implication:

That said preparation, taken as directed, is an adequate and effective treatment for and gives fast relief from the symptoms and conditions of aches, pains, weakness, tiredness, loss of pep, nervousness, sleeplessness, nausea, headache and gas pains; that it will cause the rebuilding of rich red blood and red blood cells; that it is an adequate vitamin and mineral dietary supplement, providing all the essential vitamins and minerals. By the reference to yeast and liver extract in the advertising as ingredients of the preparation, respondents have represented that the preparation contains sufficient quantities of these ingredients to be of substantial therapeutic value.

PAR. 7. The aforesaid statements and representations are misleading in material respects and constitute "false advertisements", as that term is defined in the Federal Trade Commission Act. In truth and in fact, respondents' preparation possesses no analgesic properties and the only type of ache or pain for which it would have any value whatsoever is one caused solely by a deficiency of Vitamin $B_1$ or Vitamin $B_2$, niacinamide, or iron and in these cases the deficiency and its resultant symptoms, including aches and pains, would not be corrected until after days or even weeks of administration of the preparation according to directions. The preparation would have no value whatsoever in the vast majority of aches and pains. Said preparation, taken as directed, is of no therapeutic value in the treatment of weakness, tiredness, loss of pep, nervousness, sleeplessness, nausea, headache or gas pains except in those instances when such symptoms or conditions are the result of Vitamin $B_1$, Vitamin $B_2$, niacinamide or iron deficiencies. Even in those cases, the preparation would not give fast relief from the symptoms and conditions enumerated and if any benefit is to be derived from taking the preparation, it must be administered over a considerable period of time. Each of the above symptoms and conditions may result from a number of causes having no connection with such deficiencies.

Said preparation does not supply the adult minimum daily requirements of calcium or phosphorus. It does not supply iodine, a required mineral, or such essential vitamins as A, C, or D. Said preparation cannot, therefore, be properly characterized as an adequate vitamin and mineral dietary supplement. The formation of red blood and red blood cells would be stimulated by the preparation only where a deficiency of such blood and cells results solely from iron deficiency anemia. The yeast and liver extract in the preparation are not in sufficient quantities to be of any substantial therapeutic value.

PAR. 8. The use by the respondents of the foregoing false advertisements and the false, misleading and deceptive statements and representations contained therein, has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of said preparation because of said erroneous and mistaken belief.

Furthermore, failure of respondents to reveal, with equal conspicuousness and in immediate connection with the symptoms and conditions named in the advertisements, that their preparation is of value for the treatment of those symptoms and conditions only when they are caused by deficiencies of Vitamin $B_1$, $B_2$, niacinamide or iron, has the tendency and capacity to mislead and deceive the purchasing public into the erroneous and mistaken belief that respondents' preparation is an adequate and effective treatment for such symptoms and conditions, regardless of the cause.

## CONCLUSION

The aforesaid acts and practices as hereinabove set out are all to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

## ORDER

*It is ordered*, That the respondents I. Z. Harris and Pauline D. Harris, individually and as copartners, trading and doing business under the name of Veltex Company, their officers, representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale and distribution of a drug preparation known and designated as "The New Improved

V-T Preparation" or any other similar drug in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I. Disseminating or causing to be disseminated any advertisement by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents directly or by implication:

(a) That said preparation is of any therapeutic value in the treatment of aches, pains, weakness, tiredness, loss of pep, nervousness, sleeplessness, nausea, headache or gas pains, unless it is revealed with equal conspicuousness and in immediate connection with any reference to the aforesaid symptoms or conditions, that said preparation is of value for such symptoms or conditions only when they are caused by deficiencies of Vitamins $B_1$, $B_2$, niacinamide, or iron;

(b) That said preparation gives fast relief from any of the symptoms or conditions enumerated in subparagraph (a) hereof;

(c) That said preparation is an adequate vitamin or mineral supplement, or provides all the essential vitamins or minerals;

(d) That the quantities of yeast or liver extract contained in said preparation are sufficient to be of substantial therapeutic value;

(e) That the formation of red blood, or red blood cells, will be stimulated by said preparation, unless the representation be expressly limited to cases where a deficiency of such blood or blood cells has resulted solely from iron deficiency anemia;

II. Disseminating or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said preparation, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph I above, or which fails to comply with the affirmative requirements set forth in subparagraphs (a) and (e) of Paragraph I above.

ORDER TO FILE REPORT OF COMPLIANCE

*It is ordered*, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of February 7, 1954].

IN THE MATTER OF

# JOE FRIED WOOLEN CORPORATION ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND THE WOOL PRODUCTS LABELING ACT

*Docket 6144. Complaint, Nov. 18, 1953—Decision, Feb. 9, 1954*

Where a corporation and its president, engaged in jobbing and selling at wholesale wool fabrics purchased from manufacturers in other states—

(a) With intent to violate the provisions of the Wool Products Labeling Act, participated in and caused the removal of stamps, tags, labels, or other means of identification which had been affixed to certain of said woolen fabrics which purported to contain the information required by the said Act and the Rules and Regulations promulgated thereunder to be affixed thereto, and

(b) Misbranded certain of said wool products in that, following the receipt and removal of the original manufacturer's tags, etc., as aforesaid, they falsely and deceptively labeled and tagged the same with respect to the character and amount of the constituent fibers contained therein and thus misbranded woolen fabrics or piece goods containing substantial quantities of fibers other than wool as "100% Wool":

*Held*, That such acts and practices and methods, under the circumstances set forth, were in violation of the Wool Products Labeling Act and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. John Lewis*, hearing examiner.
*Mr. George E. Steinmetz* for the Commission.
*Mr. Samuel J. Krinn*, of New York City, for respondents.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, the Federal Trade Commission, on November 18, 1953, issued and subsequently served its complaint upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in violation of the provisions of said Acts.

[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on February 9, 1954 and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

The respondents, desiring that this proceeding be disposed of by consent settlement procedure, provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding, and review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of answer to said complaint, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint.

2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion, and order to cease and desist. It is understood that the respondents, in consenting to the Commission's entry of said findings as to the facts, conclusion, and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.

3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in Paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows:

## FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Joe Fried Woolen Corporation is a corporation organized and existing under and by virtue of the laws of the State of New York and respondent Joseph Fried is the president thereof. Said individual respondent formulates, directs and controls the acts, policies and practices of said respondent corporation, the business of which consists of the jobbing and selling at wholesale of wool fabrics. The office and principal place of business of both respondents is located at 226 West 37th Street, New York, New York.

PAR. 2. Subsequent to the effective date of said Wool Products Labeling Act of 1939 and more especially since January of 1951, said respondents have purchased from various manufacturers located in States other than New York State, wool products, as "wool products" are defined in said Act. Said wool products, consisting of woolen fabrics, have been and are, after purchase by respondents, transported in commerce from the sellers located in other States to respondents in the State of New York. Said woolen fabrics so manufactured for introduction into, and transported in commerce, as aforesaid, were thereafter offered for sale and sold by said respondents to the general public at their said place of business located at 226 West 37th Street, New York, New York.

PAR. 3. Certain of said woolen fabrics purchased and transported in commerce, as aforesaid, had affixed thereto when delivered to them at their said place of business, stamps, tags, labels, or other means of identification required by said Wool Products Labeling Act of 1939. Thereafter, and before being offered for sale or sold by respondents to the general public, the respondents, with intent to violate the provisions of said Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, removed, and participated in and caused the removal of such stamps, tags, labels or other means of identification which purported to contain the information required by the provisions of said Act and said Rules and Regulations to be affixed to such products by the manufacturer thereof, or by some person authorized or required by said Act to affix such stamps, tags, labels or other means of identification to said wool products.

PAR. 4. Subsequent to the effective date of said Wool Products Labeling Act of 1939, and more especially since January of 1951, respondents introduced into, offered for sale, sold and delivered in commerce, as "commerce" is defined in the said Wool Products Labeling Act, wool products, as "wool products" are defined therein.

PAR. 5. Certain of said wool products were misbranded within the meaning and intent of said Wool Products Labeling Act and the Rules and Regulations promulgated thereunder in that, following the receipt and removal of the original manufacturers' tags, stamps, labels or other means of identification by respondents, as aforesaid, said respondents thereupon falsely and deceptively labeled or tagged the same with respect to the character and amount of the constituent fibers contained therein.

Among such wool products misbranded by respondents, as aforesaid, were woolen fabrics or piece goods labeled or tagged by respondents as consisting of "100% Wool," whereas in truth and in fact, said fabrics did not consist of one hundred percent wool but contained substantial quantities of fibers other than wool.

## CONCLUSION

The aforesaid acts, practices and methods of the respondents, as herein found, were and are in violation of the Wool Products Labeling Act of 1939, and of the Rules and Regulations promulgated thereunder, and as such constitute unfair and deceptive acts and practices in commerce within the meaning and intent of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

*It is ordered*, That the respondent Joe Fried Woolen Corporation, a corporation, and its officers, and respondent Joseph Fried, individually, and respondents' respective agents, representatives and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of woolen fabrics or other "wool products" as such products are defined in and subject to the Wool Products Labeling Act of 1939; which products contain, purport to contain, or in any way are represented as containing "wool," "reprocessed wool" or "reused wool," as those terms are defined in said Act, do forthwith cease and desist from misbranding such products by:

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

*Provided*, That the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by paragraph (a) and (b) of Section 3 of the Wool Products Labeling Act of 1939; and *provided further* that nothing contained in this Order shall be construed as limiting any applicable provisions of said Act or the Rules and Regulations promulgated thereunder.

*It is further ordered*, That said respondent Joe Fried Woolen Corporation, a corporation, and its officers, and respondent Joseph Fried, individually, and respondents' respective agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase, offering for sale, sale or distribution of "wool products" as such products are defined in and subject to the Wool Products Labeling Act of 1939, do forthwith cease and desist from causing or participating in the removal of any stamp, tag, label, or other means of identification affixed to any such "wool product" pursuant to the Wool Products Labeling Act of 1939, with intent to violate the provisions of said Act, and which stamp, tag, label or other means of identification purports to contain all or any part of the information required by said Act.

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

Joe Fried Woolen Corporation,
a corporation.

By /s/ Joseph Fried, *President.*
/s/ Joseph Fried,
JOSEPH FRIED, individually and as an officer of Joe Fried Woolen corporation, a corporation.

Date: Dec. 16, 1953.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this 9th day of February, 1954.

# IN THE MATTER OF

# PROGRESS TAILORING COMPANY ET AL.

MODIFIED CEASE AND DESIST ORDER

*Docket 3747. Order, Feb. 16, 1954*

Order modifying—in harmony with the Commission's changed interpretation of the application of Sec. 5 of the Act to the use of such terms as "free" in advertising or other offers, as set out in *Walter J. Black, Inc.*, Docket 5571, Sept. 11, 1953, and the modified final decree dated Dec. 9, 1953, of the Court of Appeals for the Seventh Circuit in the instant matter—Commission's prior orders, dated July 20, 1943, 37 F. T. C. 277, prohibiting various practices, including use of the term "free" as there set out—

So as to require respondents, in connection with the offer, sale, and distribution of wearing apparel and other merchandise—in connection with which it advertised for the services of salesmen—to cease and desist from "using the term 'free' or any other term of similar import or meaning to designate, describe, or refer to wearing apparel or other items of merchandise which are furnished as compensation for services rendered, *unless in close connection therewith all the conditions, obligations, or other prerequisites to the receipt and retention of said wearing apparel or other items of merchandise are clearly and conspicuously set forth*".

Before *Mr. Randolph Preston* and *Mr. James A. Purcell*, hearing examiners.

*Mr. R. P. Bellinger* for the Commission.

*Mayer, Meyer, Austrian & Platt*, of Chicago, Ill., and *Hogan & Hartson*, of Washington, D. C., for respondents.

MODIFIED ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answer of the respondents, testimony and other evidence in support of and in opposition to the allegations of said complaint taken before trial examiners of the Commission theretofore duly designated by it, report of the trial examiners upon the evidence, briefs filed in support of the complaint and in opposition thereto, and oral argument of counsel; and the Commission having made its findings as to the facts and its conclusion that said respondents had violated the provisions of the Federal Trade Commission Act, and on July 20, 1943, issued an order to cease and desist against respondents Progress Tailoring Company, a corporation, trading under its own name and also as J. C. Field & Son; Stone-Field Corporation, a corporation; W. Z. Gibson, Inc., a corporation; Pioneer Tailoring Company, a corporation; and Certified Tailoring

Company, a corporation; and their respective officers, representatives, agents and employees; and

The aforesaid respondents, having filed in the United States Court of Appeals for the Seventh Circuit their petition to review and set aside said order to cease and desist; and that Court having heard the matter on briefs and oral argument and having thereafter, on January 28, 1946, affirmed said order and on February 21, 1946, entered its final decree enforcing said order; and

Respondents Progress Tailoring Company, Stone-Field Corporation, W. Z. Gibson, Inc., and Pioneer Tailoring Company, respondent Certified Tailoring Company having been dissolved, and the Commission having, on December 4, 1953, jointly moved the Court to modify said final decree to accord with the change in the Commission's interpretation of the application of Section 5 of the Federal Trade Commission Act to the use of such terms as "free" in advertising or other offers to the public, as announced in its decision of the proceeding in Docket No. 5571, "In the Matter of Walter J. Black, Inc.," and the Court having, on December 9, 1953, entered an order modifying its final decree in the manner requested by the parties as aforesaid; and

The Commission being of the opinion that its order should be modified so as to accord with the aforesaid change in its interpretation of Section 5 of the Federal Trade Commission Act and to conform to the aforesaid order of the United States Court of Appeals for the Seventh Circuit:

*It is ordered, therefore*, That respondents Progress Tailoring Company, a corporation, trading under its own name and also as J. C. Field & Son; Stone-Field Corporation, a corporation; W. Z. Gibson, Inc., a corporation; and Pioneer Tailoring Company, a corporation; and their respective officers, representatives, agents, and employees, directly or through any corporate or other device in connection with the offering for sale, sale, and distribution of wearing apparel and other similar items of merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "free" or any other term of similar import or meaning to designate, describe, or refer to wearing apparel or other items of merchandise which are furnished as compensation for services rendered, unless in close connection therewith all of the conditions, obligations, or other prerequisites to the receipt and retention of said wearing apparel or other items of merchandise are clearly and conspicuously set forth.

2. Using the term "free" or any other term of similar import or meaning to describe or refer to linings, trimmings, or other portions

of garments which constitute a part of any garment, and the price of which is included in the price of the entire garment.

3. Using a pictorial representation of a building, in advertising or in any other manner, which inaccurately portrays or mispresents the size or extent of respondents' business or the comparative volume of business transacted by the respondents.

4. Representing directly or by implication that respondents are selling their garments at manufacturers' prices or at prices which save the purchaser the cost or profit of the retailer or middleman.

5. Representing that respondents are wholesale tailors or that their garments are supplied to purchasers at wholesale prices or that respondents are engaged in any business other than the sale of garments at retail.

6. The use of reproductions of any fictitious affidavit in advertising material or in any other manner.

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

It appearing that respondent Certified Tailoring Company, a corporation, has been dissolved since issuance of the original order to cease and desist herein, *it is further ordered*, That the complaint herein be, and it hereby is, dismissed as to said former respondent.

Order

IN THE MATTER OF

# METAL LATH MANUFACTURERS ASS'N ET AL.[1]

*Docket 5449. Complaint, June 28, 1946—Order, etc., opinion and dissenting opinion, Feb. 16, 1954*

Charge: Concertedly maintaining delivered price zones for metal lath.

Before *Mr. Everett F. Haycraft*, hearing examiner.

*Mr. Fletcher G. Cohn*, *Mr. Paul R. Dixon*, *Mr. Robert F. Quinn* and *Mr. Paul H. LaRue* for the Commission.

*MacLeish, Spray, Price & Underwood*, of Chicago, Ill., for Metal Lath Manufacturers Ass'n, United States Gypsum Co. and A. J. Tuscany.

*White, Bradley, Arant, All & Rose*, of Birmingham, Ala., for Alabama Metal Lath Co., Inc.

*Evans, Chanson & Gentithes*, of Warren, Ohio, for The Bostwick Steel Lath Co.

*Johnston, Thompson, Raymond & Mayer*, of Chicago, Ill., for Ceco Steel Products Corp.

*Frost & Jacobs*, of Cincinnati, Ohio, for Goldsmith Metal Lath Co.

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[1] The Commission on August 30, 1949, issued an order granting in part and denying in part respondents' motion to dismiss the complaint, and denying request for oral argument, as follows:

This matter came on to be heard upon joint and several motion to dismiss the complaint herein filed on October 25, 1948, by respondents, answer thereto filed on November 10, 1948, by counsel in support of the complaint opposing the motion except as to respondent A. J. Tuscany, briefs of counsel in support of and in opposition to the motion, trial examiner's report and recommendations, on the motion and exceptions to said report and recommendations by certain of the respondents, including separate exceptions of respondent The Goldsmith Metal Lath Company, and by counsel in support of the complaint, and request of respondents for oral argument on the motion.

Respondents' motion was made after counsel in support of the complaint closed their case in chief and is based upon the contention that the evidence produced fails to make out a prima facie case under the complaint. The motion was referred to the trial examiner theretofore appointed by the Commission to receive evidence in the case, for report and recommendation. The trial examiner reported that the evidence of record fails to connect respondent Metal Lath Manufacturers Association and individual respondent Joseph A. Sampson with the conspiracy alleged and recommended that the motion be granted with respect to them and individual respondent A. J. Tuscany. With respect to the other respondents, the trial examiner found that there is sufficient evidence in the record to make out a prima facie case, and recommended that the motion to dismiss the complaint be denied.

Respondents, except Metal Lath Manufacturers Association, A. J. Tuscany, and Joseph A. Sampson, filed exceptions to substantially each point upon which the trial examiner's comments and recommendations were adverse to them. The bases for these exceptions are substantially the same as those on which the same points were presented in the motion and briefs. Respondent The Goldsmith Metal Lath Company filed separate exceptions to the trial examiner's finding and recommendation as to it, on the basis that the record contains no direct evidence of participation by The Goldsmith Metal Lath Company in the conspiracy alleged and that the conclusion of the trial examiner is based upon

*Mayer, Meyer, Austrian & Platt*, of Chicago, Ill., for Milcor Steel Co.

*Finck & Huber*, of Buffalo, N. Y., for National Gypsum Co.

*Roberts, Cushman & Grover*, of Boston, Mass., for Penn Metal Co., Inc.

*Mr. Thomas F. Patton* and *Mr. Arthur J. Gentholts*, of Cleveland, Ohio, for Truscon Steel Co.

*Schmidt, Hugus & Laas* and *Mr. Harry R. Hesse* and *Mr. J. E. Bruce*, of Wheeling, W. Va., for Wheeling Corrugating Co.

*Macleay & Lynch*, of Washington, D. C., for Joseph A. Sampson.

## Order Disposing of Appeals From Initial Decision of Hearing Examiner, and Decision of the Commission Dismissing the Complaint

This matter having come on to be heard by the Commission upon the complaint, answer thereto, testimony and other evidence in support of and in opposition to the allegations of the complaint, initial decision of the hearing examiner, appeals from said initial decision by counsel supporting the complaint and by respondents except those

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unwarranted inferences. The Commission has considered these exceptions, and its ruling on the motion itself for the reasons hereinafter stated constitutes a denial of the exceptions for the same reasons.

Counsel in support of the complaint excepted to that portion of the trial examiner's report and recommendation pertaining to respondent Metal Lath Manufacturers Association, on the basis that the evidence of record establishes a prima facie case against the Association. The Commission is of the view that the evidence of record fails to connect respondent Metal Lath Manufacturers Association with the conspiracy alleged and, therefore, denies the exception.

There is evidence in the record tending to show that respondent manufacturers followed a common pricing system, including zone pricing, and issued substantially identical price lists, and from time to time made identical and simultaneous price changes upward in the presence of decreasing prices on sheet metal. These and other matters appearing in the record and reasonable inferences therefrom are sufficient to make a prima facie case under the allegations of the complaint with respect to respondent manufacturers.

It does not appear that the evidence of record is sufficient to connect either of the individual respondents A. J. Tuscany and Joseph A. Sampson with the conspiracy alleged.

The motion and answer thereto, with supporting briefs, clearly set forth the position and contentions of opposing counsel and it does not appear that oral argument is necessary. Respondents will have opportunity to present their contentions orally when the proceeding is before the Commission for final determination on the merits.

Having duly considered the matter and being now fully advised in the premises:

*It is ordered*, That the joint and several motion of respondents to dismiss the complaint and the request for oral argument thereon be, and the same hereby are, denied, except as to respondents Metal Lath Manufacturers Association, A. J. Tuscany, and Joseph A. Sampson.

*It is further ordered*, That the motion of Metal Lath Manufacturers Association, A. J. Tuscany, and Joseph A. Sampson be, and the same hereby is, granted, and that the complaint herein as to Metal Lath Manufacturers Association, A. J. Tuscany, and Joseph A. Sampson be, and the same hereby is, dismissed.

against whom the complaint has heretofore been dismissed, and briefs and oral arguments of counsel; and

The Commission having decided, for the reasons stated in the written opinion of the Commission which is being issued simultaneously herewith, that the appeal of the respondent manufacturers should be granted, that the appeal of counsel supporting the complaint should be denied, and that the complaint herein should be dismissed without prejudice to the right of the Commission to institute a new proceeding or to take such further action or other action in the future as may be warranted by the then existing circumstances:

*It is ordered*, That the respondents' appeal from the initial decision of the hearing examiner be, and it hereby is, granted, and that the appeal of counsel supporting the complaint be, and it hereby is, denied.

