FEDERAL TRADE COMMISSION DECISIONS

FINDINGS AND ORDERS, JULY 1, 1954, TO JUNE 30, 1955

IN THE MATTER OF

CAMDEN FIBRE MILLS, INC., ET AL.

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

Docket 6106. Complaint, June 30, 1953—Decision, July 13, 1954

Where a manufacturer of cotton, woolen, and synthetic batts or battings sold to manufacturers of shoulder pads and linings, and known as quilters—

(a) Misbranded certain batts which contained substantial quantities of miscellaneous fibers other than wool, through labeling them as "100% Reprocessed Wool";

(b) Misbranded batts as "Guaranteed 100% New", when such products were made from reprocessed stock; and

(c) Failed to stamp, tag, or label as required by law certain cartons containing individual rolls of untagged or unmarked batting:

Held, That such acts and practices 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. Harry Shapiro and *Mr. Hirsh W. Stalberg*, of Philadelphia, Pa., 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 July 13, 1954, the initial decision in the instant matter of Hearing Examiner John Lewis, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondents on June 30, 1953, charging them with having violated the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and the Federal Trade Commission Act, through the misbranding of certain wool products. Said respondents, after being duly served with the complaint, appeared by counsel and filed their answer in which they admitted the jurisdictional allegations of the complaint but denied having engaged in any illegal practices as charged.

Pursuant to notice, a hearing on the complaint was held on August 25, 1953, in Philadelphia, Pennsylvania, before Hearing Examiner James A. Purcell, theretofore duly designated by the Commission to hear this proceeding. Thereafter, on October 15, 1953, a further hearing on the complaint was held in New York, New York before the undersigned hearing examiner, who had theretofore been duly designated by the Commission to preside at said hearing in place of James A. Purcell, due to the latter's illness and unavailability to conduct said hearing. Counsel for respondents and counsel supporting the complaint interposed objection to the substitution of the undersigned as hearing examiner to the extent that such substitution was limited to his presiding at the single hearing, but stated that they had no objection to his substitution for the purpose of completing the taking of testimony and other evidence in this proceeding and the issuance of an initial decision based on all the evidence in the case, including that previously adduced before the original hearing examiner. Thereafter, pursuant to order of the Commission, the undersigned hearing examiner was substituted as hearing examiner in this proceeding in place and stead of Hearing Examiner James A. Purcell. Further hearings in this proceeding were held before the undersigned on January 7, 1954 at Washington, D. C., and on March 11, 1954 at Philadelphia, Pennsylvania.

At the various hearings held herein testimony and other evidence were offered in support of and in opposition to the allegations of the complaint, which testimony and other evidence were duly recorded and filed in the office of the Commission. All parties were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues. No request for oral argument was received from counsel. However, counsel availed themselves of the opportunity of filing proposed findings and conclusions, together with the reasons therefor, which have been carefully considered by the examiner.

Upon consideration of the entire record herein, and from his observation of the witnesses (with the exception of the two witnesses who testified at the first hearing),[1] the undersigned makes the following:

FINDINGS OF FACT

I. The business of respondents

In their answer respondents admit, and it is so found, that respondent Camden Fibre Mills, Inc. is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal place of business located at 166–176 West Columbia Avenue, Philadelphia 22, Pennsylvania. It is further admitted, and is so found, that respondents Louis Silverstein, Raymond Silverstein and Frank N. Cooper are president and treasurer, secretary, and assistant secretary and treasurer, respectively, of the corporate respondent and that said individuals formulate, direct and control the acts, policies and practices of the corporate respondent, said individual respondents having and maintaining their business offices at the same address as the corporate respondent.

Respondents are manufacturers of certain cotton, woolen, and synthetic battings which they sell to manufacturers of shoulder pads and manufacturers of linings, known as quilters. Respondents have been engaged in the manufacture of battings from woolen material since approximately May 1951, having prior thereto confined their operations to battings made from other fibers. Respondents' total sales are in excess of $1,500,000 per annum, with the sales of batting made from wool amounting to approximately $200,000.