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

Commissioners Mead and Gwynne dissenting.

## OPINION OF THE COMMISSION

By CARRETTA, Commissioner:

This proceeding is before the Federal Trade Commission upon appeals from an initial decision of a hearing examiner of the Commission holding that the respondent manufacturers have violated Section 5 of the Federal Trade Commission Act.

The complaint herein, issued on June 28, 1946, charges a violation of Section 5 of the Federal Trade Commission Act, and alleges generally that the respondent manufacturers have acted, and are still acting, wrongfully and unlawfully by means which include cooperation between and among themselves through the respondent Association and with the individual respondents in establishing, adopting, and continuing a common course of action resulting in substantial restriction, suppression, elimination, and frustration of actual and potential competition among the respondent manufacturers respecting price in the sale and distribution of metal lath. Among the specific allegations in the complaint is one that respondent United States Gypsum Company has used a patent owned by it (Pearce patent) and license agreements entered into in connection therewith for the purpose and with the effect of contributing to, promoting, and furthering the alleged unlawful course of action, and to that end has entered into mutual understandings and agreements with other respondent manufacturers. The complaint has heretofore been dismissed as to respondent Metal Lath Manufacturers Association and the two individual respondents, A. J. Tuscany and Joseph A. Sampson, for the reason that the evidence introduced fails to sustain the charges as to them. Such dismissal had the effect of also dismissing those allegations of the complaint that the respondent manufacturers have cooperated through the respondent Association and through the individual respondents Tuscany and Sampson in establishing, adopting, and continuing the unlawful activities described in the complaint.

The hearing examiner in his initial decision found, among other things, that the respondent manufacturers, beginning in or about February 1932, entered into a mutual understanding or agreement, which was in effect a conspiracy, to fix and maintain delivered price quotations, terms, and conditions of sale to purchasers of metal lath in the United States, and that pursuant to and in furtherance of such unlawful understanding or agreement the respondent manufacturers have been and still are performing a number of specified acts and practices, including using a zone delivered price system and systematically matching delivered price quotations.

Appeals from said initial decision of the hearing examiner were filed by counsel supporting the complaint and the respondent manufacturers. Counsel supporting the complaint, in their appeal, do not except to the hearing examiner's findings as to the facts, but do except to his order on the ground that it fails to include certain provisions which they contend are necessary to prevent a continuation of the illegal acts and practices. The respondent manufacturers, in their appeal, except to the findings as to the facts, conclusion, and order in the initial decision, to the hearing examiner's failure to include proposed findings of fact and of law and the order of dismissal requested by the respondents, and to the hearing examiner's rulings excluding certain evidence offered by the respondents.

It appears that the contention that the respondent manufacturers entered into an unlawful understanding or agreement or a conspiracy to restrict, suppress, eliminate, and frustrate competition in the sale and distribution of metal lath is based primarily on evidence in the record relating to certain patent licenses and the respondent manufacturers' operations thereunder. There is no contention that the evidence in the record exclusive of that relating to the said patent licenses and operations thereunder establishes a conspiracy. The pertinent facts shown by the evidence with respect to the said patent licenses and the respondent manufacturers' operations thereunder are here summarized.

On January 14, 1930, a patent (the Pearce patent) covering an improved metal lath was issued. Said patent was owned by Northwestern Expanded Metal Company. Respondent United States Gypsum Company acquired the assets, including the Pearce patent, of Northwestern Expanded Metal Company in March 1930. At about the same time, United States Gypsum Company acquired the Metal Lath Division of the Youngstown Pressed Steel Company. Thereafter, United States Gypsum Company became one of the largest manufacturers of metal lath in the United States. On February 26, 1932, United States Gypsum Company granted a license to make, use, and sell metal lath embodying the Pearce patent to respondents Truscon Steel Company, The Bostwick Steel Lath Company, Milcor Steel Company, Wheeling Corrugating Company, and the Penn Metal Company, predecessor of Penn Metal Company, Inc. A similar license was granted to respondent National Gypsum Company in 1935, to respondent Penn Metal Company, Inc., in 1936, to respondent Ceco Steel Products Corporation in 1938, and to Alabama Metal Lath Company, Inc., in October 1940. No license agreement was entered into with respondent Goldsmith Metal Lath Company. These license agreements, which were identical, provided among other things that the licensees would pay the licensor a royalty on all of the patented metal lath sold by the licensees, that the licensor had the right to fix the minimum price at which the licensees could sell the patented product, and that the licensor would not grant a more favorable license to one licensee than to another.

Respondent Milcor Steel Company canceled its license agreement in June 1941. On November 1, 1941, respondent United States Gypsum Company and respondent Milcor Steel Company entered into a new license agreement which provided for a lower royalty payment and omitted any reference to United States Gypsum Company's right to fix minimum prices. Respondent United States Gypsum Company thereafter offered the new license to the other licensees and it was accepted by each of them.

Respondent United States Gypsum Company, in the exercise of its right under the license agreements to fix minimum prices, issued bulletins from time to time notifying the licensees of changes in prices and also of changes in the boundaries of the different geographical zones. Each of the bulletins so issued was expressly limited to patented metal lath. The licensees generally sold at the prices fixed by the licensor. No such bulletins were issued after August 1940. Prior to 1939 respondent United States Gypsum Company held meetings from time to time with its licensees during which violations of the license agreements were discussed. Between August 1940 and March 1942 (the latter date being the date on which prices in the industry came under the control of the Office of Price Administration), there were three industrywide price increases, one in January 1941, one in

April 1941, and one in August 1941. Other than the fact that the price increases were identical in amount and that the effective dates of the increases were approximately the same for all the respondent manufacturers, there is no evidence that these increases resulted from any agreement or understanding between the respondents. From March 1942 until November 1946, prices in the metal lath industry were controlled by the Office of Price Administration. In June 1946 the Office of Price Administration approved price increases for the industry and price lists issued by the various manufacturers reflected the approved increases. There is no information in the record as to prices after June 1946. The complaint herein was issued on June 28, 1946. The Pearce patent and the license agreements thereunder expired on January 14, 1947.

The principal provisions of the license agreements which are questioned by this proceeding are those giving the licensor the right to fix the minimum price at which the licensees could sell the patented metal lath, and the principal activities of the respondent manufacturers under the patent licenses relied upon as showing an unlawful course of action were the issuance of bulletins by the licensor notifying the licensees of changes in prices and in zone boundaries, the licensees' observance of and adherence to the changes so announced, and the holding of meetings by the licensor with its licensees, during which violations of the license agreements were discussed.

As has been noted hereinabove, the second series of license agreements, entered into on or about November 1, 1941, did not contain any provision with respect to the price at which the licensees could sell the patented product. No bulletins were sent out by the licensor after August 20, 1940, and no meetings of licensees were held after 1939. The record affords no basis for a determination that these, or any substantially similar acts and practices, were continued, resumed, or engaged in after about 1941. Neither is there any basis for a determination that there is likelihood of a resumption of the same, or similar, acts and practices in the future. On the contrary, the expiration of the Pearce patent and the licenses thereunder makes it unlikely that a similar course of action, regardless of whether lawful or unlawful, will be resumed by the respondent manufacturers.

These facts must be considered in the light of the decision of the United States Court of Appeals for the Ninth Circuit in *Oregon-Washington Plywood Company* v. *Federal Trade Commission*, 194 F. 2d 48 (1952) (the *Plywood* cases) and the decision of the United States Court of Appeals for the Fourth Circuit in *New Standard Publishing Company* v. *Federal Trade Commission*, 194 F. 2d 181 (1952). In the *Plywood* cases, the Commission found in 1950 that the respondents had, "during a substantial part of the period of time between May 1, 1935, and August 1, 1941" in one case and "during a substantial part of the period of time between January 1, 1938, and November 29, 1941" in the other, engaged in illegal activities. The court in vacating the Commission's orders said, "The record here is silent as regards the existence of any special circumstances suggesting a likelihood that the petitioners will resume the practices discontinued so many years prior to the issuance of the complaints." In the *New Standard Publishing Company* case the Commission entered an order in 1951 based on findings that the respondents had engaged in the prohibited practices some ten years before the order was entered. The order was vacated because there was nothing in the record to show that the illegal practices had been continued.

We do not interpret these decisions as requiring dismissal of every proceeding in which the respondents are shown to have terminated the challenged practices prior to the issuance of the complaint. The law to the contrary is well established. We do, however, interpret these decisions as requiring dismissal when, as in this case, the principal activities relied upon to prove an unlawful course of action were engaged in approximately five years prior to the issuance of the complaint. If it should be determined that the respondents did engage in certain illegal activities some five years prior to the issuance of the complaint and some thirteen years before the case was finally disposed of, there is no record basis for a determination that such activities, or the results of such activities, were continued or resumed, or that there is likelihood of their being resumed in the future. Under these circumstances, it is not material whether the evidence in the record relating to the first series of patent licenses and respondents' operations thereunder shows a course of conduct then unlawful, and we are not here making any determination as to the legality or illegality of the license agreements.

The complaint in this proceeding must, therefore, be dismissed. Such disposition of this proceeding renders it unnecessary to rule more specifically on each of the exceptions to the initial decision of the hearing examiner raised by counsel supporting the complaint and the respondent manufacturers in their appeals.

## DISSENTING OPINION OF COMMISSIONER MEAD

Metal lath is an important product in the building industry. The Commission isued a complaint charging in effect that the principal producers of metal lath were conspiring to fix prices in violation of Section 5 of the Federal Trade Commission Act. It is elementary that a price fixed by conspiracy is not a competitive price. A "rigged" price is generally higher than a competitive price. The basic purpose of a price conspiracy is generally to achieve a higher stabilized price for the product.

The public policy of the United States is that the public is entitled by law to purchase articles offered for sale in interstate commerce at a price determined by the free play of competitive forces. In fact, the Sherman Act provides that conspiracies in restraint of trade are a criminal offense against the United States. Our economic strength is due in large measure to that public policy. To the extent that we protect it, we will remain strong and free.

Competition, like truth, is a hard taskmaster. The easy way is to follow the pattern of least resistance. The easy way is the conspiracy way. The conspirator favors the shortsighted temporary price advantages which may be achieved by a conspiracy rather than the long view of a strong enduring competitive industry.

The allegations in the complaint in this case are detailed in the Majority Opinion of the Commission. The respondent, U. S. Gypsum Company, owned a patent on a type of metal lath and licensed other respondent manufacturers to produce this patented lath. The license agreements provided that Gypsum would fix the minimum price at which the patented lath was sold by the licensees. Gypsum agreed not to give any licensee a better deal than Gypsum gave any other licensee. This was the "Favored Nation" clause.

The obvious result of this pricing pattern was that all producers sold patented metal lath at the same price. The price on the nonpatented lath which was sold also by the producers and which was not specifically covered in the license agreements naturally followed the price of the patented lath.

Obviously, prices within the industry were not competitive. The complaint recognizing the obvious lack of competition charged that respondents were engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

Respondents deny that they were engaged in an illegal conspiracy. Respondent Gypsum alleges that the licensing agreements were legal under the principle decided by the Supreme Court in *U. S.* vs. *General Electric* (272 U. S. 476).

The Supreme Court has not directly overruled the General Electric case. The Court, however, in subsequent opinions has limited and qualified the application of the General Electric case. Patent law was designed to encourage invention by protecting the inventor and his licensees from piracy and to enable the inventor for a reasonable time to enjoy the fruits of his originality. Patent law was not designed to afford a legal cloak of protection to an industrywide price stabilization agreement. Under the Patent law, for the duration of the patent the price arrangement between the holder of the patent and his licensee acting on a bilateral basis in the protection of the patent monopoly is exempt generally from the application of the antitrust laws. This exemption, however, does not apply to an industrywide horizontal, multilateral agreement between and among the licensor and the other licensee producers. That, basically, is a concert of action among all the producers to fix the price of the product involved. If the Courts had not so interpreted the patent and antitrust laws, the Congress would have amended these laws so as to protect the public against the abuse of an otherwise useful and needed principle of law.

Extensive testimony was taken in this case before the Hearing Examiner. The Examiner in this case is the Chief Hearing Examiner of this Commission. He has had many years of experience in the antitrust laws. The Chief Hearing Examiner heard all the testimony and saw the demeanor of the witnesses on the stand. He lived with this case for a substantial period of time during the course of the hearings. At the conclusion of the hearings, the Examiner filed his very carefully prepared and ably written Initial Decision. The Examiner found the facts which had been proven in the record and based thereon, he concluded as follows:

"It is further concluded that the said acts, practices, methods, policies and courses of action, as hereinbefore found, are all unfair, oppressive and to the prejudice of the public; have a dangerous tendency to, and have actually hindered, restrained, suppressed, frustrated, eliminated and prevented competition in the sale of metal lath in commerce within the intent and meaning of the Federal Trade Commission Act, and have the tendency and capacity to restrain unreasonably and have unreasonably restrained such commerce in said product and therefore, in the light of the decisions of the United States Federal Courts in the *U. S. Gypsum* case, *supra*, and the case of *Fort Howard Paper Company* v. *Federal Trade Commission* (156 F. 2d 899), and *Allied Paper Mills, Inc.* v. *Federal Trade Commission* (168 F. 2d 600), constitutes unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act."

The Administrative Procedure Act was a sort of Magna Charta for Hearing Examiners in the administrative agencies of the Federal Government. The Act gave the Examiners the status of administrative judges. Much has been spoken and written both in and out of Court rooms relative to this new and more independent and dignified status of Examiners. The dismissal of agency complaints by Examiners has been cited as an indication that Examiners are independent of the agencies. Court opinions have given substantial weight to the decisions of Examiners when the Examiners dismissed allegations of complaints. The obvious reason for giving substantial weight to a finding of an Examiner is that he is the trier of the facts and is in the best position to evaluate conflicting testimony. If these arguments are valid in cases in which an Examiner dismisses a complaint, the arguments should be equally valid in cases in which an Examiner finds for the complaint.

It is not often in an antitrust conspiracy case that the various elements of the case are substantially similar to another conspiracy case which has been decided by the Supreme Court of the United States. I refer to the case of *United States* v. *U. S. Gypsum Co., et al.* (333 U. S. 364). In that case the Supreme Court held that an independent patent licensing agreement containing minimum price provisions resulting in identical prices and the absence of price competition was in violation of the Sherman Act. The respondents in this case attempted to differentiate the facts in this case from the facts in the *Gypsum* case, supra. As stated by the Hearing Examiner:

"It is contended by respondents that the licensees of respondent U. S. G. in the present case were not aware that similar licenses were being granted by respondent U. S. G. to other members of the industry and for that reason this case can be distinguished from the *Gypsum* case. This contention is not supported by the record in the first place, the license agreement itself, in language almost identical with that used in the *United States Gypsum* case, contains the so-called 'Favored Nation' clause which gives each licensee the right to insist upon as favorable consideration as any other licensee. This clause clearly indicates that the consummation of similar license agreements with their competitors must have been contemplated by the various licensee respondents. The Court in the *Gypsum* case held 'the concert of action being established by the favored licensee clause of the standard license agreement.'

"Secondly, the record shows that from time to time these licensees were called together in meetings by the respondent U. S. G. and questioned with respect to alleged violations of the license agreements by selling patented metal lath at prices below the minimum prices fixed by respondent U. S. G. in the license bulletins which were sent out by U. S. G. and received by the respective licensees, so that they then became aware of who the other licensees were, if they had not known before."

The Majority Opinion of the Commission points out that the minimum price provisions of the licensing agreement were not continued after 1941. That may be true insofar as the written agreements are concerned. However, by the use of the minimum price provisions in the license agreements and the "Favored Nation" clause, the foundation and structure of the pricing pattern had been constructed. The zone pricing system had been created in the industry. Under this system the entire United States had been divided into a few pricing zones and all purchasers buying the patented metal lath within any particular zone were quoted the same price by the various respondent licensees. The price of unpatented lath followed the price of the patented lath.

After the discontinuance by U. S. Gypsum, the licensor, of the license bulletins advising licensees of the minimum prices of patented lath, there were three price changes in the industry, all of which were price increases. The Examiner comments on these identical price advances as follows:

"It is believed from the whole record that the coincidence of these significant changes were not due to mere happenstance but were the result of the conscious cooperative action of the various respondents."

Sellers of commodities frequently claim that they sell at prices identical to their competitors in order to meet competition in good faith. The Examiner asked the question whether or not if a seller's competitor increases his price must the seller also increase his price to the same amount in order to meet competition. Call that what you will, it is not the vigorous competition contemplated by the antitrust laws.

As I stated in the Majority Opinion of the Commission in the National Lead et al. case, Docket 5253, a zone pricing system established by conspiracy operates almost automatically. The freight rate books and the other conspiratorial paraphernalia common to the basing point systems of pricing are not needed when a zone system of pricing is used. Detection of a conspiratorial zone pricing system is difficult because so few overt conspiratorial acts are necessary to maintain the pricing patterns.

The ability of the regulatory agency to preceive a conspiracy should keep pace with the skill of the conspirator in concealing the conspiracy. Otherwise, the finder of facts would be in the difficult position of an old-style Indian trying to track his man by looking for footprints and broken twigs on a city sidewalk. Thankfully, we do have modern Indians. The Courts have recognized that the law of conspiracy should be and is dynamic. Discerning Judges of our time have understood the realities of the modern type of planned common course of action by sellers intent on "stabilizing upward" prices. These judges have interpreted the law as it was intended by the Congress.

In an antitrust conspiracy case a few simple questions should be asked and answered. Are the prices in the industry competitive? Do purchasers have price alternatives? From all the facts, would a reasonable man conclude that the identical prices in the industry are due to a planned common course of action by the sellers?

The majority of the Commission does *not* find that an illegal conspiracy did not exist. The majority indicates that the record does not affirmatively show that the alleged conspiracy existed subsequent to 1941 and that on the basis of *Oregon-Washington Plywood Co.* v. *Federal Trade Commission*, 194 F. 2d 48 (1952) (*Plywood* cases) and the *New Standard Publishing Company* v. *Federal Trade Commission*, 194 F. 2d 181 (1952), the complaint should be dismissed.

I strongly dissent from the indication in the Majority Opinion that the *Plywood* cases and the *New Standard* case, supra, are authority for dismissing this complaint. Is the majority holding that the burden is on the Government to prove that the conspiracy continued up to a period shortly before the complaint issued? Must the Government prove overt conspiratorial acts committed immediately prior to the issuance of the complaint, or even subsequent thereto? If that is the position of the majority, I emphatically disagree with that position.

The record in this case shows that the pricing patterns which had been continued and perfected by a concert of action, closely identical to that condemned by the Supreme Court in the *Gypsum* case, continued until substantially the establishment of the Office of Price Administration. If the pricing pattern is perfected by conspiracy, and the pattern is continued by the conspirators, then the conspirators will continue to enjoy the fruits of their illegal practice. It is reasonable to assume that the O. P. A. froze for the duration of its existence this pricing pattern used by respondents. The complaint was issued in 1946. Evidence of activities by respondents subsequent to 1946 would not be admissible to prove an allegation in the complaint that respondents had violated the law prior to the issuance of the complaint.

Modern price conspiracies usually may only be proven by showing the activities of sellers over a substantial period of years. It is unrealistic to assume that a pricing conspiracy can be proved by proving only acts of the alleged conspirators for a period of a month or a year or even two years prior to the complaint. In order to prove such conspiracies, it may be necessary to begin the proof with evidence as to events taking place several years prior to the complaint when the foundation of the conspiracy was laid and the procedures and techniques of pricing were established. The conspiratorial tree having been planted and duly nourished in its formative period, the conspirators may continue for several years to enjoy the illgotten fruits from this tree with a minimum of overt observable gardening on their part.

In the *Plywood* cases, the Government stipulated itself out of Court. The Court ruled that by the stipulated facts the Government admitted that the price conspiracy had been discontinued for several years prior to the issuance of the complaint. The Court obviously meant that the Government also admitted that not only the conspiracy, but the advantages flowing from the conspiracy had been long since terminated. This admission by the Government would indicate that the Plywood Industry was then and had been competitive for several years.

The facts are entirely different in this case. There is no admission by Government Counsel that the conspiracy has terminated. There was no showing by respondents that they had purged themselves of the pricing patterns which they had used by unlawful agreement. In fact, respondents contend that they never acted unlawfully. If this complaint is dismissed, respondents will probably consider themselves free to continue the pricing patterns which were, in my opinion, established by unlawful agreement. It is reasonable to assume from the record that these pricing patterns have been continued by respondents.

As stated above, respondents point out that the minimum price provisions in the licensing agreements have long since been discontinued. In this connection, the decision of the Court in *C-O-Two Fire Equipment Co.* v. *U. S.*, 197 F. 2d 489 is interesting. In that Sherman Act case the defendants contended that a provision regarding minimum prices in a license agreement was abrogated by mutual consent in August of 1942. The Court of Appeals said in its decision on May 29, 1952:

"The record, however, does not reveal any price competition as might be expected in the industry after the alleged abrogation of the price maintenance provision. From such circumstances, the trier of the facts might properly have inferred either that no such abrogation did, in fact, take place, or that it was done for appearance's sake only and was not a thing of substance."

In this case, as described above, the record shows that there were three price changes after the minimum price bulletins by the licensor were discontinued. The record further shows, and it was so found by the Examiner, that in all three of these instances the price increase by the respondents were in similar amounts and at substantially the same times. The Court in the *C-O-Two* case, supra, stated:

"In the instant situation, appellants have not come forward with any satisfactory explanation for the admitted price uniformity nor was any evidence introduced to dissipate the inference of conspiracy arising from the history of licensing agreements with minimum price maintenance provisions save for the bare statements that such provisions were abrogated."

The *New Standard Publishing Company* case, supra, was a false advertising case. That type of case is dissimilar to a conspiracy case. The question of whether or not a representation has been discontinued is readily susceptible of proof. Representations are published for the world to see and are not hidden and concealed as are conspiratorial acts. Once the representation has been discontinued its value quickly and substantially decreases until it is nil. Members of a conspiracy may continue to enjoy the fruits of a pricing pattern established by conspiracy although they have discontinued provable conspiratorial acts.

The *New Standard* case, supra, is not authority for dismissing this complaint for an additional compelling reason. The order to cease and desist in that case was entered by the Commission nine years after the respondent ceased handling the Doubleday products which were the subject matter of the alleged misrepresentations. The order of the Commission was vacated by the Court because of the protracted delays in the trial of the case. The Court did not hold that the case was moot. The Court stated:

"We agree with the Commission that there has been no such showing that the case is moot as would warrant us in so declaring and directing the dismissal of the proceedings."

The Court in vacating the order of the Commission indicated that it was acting at the suggestion of the Commission. The Court stated:

"We think, however, as suggested by the Commission, that the delay which has occurred in the case requires notice and that the order of the Commission should not be enforced without the taking of additional evidence showing that its entry is appropriate under present circumstances."

The detecting and proving of the modern streamlined matured pricing conspiracy admittedly is difficult. Identity of prices for short periods of time on homogeneous products such as cement, sand, etc., may be the result of competition. The problem is to determine whether or not the identical prices are the result of competition or conspiracy. For this task one must be aware of the dynamic concept of the law of conspiracy.

This Commission attempted in Count II of the *Rigid Conduit* case, Docket 4452, to attack a system of identical prices which injured competition without the necessity of proving a conspiracy. This action engendered sharp criticism of the Commission from certain sources. The Commission recoiled from this criticism. Subsequently, it has been the policy of the Commission to proceed in such matters only by the conspiracy route. This should not deter the Commission from giving to the law of conspiracy its full purposeful meaning in order to protect the public interest. The Courts in certain great opinions by distinguished and able members of the judiciary have shown the way. The Supreme Court stated in *U. S.* v. *Masonite Corporation*, 316 U. S. 265:

"It is not clear at what precise point each appellee became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement, but it is clear that as it continued, each became familiar with its purpose and scope * * *"

The Supreme Court stated in *Interstate Circuit* v. *U. S.*, 306 U. S. 208:

"* * * acceptance by competitors, without previous agreement of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

In the *C-O-Two* case, supra, the Court stated:

"But the trial court sitting as the trier of the facts regarded this evidence as being another one in a series of 'plus factors' which, when standing alone and examined separately, could not be said to point directly to the conclusion that the charges in the indictment were true beyond a reasonable doubt, but which when viewed as a whole in their proper setting spelled out that irresistible conclusion."

In *U. S.* v. *Patten*, 226 U. S. 525, the Court stated:

"the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."

It is frequently noted that Federal Trade Commissioners are, or should be, experts in the field of unfair methods of competition. I fully agree. It is in conspiracy law that this expertness should be most valuable in the public interest. This Commission should be capable because of its expertness to pierce the outer deceptive facades of make-believe competitive conduct and detect the collective concert of action by conspirators underneath. The Commissioners should understand and recognize normal competitive behavior as distinguished from conspiratorial behavior. In conspiracy law the Courts have shown the way as indicated by the opinions quoted above. This Commission with its expertness should blaze the paths and thereby assure the consuming public that the prices of widely used commodities will be determined not by the few but by the impartial law of supply and demand.

If this Commission wrongs a corporation, the corporation can appeal to the Courts for relief. If this Commission wrongs the public in deciding a case, there is no appeal by the public to the Courts. We have, therefore, a great responsibility because, for the public, we are the Court of last resort.

Corporations represent wealth owned by individuals. Corporations are therefore, entitled to due process and to the impartial administration of justice. The Federal Trade Commission, when it issues a complaint, acts for the people of the United States. The people, in actions before this Commission, are also entitled to due process and to impartial justice. I am confident that all my colleagues on the Commission agree on this basic principle. In the application, there is the rub. Honest and sincere men will, and do, differ.

In conclusion, and to sum up, the prices in this industry were obviously not determined by the free play of competitive forces. Respondents claim that their practices were protected by the patent monopoly and the *General Electric* case, supra. The majority of the Commission states that whether or not respondents did conspire illegally, the record does not show that respondents have conspired lately.

In my opinion, this industry-wide "rigged" non-competitive pricing pattern is not protected by the *General Electric* case, supra. In addition, the most recent evidence in the record was to the effect that the pricing pattern was still being used. There is no affirmative evidence in the record that respondents have been competitive—lately.

I agree with the Chief Hearing Examiner that the record shows that respondents have conspired to fix prices and have restrained competition. An appropriate order to cease and desist should issue restraining respondents from continuing this conspiracy. The majority of the Commission has not directed that such order issue but has dismissed the complaint. From that action of the majority, I dissent.

Syllabus

IN THE MATTER OF

# ANCHOR SERUM COMPANY

DECISION AND DISSENTING OPINION IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3 OF THE CLAYTON ACT

*Docket 5965. Complaint, Mar. 14, 1952—Decision, Feb. 16, 1954*

Where a corporation which was engaged since 1913 in the manufacture, distribution, and sale of various animal health products, principally anti-hog-cholera serum and hog-cholera virus, and other biological products; was licensed since 1936 to produce and sell its products by the Bureau of Animal Industry, United States Department of Agriculture; sold its said products which it advertised nationally and by means of farm magazines, local newspapers, direct mail, billboards, and, to some extent, by radio advertising, to customers variously denominated as wholesalers, dealers, and consumers, located throughout the various States of the United States, with about 95% of such sales being to wholesalers, 4% to dealers, and 1% to consumers as defined by said Bureau; was in active and substantial competition with others similarly engaged, and one of about 32 manufacturers who produced, sold, and distributed such serum and virus in the same trade areas as did it, and who competed with it for customers who resold or used said products; and was the largest lay producer of the nine "lay" producers included in said 32 manufacturers, namely, those who sell in other than veterinarian channels, such as to drug stores, farm bureaus, wholesalers, etc., in competition, like the others, for the ultimate consumer market, viz., the farmer hog owner;

In accordance with aims and policies to obtain contracts with large-volume or wholesale purchasers, to require the latter to purchase their entire requirements from it, and to monopolize the field in said class of customers; and theretofore in free and open competition in the sale of its products in commerce but for the matters and things below set forth—

Entered into exclusive-dealing contracts, beginning in or about 1947 with 16 of its wholesale customers, in which classification were embraced all of its customer farm cooperatives in various States, including the two largest hog producing States and largest potential market for serum and virus, where the largest distributors of said products in their respective areas, contract purchasers, namely, the Iowa Farm Serum Co., with 137 dealers strategically located throughout the State's 99 counties, obligated to deal in and sell only serum and virus obtained from said Iowa company, and the Illinois Farm Bureau Serum Association, with 90 dealers similarly located in various counties and similarly obligated, enjoyed a competitive advantage over both wholesalers and retailers of serum and virus in their respective areas in that said cooperatives were able to purchase at the lower wholesale price and additionally to pay patronage dividends to their members, to the ultimate benefit of the individual farmer-consumer:

*Held*, That such acts and practices constituted a violation of Sec. 3 of the Clayton Act.

Before *Mr. James A. Purcell*, hearing examiner.

*Mr. William C. Kern* and *Mr. Andrew C. Goodhope* for the Commission.

*Cushman, Darby & Cushman* and *Davies, Richberg, Tydings, Beebe & Landa*, of Washington, D. C., *McBride & Baker*, of Chicago, Ill., and *Culver, Phillip, Kaufman & Smith*, of St. Joseph, Mo., for respondent.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), the Federal Trade Commission, on March 14, 1952, issued and subsequently served its complaint in this proceeding upon Anchor Serum Company, a corporation, charging it with violation of the provisions of Section 3 of the said Clayton Act. After the issuance of said complaint and the filing of respondent's answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it and said testimony and other evidence were duly recorded in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner upon the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel (oral argument not having been requested); and said hearing examiner, on April 10, 1953, filed his initial decision herein.

Within the time permitted by the Commission's Rules of Practice, respondent filed an appeal from said initial decision, and the Commission, after duly considering said appeal and briefs of counsel in support thereof and in opposition thereto, and the record herein, issued its order granting in part and denying in part the said appeal.

Thereafter, this matter regularly came on for final consideration by the Commission upon the entire record herein, and the Commission, being now fully advised in the premises, makes the following findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Anchor Serum Company, is a corporation chartered in 1917 and organized, existing, and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at South St. Joseph, Missouri.

Par. 2. Respondent is now and since the year 1913 has been engaged in the manufacture, distribution, and sale of various animal health products, principally anti-hog cholera serum and hog cholera virus (hereinafter referred to as serum and virus), and other biological products. Since the year 1936 respondent has been licensed to produce and sell its products by the Bureau of Animal Industry, United States Department of Agriculture.

Par. 3. Respondent markets its said products by selling same to customers, variously denominated as wholesalers, dealers, and consumers, located throughout the various States of the United States and has, at all times herein mentioned, maintained a constant current of trade in commerce in its said products between and among the various States of the United States. Respondent advertises its products nationally and by means of farm magazines, local newspapers, direct mail, billboards, and, to some extent, by radio advertising.

Par. 4. In the course and conduct of its said business respondent has been, at all times herein mentioned, in active and substantial competition in interstate commerce with persons, firms, and other corporations similarly engaged in the sale and distribution of serum, virus, and other biological products.

Par. 5. There are approximately thirty-two manufacturers who produce, sell, and distribute serum and virus in the same trade areas as respondent and who compete with respondent for customers who resell or use the said products. All such manufacturers are known in the trade as either "lay" or "vet" producers, such characterization being determined by, and descriptive of, the type of customer to whom they *sell*. "Vet" producers sell principally to veterinarians or to wholesalers who resell exclusively to veterinarians, and "lay" producers sell in other than veterinarian channels, such as to drugstores, farm bureaus, wholesalers, etc. All producers compete for the ultimate consumer market, viz, the farmer hog owner. The total of thirty-two manufacturers is divided into twenty-three "vet" and nine "lay" producers, of which latter category the respondent is the largest.

Respondent sells to three classifications of customers divided, percentagewise, approximately as follows: To wholesalers, 95%; to dealers 4%; and to consumers 1%, all of these categories of purchasers being defined by the Bureau of Animal Industry (U. S. Department of Agriculture) Order Regulating the Handling of Anti-Hog-Cholera Serum and Hog-Cholera Virus, as Amended (Sept. 1, 1952).

Par. 6. Respondent, in the course and conduct of its said business, has executed written contracts of sale of its products with sixteen of its wholesale customers. While the specific language of these contracts varies, each contract contains a clear and unambiguous clause requiring the customers to purchase all their requirements of serum, virus, and other biologicals or pharmaceuticals, which respondent sells, only from the respondent. An example of the specific language employed in four of such contracts (those of the Illinois Farm Bureau Serum Association and the Iowa Farm Serum Company being selected) follows:

*Association agrees:* 1. To buy, and does by these presents buy, and agrees to pay for all of its requirements of serum, virus and other products at the prices and on terms specified herein.

Seven of such contracts, specifically between respondent and its wholesale customers located in Sioux City, Iowa, Jackson, Mississippi, South St. Paul, Minnesota, National Stock Yards, Illinois, Grand Island, Nebraska, Albuquerque, New Mexico, and Shreveport, Louisiana, all contain the following quoted provision:

In consideration of the foregoing, the party of the second part agrees to purchase and pay for all his (their) requirements of anti-hog cholera serum, hog cholera virus and other serums, vaccines and biological products produced by the party of the first part [the respondent] and which it is able and willing to supply * * *.

All of the aforesaid contracts are currently in force and remain effective for indefinite periods of time or until canceled by expiration of specific contract periods or the happening of certain contingencies in each contract specified.

PAR. 7. The names and geographical locations of respondent's contract purchasers above mentioned, together with the sales to such purchasers of all products, expressed in dollar value, and the sales of serum, expressed in cubic centimeters (the latter for purposes of comparison where competitors' volume of business is expressed in cubic centimeters and not in dollars), and for the years indicated are as follows:

| | 1949 | 1950 | 1951 |
|---|---|---|---|
| Anchor Serum Co. of Iowa, Sioux City, Ia | $50,274.31<br>2,728,100 cc | $61,491.22<br>3,316,600 cc | $91,530.80.<br>4,163,900 cc. |
| Anchor Serum Co. of Minnesota, St. Paul, Minn | $46,464.11<br>2,457,100 cc | $90,031.01<br>6,014,300 cc | $154,802.27.<br>8,925,900 cc. |
| Anchor Serum Co. of Illinois, Chicago, Ill | $43,355.96<br>2,857,925 cc | $34,679.04<br>2,657,150 cc | $47,245.25.<br>3,229,000 cc. |
| Anchor Serum Co. of Grand Island, Nebr., Grand Island, Nebr. | $73,839.26<br>4,266,225 cc | $72,518.00<br>5,287,650 cc | $93,064.44.<br>5,715,190 cc. |
| Anchor Serum Co. of New Mexico, Albuquerque, N.M | $9,052.04<br>422,000 cc | $26,016.16<br>2,298,000 cc | $31,538.67.<br>1,196,750 cc. |
| Arkansas Farmers Association, Little Rock, Ark | ---------------- | $5,796.89<br>351,700 cc | $7,491.69.<br>366,600 cc. |
| Missouri Farmers Association, Inc., Columbia, Mo | ---------------- | $48,805.09<br>3,113,200 cc | $51,061.56.<br>3,197,650 cc. |
| Anchor Serum Co. of Spokane, Spokane, Wash | ---------------- | $3,480.86<br>152,500 cc | $7,867.30.<br>314,000 cc. |
| Anchor Serum Co. of Charlotte, Charlotte, N. C | $5,517.36<br>2,711,400 cc | $33,663.83<br>2,828,750 cc | $52,410.89.<br>4,020,000 cc. |
| Anchor Serum Co. of San Angelo, San Angelo, Tex | $4,922.27<br>99,200 cc | $15,777.05<br>298,300 cc | $27,421.37.<br>325,900 cc. |
| Hiram T. French & Wife, Fresno, Calif | $16,3[illegible]9.63<br>729,150 cc | $23,239.69<br>1,499,300 cc | $32,649.01.<br>2,225,000 cc. |
| Illinois Farm Bureau Serum Association, Chicago, Ill | $535,708.61<br>38,842,150 cc | $454,752.58<br>40,649,200 cc | $507,107.59.<br>40,037,700 cc. |
| Iowa Farm Serum Company, Des Moines, Ia | $549,373.85<br>39,836,475 cc | $509,690.92<br>43,334,200 cc | $605,794.11.<br>43,243,850 cc. |
| Anchor Serum Co. of Indiana, Indianapolis, Ind | $252,758.70<br>18,040,475 cc | $265,462.20<br>23,697,000 cc | $279,689.07.<br>20,413,900 cc. |

It will be noted that the foregoing figures represent sales by respondent to *contract* purchasers only and do not represent sales of respondent's total output. All such sales were made under terms of the contracts as described in Paragraph 6 hereof which contracts imposed upon the purchasers the onus or obligation to purchase respondent's products to the exclusion of the products of respondent's competitors. That the aggregate dollar value, and cubic centimeter quantity, of respondent's annual sales under such restrictive conditions to its wholesale customers have been substantial, and the wide distribution of respondent's activities in many areas of the United States, is self-evident from the foregoing sales recapitulation.

PAR. 8. The results naturally consequential to the use by respondent of its exclusive dealing contracts have been to arrogate to respondent a monopoly of a very substantial portion of the available market for serum and virus and thus to foreclose such market to competitors. For example: The States of Iowa and Illinois are the two largest hog-producing States in the country and constitute the largest potential markets for serum and virus. In the former, the Iowa Farm Serum Company, and in the latter, the Illinois Farm Bureau Serum Association, are the largest distributors of serum and virus in their respective areas, and both are contract purchasers of respondent. Respecting actual area coverage, the Iowa Company has 137 dealers located strategically throughout the State's 99 counties, all such dealers, in turn, being required to deal in and sell only serum and virus obtained from the Iowa Company; the Illinois Association has 90 dealers located in the various counties of Illinois all of whom are likewise required to deal in and sell only serum and virus obtained from the Illinois Association. The Iowa Company and the Illinois Association, exclusive dealers of respondent, are in competition with both wholesalers and retailers of serum and virus in their respective areas and enjoy a competitive advantage in that they are able to purchase at the lower wholesale price and additionally to pay patronage dividends to their members, thus ultimately inuring to the benefit of the individual farmer consumer.

PAR. 9. As a result of respondent's exclusive dealing contracts aforesaid, competing manufacturers and producers have suffered loss of a substantial volume of business by them enjoyed previous tc adoption by respondent of its exclusive contracts. As examples:

*A.* Lederle Laboratories Division of the American Cyanamid Com pany (Lederle Laboratories, Inc., prior to September 1, 1946), com petitor of respondent, sold serum and virus to the Iowa Farm Serur Company during the years and in the amounts following:

| | |
|---|---|
| 1945 | $56,757.57 |
| 1946 | 65,211.16 |
| 1947 | 17,943.14 |
| 1948 | [1] 621.24 |
| 1949 | None |

and also sold to the Illinois Farm Bureau Serum Association as follows:

| | |
|---|---|
| 1945 | $172,114.08 |
| 1946 | 169,338.69 |
| 1947 | 125,903.10 |
| 1948 | None |

[1] This being an unfilled quota under its 1947 contract.

The reasons assigned by both the Iowa Company and Illinois Association for cessation of purchases from Lederle were the contracts between them and the respondent.

The following quotations are given as indicating the purposes and intentions of respondent and the results anticipated from said contracts:

Letter from respondent, dated March 20, 1947, addressed to Mr. Harry Meloy, General Counsel for Illinois Farm Bureau Serum Association:

Since visting you in your office I have been doing a lot of thinking and talking concerning our problems of proposing to you a suitable proposition *covering a long term purchase of all of your serum and virus requirements from us.* We now have the following proposition to make to you.

*This is to be for a long term contract covering five years with an option of renewal for every five year period thereafter* and it may be terminated by either party with the giving of eighteen months written notice of such. * * * *It is also understood that your entire purchases of serum and virus be covered in this contract and that we are to furnish all of your requirements.* * * * (Italics supplied.)

And again, letter from respondent, dated June 5, 1947, addressed to Mr. Sam Russell of the Illinois Farm Bureau Serum Association, *inter alia*, as follows:

* * * I note that you state that *the serum you have purchased from Lederle* will have been delivered by about June 15th, although it is possible it is apt to last a little longer time. It is completely satisfactory with us if you would like to set a date farther in the future so that you could give your counties a definite time when they could make the change.

*It is also stipulated in the contract that when you get into an organized bacterin and pharmaceutical department you would purchase these products from us.* In the meantime I have a salesman who is going to work the State of Illinois, calling on your counties in the promotion of these new products. I would appreciate it very much if you would get a letter out to all of your counties advising them of his coming and to show him all possible courtesy, and if you deem it helpful, *I would appreciate your mentioning the fact that all of* *the serum and virus requirements are being purchased from this company. I would appreciate receiving a copy of the letter you send out to these counties for my information.* * * * [Italic supplied.]

Respondent introduced testimony to the effect that the Illinois Association was the moving party in negotiating the original cost-plus exclusive contract with respondent and, during the negotiations, opportunity was afforded Lederle to compete for the business but nothing came of it. Such evidence was also to the effect that the Illinois Association, by such a contract, sought to assure its members a constant and uninterrupted flow of serum and virus in large quantities and at critical periods, yet it is significant to note that no testimony was offered complaining of the quality or quantity of goods furnished the Association by Lederle during the years preceding 1948, when the first exclusive contract was effectuated.

Irrespective of the contention that the Illinois Association was the movant in negotiating the contract, the fact remains that the contract (and succeeding ones) became a *fait accompli* and must speak for itself, and the parties thereto are chargeable with the results flowing therefrom.

*B.* The Diamond Serum Company of Des Moines, Iowa, a competitor of respondent, sold virus and serum to Iowa Farm Serum Company during the years and in the amounts following:

| | *Virus* | *Serum* |
|---|---|---|
| Oct. 1, 1945–Sept. 30, 1946 | 830,985 cc | 11,814,0[illegible]5 cc. |
| | $15,950.09 | $79,403.72. |
| Oct. 1, 1946–Sept. 30, 1947 | 834,340 cc | 12, 769, 675 cc. |
| | 16, 686.35 | $90,469.73. |
| Oct. 1, 1947–July 30, 1948 | 190,950 cc | 1,961,000 cc |
| | $2,199.00 | $15,087.39. |

The sales by Diamond to the Iowa Company for the fiscal period 1945–1946 represented the entire production of Diamond, and during the next succeeding period 1946–1947, Diamond had but one other customer than the Iowa Company, and Diamond's last sale to Iowa Company was in July 1948. The record is silent as to why the Iowa Company ceased doing business with Diamond, but when the fact that respondent entered into its full-requirement contract with Iowa on April 29, 1947, is considered together with the advantages accruing to Iowa by reason thereof, the resulting cessation of sales speaks for itself. Here again, as in the instance of the Illinois Association, respondent brought out that the Iowa Company, through its counsel, sought the contract and, while offering to negotiate with Lederle on a similar basis, did not approach Diamond. On this attempted defense showing the same conclusion must be reached as in the same circumstances set up concerning the Illinois Association.