II. The interstate commerce

The largest market for respondents' wool battings is in the New York City area, with some sales being made in Pennsylvania and Maryland. The answer of respondents admits, and it is so found, that subsequent to the effective date of the Wool Products Labeling Act and more especially since the beginning of the year 1951, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment and

[1] No substantial issue of credibility is involved in the testimony of Frank N. Cooper and Robert S. Scott (who testified at the first hearing), in the resolution of which an opportunity for observation of the demeanor of these witnesses would be of any material assistance.

offered for sale in commerce, as "commerce" is defined in the Wool Products Labeling Act, wool products, as "wool products" are defined therein.

III. The alleged misbranding

A. *The charges*

The complaint alleges three different types of misbranding with respect to respondents' wool batting, as follows:

1. That certain of the batting was misbranded within the intent and meaning of Section 4 (a) (1) of the Wool Products Labeling Act and Rule 30 of the Rules and Regulations promulgated thereunder, in that it was falsely and deceptively identified as "100% Reprocessed Wool," whereas in fact it was not composed of 100% reprocessed wool but contained substantial quantities of miscellaneous fibers other than wool.
2. That certain of the batting was misbranded within the meaning of Section 4 (a) (1) of the Act and Rule 20 of the Rules and Regulations in that it was falsely and deceptively tagged as consisting of all or 100% new materials, whereas in fact it did not contain new wool but was composed of reprocessed wool, together with certain quantities of miscellaneous fibers other than wool.
3. That certain of the batting was misbranded in that it was not stamped, tagged or labeled as required under Section 4 (a) (2) of the Act and in the manner and form prescribed by the Rules and Regulations.

B. *The evidence*

The evidence of misbranding revolves around four samples of batting, alleged to have been manufactured by respondents, which were obtained by attorney-investigators of the Commission from the premises of four different customers of respondent. Three of the samples were obtained by one investigator and the fourth sample was obtained by another. The first sample, identified in this proceeding as Commission's Exhibit 11, was obtained from respondents' customer, State Quilting Company, on October 4, 1951. It was removed from a sealed carton bearing the name "Camden Fibre Mills Inc." and a label with the words, "100% Reprocessed Wool." Respondents' packing slip, which accompanied the merchandise on delivery to the customer, and their invoice covering the sale of the batting, both described the product as "100% Reprocessed Wool." The second sample, identified as Commission's Exhibit 12, was obtained by the same investigator on February 19, 1952 from the premises of Philip Gottlieb, a contractor performing quilting for respondents' customer, L. Rimsky Inc., a textile converter. The sealed carton from which this sample was obtained contained the name "Camden Fibre Mills Inc.," but no label or tag with respect to wool content. However, respondents' packing slip and invoice covering the delivery and sale of the batting which were obtained from the customer, L. Rimsky Inc., describe the batting as "Wool Batting Type WOOLO * * * 100% Reprocessed." The third sample, identified as Commission's Exhibit 13, was obtained by the same investigator on January 14, 1952 from the premises of respondents' customer, Crown Quilting Company. The sample was obtained from a sealed carton bearing a tag with the identifying name "Camden Fibre Mills Inc." but no description of the wool content other than a designation of the product as "Woolo." However, the packing slips and invoices covering the shipment and sale of the cartons of batting, from which the sample was taken, describe the merchandise as "Wool Batting Type WOOLO * * * 100% Reprocessed Wool." The fourth sample, identified as Commission's Exhibit 15, was obtained by a second Commission investigator from the premises of respondents' customer, Kasbar Quilting Company, during February 1952. The sample was taken from a sealed carton bearing a tag with the name "Camden Fibre Mills Inc.". The tag describes the product as "Woolo" and it is further identified on the packing slip and invoice as "100% Reprocessed Wool."