Further analysis from the viewpoint of injury to competition inuring to Lederle and Diamond is graphically illustrated by the following figures showing increased sales by respondent to Illinois Association and Iowa Company, the year 1946 having been selected as the starting point because it is the last complete year of sales under free competitive conditions and before the 1947 full-requirement contracts were initiated by the respondent:

Sales by Respondent to:—

| | | |
|---|---|---|
| Illinois Farm Bureau Serum Association: | | |
| 1946 | $134,737.48. | 16,558,200 cc. |
| 1947 | $327,727.77. | 26,034,150 cc. |
| 1948 | $504,846.55. | 36,742,795 cc. |
| 1949 | $535,708.61. | 38,842,150 cc. |
| 1950 | $454,752.58. | 40,649,200 cc. |
| 1951 | $507,107.59. | 40,037,700 cc. |
| Iowa Farm Serum Company: | | |
| 1946 | $133,638.70. | 16,168,325 cc. |
| 1947 | $221,836.66. | 17,132,500 cc. |
| 1948 | $497,285.49. | 36,111,295 cc. |
| 1949 | $549,373.85. | 39,836,475 cc. |
| 1950 | $509,690.92. | 43,334,200 cc. |
| 1951 | $605,794.11. | 43,243,850 cc. |

On the basis of the above figures compared with the tabulations of sales by respondent's competitors to the identical purchasers, as set forth in subparagraphs "A" and "B" of this paragraph, no other finding of fact would be compatible with the results than that such ensued as a direct corollary of the respondent's exclusive full-requirement contracts and the natural effects flowing therefrom.

Par. 10. The aims and policies of respondent were to obtain contracts with large volume or wholesale purchasers and to require the latter to purchase their entire requirements from respondent. The qualifications to attain the designation of "wholesaler" before being licensed as such by competent and legal authority (as in fact are the other categories of dealers and users) are fixed by the appropriate control agency of the United States Department of Agriculture, and one of the requirements of a "wholesaler" is that he must have purchased at least 15,000,000 cc. of serum in the previous calendar year, i. e., he must be a large-volume purchaser. Respondent's sales are approximately as follows: 95% to wholesalers; 4% to dealers, and 1% to consumers, as defined in the B. A. I. Marketing Order as amended. All of the farm cooperative organizations, who are respondent's customers, belong to the "wholesaler" group.

Indicative of respondent's policy to monopolize the field in this class of customers, it is deemed expedient to quote from a letter of respondent to a potential customer, Fidelity Laboratories, Inc., of Chicago, dated January 19, 1948. It is regretted that the following lengthy quotation should be made but, upon the theory that one picture is worth ten thousand words, the following is presented as a picture of the respondent's aims and policies, painted in the words of its president and executive officer, and would be difficult to paraphrase without danger of misinterpretation or loss of values:

> I am not particularly interested in selling serum by a million cc's or so at a time for that does not allow us to enlarge our production sufficiently to plan an increased volume throughout the year. What I would like for you to do is to contract with us for your entire requirements of anti-hog-cholera serum and virus and definitely obligate yourself to purchase a minimum number of cc's in a year's time—say, for instance, 20 or 25 million cc's and that this serum should be paid for at a certain number of cents below our wholesale price at the time of delivery. This would be a sliding scale arrangement that would be profitable to both of us and the volume of serum that you would purchase would be large enough that we could materially increase production and therefore count on reducing our overhead at the same time.
>
> * * * * * * *
>
> For your information, I have already sold for this year over 160,000,000 cc of serum and I can assure you that with this volume that our overhead costs, etc., are practically at a minimum and therefore would enable us to make serum a great deal cheaper than any other company in the country. What I want to do is to contract with other producers, wholesalers, etc., to bring our total production up to 250,000,000 cc's a year which we can comfortably produce in our plant. As you know, we are on a cost-plus arrangement with the farm bureaus and due to this contract there is no possibility of our raising the price to suit our own needs. We are out to make large quantities of serum, are set up to do the job efficiently, and frankly, are going to start cutting serum prices down to a figure that no one else will be able to touch in the country. I believe you will be making a very wise and profitable move by coming in with this on a proposed setup as I have outlined above.

In addition to the actual injury to competition above found, contracts of the type negotiated by respondent with wholesalers have had the further result and effect of enabling respondent to operate its facilities at top capacity, consistent with its forseeable selling ability, and avoiding the fluctuations incident to high- and low-production periods, thus reducing unit costs to a minimum, advantages denied respondent's competitors who did not indulge in respondent's practice of securing full-requirement contracts.

PAR. 11. The policies and contracts of the respondent have had a further adverse and injurious effect, at another level of competition, upon competitors of the respondent in that the former have been seriously hampered and hindered in maintaining the interest of drugstores in the retail distribution of their products, the said drugstores being unable to compete with respondent's large wholesale customers under the aforesaid total-requirement contracts with respondent. An example of this is found in the case of Fidelity Laboratories, Inc., a competitor of respondent. Combined sales by Fidelity in the States of Iowa and Illinois to its customers follow:

| *Year* | *Serum* | *Virus* |
|---|---|---|
| 1945 | $31,554.72 | $6,474.12. |
| | 4,688,800 cc | 340,920 cc. |
| 1946 (1st 6 mos. only; figures for last 6 mos. unavailable). | $17,028.91 | $3,380.57. |
| | 2,216,050 cc | 164,180 cc. |
| 1947 | $35,396.71 | $6,529.34. |
| | 3,151,035 cc | 224,285 cc. |
| 1948 | $11,187.66 | $3,528.49. |
| | 893,150 cc | 109,745 cc. |
| 1949 | $16,253.60 | $2,763.58. |
| | 1,377,850 cc | 88,040 cc. |
| 1950 | $12,789.97 | $2,501.41. |
| | 1,270,100 cc | 93,015 cc. |
| 1951 | $13,034.31 | $1,293.95. |
| | 943,250 cc | 41,195 cc. |

Examination of the foregoing figures indicates the time of break or decline in Fidelity's sales took place in 1948, which is concurrent with the time of negotiation and effective dates of respondent's contracts with its wholesalers as hereinbefore delineated. And further, Fidelity enjoyed 36 drug store accounts in these States in the year 1945; it had only 23 in 1948 and but 12 in 1951. An attempt to meet this situation by placing traveling salesmen in these States failed because of the aforesaid competition.

PAR. 12. Not only is the aggregate dollar volume of serum and virus and other products sold by respondent to its customers pursuant to the restrictive conditions and agreements hereinabove found to be substantial, but such sales, made under such conditions and restrictions, materially lessen competitive sales in each of the trade areas in which said customers are located; and respondent, during all the time mentioned in the complaint, would have been, and would now be, in free and open competition in the sale of such products in commerce were it not for the suppression of said competition in the manner and form hereinabove found.

PAR. 13. Respondent's sales and contracts for sale of serum and virus on the aforesaid conditions, agreements, and understandings that the purchasers thereof shall not purchase like or similar products of competitors may have, have had, and now have, the effect of substantially lessening competition in the line of commerce in which the respondent is engaged and in the line of commerce in which the customers and purchasers of respondent are engaged; and have had, and now have, a tendency to create a monopoly in respondent in the sale in commerce of such products sold by the respondent.

CONCLUSION

The record in this proceeding establishes that respondent has entered into contracts with sixteen of its wholesale customers under which these customers have agreed to purchase their entire requirements of anti-hog cholera serum, hog cholera virus, and other products sold by the respondent, from respondent. Respondent is the largest of nine "lay" producers of serum and virus in the United States. Respondent's sales to its sixteen wholesale customers who have agreed to purchase their entire requirements of serum, virus, and other products from respondent have increased considerably since the execution of the agreements, and respondent's volume of business under these agreements is substantial. As a result of respondent's exclusive dealing arrangements with sixteen of its wholesale customers, a very substantial portion of the available market for serum and virus has been foreclosed to respondent's competitors, and competing manufacturers and producers have suffered the loss of a substantial volume of the business enjoyed by them previous to the execution by the respondent of the restrictive contracts.

It is thus established that respondent has made sales and contracts for sale of its products on the condition, agreement, and understanding that the purchasers shall not deal in like or similar products of competitors and that the effect of such sales and contracts for sale on such condition, agreement, and understanding has been to substantially lessen competition between respondent and its competitors and to tend to create a monopoly in the respondent.

Respondent introduced evidence to the effect that its contracts with certain of its large volume purchasers, whose names included the word "Anchor," were entered into for the purpose of protecting the "Anchor" name and respondent's investment and extensive advertising to promote that name. Some of these customers were Anchor Serum Company of Iowa; Anchor Serum Company of Mississippi; Anchor Serum Company of Minnesota; Anchor Serum Company of Illinois; Anchor Serum Company of Grand Island, Nebraska; Anchor Serum Company of New Mexico; and Anchor Serum Company of Louisiana. Respondent's contracts with these purchasers were on a full-requirement basis and all of them contained the provision that the purchaser was:

> * * * at liberty to make such purchases elsewhere to the extent the party of the first part [respondent] is unable or unwilling to supply the same.

Respondent claims that these contracts, with their restrictive provisions, are fully justified because their purpose was to protect respondent's trade name and good will attaching to the name "Anchor." It is noted, however, that the evidence fails to indicate that these purchasers would improperly brand or advertise competitive products handled by them or that they would do any other act inimical to the respondent in the absence of the restraint imposed by the contracts. Nor is there any evidence indicating effort on the part of the respondent to assure it adequate protection without resorting to methods which are clearly unlawful. See *International Business, etc.* v. *United States*, 298 U. S. 131.

Respondent also introduced the testimony of authorized agents of two of its large volume contract purchasers, with whom it had full-requirement contracts, to the effect that negotiations for such contracts had been initiated by the purchasers and not by the respondent. Such testimony further tended to show that this action was motivated by a desire on the part of the purchasers to achieve assured continuity of a supply of respondent's products, and that such contracts would be otherwise beneficial to the purchasers in giving them advantageous prices and freedom from "shopping" around among the various producers in the industry.

In the Commission's view, no consideration of economic merit, expediency, or necessity is sufficient to constitute an adequate defense to those acts which are proscribed by the applicable provisions of the Clayton Act here invoked. It is, therefore, immaterial at whose instance the negotiations for the contracts were instigated, or whether the contracts were for the benefit of respondent or its customers. It may be pertinent to here point out also that these parties are the only ones whose interests were considered by the respondent, as a result of which the tri-dimensional aspect of the situation was disregarded and the interests of the public and of those competitors of the respondent to whom injury ensued from the acts of the respondent were not considered. *United States* v. *United Shoe Machinery Corp.*, 264 Fed. 138; *United States* v. *International Business Machines Corp.*, 13 F. Supp. 11, *aff'd* 298 U. S. 131; *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451; and as particularly apposite: *Standard Oil Co. of Calif.* v. *United States*, 337 U. S. 293.

Respondent challenged the jurisdiction of the Commission on the ground that jurisdiction of the subject matter is vested solely in the Department of Agriculture by the Anti-Hog Cholera Serum and Hog Cholera Virus Act of 1935 (7 U. S. C. A. §§ 851–855). This contention finds no support in the specific language of the said Act, nor in any reasonable construction thereof. Further, neither the order of the Secretary of Agriculture nor the marketing agreements entered into pursuant to the directions and authority of said Act are susceptible of any such construction, nor indeed could they be effective to oust the Commission's jurisdiction in the absence of clear and unequivocal legislative language of specific intent.

The respondent is not exempt from the operation of the antitrust laws, as the only contracts exempted by the said Act are those provided for in the Act. This question of exemption from operation of the antitrust laws was considered in the case of *American Cooperative Serum Ass'n* v. *Anchor Serum Co.*, 153 F. 2d 907, which was a suit for treble damages against Anchor Serum and the Illinois Farm Bureau Association to recover for violation of Section 2 of the Clayton Act, as amended. In that case the same plea of exemption was urged by this respondent, with adverse results to it. See also: *Hinton* v. *Columbia River Packers*, 131 F. 2d 88; *Manaka* v. *Monterey Sardine Industries, Inc.*, 41 F. Supp. 531.

The Commission therefore concludes that the acts and practices of the respondent as hereinabove found constitute a violation of Section 3 of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act).

## ORDER

*It is ordered*, That the respondent, Anchor Serum Company, 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 anti-hog cholera serum or hog cholera virus in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Selling or making a contract or agreement for the sale of any such products on the condition, agreement, or understanding that the

purchaser of said products shall purchase all of his (its) requirements from respondent or that otherwise requires that the purchaser thereof shall not use or deal in or sell the goods, wares, and merchandise of a competitor or competitors of the respondent.

2. Enforcing or continuing in operation or effect any condition, agreement, or understanding in, or in connection with, any existing sales contract, which condition, agreement, or understanding is to the effect that the purchaser of said products shall purchase all of his (its) requirements from respondent or which otherwise requires that the purchaser thereof shall not use or deal in the goods, wares, and merchandise of a competitor or competitors of the respondent.

*It is further ordered*, That the 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 this order.

Commissioners Mason and Carretta dissenting.

DISSENTING OPINION OF COMMISSIONER ALBERT A. CARRETTA

The Commission's "Order Disposing of Respondent's Appeal from Initial Decision of the Hearing Examiner" states, among other things:

"One of respondent's contentions is that there is insufficient evidence in the record to support the hearing examiner's findings with respect to 'other biological products,' and that, therefore, the hearing examiner was not warranted in including 'other biological products' in the prohibitions of the order. The Commission agrees with this contention of the respondent."

I disagree with the majority of the Commission when it concludes that the above-quoted contention of the respondent is sufficient to warrant a modification of the Order recommended by the Hearing Examiner in this matter, which Order applied its inhibitions to "*anti-hog cholera serum or hog cholera virus or other biological products or similar or related products.*" The Commission, having been convinced by the argument made by respondent, has modified the Order of the Hearing Examiner by limiting such Order to "*anti-hog cholera serum or hog cholera virus.*" This I believe to be error.

By referring to the very "Findings as to the Facts" which the majority of the Commission uses as the basis for its modified Order, we find that in Paragraph Four thereof, the Commission states:

"In the course and conduct of its said business respondent has been, at all times herein mentioned, in active and substantial competition in interstate commerce with persons, firms, and other corporations similarly engaged in the sale and distribution of serum, virus, *and other biological products*." (Italics added.)

From the foregoing, it must be concluded that the Commission is convinced that the subject respondent is in competition with other firms not only in the sale and distribution of serum and virus, but also in the sale and distribution of other biological products.

In Paragraph 6 of the Commission's "Findings as to the Facts," the Commission, among other things, states:

"Respondent, in the course and conduct of its said business, has executed written contracts of sale of its *products* with sixteen of its wholesale customers. While the specific language of these contracts varies, each contract contains a clear and unambiguous clause requiring the customers to purchase all their requirements of serum, virus, *and other biologicals or pharmaceuticals*, which respondent sells, only from the respondent. (Italics added.)

This Finding appears to be conclusive as to the extent of the exclusive dealing contracts of the respondent. Such contracts relate not only to serum and virus, but also to "other biologicals or pharmaceuticals."

In Paragraph 9 of its "Findings as to the Facts," the Commission, among other things, states:

"As a result of respondent's exclusive dealing contracts aforesaid, competing manufacturers and producers *have suffered loss of a substantial volume of business* by them enjoyed previous to adoption by respondent of its exclusive contracts." (Italics added.)

This finding of the Commission does not say that the competing manufacturers and producers have suffered loss of a substantial volume of only their business in anti-hog cholera serum or hog cholera virus. It states that the competing manufacturers and producers *have suffered loss of a substantial volume of business*—which must be read to include serum, virus and other biologicals as well. (By referring to Paragraph Four of the "Findings as to the Facts," we note that respondent's competitors are engaged in the sale and distribution of serum, virus, and other biological products.)

Paragraph 12 of the Commission's "Findings as to the Facts" reads as follows:

"Not only is the aggregate dollar volume of serum and virus *and other products* sold by respondent to its customers pursuant to the restrictive conditions and agreements hereinabove found to be substantial, but such sales, made under such conditions and restrictions materially lessen competitive sales in each of the trade areas in whicl said customers are located; and respondent, during all the time men tioned in the complaint, would have been, and would now be, in fre and open competition in the sale *of such products* in commerce were it not for the suppression of said competition in the manner and form hereinabove found." (Italics added.)

By the use of the term "other products" in the above-quoted Finding, the Commission must have intended to refer to the other biological products or similar or related products which are sold by the respondent. What else could the Commission have intended?

I am of the opinion that the record in this case is sufficient to warrant the issuance of a cease and desist order against this respondent in the language as recommended by the Hearing Examiner. The Order of the Commission should apply not only to anti-hog-cholera serum or hog cholera virus, but also to other biological products or similar or related products.

The reasoning used by the Commission in the order issued herein seems to indicate that in a Section 3 proceeding, the Commission has the burden of proving "effect upon competition" for each and every product distributed by a respondent. I am not willing to bind myself to such an interpretation of the statute. It is my opinion that whenever a manfacturer enters into exclusive dealing contracts with its customers, and such contracts cover *all of the products* manufactured by such respondent, the Commission need only show that the effect of such contracts may be substantially to lessen competition in its field of operation. If such manufacturer sells or distributes 100 separate and distinct but related products, the Commission should not be required to prove the effect upon competition as to each and every one of the 100 products. It should suffice, when exclusive dealing contracts cover a manufacturer's entire line of products, if the Commission were required to prove the effect upon competition of such exclusive dealing contracts. Competition, in this case, must of course relate to competition among those distributing approximately the same line of goods.

In this instant case, the respondent sold anti-hog-cholera serum, hog cholera virus, and other biological products. Its competitors sold the same line of products, although some may have sold only the serum and the virus. Consequently, even if we grant for the sake of argument that in the instant case, counsel in support of the complaint only proved the "effect upon competition" as it relates to anti-hog-cholera serum and to hog cholera virus, the Commission may nevertheless issue its Order in such form as to apply also to "other biological products or similar or related products."

As authority for my opinion in this matter, I should like to cite the decision of the Supreme Court of the United States in the matter of *Federal Trade Commission* v. *The Ruberoid Co.*, 343 U. S. 470 (1952). The Ruberoid case involved a violation of Section 2 (a) of the Clayton

Act, as amended by the Robinson-Patman Act. Since the instant case involves a violation of Section 3 of the same Act, I should like to point to similarities in the two sections. Section 2 of the Clayton Act pertains to discriminations in price, service or facilities. However, Section 2 does not make unlawful all such discriminations. They are unlawful only "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly *in any line of commerce*, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them." (Italics added.) Section 3 pertains to tying or exclusive leases, sales or contracts. However, not all such leases, sales, or contracts are unlawful. They are unlawful only "where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly *in any line of commerce*." (Italics added.)

From the foregoing, it may be seen that the tests are approximately the same, and that both Section 2 and Section 3 use the language "in any line of commerce."

In the Ruberoid case, in disposing of the attacks made by The Ruberoid Co. upon the breadth of the Commission's order, the Supreme Court stated:

"Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. 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."

In that case, the Supreme Court also stated:

"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.' "

In *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321 (1944), the United States Court of Appeals for the Seventh Circuit had before it, among other things, the question pertaining to the insufficiency of the evidence to support the order as entered by the Commission. There, the Court said:

"Complaint is made that the *evidence* chiefly concerned itself with blue print paper and other reproduction papers and cloths, whereas the *order* covers a multitude of items as to some of which there was little or no evidence."

Notwithstanding the foregoing complaint made by respondents, the Seventh Circuit approved the order of the Commission.

In *Local 167* v. *United States*, 291 U. S. 293 (1934) the Supreme Court considered an appeal from an injunction issued under the Sherman Act for violations of Sections 1 and 2 thereof. Although the principal commodity was live poultry, the injunction also included "poultry feed, or other commodities necessary to the poultry business." In approving the breadth of the injunction issued therein, the Supreme Court said:

"Having been shown guilty of coercion in respect of the coops in which poultry is kept and fed, appellants may not complain if the injunction binds generally as to related commodities including feed and the like."

In further support of my position, see also: *Hershey Chocolate Corporation* v. *Federal Trade Commission*, 112 F. 2d 968, 971–972 (3rd Cir. 1941); *Haskelite Manufacturing Corporation* v. *Federal Trade Commission*, 127 F. 2d 765, 766 (7th Cir. 1942); *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52, 58–59 (4th Cir. 1950); *Consumer Sales Corporation* v. *Federal Trade Commission*, 198 F. 2d 404, 408 (2nd Cir. 1952).

Based upon the record in this case, and based upon the same "Findings as to the Facts" adopted by the majority of the Commission, it is my opinion that the Order to Cease and Desist included in the initial Decision of the Hearing Examiner should have been adopted in its entirety by the Commission.

Commissioner Mason concurring.

IN THE MATTER OF

# ASTOR INDUSTRIES, INC. ET AL.

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 5889. Complaint, June 27, 1951—Decision, Feb. 17, 1954*

Where a corporation and its three officers, engaged in the competitive sale to distributors and retailers of sewing machine heads imported by them from Japan, upon some of which there appeared on the back of the vertical arm a decalcomania displaying the word "Japan" and upon some of which there appeared on brass or brass colored medallions on the front of the vertical arm, the words "Reg. Applied for Hudson" or "Reg. Applied for Hudson, Japan", and of the completed sewing machines of which said heads were a part, and, as thus engaged, in attaching to said heads at the only place provided therefor motors marked "Made in U. S. A." thus concealing the aforesaid marking on said imported heads—

(a) Offered and sold the aforesaid machines upon some of which the word "Japan" as included on the front of the vertical arm, as above set forth, was, by virtue of the lettering, coloring, and general arrangement, indistinct, difficult to read, unemphasized, and distinguishable only by careful inspection, with no adequate marking to show the place of manufacture or origin of said imported heads; and

(b) Falsely represented that their said sewing machines were manufactured by or connected in some way with the Hudson Motor Car Company, through conspicuously branding their said machines with the name "Hudson" and use thereon of the words "The Hudson Sewing Machine Co.", and the featuring of said name in instruction booklets, advertising circulars, displays, and letters:

*Held*, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and of their competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. Frank Hier*, hearing examiner.
*Mr. William L. Taggart* for the Commission.
*Mr. Joseph N. Klapper*, of New York City, for respondents.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on June 27, 1951, issued and subsequently served its complaint in this proceeding upon Astor Industries, Inc., a corporation, and Max Goldberg, Manny Goldberg, George Zuckerman, Henry Spiegelman, and John D. Bussel, individually and as officers of said corporation, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner upon the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel, and said hearing examiner, on February 25, 1953, filed his initial decision herein.

Within the time permitted by the Commission's Rules of Practice, counsel supporting the complaint filed with the Commission an appeal from said initial decision, and thereafter this proceeding regularly came on for final consideration by the Commission upon the record, including briefs of counsel in support of and in opposition to said appeal (oral argument not having been requested); and the Commission, having entered its order granting said appeal, and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and conclusion drawn therefrom and order, the same to be in lieu of the initial decision of the hearing examiner.

## FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Astor Industries, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York with its office and principal place of business located at 220 Fifth Avenue, New York, New York. Respondents Max Goldberg, Manny Goldberg, George Zuckerman, Henry Spiegelman, and John D. Bussel are president, vice president, vice president, secretary, and treasurer, respectively, of corporate respondent, and acting as such officers formulate, direct, and control the policies, acts, and practices of said corporation. The address of the individual respondents is the same as that of the corporate respondent. They are the only officials of corporate respondent.

PAR. 2. Respondents are now, and have been for several years last past, engaged in the sale of sewing-machine heads imported by them from Japan, and completed sewing machines of which said heads are a part, to distributors and also to retailers who, in turn, sell to the purchasing public. Respondents do not sell to consumers. In the course and conduct of their business, respondents cause their said products, when sold, to be transported from their place of business in the State of New York to the purchasers thereof located in various other States and maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between the various States of the United States. Their volume of trade in said commerce has been and is substantial.

PAR. 3. Whatever markings, showing country of origin, are on the sewing-machine heads imported from Japan by respondents, whether by plaque, medallion, or decalcomania, are left unchanged by respondents. Some of these machines imported by respondents have a metal plaque or medallion, elliptical in shape, attached to the front of the vertical arm by two small rivets, reading in raised letters about ¼ of an inch, "Reg. Applied for Hudson" or "Reg. Applied for Hudson, Japan." Other sewing-machine heads imported by respondents have, in addition, a decalcomania on the rear of the vertical arm about an inch above the bed, gold letters on black lacquer, reading "Japan." Respondents purchase these machines, as above described, with and without attachments for the sewing-machine head (such as light, motor, foot pedal), and these purchases are resold in the same condition by respondents after inspection.

PAR. 4. These machines are designed for electric operation and when a motor is attached at the only place provided for it, the rear of the vertical arm, the decalcomania marking thereof of "Japan" is effectively concealed from even careful inspection, short of removing the motor or turning the machine into an awkward and unusual position, from a user's standpoint, imposed only by a desire to see that particular spot but entirely unlikely to ensue from ordinary or normal use of the machine. There is substantial evidence in the record that purchaser-users never saw this concealed marking or suspected the foreign origin of their purchases. The finding is that such marking is, for practical purposes and to the ordinary user or purchaser, completely and effectively concealed.

PAR. 5. The brass or brass-colored medallions riveted to the front of the vertical arm of respondents' imported machines are in bright gold color, in raised letters only, with no background coloring to emphasize the raised letters and with other lettering "Reg. Applied for Hudson" of similar size and protrusion, so that the word "Japan" is indistinct, difficult to read, unemphasized, and distinguishable only by careful inspection. There is substantial evidence in the record that users and purchasers did not see, or seeing, did not comprehend, such marking.

PAR. 6. When these markings, as hereinabove described, are taken together with the additional facts that the motors attached to these machines whether "Hudson" or "Universal" are all marked "Made in U. S. A.," that the instruction booklet prepared and distributed by respondents to dealers and accompanying the machine when sold to the consumer, as well as all of the other advertising of respondents except letters to dealers, fails to mention anywhere the foreign origin of the machine, and that the name "Hudson" is part of the corporate or brand name of a number of American concerns manufacturing and selling domestically, some of them nationally known, it is plain that many consumer-purchasers would be, and are, deceived into the belief that respondents' Hudson sewing machines are made in the United States. The finding, accordingly, is that respondents' imported Hudson sewing machines are not adequately marked to show their place of manufacture or origin.

PAR. 7. The fact that 70–80 percent of these machines are supplied by respondents to dealers in the original containers as they arrived from Japan, which containers plainly show on the outside their foreign origination; the fact that respondents ordered the decals and medallions put on the machines in ordering them from the makers in Japan; and the fact that purchasing dealers are, regardless of markings, under no misapprehension that the machines were imported or that such dealers are instructed by respondents to tell consumers that the machines are imported, are equally irrelevant. Respondents, by placing in the hands of these dealers their sewing machines as hereinabove described, have provided the dealers with the means and instrumentality whereby the purchasing public may be, and is, misled and deceived as to the place of origin of said machines. This is emphasized by the substantial evidence in the record that these riveted medallions may be removed with comparative ease without the marks of removal being discernible except upon the closest inspection. Whether dealers do so deliberately or innocently is beside the point. It is sufficient if the public has been, or can be, misled.

PAR. 8. When sewing machines are exhibited and offered for sale to the purchasing public and such articles are not marked at all or are inadequately marked to show their foreign origin, or if such articles are marked and the markings are concealed, removed, or obliterated, the purchasing public understands and believes such articles to be wholly of domestic origin.

PAR. 9. Respondents use the brand name "Hudson" in marketing their imported machines. Every machine is branded with the name in decalcomania, gold letters of equal size on the black lacquer of the machine's horizontal arm, both sides; and across the top of the same arm, in the same manner, there appear the words "The Hudson Sewing Machine Co." In addition to this, the word "Hudson" appears in raised letters on the metal medallion affixed to the front of the vertical arm. All of respondents' instruction booklets, advertising circulars, display, and letters prominently feature the name "Hudson."

PAR. 10. The name "Hudson" is a part of the corporate name of the Hudson Motor Car Company, a corporation which has been and is favorably known to the purchasing public and which is and has been long established in the automobile industry by selling an automobile known as "Hudson."

A number of witnesses who testified in this proceeding said that they associated the name "Hudson" with the Hudson Motor Car Company or with the Hudson automobile. One of the witnesses said that he associated the name "Hudson" with the manufacturer of the Hudson automobile. He did not know whether Hudson Motor Car Company manufactured anything other than automobiles but there was the possibility that the company also manufactured the sewing machine on which the name "Hudson" appeared. Another witness, a housewife, testified that she would assume anything in the machinery line with the name "Hudson" was made by the Hudson Motor Car Company. Other consumer witnesses testified to the same effect. A representative of the Hudson Motor Car Company testified that the word "Hudson" as it appears on the horizontal arm of respondents' machines and in some of the respondents' advertising literature simulated in appearance some of his company's advertising. There is also in the record a stipulation by opposing counsel to the effect that if three named consumers who had purchased respondents' machines were called as witnesses, they would testify that the name "Hudson" did not, to their minds, indicate that the machines had any connection whatsoever with the Hudson Motor Car Company.

Based upon the whole record, the Commission concludes, and therefore finds, that by using the word "Hudson" as a trade or brand name for their sewing machines in the manner hereinabove found, the respondents have represented, contrary to the fact, that their sewing machines are manufactured by or connected in some way with the Hudson Motor Car Company. Respondents' use of the word "Hudson" has also enhanced the erroneous and mistaken belief on the part of the purchasing public that respondents' sewing machines are o domestic origin.

PAR. 11. There are among members of the purchasing public a sul stantial number who have a decided preference for products man factured in the United States over products manufactured in whc or in part in foreign countries, and this preference extends to sewi machines. There are also many members of the purchasing pub who prefer to purchase products, including sewing machines, wh are manufactured by, or connected in some way with, well and favorably known American firms rather than products manufactured by a firm or firms which are not well known to the purchasing public.

PAR. 12. The booklet which respondents furnish with each machine sold to dealers, and which the dealer in turn gives the user-purchaser when the machine is resold, contains on the inside of the front cover page the following:

HUDSON
ELECTRIC SEWING MACHINE
Twenty Year Guarantee Bond

This certifies that ________________________ is the owner of HUDSON Electric Sewing Machine Serial No. ________ Purchased on ________________.

1. The HUDSON Electric Sewing Machine covered in this guarantee is warranted to be free from defects in workmanship and material for a period of twenty years from the date of this certificate.

2. All HUDSON Electric Sewing Machine parts are made of the finest materials. All friction parts are doubly protected for long life. Any part found defective will be replaced by your HUDSON dealer free of charge for a period of twenty years.

3. Parts that normally require replacement such as bobbin case, bobbins, needles and attachments are not covered by this guarantee.

4. The HUDSON Sewing Machine motor and motor accessories are guaranteed for one year.

HUDSON Electric Sewing Machine Dealer.

This is signed by the local retailer who sells to the consumer. The complaint charges that the use of the word "guarantee" without disclosing the terms and conditions of the guarantee is confusing and misleading.

PAR. 13. The evidence is in conflict. Several witnesses most of whom had never seen the guarantee before, and some of whom were not shown it when testifying, have the impression, notwithstanding that the signature line is plainly for the dealer to sign, that it was a guarantee or warranty by the manufacturer of the product. One of these, though, testified he would go to the store he purchased from, if anything went wrong. This, of course, is not the charge in the complaint. Only one witness stated he did not understand from it whether parts or service, or both, were guaranteed, and how long for each. On the other hand, two business executives, one in the sewing machine business the other unconnected with it, testified, in the first instance, that except for the term of years and the fact of dealer backing instead of manufacturer backing, it was the same as the guarantee of his company; in the second instance, that the average person reading it would know what he was supposed to get. In addition, a labor union official had no trouble understanding it. This, taken with the wording and substance of the document itself and the demeanor of the sole witness testifying that it was confusing to him, makes the preponderance of evidence against the charge, and the finding, accordingly, is that the use of the word "guarantee" is not misleading or confusing, and that the guarantee does disclose its terms and conditions.

PAR. 14. Respondents, in the course and conduct of their business, are in substantial competition in commerce with makers and sellers of domestically made sewing machines and also with sellers of imported sewing machines.

PAR. 15. The failure of respondents adequately to disclose on the sewing machine heads that they are manufactured in Japan and the use of the brand or trade name "Hudson" have the tendency and capacity to lead members of the purchasing public into the erroneous and mistaken belief that respondents' said products are of domestic origin and are manufactured by, or connected in some way with, a well and favorably known domestic manufacturer, and into the purchase of sewing machines of which said heads are a part because of such erroneous and mistaken belief. As a result thereof trade in commerce has been unfairly diverted to respondents from their competitors and injury has been and is being done to competition in commerce.

CONCLUSION

The respondents import sewing machine heads from Japan. When these heads are assembled and processed into completed sewing machines, whatever markings there were on the heads showing the country of origin are, for all practical purposes, effectively concealed from the ordinary user or purchaser. Respondents use the name "Hudson" as a brand or trade name for their completed sewing machines. The name "Hudson" appears on the front horizontal arm of the sewing machines, and is prominently featured in respondents' advertising literature. As a result of respondents' failure to adequately disclose on the sewing machine heads that they are imported from Japan and the use of the brand or trade name "Hudson," purchasers and prospective purchasers are led to believe that respondents' sewing machines are of domestic origin and are manufactured by, or connected in some way with, a well and favorably known domestic manufacturer. A substantial number of the purchasing public has a decided preference for sewing machines manufactured in the United States over sewing machines manufactured in whole or in part in Japan. There are also many persons who prefer to purchase sewing machines manufactured by, or connected in some way with, well and favorably known American firms rather than sewing machines manufactured by a firm or firms which are not well known to the purchasing public.

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The fact, if it be so, that the sewing machine heads imported by the respondents were inspected and passed by United States Customs officers at the port of entry as being properly or adequately marked is immaterial and no defense to this proceeding. *L. Heller & Son, Inc.* v. *Federal Trade Commission*, 191 F. 2d 954. Also, whether or not the Singer Sewing Machine Company manufactures and imports from Great Britain sewing machines which are not marked at all, or not adequately marked, as to country of origin is immaterial and no defense to this proceeding. *Independent Directory Corp.* v. *Federal Trade Commission*, 188 F. 2d 468; *Ford Motor Co.* v. *Federal Trade Commission*, 120 F. 2d 175, 182.

The Commission therefore concludes that the acts and practices of the respondents as hereinabove found are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

## ORDER

*It is ordered*, That the respondents, Astor Industries, Inc., a corporation, and its officers, and Max Goldberg, Manny Goldberg, George Zuckerman, Henry Spiegelman, and John D. Bussell, as officers of said corporation, and said respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of sewing machine heads or sewing machines in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling, or distributing foreign-made sewing machine heads or sewing machines of which foreign-made heads are a part, without clearly and conspicuously disclosing on the heads, in such a manner that it will not be hidden or obliterated, the country of origin thereof.

2. Using the word "Hudson," or any simulation thereof, as a brand or trade name to designate, describe, or refer to their sewing machines or sewing machine heads; or representing through the use of any other word or in any other manner that their sewing machines or sewing machine heads are manufactured by anyone other than the actual manufacturer.

*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.

Commissioner Carretta not participating.

IN THE MATTER OF

# PAMCO, INC.; AND MAX CHISSIK AND ARTHUR FOYER, DOING BUSINESS AS SEWING MACHINE FACTORS

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 6012. Complaint, July 18, 1952—Decision, Feb. 17, 1954*

Where two partners engaged, in substantial competition in commerce with makers and sellers of domestic sewing machines and with sellers of imported sewing machines, some of whom adequately disclosed to the public the foreign origin of their machines or parts thereof, in processing and assembling into sewing machines, heads imported from Japan, upon the back of the vertical arm of which the word "Japan" became covered by the motor attached to the head and on some of which a medallion, readily removable, placed on the front of said arm disclosed the word "Japan" in such small and indistinct fashion as not to constitute adequate notice to the public that said heads were imported—

(a) Offered and sold sewing machines thus completed with no mark on the heads or on the complete machines of which said heads were a part showing foreign origin, and without otherwise informing the public of the foreign origin of said heads before the offer for sale to the public of the machines in question; and

(b) Falsely represented that their machines were manufactured by or connected in some way with the American firm or firms with which the name "Champion" had long been associated, through printing or embossing on the front horizontal arm of the head the trade or brand name "Champion", and use thereof in their advertising matter;

(c) Falsely represented, directly or by implication, through the depiction of a portable electric sewing machine in their advertising and the figure "$169.95" that the machines in question were customarily sold to members of the public for said sum;

When in fact said price was wholly fictitious and greatly in excess of the amount usually charged therefor; and

(d) Misleadingly used the words "unconditionally guaranteed" in said advertising through failure to disclose the terms and conditions of such guarantee:

*Held*, That such acts and practices constituted unfair and deceptive acts and practices in commerce and unfair methods of competition therein.

Before *Mr. John Lewis*, hearing examiner.

*Mr. William L. Taggart* for the Commission.

*Mr. Irving Schoenfeld*, of San Francisco, Calif., for Pamco, Inc., Arthur Foyer and Julius Foyer.

*Mr. Bertrand F. Lurie*, of San Francisco, Calif., for Edward Sassoon and H. P. Haslehurst.

*Mr. Alfred M. Miller*, of San Francisco, Calif., for Max Chissik and Arthur Foyer.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Commission, on July 18, 1952, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof except Edward Sassoon and H. P. Haslehurst (upon whom service of the complaint was not made), charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answers thereto a hearing was held before a hearing examiner of the Commission theretofore duly designated by it, at which testimony and other evidence, including two written stipulations as to the facts entered into by and between counsel supporting the complaint and counsel for the respondents, in support of and in opposition to the allegations of the complaint were introduced. Such testimony and other evidence were duly recorded and filed in the office of the Commission, and the hearing examiner, on February 25, 1953, filed his initial decision.

Within the time permitted by the Commission's Rules of Practice, counsel supporting the complaint filed with the Commission an appeal from said initial decision and thereafter this proceeding came on for final consideration by the Commission upon the record, including briefs of counsel in support of and in opposition to the said appeal (oral argument not having been requested); and the Commission, having entered its order granting in part and denying in part said appeal and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Pamco, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California, with its office and principal place of business located at 510 Battery Street, San Francisco, California. Respondents Arthur Foyer and Julius Foyer, whose address is the same as that of the corporate respondent, are president and vice president and treasurer, respectively, of said respondent, and acting as such officers, formulate, direct, and control the policies, acts, and practices of said corporation. Respondents Edward Sassoon and H. P. Haslehurst were at one time second vice president and secretary, respectively, of the corporate respondent; however, their connection with said respondent ceased prior to the commencement of this proceeding and, they not having been served in this proceeding and no proof having been offered with respect to them, the complaint will be dismissed as to them.

Respondents Max Chissik and Arthur Foyer are copartners doing business under the name of Sewing Machine Factors, with their office and principal place of business located at 366 Golden Gate Avenue, San Francisco, California.

PAR. 2. Respondent Pamco, Inc., purchases sewing machine heads from various firms in Japan and imports the same into the State of California. The sewing machine heads so imported were and are sold and delivered within the State of California to Max Chissik and Arthur Foyer, copartners doing business as Sewing Machine Factors. The sewing machine heads are processed and assembled into sewing machines by Sewing Machine Factors and the completed sewing machines are then sold to distributors and retailers who in turn sell the sewing machines to the purchasing public.

The hearing examiner in his initial decision in this matter concluded that the stipulated facts failed to show that respondent Pamco, Inc., its officers, and Julius Foyer individually, have committed any unfair or deceptive acts or practices or engaged in any unfair methods of competition in commerce, and dismissed the complaint as to said respondents. Notwithstanding the fact that respondent Arthur Foyer is president of respondent Pamco, Inc., and also a partner in the partnership of Sewing Machine Factors, there is no showing that the relationship between Pamco, Inc., and the partnership is other than that of seller and buyer. The Commission, therefore, agrees with the hearing examiner's conclusion with respect to respondents Pamco, Inc., its officers, and Julius Foyer individually, and the complaint will be dismissed as to them.

PAR. 3. Respondents Max Chissik and Arthur Foyer, in the course and conduct of their business, caused some of their said sewing machines, when sold, to be transported from their place of business in the State of California to purchasers thereof located in various other States of the United States, and maintain and at all times mentioned herein have maintained a course of trade in said products in commerce among and between the various States of the United States.

PAR. 4. When the sewing machine heads are received by respondents Max Chissik and Arthur Foyer, the word "Japan" appears on the back of the vertical arm. Before the heads are sold to the purchasing public as a part of a complete sewing machine, it is necessary to attach a motor to the head, in the process of which the aforesaid word is covered by the motor so that it is not visible. In some instances, said heads, when received by said respondents, are marked with a medallion, placed on the front of the vertical arm, upon which the word

"Japan" appears. This word is, however, so small and indistinct that it does not constitute adequate notice to the public that the heads are imported. Furthermore, said medallion can be readily removed and when the medallion is so removed, no visible mark of origin appears on the machine.

Said respondents place no other mark on the imported sewing machine heads or on the complete sewing machines, of which said heads are a part, showing foreign origin, or otherwise inform the public that the heads are of foreign origin, before they are offered for sale to the public.

PAR. 5. When articles of merchandise, including sewing machines, are exhibited and offered for sale by retailers to the purchasing public and such articles are not marked or are not adequately marked showing that they are of foreign origin, or if marked and the markings are covered or otherwise concealed, such purchasing public understands and believes such articles to be wholly of domestic origin.

PAR. 6. The respondents Max Chissik and Arthur Foyer use the word "Champion" as a trade or brand name for their sewing machine heads and complete sewing machines, which word is printed or embossed on the front horizontal arm of the head in large, conspicuous letters, and use said trade or brand name in their advertisting matter. The word "Champion" is the name or part of the name of, or used as a trade name, mark, or brand by, one or more business organizations transacting and doing business in the United States and which are and have been well and favorably known to the purchasing public and well and long established in various industries.