Within a short time after each of the above samples was obtained, a portion thereof was transmitted to the National Bureau of Standards for testing as to fiber content. Each of the samples was given a chemical test, in accordance with standard Government specifications, to determine the presence of various fibers and the quantities thereof. In testing each piece of batting submitted, two samples from each piece were taken and separately tested. The results of these tests are as follows:

Fiber	Exhibit 11 Sample		Exhibit 12 Sample		Exhibit 13 Sample		Exhibit 15 Sample	
	No. 1	No. 2	No. 1	No. 2	No. 1	No. 2	No. 1	No. 2
	Percent	*Percent*	*Percent*	*Percent*	*Percent*	*Percent*	*Percent*	*Percent*
Acetate Rayon	1.9	1.9	2.0	1.9	1.6	1.4	1.3	1.5
Nylon			2.1	2.2			2.8	3.1
Vegetable Fiber (including cotton and viscose rayon)	10.8	10.6	3.6	3.6	7.3	7.3	4.3	4.1
Wool	87.3	87.5	92.3	92.3	91.1	91.1	91.6	91.6

The first charge of misbranding is based on the fact that the above samples were labeled or identified, either on the cartons from which they were taken, or on the packing slips and invoices accompanying the delivery and sale of the merchandise, or on both, as "100% Reprocessed Wool," whereas the tests made by the Bureau of Standards disclose that they contained substantial quantities of other fibers. The second charge of misbranding is based upon the fact that all of the tags, invoices and packing slips of respondents', which were received in evidence in this proceeding, contain the following printed statement thereon: "Our Products Guaranteed 100% New." This representation is claimed to be false since respondents' wool batting is admittedly made from reprocessed, rather than new, wool. The third charge of misbranding rests primarily on the fact that the individual rolls of batting do not contain any tag, label or other means of identification showing the wool content of each piece of batting. Where a tag or label as to wool content is used it is affixed to the cartons in which the individual rolls of batting are packed for delivery, rather than on the rolls themselves.[2]

C. *Contentions of respondents*

The evidence offered by respondents in opposition to the complaint, and the contentions advanced by them, are directed primarily to the first charge of misbranding, viz., that respondents falsely or deceptively identified certain of their batting as 100% reprocessed wool. Respondents' contentions in this regard fall into three main categories, which may be summarized as follows:

1. Counsel for respondents attempted to establish at the hearings that there was a possibility the samples obtained by the Commission's attorney-investigators and tested by the Bureau of Standards, were not respondents' merchandise, but had been confused with merchandise from other manufacturers. It is not entirely clear whether respondents are still urging this contention, although the proposed findings submitted by them would appear to indicate that they now concede that the four samples were taken from their merchandise.[3] In any event, however, the hearing examiner is satisfied from the record, and so finds, that the samples obtained by the Commission's agents and tested by the Bureau of Standards were all samples of merchandise manufactured by respondents and sold to the various customers referred to above under the designation or description, on the tag, label or accompanying invoice, of 100% reprocessed wool. The testimony of the Commission's investigators combined with

[2] The rolls of batting, which vary from 25 to 80 yards in length, are wrapped in tissue paper and are usually packed six to the carton.
[3] See particularly paragraph 17 of respondents' proposed findings.

that of the customers from whom they obtained the samples of merchandise, invoices, packing slips and tags establishes *prima facie* that the merchandise they obtained was manufactured and sold by respondents. The evidence offered on behalf of respondents is insufficient to overcome the *prima facie* case thus established. In fact, aside from attempting to discredit the Commission's investigator Robert S. Scott, on cross-examination,[4] there was no evidence offered by respondents which in any way suggests that the merchandise was not respondents'.