PAR. 7. A number of the witnesses who testified in this proceeding said that they associated the word "Champion" with well and favorably known American firms or products with which the name "Champion" has long been associated. For example, one witness testified that he associated the word with "Champion spark plug or Studebaker Champion or something like that." Another testified that he would connect a machine bearing the word "Champion" with a standard trade name of American built products. Still another testified that she usually made purchases by the brand name of the products and that it was her impression that "the name 'Champion' implies that it is an American name. It is associated with an American expression, American products, or trade name like Champion spark plugs or Wheaties 'the Food of Champions' and so on." She would assume that a sewing machine with the word "Champion" on it was made by one of the American firms using said word as a trade name.

Based upon the record as a whole, the Commission concludes and, therefore, finds that by using the word "Champion" as a trade or brand name for their sewing machines in the manner hereinabove found, respondents Max Chissik and Arthur Foyer have represented, contrary to fact, that their sewing machines are manufactured by, or connected in some way with, the American firm or firms with which the name "champion" has long been associated. Said respondents' use of the word "Champion" has also enhanced the erroneous and mistaken belief on the part of the purchasing public that the sewing machines are of domestic origin.

PAR. 8. There are among the members of the purchasing public a substantial number who have a decided preference for products manufactured in the United States over products manufactured in whole or in part in foreign countries, and this preference extends to sewing machines. There are also many members of the purchasing public who prefer to purchase products, including sewing machines, which are manufactured by, or connected in some way with, well and favorably known American firms rather than products manufactured by a firm or firms which are not well known to the purchasing public.

PAR. 9. The respondents Max Chissik and Arthur Foyer, in their advertising, make the following statements:

[Picturization of a portable electric sewing machine]
$169.95
Unconditionally Guaranteed

By and through the use of the aforementioned statements, respondents represented, directly or by implication, that the portable electric sewing machines were customarily sold to members of the purchasing public for the sum of $169.95.

The aforesaid representations were false, misleading, and deceptive. In truth and in fact, the sum of $169.95 is greatly in excess of the amount usually and ordinarily charged for the said sewing machines by respondents and is a wholly fictitious price. The use of the words "Unconditionally Guaranteed" in said advertising, without disclosing the terms and conditions of the guarantee, is confusing and misleading and constitutes an unfair and deceptive act and practice.

PAR. 10. The use by respondents Max Chissik and Arthur Foyer of the foregoing false, misleading, and deceptive statements and representations has had, and now has, the tendency and capacity to mislead or deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all such statements and representations were and are true and to induce the purchase of substantial quantities of said machines because of such erroneous and mistaken belief.

PAR. 11. Respondents Max Chissik and Arthur Foyer, by supplying the complete sewing machines, of which the aforesaid imported head are a part, to dealers, provide said dealers a means and instrumentality whereby they may mislead and deceive the purchasing public as to the place of origin of said heads and as to the manufacturer thereof.

PAR. 12. Respondents Max Chissik and Arthur Foyer, in the course and conduct of their business, are in substantial competition in commerce with the makers and sellers of domestic sewing machines and also the sellers of imported sewing machines, some of whom adequately disclose to the public that their machines or parts thereof are of foreign origin.

PAR. 13. The failure of respondents Max Chissik and Arthur Foyer to adequately disclose on the sewing machine heads, in such a manner that it cannot be readily removed, hidden, or obliterated, that they are manufactured in Japan, and also the use of the trade or brand name "Champion," have the tendency and capacity to lead members of the purchasing public into the erroneous and mistaken belief that their said product is of domestic origin and is manufactured by, or connected in some way with, well and favorably known American firms with which the word "Champion" has long been associated, and to induce members of the purchasing public to purchase sewing machines of which said heads are a part because of this erroneous and mistaken belief.

As a result thereof, substantial trade in commerce has been unfairly diverted to respondents Max Chissik and Arthur Foyer from their competitors and substantial injury has been and is being done to competition in commerce.

CONCLUSION

Respondents Max Chissik and Arthur Foyer, copartners doing business as Sewing Machine Factors, purchase sewing machine heads which have been imported from Japan. In the assembling and processing of the imported sewing machine heads into completed sewing machines, whatever markings there were on the heads showing the country of origin are, for all practical purposes, effectively concealed from the ordinary user or purchaser. These respondents use the word "Champion" as a trade or brand name for their completed sewing machines. The word "Champion" appears on the front horizontal arm of the sewing machines and is used in the respondents' advertising literature. As a result of the failure to adequately disclose on the sewing machine heads that they are imported from Japan and the use of the brand or trade name "Champion," purchasers and prospective purchasers are led to believe that the sewing machines are of domestic origin, and are manufactured by, or connected in some way with, well and favorably known American firms with which the word "Champion" has long been associated. Many members of the purchasing public have a decided preference for sewing machines manufactured in the United States over sewing machines manufactured in whole or in part in Japan. There are also many persons who prefer to purchase sewing machines which are manufactured by, or connected in some way with, well and favorably known American firms rather than sewing machines manufactured by a firm or firms which are not well known to the purchasing public. These respondents have also made false, misleading, and deceptive statements and representations in their advertising of their sewing machines.

The Commission, therefore, concludes that the acts and practices of the respondents Max Chissik and Arthur Foyer, doing business as Sewing Machine Factors, as hereinabove found, are all to the prejudice and injury of the public and of said respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

## ORDER

*It is ordered*, That respondents Max Chissik and Arthur Foyer, individually and as copartners doing business as Sewing Machine Factors, or doing business under any other name, and their representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of sewing machine heads or sewing machines in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling, or distributing foreign-made sewing machine heads, or sewing machines of which foreign-made heads are a part, without clearly and conspicuously disclosing on the heads the country of origin thereof, in such a manner that it cannot readily be hidden or obliterated.

2. Using the word "champion" or any simulation thereof as a brand or trade name to designate, describe, or refer to their sewing machines, or sewing machine heads; or representing, through the use of any other word or in any other manner, that the sewing machines or sewing machine heads are manufactured by anyone other than the actual manufacturer.

3. Representing, directly or by implication, that certain amounts are the prices of their sewing machines when such amounts are in excess of the prices at which their said sewing machines are ordinarily sold in the usual and regular course of business.

4. Representing, directly or by implication, that their sewing machine heads or sewing machines are guaranteed, unless the nature and extent of the guarantee and the manner in which the seller will perform thereunder are clearly and conspicuously disclosed.

*It is further ordered*, That the complaint be, and it hereby is, dismissed as to respondent Pamco, Inc., and its officers, and respondents Julius Foyer, Edward Sassoon, and H. P. Haslehurst, individually and as officers of said corporation.

*It is further ordered*, That respondents Max Chissik and Arthur Foyer 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.

Commissioner Carretta not participating.

Syllabus

IN THE MATTER OF

# CLARK R. BELLOWS, JR., TRADING AS INSTITUTE OF APPLIED HYPNOLOGY, AND CLARK R. BELLOWS, SR.

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 6142. Complaint, Nov. 13, 1953—Decision, Feb. 19, 1954*

Where two individuals engaged in the interstate sale and distribution of a correspondence course in hypnotism, in advertising in periodicals and advertising material mailed to prospective purchasers—

(a) Represented that hypnotism could be learned by anyone of average intelligence by taking their said course by correspondence, when in fact many persons of average or above-average intelligence could not do so;

(b) Falsely represented that one practicing hypnotism as thus taught would develop willpower, self-confidence, self-control, courage, poise, polish, and personal force, and that such a person could overcome an inferiority complex through hypnotism;

(c) Falsely represented that through the practice of autosuggestion as taught thereby a person was enabled to remake, rebuild, and reconstruct his life and that through study of the course one could become a mental giant;

(d) Represented that said course was not an ordinary mail order course of instruction but consisted of actual extension work in which resident training methods and principles were applied and taught by an experienced faculty, notwithstanding the fact it was an ordinary correspondence course and in no sense extension work;

(e) Represented that hypnotism and autosuggestion as thus taught by them offered real opportunities for money-making, when in fact they offered little opportunities therefor in excess of some opportunities for spare-time earnings in the entertainment field;

(f) Falsely represented there was a scarcity of, and a big demand for, hypnotists in this country;

(g) Falsely represented that persons completing their course of instruction were properly qualified to treat numerous specified diseases, habits, and abnormal conditions of the body by hypnotism, including therein diseases and conditions ranging from amnesia, complexes, and constipation, to morphia and other drug habits, stammering, stuttering, and obesity;

(h) Represented through the use of the words "Institute", "faculty", and "Institution of learning" in the operation of the business concerned that such business was an institution of higher learning with a staff of competent, experienced, and qualified educators offering resident training and instruction in philosophy, art, science, or other subjects of higher education;

Notwithstanding the fact there was no adequate equipment in the form of classrooms, laboratories, and libraries, nor a competent faculty of learned persons for the instruction of resident students in subjects of higher education; they did not operate an institute or institution of learning as understood by the general public and in the field of education; and the business consisted of selling for profit a course of instruction in hypnotism, in the conduct of which said first-named individual was on occasion assisted by the other; and

(i) Represented through the title "Doctor" or its abbreviation "Dr." in referring to said second individual who had prepared the course that the degree had been conferred upon him by an accredited and recognized college or university;

When in fact the title or degree of "Doctor" used by said individual was not conferred by any such college, university, or institution of higher learning, and was not recognized or accredited by such an institution or by reputable scientists or educators:

*Held*, That such acts and practices constituted unfair and deceptive acts and practices in commerce.

Before *Mr. Abner E. Lipscomb*, hearing examiner.

*Mr. William L. Pencke* for the Commission.

## Decision of the Commission

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated February 19, 1954, the initial decision in the instant matter of hearing examiner Abner E. Lipscomb, as set out as follows, became on that date the decision of the Commission.

### INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on November 13, 1953, issued and subsequently served its complaint in this proceeding upon respondents Clark R. Bellows, Jr., an individual, trading under the name of Institute of Applied Hypnology, and Clark R. Bellows, Sr., charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. On January 5, 1954, respondents filed their answer admitting all the material allegations of fact set forth in said complaint and waiving all intervening procedure and further hearing as to the said facts. Thereafter, the proceeding regularly came on for final consideration by the above-named hearing examiner theretofore duly designated by the Commission upon said complaint and answer thereto, and said hearing examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

### FINDINGS AS TO THE FACTS

Paragraph 1. Respondent Clark R. Bellows, Jr., is an individual, trading under the firm name of Institute of Applied Hypnology;

respondent Clark R. Bellows, Sr., an individual, prepares all advertising matter in conjunction with respondent Clark R. Bellows, Jr., and participates in the net profits of the business of the Institute of Applied Hypnology. The principal office and place of business of said respondents is at 120 Central Park South, in the City and State of New York.

PAR. 2. Respondent Clark R. Bellows, Jr., is now, and has been for more than two years last past, engaged in the sale and distribution in commerce between and among the various states of the United States of a course of instruction in hypnotism which was prepared and compiled by respondent Clark R. Bellows, Sr., and which is pursued by correspondence through the medium of the United States mails. Respondent Clark R. Bellows, Jr., causes said course of instruction and other documents to be transported from his said place of business in New York to the purchasers thereof located in the various states of the United States other than the State of New York.

PAR. 3. There is now, and has been at all times hereinafter mentioned, a course of trade in said course of instruction so sold and distributed by respondents in commerce between the various states of the United States.

PAR. 4. In the course and conduct of their business, as aforesaid, respondents, by means of advertisements placed in magazines having a national circulation and circulars and other advertising material mailed to purchasers and prospective purchasers of their said course of instruction, have made and are making representations with respect to the merit of said course and the powers, achievements and accomplishments in the field of hypnotism and autosuggestion which may be attained and acquired through the study and completion of said course of instruction, in substance as follows:

1. That hypnotism can be learned by anyone of average intelligence by taking respondents' course by correspondence.

2. That one practicing hypnotism as taught by said course will develop will power, self-confidence, self-control, courage, poise, polish and personal force and can overcome an inferiority complex through hypnotism.

3. That, through the practice of autosuggestion as taught by means of said course, a person is enabled to remake, rebuild and reconstruct his life.

4. That, by studying respondents' course, one can become a mental giant.

5. That said course is not an ordinary mail order course of instruction but consists of actual extension work in which resident training methods and principles are applied and taught by an experienced faculty.

6. That hypnotism and autosuggestion, as taught by respondents, offer real opportunities for money-making.

7. That there is a scarcity of, and a big demand for, hypnotists in this country.

8. That persons completing respondents' course of instruction are properly qualified to treat diseases, habits and abnormal conditions of the human body by hypnotism and that such diseases or conditions which they can cure, or substantially benefit, include: amnesia (loss of memory), complexes (almost all types), constipation, contractures and paralyses resulting from gross lesion of the brain, dyspepsia, enuresis nocturnia (bed-wetting), epilepsy, excesses (alcoholism, tobacco), facial and other twitchings, hysterias (almost all types), insomnia, masturbation, menstrual irregularities, morphia and other drug habits, nail-biting, neuralgia, neurasthenia, pain used as anesthesia in operations and post operative (including labor pains), stammering, stuttering and obesity.

PAR. 5. The aforesaid claims, statements and representations are false, deceptive and misleading. In truth and in fact:

1. Many persons of average or above-average intelligence cannot learn hypnotism through respondents' correspondence course.

2. The practice of hypnotism, as taught by respondents' course, will not develop will power, self-confidence, self-control, courage, poise, polish, personal force or overcome an inferiority complex.

3. The practice of autosuggestion, as taught by said course, will not enable a person to remake, rebuild, or reconstruct his life.

4. The study of respondents' course will not increase one's mental powers to any significant degree.

5. Respondents' course of instruction is an ordinary correspondence course and is in no sense extension work.

6. Hypnotism and autosuggestion, as taught by respondents' course, offer little opportunity for money-making in excess of some opportunities for spare-time earnings in the entertainment field.

7. There is neither a big demand for, nor a scarcity of, hypnotists in this country.

8. Persons completing respondents' course are not qualified to treat diseases, habits and abnormal conditions of the human body by hypnotism and cannot cure or substantially benefit or change any of the diseases, conditions or habits enumerated in Paragraph Four (8).

PAR. 6. Respondent Clark R. Bellows, Jr., operates his business under the name of Institute of Applied Hypnology and makes frequent reference in his advertising matter to "Institute," "faculty," "Institution of learning," and the title "Doctor" or its abbreviation "Dr." in referring to respondent Clark R. Bellows, Sr.

Through the use of the words "Institute," "faculty" and "Institution of learning," respondents represent that the business is an institution of higher learning with a staff of competent, experienced and qualified educators offering resident training and instruction in philosophy, art, science or other subjects of higher education. The title or degree of "Doctor" used by respondent Clark R. Bellows, Sr., implies that the degree "Doctor" has been conferred upon said respondent by an accredited and recognized college or university.

Said representations are false and misleading. In truth and in fact, respondents do not operate an institute or institution of learning, as that term is understood by the general public and in the field of education. There is no adequate equipment in the form of classrooms, laboratories, and libraries, nor a competent faculty of learned persons for the instruction of resident students in subjects of higher education. Respondent Clark R. Bellows, Jr., is engaged in the business of selling for profit a course of instruction in hypnotism, and on occasion is assisted by respondent Clark R. Bellows, Sr., who prepared said course. The title or degree of doctor used by said respondent Clark R. Bellows, Sr., was not issued or conferred by any recognized college, university or institution of higher learning and is not recognized or accredited by such institutions or by reputable scientists or educators.

PAR. 7. The use by respondents of the false, misleading and deceptive statements and representations aforesaid has the tendency and capacity to confuse, mislead and deceive members of the public into the belief that such statements and representations are true and to induce them to purchase respondents' course of instruction in said commerce on account thereof.

## CONCLUSION

The aforesaid acts and practices of respondents, as herein found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

## ORDER

*It is ordered*, That the respondent Clark R. Bellows, Jr., trading as Institute of Applied Hypnology, or trading under any other name, the respondent Clark R. Bellows, Sr., and their agents, representatives 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 courses of instruction in hypnotism, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That any one of average intelligence can learn hypnotism by taking respondents' course of instruction by correspondence;

(b) That a person practicing hypnotism, as taught by respondents' course, will develop willpower, self-confidence, self-control, courage, poise, polish or personal force, or can overcome an inferiority complex;

(c) That a person practicing autosuggestion, as taught by respondents' course, is enabled to remake, rebuild or reconstruct his life;

(d) That by studying respondents' course one can become a mental giant;

(e) That respondents' course is not a mail order course or is an extension course applying resident training methods and principles;

(f) That there is a big demand for, or a scarcity of, hypnotists in this country;

(g) That persons completing respondents' course are qualified to treat diseases, habits or abnormal conditions of the human body by hypnotism or can cure or substantially benefit amnesia, complexes, constipation, contractures or paralyses resulting from gross lesion of the brain, dyspepsia, enuresis nocturnia, epilepsy, excesses, facial and other twitchings, hysterias, insomnia, masturbation, menstrual irregularities, morphia or other drug habits, nail-biting, neuralgia, neurasthenia, pains, stammering, stuttering or obesity;

2. Misrepresenting the money-making opportunities of persons completing respondents' course;

3. Using the word "Institute" in their trade name or otherwise representing that their business is other than a commercial enterprise operated for profit.

4. Using the words "faculty," "institution of learning" or similar words or phrases representing that their business is other than a commercial enterprise operated for profit;

5. Using the title "doctor" or any abbreviation thereof to designate any person identified with respondents' enterprises unless such title has been duly conferred by an accredited educational institution of higher learning.

## ORDER TO FILE REPORT OF COMPLIANCE

*It is ordered*, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of February 19, 1954].

IN THE MATTER OF

# HAIR & SCALP CLINIC, INC., ET AL.

## DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 6096. Complaint, May 6, 1953—Decision, Feb. 21, 1954*

Where a corporation and its two officers, engaged in the sale and distribution of various cosmetic and medicinal preparations for external use in the treatment of conditions of the hair and scalp designated as "Dioxynol", with various numerical and other similar designations such as "#26", "#57", "Spec. #99", "A-1", and as "Special Formula Shampoo", "Hydrosol" (a detergent), and "Sebol" (a hair dressing cream oil); in advertising, principally in newspapers—

(a) Represented falsely that through the use of said preparations in treatments in their place of business by their operators, and by purchasers in their homes, baldness and hair loss would be prevented and overcome;

(b) Falsely represented that the hair would take on new life, that new hair and stunted hair would be induced to grow, that itching of the scalp, dandruff, excessive dryness and oiliness of the scalp would be permanently eliminated, and that other scalp disorders would be prevented and overcome, and that an individual would be able to maintain a thick, healthy growth of hair;

(c) Falsely represented that their said preparations were newly discovered, scientific formulas;

(d) Represented falsely, through the use of the word "Trichologist", and by other means in their said advertising, that one of the aforesaid officers and certain of their employees had had competent training in dermatology and other branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair:

*Held*, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. William L. Pack*, hearing examiner.

*Mr. Joseph Callaway* for the Commission.

*Mr. Clarence M. Dinkins* and *Mr. Jacob Gordon*, of Washington, D. C., for respondents.

## DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated February 21, 1954, the initial decision in the instant matter of hearing examiner William L. Pack, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 6, 1953, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that Act. After the filing by respondents of their answer to the complaint, a stipulation was entered into whereby it was stipulated and agreed that a statement of facts executed by counsel supporting the complaint and counsel for respondents might be taken as the facts in this proceeding and in lieu of evidence in support of and in opposition to the charges stated in the complaint, and that the hearing examiner might proceed upon such statement of facts to make his initial decision, stating his findings as to the facts, including inferences which he might draw from the stipulated facts, and his conclusion based thereon and enter his order disposing of the proceeding without the filing of proposed findings and conclusions. Respondents, however, reserved the right to present oral argument. It was further stipulated that if the proceeding should come before the Commission upon appeal from the initial decision of the hearing examiner or by review upon the Commission's own motion, the Commission might, if it so desired, set aside the stipulation and remand the case to the hearing examiner for further proceedings under the complaint. Thereafter, a hearing was held before the hearing examiner, theretofore duly designated by the Commission, at which counsel were heard in oral argument and certain documentary evidence made a part of the record. Subsequently, the proceeding regularly came on for final consideration by the hearing examiner upon the complaint, answer, stipulation (the stipulation having been approved by the hearing examiner), documentary evidence and oral argument of counsel, and the hearing examiner, after duly considering the matter, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Hair & Scalp Clinic, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 606 Bond Building, Fourteenth Street and New York Avenue NW., Washington, D. C.

The individual respondents Ray W. Plasterer and Virginia E. Plasterer are respectively the president and secretary of the corporate respondent. The individuals have their office at the same address as the corporate respondent and at all times hereinafter mentioned have formulated, directed, and controlled its acts, policies, and business affairs.

PAR. 2. Respondents are now and for the past several years have been engaged in the business of selling and distributing various cosmetic and medicinal preparations for external use in the treatment of conditions of the hair and scalp, including sales of such preparations through use of them in connection with treatments administered in the office of respondents. Respondents have their preparations compounded for them by others in the District of Columbia, and cause the preparations to be transported from the place of their manufacture to respondents' office in the District of Columbia and also from respondents' office in the District of Columbia to individual purchasers of the preparations located in the District of Columbia and in various States of the United States. Respondents maintain and at all times mentioned herein have maintained a substantial course of trade in their preparations in commerce in the District of Columbia and between the District of Columbia and various States of the United States.

PAR. 3. Respondents, through advertisements, invite persons to come to their place of business for diagnosis and treatment, whereupon certain series of treatments are recommended. If such treatments are agreed to, certain of respondents' cosmetic and medicinal preparations are sold to such persons and used in the process of such treatments. Respondents also sell to those induced to visit their office by their advertisements, certain of their preparations for home use in the treatment of the hair and scalp, and in many instances ship the preparations to such persons at their homes in the District of Columbia and in various States of the United States.

PAR. 4. In the course and conduct of their business, respondents have disseminated and are now disseminating and have caused and are now causing the dissemination of advertisements concerning their preparations by the United States mails and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of their preparations; and respondents have also disseminated and are now disseminating and have caused and are now causing the dissemination of advertisements concerning their preparations by various means for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of their preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations contained in such advertisements, principally in newspapers, disseminated and caused to be disseminated as hereinabove set forth, until the date of August 1, 1953, are the following:

Stop Hair Fall

Excessive hair fall, dandruff, itching and dry lifeless hair are the first symptoms of approaching baldness, Hair and Scalp Clinic's thorough pleasant treatment, adapted to the needs of each scalp problem, penetrates into the scalp, removes the causes of these symptoms, thereby permitting stunted hair to grow and obtain nourishment from a healthy scalp.

If you are accepted for treatment, modern scientific methods will eliminate the cause of your hair loss, your hair will thicken, your scalp will feel healthy and alive. The appearance of your hair will improve and you will learn how to keep it healthy and strong.

Your hair will fall out as long as you neglect it . . . as long as you ignore the causes of hair loss. It could be infectious dandruff or any one of many scalp disorders. That's why we urge you to consult us to determine the exact means to end your hair worries.

Ray Plasterer says:

"My newly discovered scientific formula may prevent future loss of hair."

Your hair and scalp problems are our life's work and our new discoveries are at your disposal.

Consult Ray W. Plasterer<br>
Washington's Leading Trichologist.<br>
If your case is accepted<br>
Results are guaranteed.

PAR. 5. The formulas for respondents' preparations are as follows:

*Dioxynol*

| | |
|---|---|
| Oxyquinoline sulfate | ¼ oz. |
| Resorcin | 1 oz. |
| Glycerine | 2 oz. |
| Water q. s. | 32 oz. |

*#26*

| | |
|---|---|
| Oleorescin Capsicum | 2 gms. |
| Neobase B. W. Co | 100 gms. |

#57

| | |
|---|---|
| Eurosol | 10 CC |
| Salicylic acid | 10 gm. |
| Precipitated sulfur | 20 gm. |
| Anhydrous lanolin | 50 gm. |
| Neobase B. W. Co | 500 gm. |

*#307*

| | |
|---|---|
| Salicylic acid | 4% |
| Precipitated sulfur | 4% |
| Anhydrous lanolin | 6% |
| Neobase B. W. Co | 100% |

#40

| | |
|---|---|
| Pixabol | 4 drams |
| Eurosol | 4 drams |
| Salicylic acid | 4 grams |
| Glycerine | 12 oz. per 1 gal. |
| Alkolave q. s. | 1 qt. |

#70

| | |
|---|---|
| Tinc. cinchona | 60 CC |
| Glycerine | 60 CC |
| Alkolave | 500 CC |
| Water q. s. | 1,000 CC |

*Spec. #99*

| | |
|---|---|
| Tinc. cantharides | 2 drams |
| Resorcin | 2 drams |
| Glycerine | 2 drams |

Equal parts bay rum and alcohol to make quart.

*A-1*

| | |
|---|---|
| Tinc. cantharides | 20 CC |
| Tinc. capsicum | 20 |
| 70% alcohol q. s. | 1,000 CC |

*Special #100*

| | |
|---|---|
| Boric acid | 1 dram |
| Zinc oxide | 1 dram |
| Starch | 1 dram |
| Phenol | ½ |
| Neobase B. W. Co. q. s. | 2 oz. |

*S9*

| | |
|---|---|
| Glycerine | 2 drams |
| Resorcin | 4 drams |
| Tinc. cantharides | 4 drams |
| Alcohol q. s. | 32 fl. oz. |

*#11*

| | |
|---|---|
| Oxyquinoline sulfate | 1 oz. |
| Tinc. cantharides | 1 oz. |
| Alcohol q. s. | 1 gal. |
| Salicylic acid | ½% |

Also "Special Formula Shampoo," said to be a coconut oil shampoo, "Hydrosol," a detergent, and "Sebol," a hair dressing cream oil.

PAR. 6. Through the use of the aforesaid statements and representations and others similar thereto, respondents have represented, directly or by implication, that by the use of such preparations, methods, and treatments in their place of business by their operators and by purchasers of such preparations in their homes, baldness and hair loss will be prevented and overcome; that the hair will take on new life; that new hair and stunted hair will be induced to grow; that itching of the scalp, dandruff, excessive dryness and oiliness of the scalp will be permanently eliminated; and that other scalp disorders will be prevented and overcome; that an individual will be able to maintain a thick healthy growth of hair; that respondents' preparations are newly discovered scientific formulas. By referring to respondent Ray W. Plasterer as a "Trichologist," and by other means in such advertising respondents have represented, directly or by implication, that respondent Ray W. Plasterer and certain of respondents' employees have had competent training in dermatology and other branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair.

PAR. 7. These representations are erroneous and misleading. Regardless of the exact formulas or methods of application and whether used alone or in conjunction with massage, heat, combing, brushing, shampooing, or any other manner of treatment of the hair and scalp, respondents' preparations will not prevent or overcome baldness or hair loss, or correct these conditions, or have any favorable influence on their underlying causes; will not cause the hair to take on new life; will not induce the growth of new hair or stunted hair; will not permanently eliminate itching of the scalp, dandruff or dryness or oiliness of the scalp or prevent, correct, or overcome any other disorder of the adult scalp. Regardless of the formulas or however used, the preparations will not cause an individual to maintain a thick or healthy growth of hair. Respondents' formulas or preparations are not new or the result of new discoveries. Neither respondent Ray W. Plasterer nor any of respondents' employees has undergone competent training in dermatology or any other branch of medicine pertaining to diagnosis or treatment of scalp disorders affecting the hair, and respondents are not operating an institution for the diagnosis and treatment of diseases of the scalp by dermatologists.

PAR. 8. The complaint also raises an issue as to the corporate name Hair & Scalp Clinic, Inc., charging that through the use of the word "Clinic" in the name respondents "have represented directly and by implication, contrary to the fact, that they are operating an institution for the diagnosis and treatment of diseases of the scalp by dermatologists." The issue thus presents the question of the meaning of the word clinic.

Among the definitions of the word found in Webster's New International Dictionary, Second Edition, is the following: "An institution, usually connected with a school, court, or settlement, in which concrete cases or problems of a special type are studied, and expert advice or treatment given; as, a vocational, child-guidance, or psychiatric clinic." The record also indicates that during recent years the use of the word clinic has broadened considerably, such expressions as "housing clinic," "child welfare clinic," "marketing clinic," "sales clinic," "baseball clinic," etc., being encountered frequently in modern-day language.

In view of the dictionary definition quoted above and the rather common use of the word to refer to organizations and activities having no connection with medical science, it is concluded that the use of the word in respondents' corporate name is incapable of misleading any substantial portion of the public, and that this charge in the complaint has not been sustained.

Substantial amounts (a total of some $50,000 during the past six years) have been expended by respondents in advertising the corporate name, and obviously they should not be deprived of its use except upon clearly adequate grounds. Such grounds appear to be lacking here. In its recent decision in the case of Country Tweeds Incorporated, Docket No. 5957, issued November 25, 1953, the Commission recognized that trade names are valuable business assets and should not be prohibited unless such action is clearly necessary for the protection of the public.

PAR. 9. The record indicates that the representations challenged by the complaint have already been discontinued by respondents (except the use of the corporate name). It is urged by counsel for respondents that there is no likelihood that the representations will be resumed in the future, and that therefore the proceeding should be dismissed for want of present public interest. It appears, however, that this matter has, in effect, already been determined by the Commission and adversely to respondents' contention the Commission having recently declined to permit respondents to dispose of the proceeding by the execution of an informal stipulation and agreement to cease and desist. The grounds urged by respondents at that time in support of their application to dispose of the case by stipulation being essentially the same as those now urged in support of their contention that the complaint should be dismissed, it is concluded that the Commission has already determined that the proceeding should not be dismissed but should proceed to final decision on the merits.

PAR. 10. The use by respondents of the erroneous and misleading representations referred to above has the tendency and capacity to mislead and deceive a substantial portion of the public with respect to respondents' preparations and treatments, and the tendency and capacity to cause such portion of the public to purchase such preparations and treatments as a result of the erroneous and mistaken belief so engendered.

CONCLUSION

The acts and practices of the respondents as hereinabove set forth are all to the prejudice of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

*It is ordered*, That the respondents, Hair & Scalp Clinic, Inc., a corporation, and its officers, and Ray W. Plasterer and Virginia E. Plasterer, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale or sale of treatments of the hair and scalp in which the various cosmetic and medicinal preparations set out in the findings herein are used; or in connection with the offering for sale, sale or distribution of the various cosmetic and medicinal preparations set out in the findings herein, for use in the treatment of conditions of the hair and scalp, or any other preparations of substantially similar composition or possessing substantially similar properties, do forthwith cease and desist from:

I. Disseminating or causing to be disseminated by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication:

(a) That treatments of the hair or scalp by respondents or their employees, in which the various cosmetic and medicinal preparations set forth in the findings are used, or in which any other preparations of substantially similar composition or possessing substantially similar properties are used, or that the use of said preparations by purchasers in their homes, will:

(1) Have any effect in preventing or overcoming baldness or loss of hair.

(2) Cause the hair to take on new life.

(3) Induce the growth of new hair or stunted hair.

(4) Cause the permanent elimination of itching of the scalp, dandruff, dryness, or oiliness of the scalp, or prevent or cure other scalp disorders.

(b) That respondents' formulas or preparations or any of them are new or the result of new discoveries.

(c) That respondents or any of their employees have had competent training in dermatology or other branches of medicine pertaining to diagnosis or treatment of scalp disorders affecting the hair, or that respondents or any of their employees are trichologists.

II. Disseminating or causing to be disseminated by any means any advertisement for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation prohibited in Paragraph I hereof.

ORDER TO FILE REPORT OF COMPLIANCE

*It is ordered*, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of February 21, 1954].

In the Matter of

# LACY'S, INC., ET AL.

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 6131. Complaint, Oct. 27, 1953—Decision, Feb. 26, 1954*

Where a corporation and two officers thereof, engaged in the sale of television sets and home freezers, in advertising their said freezers by radio broadcasts, in newspapers, and through brochures utilized by their salesmen—

(a) Represented through the use of such terms as "Lacy's Family Food Plan" that they were engaged in the operation of a plan for the purchasing of food, when their sole connection with the food business was that they enrolled the purchasers of their freezers in a food purchasing plan operated by another concern with which they were in no way affiliated;

(b) Represented falsely that participants in said plan could eliminate the retailer and buy food at wholesale prices or from a wholesaler;

(c) Represented falsely that participants in the said plan could effect overall monetary savings through the general use of frozen foods in place of corresponding foods in other form;

(d) Represented falsely that the average family could reduce its expenditures for food by $30 to $50 per month by participation in the plan they offered; that participants in said plan could save 20% to 30% of their food cost; and that net monetary savings could be effected by all who purchased and used their home freezers; and

Where said corporation and individuals in advertising certain television sets—

(e) Represented that they were making bona fide offers to sell various sets advertised, including Admiral, General Electric, and others, at the prices specified from time to time through newspaper advertisements and radio broadcasts in which they offered to give a demonstration of the sets in the homes of persons interested;

When in fact said offers were made to induce prospective purchasers to visit their stores or to obtain leads as to persons interested in the purchase of sets in order that they could be solicited in their homes by respondents' salesmen; and respondents and their salesmen, at their place of business and in calling upon persons at their homes, in many instances, failed to demonstrate the advertised sets or disparaged the design, workmanship, and performance thereof and attempted to demonstrate and sell different and more expensive sets:

*Held*, That such acts and practices constituted unfair and deceptive acts and practices in commerce.

Before *Mr. William L. Pack*, hearing examiner.
*Mr. John J. McNally* for the Commission.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance", dated February 26, 1954, the initial decision in the instant matter of hearing examiner William L. Pack, as set out as follows, became on that date the decision of the Commission.

### INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on October 27, 1953, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that Act. Respondents Lacy's, Inc., William Warsaw and Hyman Goodbinder filed no answers to the complaint, nor did they enter any appearance at a hearing held on January 8, 1954, by the above-named hearing examiner, theretofore duly designated by the Commission, such hearing being held in accordance with notice given in the complaint. Respondents Eugene H. Rietzke and Hyman M. Goldstein filed answers to the complaint but did not appear at the hearing. Thereafter, the proceeding regularly came on for final consideration by the hearing examiner upon the complaint, the answers of respondents Eugene H. Rietzke and Hyman M. Goldstein, and the default of the other respondents, and the hearing examiner, having duly considered the matter, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order.

### FINDINGS AS TO THE FACTS

Paragraph 1. Respondent Lacy's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its general office and principal place of business located at Eighth and E Streets, N. W., Washington, D. C. Respondents William Warsaw and Hyman Goodbinder are, respectively, President and Vice President of the corporate respondent and formulate, direct and control its affairs and policies.

Respondent Eugene H. Rietzke and Hyman M. Goldstein, while admitting in their answers that they have been officers of the corporate respondent, allege that their duties were in no way connected with the formulation, direction or control of the advertising or sales policies or activities of the corporation, and that they have not at any time participated in the formulation, direction or control of such policies or activities. Supporting the answers and affidavits by certain other parties connected with the corporation who appear to have been in position to have knowledge of the relationship between these two respondents and the corporation. At the hearing, counsel supporting the complaint stated that no evidence was available to controvert the statements in the answers. It is therefore concluded that the complaint should be dismissed as to these two respondents, and the term respondents as used hereinafter will not include these individuals unless the contrary is indicated.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the sale of electrical appliances, including television sets and home freezers. Respondents have made arrangements whereby purchasers of said home freezers are enrolled in a food distributing organization, operated by a concern unaffiliated with respondents, which entitles participants to purchase certain food items in bulk quantities.

PAR. 3. In the course and conduct of their business, respondents cause said television sets and home freezers, when sold, to be transported to the purchasers thereof at their places of residence in the District of Columbia and in States adjacent thereto, and at all times material herein have maintained a course of trade in said television sets and home freezers in commerce in the District of Columbia and adjacent States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents, through the use of radio and television broadcasts and advertising inserted in newspapers have made certain statements with respect to their home freezers. Among and typical, but not all inclusive, of said statements are the following:

*Over Television Station WTOP–TV, Washington, D. C., May 24, 1952:*

> Every time you eat a meal, you COULD be saving money, through the Washington Food Savings Plan. Savings of $30 to $50 a month for the average family. This is the food plan that's sweeping the country. The plan that makes it possible for you to buy all the food you need at low, low prices * * *

*Over Television Station WTTG–TV, Washington, D. C., July 12, 1952:*

> * * * I want to show you how you can own this Gibson freezer or a Deepfreeze, Hotpoint, General Electric, or Westinghouse freezer for just 40 cents a day, when you buy it from the Washington Food Savings Plan. Also I will show you how you can save hundreds of dollars a year on the biggest expenditure in your budget * * * your food bill. When you buy a freezer for 40¢ a day from the Washington Food Savings Plan they will make arrangements so you may buy meats, poultry, vegetables, fish, fruits and juices at low, low discount prices at much less than you are now paying at your retail food store. You buy only the finest foods, nationally advertised brands at way below retail prices * * * You save money because you don't

have a left-over problem * * * you simply freeze it in the freezer where it keeps until you are ready to use it again. You can also freeze your own foods * * * here's an example of how you can save money by buying foods at the right time. Take poultry for instance. Chickens have gone up as much as 7¢ a pound in the last week. With a freezer you could buy all food items when the prices are low. The Washington Food Savings Plan keeps you posted with their monthly bulletins. When you buy this lovely freezer from the Washington Food Savings Plan for only 40¢ a day, you'll receive a membership card that entitles you to buy all the food you need and it's delivered right to your door FREE. You don't have to buy in large quantities, you only buy what you need as you need it at low, low discount prices.

Every home should have a freezer. You'll save hundreds of dollars a year. Call Republic 3800 * * * for more details. That's Republic 3800 * * * the Washington Food Savings Plan where you can buy this freezer with a five-year guarantee for just 40¢ a day. The number is Republic 3800 * * * and they will take your call right now.

*Over Radio Station WARL, Arlington, Virginia, February 28, 1953:*

* * * "Today's Woman" describes the food plans as the hottest cold wave ever to hit the country and goes on to say that freezer food plans have lowered the food costs for some families as much as 30% * * *. In just a moment we'll tell you how you can start saving by joining the Lacy's Family Food Plan.

*March 4, 1953:*

* * * Here's your chance to save money on food, and actually to eat better than ever before while you're doing it * * *.

***Advertisement in the Washington "Times Herald" issue of June 4, 1952:***

***Top of Page:***

LET LACY'S SHOW YOU HOW THE MONEY YOU SAVE ON FOOD PAYS FOR YOUR (Depiction of an emblem or trademark and the name "Gibson"). It's a proven fact and we can show you how LACY'S sponsored Washington Food Savings Plan saves you enough on food to pay for your freezer!

***Right Side:***

1—SAVE MANY DOLLARS—EAT BETTER THAN EVER because you buy fresh-frozen packaged foods, you eliminate paying for waste, and you get MORE NUTRITION from foods that are frozen before the bodybuilding vitamins and minerals are lost. Only the finest crops, U. S. choice steaks, roasts and beef are offered to you.

2—SAVE LOTS OF MONEY THE LACY WAY! Because you buy your food at DISCOUNT PRICES—buy in season when prices are lowest—freeze low-cost, bulk-cooked food, and leftovers—YOU SAVE ON EVERY SINGLE MEAL!

3—SAVE TIME! SAVE WORK! SAVE GOING TO THE GROCERS. Meal planning is easier, quicker, and more balanced all year 'round; hundreds of trips to the store are eliminated—you have more variety, more convenience with a Gibson freezer in your home.

For membership in a "New Way of Life" come into any of Lacy's 7 stores or Call today * * *.

*Left Side:*

(Depiction of a Freezer)

1952 BRANDNEW 10 CU. FT. GIBSON HOME FREEZER $399.95. Your savings on the food plan pay your monthly payments. Other GIBSON freezers: 13 Cu. Ft. $439.95; 18 Cu. Ft. $614.95.

*From a Brochure utilized by respondents' salesmen:*

MORE SAVINGS FOR YOU. Comparison table—savings in waste (chart showing various vegetables, fruits, fish, and poultry—columns headed "FROZEN FOOD," "FRESH FOOD," AND "% WASTE ELIMINATED").

* * * all factors considered, frozen foods are more economical * * *.

SAVE THOSE LEFTOVERS and save more money (Depiction of a table, a home freezer and a rubbish can).

20%—Start Saving Here—(pointing to freezer).

20%—Stop Waste Here—(pointing to rubbish can).

HERE'S HOW THIS FOOD PLAN OPERATES (Depiction of a truck leaving a farm, bypassing a retail store which is crossed out with a large X. The truck is labeled "WASHINGTON FOOD SAVINGS PLAN.")

SAVE THE DISCOUNT.

Respondents' salesmen exhibit literature to prospective purchasers of home freezers containing the same or similar statements as aforesaid and make oral statements of the same or like import.

PAR. 5. Through the use of the foregoing statements and others of the same import, but not specifically set out herein, respondents represented, directly or by implication:

1. That they are engaged in the operation of a food-purchasing plan.

2. That participants in said plan can eliminate the retailer and buy food at wholesale prices or from a wholesaler.

3. That participants in said plan can effect overall monetary savings through the general use of frozen foods in place of corresponding foods in other forms.

4. That the average family can reduce its expenditures for food by $30 to $50 per month by participation in the plan offered by respondents.

5. That participants in said plan can save 20% to 30% of their food costs.

6. That net monetary savings can be effected by all who purchase and use respondents' home freezers.

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

1. Respondents are engaged in the sale of electrical appliances, including home freezers and television sets; not in the food business. Their sole connection with the food business is that they enroll the purchasers of their freezers in a food-purchasing plan operated by another concern with which they are in no way affiliated.

2. The food-distributing organization, from which participants in said food plan purchase, is not a wholesaler and the prices at which participants purchase are not wholesale prices.

3. In the main, frozen foods purchased through said plan will cost more per edible pound than corresponding foods in other available forms normally consumed by the public. No overall saving in food costs will be accomplished by the general substitution of frozen foods, purchased through said plan, for corresponding foods in other forms.

4. In the main, food plan prices are considerably in excess of usual retail prices of corresponding foods in other forms and are close to, and in some instances identical with, usual retail prices of similar frozen foods.

For a saving of $30 to $50 per month on the family food bill effected by participation in said plan, the family's monthly food bill prior to participation must have been far in excess of that which is usual for many families, and such participation will not in any substantial number of instances result in a saving of $30 to $50 per month.

5. The prices of most items available through said food plan are more than 80% of the prices thereof in usual retail channels. Participation in the plan will not, in any substantial number of instances, result in savings of 20 to 30% of participants' food costs.

6. In a substantial number of instances, the purchase and use of a home freezer will not result in net monetary savings. In such instances the increase in expenses directly attributable to the purchase and use of a freezer will eliminate savings, if any, which may be effected through the purchase of food in bulk quantities. Among the expenses which will be thus incurred are the costs of financing where credit is used and of operation, maintenance and depreciation of the home freezer.

PAR. 7. In the course and conduct of their business, respondents, through the use of radio broadcasts and advertisements inserted in newspapers, have made certain statements with respect to television sets and other appliances. Among and typical, but not all inclusive, of said statements are the following:

*From the "Washington Post" issue of June 22, 1952.*

ON SALE MONDAY AT LACY'S 7 STORES
1951 and 1952 orig. $249.95 to $319.95 ADMIRAL,
GENERAL ELECTRIC, EMERSON, ZENITH, TELETONE,
MOTOROLA, PHILCO, HALLICRAFTERS, CROSLEY and
other famous 16", 17" and 20" console and table
T. V. $99. (depictions of eight television sets)

Respondents also offered, from time to time, through radio broadcasts and through advertisements inserted in newspapers, to give a demonstration of, and to sell, television sets at various stated prices, in the homes of those members of the public who request to have the advertised set demonstrated.

PAR. 8. Through the use of the foregoing statements and others of the same import, but not specifically set out herein, respondents represented that they were making bona fide offers to sell the advertised television sets at the stated prices.

PAR. 9. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact, said offers to sell the advertised television sets were not bona fide offers to sell said items. On the contrary, said offers were made for the purpose of inducing prospective purchasers of television sets to visit respondent's stores, or to obtain leads as to persons interested in the purchase of television sets in order that they could be solicited in their home by respondents' salesmen.

Respondents and their salesmen, at their place of business and in calling upon persons at their homes, in many instances failed to demonstrate the advertised television sets, or disparaged the design, workmanship and performance of said television sets, and attempted to demonstrate and sell different and more expensive television sets than those advertised.

PAR. 10. The use by respondents of said false and misleading statements and representations had the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the statements and representations contained therein were true, and to induce the purchase of substantial quantities of respondents' freezers and television sets by reason of such erroneous and mistaken belief.

## CONCLUSION

The acts and practices of respondents as herein found are all to the prejudice of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

## ORDER

*It is ordered*, That respondents, Lacy's, Inc., a corporation, and its officers, and William Warsaw and Hyman Goodbinder, individually, 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 electrical appliances, including home freezers and television sets, do forthwith cease and desist from:

1. Representing, through the use of such terms as "Lacy's Family Food Plan" or in any other manner, that they are engaged in the operation of a plan for the purchasing of food.

2. Representing, directly or by implication, that participants in such plan can eliminate the retailer or buy at wholesale prices or from a wholesaler.

3. Representing, directly or by implication, that overall monetary savings may be effected through the general use of frozen foods in place of corresponding foods in other forms.

4. Representing, directly or by implication, that any stated overall monetary saving can be effected through participation in such plan unless, in immediate connection therewith, the amount of the expenditure for foods available through such plan which is necessary to effect such saving is disclosed.

5. Misrepresenting the difference between the price of foods available under the plan and the price of such foods in usual retail channels, or the percentage of food costs which can be saved by participation in such plan.

6. Representing that net monetary savings, however expressed, can be effected by the use of freezers purchased from respondents, unless the costs of operation, maintenance, and depreciation and, in the event that the freezer is purchased on credit, the costs of such credit, are taken into account.

7. Representing, directly or by implication, that television sets or other appliances are being offered for sale, when such offer is not a genuine and bona fide offer to sell the television sets or other appliances so offered.

*It is further ordered*, That the complaint be, and it hereby is, dismissed as to respondents Hyman M. Goldstein and Eugene H. Rietzke.

ORDER TO FILE REPORT OF COMPLIANCE

*It is ordered*, That the respondents, Lacy's, Inc., a corporation, William Warsaw and Hyman Goodbinder, individually, shall, within sixty (60) days after service upon them of this order, file with the Commission, a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of February 2( 1954].

403443—57——48

IN THE MATTER OF

# DISTILLERS CORPORATION-SEAGRAMS, LTD., ET AL.

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 6047. Complaint, Sept. 24, 1952—Decision, Mar. 2, 1954*

Where 13 corporations which were engaged in the production, sale, and distribution of alcoholic beverages; were direct or indirect subsidiaries of a Canadian corporation which had created or acquired and owned directly or indirectly a large number of subsidiary corporations thus engaged; were included, as such subsidiaries, among the members of such subsidiary organization, utilized, among other purposes, to facilitate the sale and distribution of alcoholic beverages under various trade-marks, brands, and trade names so that at least some of said respondents should sell or distribute to persons other than those owned or controlled by any of them, i. e., those outside the group, such beverages for public consumption under trade-marks, brands, and trade names which were in competition, except insofar as restricted as below set forth, with similar alcoholic beverages likewise sold or distributed as such to persons under different trade-marks, brands, and trade names, by other similar subsidiary respondents; were engaged in the interstate sale of such beverages to wholesalers or others located throughout the country; constituted collectively, along with their affiliated and subsidiary corporations, one of the largest producers and sellers of alcoholic beverages in the United States, the gross sales of which as such were in excess of $200,000,000 in 1951; and, in the case of each, were in competition with one or more of the other respondents in such sales, except as hindered, lessened, or suppressed as below set forth—

With intent and effect of restricting and hindering their aforesaid competition in commerce in the sale and distribution of such beverages to persons other than those owned or controlled by any of them, through combination, conspiracy, cooperation, and planned common courses of action, and as part thereof, for more than five years past—

(a) Raised, fixed, stabilized, or maintained prices;

(b) Discussed, conferred, and exchanged information by correspondence and otherwise between and among themselves or with other concerns affiliated with or wholly or partly owned or controlled by them, for the purpose or with the effect of establishing or maintaining prices, terms, or conditions of sale or of securing adherence to prices, terms, or conditions of sale;

:) Met with one another or with retail liquor dealers or with representatives of retail liquor dealer associations for the purpose or with the effect of reaching agreement as to the employment of resale price maintenance contracts or arrangements; of adjusting or increasing resale prices after tax rate changes; and of reaching agreements as to the use of resale price maintenance contracts or arrangements as a means of fixing, raising, stabilizing, or maintaining prices;

Used common directors or officers as a means of raising, fixing, stabilizing, or maintaining prices;

(e) Policed or enforced, or attempted to police or enforce, illegal resale price maintenance contracts or arrangements; and

(f) Effected or maintained conditions, agreements, contracts, understandings, or arrangements, both express and implied, requiring that distributors or other purchasers give notice in advance of dealing in any alcoholic beverage product produced or sold by any competitor or competitors of respondents, the tendency of which was to preclude distributors of alcoholic beverages from selling or handling products sold by competitors of respondents:

*Held,* That such acts and practices constituted unfair acts and practices in commerce and unfair methods of competition therein.

Before *Mr. Frank Hier*, hearing examiner.

*Mr. Lynn C. Paulson* and *Mr. Joseph J. Gercke* for the Commission.

*White & Case*, of New York City, for respondents.

CONSENT SETTLEMENT [1]

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on September 24, 1952, issued and subsequently served its complaint on the respondents named in the complaint, charging them with the use of unfair methods of competition and/or unfair acts and practices in violation of the provisions of said Act.

The respondents, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding, any review thereof, and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth, and in lieu of the answers to said complaint heretofore filed and which, upon acceptance by the Commission of this settlement, are to be withdrawn from the record, hereby (and prior to the commencement of the taking of any testimony herein):

(1) Admit all the jurisdictional allegations set forth in the complaint as to them.

(2) Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion and order to cease and desist. It is understood that the respondents, in consenting to the Commission's entry of said findings as to the facts, conclusion

[1] The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

Counsel supporting the complaint having stated that evidence is not available to support the allegations of the complaint other than those covered by the consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, the said consent settlement was accepted by the Commission on March 2, 1954 and ordered entered of record as the Commission's findings as to the facts, conclusions, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.

(3) Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Joseph E. Seagram & Sons, Inc., is a wholly owned subsidiary of Distillers Corporation-Seagrams, Ltd., and is a corporation organized and existing under and by virtue of the laws of the State of Indiana and has its main office and principal place of business at 405 Lexington Avenue, New York 17, New York.

Respondent Seagram-Distillers Corporation is a wholly owned subsidiary of respondent Joseph E. Seagram & Sons, Inc., and is a corporation organized and existing under and by virtue of the laws of the State of Delaware and has its main office and principal place of business at 405 Lexington Avenue, New York 17, New York.

Respondent Distillers Products Sales Corporation is a jointly owned subsidiary of respondents Seagram Distillers Corporation and Calvert Distillers Corporation and is a corporation organized and existing under and by virtue of the laws of the State of Massachusetts and has its main office and principal place of business at 648 Beacon Street, Boston, Massachusetts.

Respondent Frankfort Distilleries, Incorporated, is a wholly owned subsidiary of Chivas Brothers Import Corporation, a subsidiary of respondent Joseph E. Seagram & Sons, Inc., and is a corporation organized and existing under and by virtue of the laws of the State of Delaware and has its main office and principal place of business at 405 Lexington Avenue, New York 17, New York.

Frankfort Distillers Corporation is a wholly owned subsidiary of respondent Frankfort Distilleries, Incorporated, and is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and has its main office and principal place of business at 50 Rockefeller Plaza, New York 17, New York.

Respondent Paul Jones and Company, Inc., is a wholly owned subsidiary of respondent Joseph E. Seagram & Sons, Inc., and is a corporation organized and existing under and by virtue of the laws of the State of Maryland and has its main office and principal place of business at Box 357, Baltimore, Maryland.

Respondent Hunter-Wilson Distilling Co., Inc., is a jointly owned subsidiary of respondents Joseph E. Seagram & Sons, Inc., and Gallagher & Burton, Inc., and is a corporation organized and existing under and by virtue of the laws of the State of Maryland and has its main office and principal place of business at Dundalk, Baltimore, Maryland.

Respondent Gallagher & Burton, Inc., is a wholly owned subsidiary of respondent Joseph E. Seagram & Sons, Inc., and is a corporation organized and existing under and by virtue of the laws of the State of Kentucky and has its main office and principal place of business at Baltimore (Relay), Maryland.

Respondent Carstairs Bros. Distilling Co., Inc., is a wholly owned subsidiary of respondent Joseph E. Seagram & Sons, Inc., and is a corporation organized and existing under and by virtue of the laws of the State of Maryland, and has its main office and principal place of business at Baltimore (Relay), Maryland.

Respondent The Calvert Distilling Co. is a wholly owned subsidiary of respondent Joseph E. Seagram & Sons, Inc., and is a corporation organized and existing under and by virtue of the laws of the State of Maryland and has its main office and principal place of business at Baltimore (Relay), Maryland.

Respondent Calvert Distillers Corporation is a wholly owned subsidiary of respondent The Calvert Distilling Co., and is a corporation organized and existing under and by virtue of the laws of the State of Maryland, and has its main office and principal place of business at 405 Lexington Avenue, New York 17, New York.

Respondent Julius Kessler Distilling Co., Inc., is a wholly owne subsidiary of respondent The Calvert Distilling Co., and is a corpor tion organized and existing under and by virtue of the laws of tl State of Indiana, and has its main office and principal place of busin at Lawrenceburg, Indiana.

Respondent Distillers Distributing Corporation is a wholly ow subsidiary of respondent Joseph E. Seagram & Sons, Inc., and is a poration organized and existing under and by virtue of the laws of State of Delaware and has its main office and principal place of ness at 405 Lexington Avenue, New York 17, New York.

PAR. 2. Distillers Corporation-Seagrams, Ltd., a Canadian cor tion, has caused to be created or acquired, and owns, directly or th subsidiary corporations, a large number of subsidiary corporatio gaged in the production, sale and distribution of alcoholic bev Among said subsidiaries are the respondents named herein, vi seph E. Seagram & Sons, Inc., Seagram-Distillers Corporation, Distillers Products Sales Corporation, Frankfort Distilleries, Incorporated, Frankfort Distillers Corporation, Paul Jones and Company, Inc., Hunter-Wilson Distilling Co., Inc., Gallagher & Burton, Inc., Carstairs Bros. Distilling Co., Inc., The Calvert Distilling Co., Calvert Distillers Corporation, Julius Kessler Distilling Co., Inc., Distillers Distributing Corporation. This corporate subsidiary organization is utilized, among other purposes, to facilitate the sale and distribution of alcoholic beverages under various trade-marks, brands and trade names so that at least some of said respondents sell or distribute to persons other than those owned or controlled by any of the respondents, alcoholic beverages intended for ultimate consumption by the public under trade-marks, brands and trade names which are in competition, except insofar as competition has been restricted and lessened by the acts and practices herein set forth, with similar alcoholic beverages sold or distributed to persons other than those owned or controlled by any of the respondents under different trade-marks, brands and trade names by other respondents herein, all of whom are subsidiaries of Distillers Corporation-Seagrams, Ltd.

PAR. 3. Respondents sell or cause to be sold alcoholic beverages to wholesalers or others located throughout the several States of the United States and in the District of Columbia, and said alcoholic beverages, when sold as aforesaid, are transported to said wholesalers or others in states other than the state or place of production or sale of said alcoholic beverages, so that these respondents are now and have ›een for more than five years last past engaged in trade and commerce n said products between and among the various States of the United tates and in the District of Columbia.

The respondents named herein, and their affiliated and subsidiary rporations, are collectively one of the largest producers and sellers alcoholic beverages in the United States. The gross sales of all mbers of the Seagram group were in excess of $200,000,000 in 1951.

ᴾAR. 4. Each respondent has been and now is in competition with or more of the other respondents named herein, and with others aking, or seeking to make, sales of alcoholic beverages in commerce een and among the various States of the United States, except in- as said competition has been hindered, lessened, restricted or sup- ɘd by the combination and practices which they engaged in and are herein set forth.

more than five years last past, and continuing to the present he respondents hereinbefore named and described have acted for pose and with the effect of restricting and hindering competi- commerce in the sale and distribution of alcoholic beverages to persons other than those owned or controlled by any of the respondents in that they have, through combination, conspiracy, cooperation and planned common courses of action, and as part and parcel thereof, done and performed things, acts and practices as follows:

(a) Raised, fixed, stabilized or maintained prices.

(b) Discussed, conferred and exchanged information by correspondence and otherwise between and among themselves or with other concerns affiliated with or wholly or partly owned or controlled by them for the purpose or with the effect of establishing or maintaining prices, terms or conditions of sale or of securing adherence to prices, terms or conditions of sale.

(c) Met with one another or with retail liquor dealers or with representatives of retail liquor dealer associations for the purpose or with the effect of reaching agreement as to the employment of resale price maintenance contracts or arrangements; of adjusting or increasing resale prices after tax rate changes; of reaching agreements as to the use of resale price maintenance contracts or arrangements as a means of fixing, raising, stabilizing or maintaining prices.

(d) Used common directors or officers as a means of raising, fixing, stabilizing or maintaining prices.

(e) Policed or enforced, or attempted to police or enforce, illegal resale price maintenance contracts or arrangements.

(f) Effected or maintained conditions, agreements, contracts, understanding or arrangements, both express and implied, requiring that distributors or other purchasers give notice in advance of dealing in any alcoholic beverage product produced or sold by any competitor or competitors of respondents, the tendency of which was to preclude distributors of alcoholic beverages from selling or handling products sold by competitors of respondents.

## CONCLUSION

The aforesaid acts and practices constitute unfair acts and practices and unfair methods of competition in interstate commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

## ORDER TO CEASE AND DESIST

*It is ordered*, That the respondents, Joseph E. Seagram & Sons., Inc., a corporation, Seagram Distillers Corporation, a corporation, Distillers Products Sales Corporation, a corporation, Frankfort Distilleries, Incorporated, a corporation, Frankfort Distillers Corporation, a corporation, Paul Jones and Company, Inc., a corporation, Hunter-

Wilson Distilling Co., Inc., a corporation, Gallagher & Burton, Inc., a corporation, Carstairs Bros. Distilling Co., Inc., a corporation, The Calvert Distilling Co., a corporation, Calvert Distillers Corporation, a corporation, Julius Kessler Distilling Co., Inc., a corporation, and Distillers Distributing Corporation, a corporation, directly or indirectly, through their officers, agents, representatives or employees, in or in connection with the offering for sale, sale or distribution in commerce between and among the several States of the United States and in the District of Columbia, of alcoholic beverages, do forthwith cease and desist from entering into, cooperating in, carrying out or continuing any combination, conspiracy, cooperation or planned common course of action between any two or more of said respondents engaged in competition in the sale of alcoholic beverages to persons other than those owned or controlled by any of the respondents, or between any one or more of said respondents and any wholly or partly owned subsidiary or affiliated concern not a party hereto, engaged in competition in the sale of alcoholic beverages to persons other than those owned or controlled by any of the respondents, to do or perform any of the following acts or things:

(1) Raise, fix, stabilize or maintain prices;

(2) Discuss, confer or exchange information for the purpose or with the effect of establishing or maintaining prices, terms or conditions of sale, or of securing adherence to prices, terms or conditions of sale;

(3) Exchange information with or meet with any retail liquor dealer or with any representative of any retail liquor dealer association, or others for the purpose or with the effect of reaching agreement as to the employment of any resale price maintenance contract or arrangement, of adjusting or increasing resale prices after tax rate changes, or of reaching agreement as to the use of any resale price maintenance contract or arrangement as a means of raising, fixing, stabilizing or maintaining prices;

(4) Use common directors or officers as a means of raising, fixing, stabilizing or maintaining prices;

(5) Enter into any resale price maintenance contract or arrangement, or police, enforce, or attempt to police or enforce any such contract or arrangement.

*It is further ordered*, That each of the respondents, directly or indirectly, through its officers, agents, representatives or employees, do forthwith cease and desist from effecting or maintaining any condition, agreement, contract, understanding or arrangement, express or implied, providing that any distributor or any other purchaser shall be required to give notice in advance of dealing in any alcoholic beverage product produced or sold by any competitor or competitors of respondents.

*Provided*, That nothing herein contained shall be construed to limit or otherwise affect any right with respect to resale price maintenance contracts or arrangements which any of the respondents may have under Section 5 of the Federal Trade Commission Act as amended by the McGuire Act (Public Law 542, 82d Cong., Chap. 745, Second Session, Approved July 14, 1952).

*Provided further*, That if, as a result of any valid statute or regulation of any state, territory, or possession or subdivision thereof, adopted pursuant to the Twenty-first Amendment to the Constitution of the United States, relating to the offering for sale, sale or distribution of alcoholic beverages, respondents, or any of them, or one or more of their wholly or partly owned subsidiaries or affiliated concerns, as a condition of doing business in said state, territory, possession or subdivision thereof, engage in acts or practices which, upon a prima facie showing on the record herein (not overcome by answer) may be construed by the Federal Trade Commission as violating any provision of the foregoing order, the Commission agrees that it will reopen this order solely for the purpose of determining whether to alter, modify or set aside such provision and that it will suspend such provision of this order, pending disposition of the issue as to whether such provision should be altered, modified or set aside. This proviso shall be without prejudice to, and nothing herein contained shall be construed to limit or otherwise affect, any defense which may otherwise be available to any respondent, in any proceeding to enforce the foregoing order or based on an alleged violation thereof.

*It is further ordered*, That Distillers Corporation-Seagrams, Ltd., a corporation, Seagram, Inc., a corporation, Distillers Warehouses, Inc., a corporation, William Jameson & Company, Inc., a corporation, Carstairs Distillers Corporation, a corporation, and The Pharma-Craft Corporation, a corporation, are hereby dismissed from this proceeding; such dismissals are without prejudice.

*It is further ordered*, That Seagram Sales Corporation, a corporation, Sea-Cal-Frank corporation, a corporation, and Browne-Vintners Co., Inc., a corporation, are hereby dismissed from this proceeding. Provided, however, that the dismissal of these three corporations is without prejudice and is not to be construed in any sense as exempting said corporations from the application of any of the provisions of the order to cease and desist as are applicable to any concern wholly or partly owned or controlled by or affiliated with any one or more of the respondents herein.

*It is further ordered*, That the respondents shall, within twelve months after the service upon them of this order, file with the Com mission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Joseph E. Seagram & Sons, Inc.
By (Sgd) Frank R. Schwengel,
*President.*

Seagram Distillers Corporation
By (Sgd) Herbert W. Evenson,
*Executive Vice President.*

Distillers Products Sales Corporation
By (Sgd) Frank R. Schwengel,
*President.*

Frankfort Distilleries, Incorporated
By (Sgd) Arthur Hiller,
*Vice President.*

Frankfort Distillers Corporation
By (Sgd) Ellis D. Slater,
*President.*

Paul Jones and Company, Inc.
By (Sgd) Alex F. Bracker,
*President.*

Hunter-Wilson Distilling Co., Inc.
By (Sgd) Frank E. Desmond,
*President.*

Gallagher & Burton, Inc.
By (Sgd) James E. Friel,
*Vice President.*

Carstairs Bros. Distilling Co., Inc.
By (Sgd) James E. Friel,
*Vice President.*

The Calvert Distilling Co.
By (Sgd) James E. Friel,
*Vice President.*

Calvert Distillers Corporation
By (Sgd) Tubie Resnik,
*Executive Vice President.*

Julius Kessler Distilling Co., Inc.
By (Sgd) Frank R. Schwengel,
*President.*

Distillers Distributing Corporation
By (Sgd) James E. Friel,
*Vice President.*

Date: November 19, 1953.

The foregoing consent settlement is hereby accepted by the Federal ade Commission and ordered entered of record on this 2nd day of ırch, 1954.