2. The second contention of respondents, and one which they seriously urged both at the hearing and in their proposed findings, is that there exists an understanding or custom in the trade that a wool product may be designated as 100% wool if it does not contain more than 5% non-wool fibers, and that consequently none of respondents' customers were deceived by the designation of the batting, which they bought from respondents, as 100% reprocesed wool. Respondents' contention that there is, in effect, a 5% tolerance in the labeling of wool products is based on a misconception of both the law and the facts. In the first place the only tolerances permitted under the Wool Products Labeling Act in the labeling of wool products are (a) where the deviation in fiber content from that stated on the label has resulted from "unavoidable variations in manufacture and despite the exercise of due care," and (b) an exemption in labeling a wool product, to the extent of 5% of the total fiber weight of such wool product, for "ornamentation." Neither of these so-called tolerances are applicable in the instant situation since there has been no showing by respondents that the variations in their product, described as 100% reprocessed wool, were due to any unavoidable variations in manufacture after the exercise of due care,[5] or that the variations consisted of any ornamentation in the batting. In the face of the plain wording of the statute any trade practice or understanding to the contrary has no legal force or effect as a justification for the misdescription or misrepresentation of merchandise.[6] Con-

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[4] Despite rather strenuous cross-examination of the witness Scott, the hearing examiner is satisfied from his testimony as a whole, which was largely corroborated by the testimony of respondents' customers, that the samples he obtained were from batting manufactured and sold by respondents.

[5] Respondents did submit evidence that instructions had been given to employees that when changing from blended wool to 100% wool, the machinery used in processing the batting should be cleaned. This, however, does not establish that the deviations from the 100% wool designation resulted from unavoidable variations in manufacture since, according to one of respondents' own witnesses from the United States Testing Company, the wool content of the batting will always correspond to the fiber content of the wool stocks from which it is made.

[6] See *F. T. C.* v. *Winsted Hosiery Co.*, 258 U. S. 483, 493.

cerning the contention of respondents that none of their customers were deceived by their labeling of the product as 100% reprocessed wool, it may be noted that this is immaterial since it is the tendency and capacity to deceive which constitutes the offense, and actual deception need not be shown.[7]

Even assuming, *arguendo*, that the existence of a trade understanding with respect to tolerances in wool labeling could have some legal effect, either as a defense to respondent's misbranding or as bearing on the question of public interest, the record in this case fails to establish any clear understanding or practice with respect to a 5% tolerance in the labeling of wool products. Thus while one witness stated that he understood a product could be called 100% wool if it contained in excess of 95% wool (R. 149), another witness indicated that the tolerance only applied to variances of 1 or 2% (R. 179). The main witness called by respondents for the purpose of establishing such trade understanding testified that while it was his understanding that any wool product containing up to 5% of foreign fiber could be labeled as 100% wool, it was customary in such instance to label the product as "commercially" 100% wool, otherwise the trade would understand that the 100% wool label meant what it stated. In line with the testimony of this witness, it may be noted that in none of the invoices or tags used by respondent does the word "commercial" or "commercially" appear, the merchandise being labeled unqualifiedly as "100% Reprocessed Wool."

Finally, even assuming that respondents had established the existence of a trade understanding with respect to a 5% tolerance in labeling batting and that such understanding had some legal efficacy, it would have no application in this case since all of the samples tested were found to contain in excess of 5% non-wool fibers. Unless the tests made by the National Bureau of Standards are unreliable, respondents' contention based on a so-called 5% tolerance is wholly irrelevant. Respondents refer in their proposed findings to two items as suggesting the possible unreliability of the tests conducted by the National Bureau of Standards. The first of these is the testimony of a representative of the United States Testing Company who stated that in testing batting it is sometimes necessary to test a number of samples in order to get a representative result since there may be variations of as much as 5 to 8% between two different samples from the same piece of batting. Respondents apparently regard this testimony

[7] *F. T. C.* v. *Winsted Hosiery Co., supra; F. T. C.* v. *Algoma Lumber Co.,* 291 U. S. 81; *Charles of the Ritz Dist. Corp.* v. *F. T. C.,* 143 F. 2d 676; *J. Bockenstette* v. *F. T. C.,* 134 F. 2d 369.

as suggesting the unreliability of the tests conducted by the National Bureau of Standards where only two samples from each piece of batting were tested. However, the representatives of the Bureau of Standards testified that in obtaining each sample they took a number of fibers from different parts of each piece of batting tested in order to get a representative sample, and that only where the two samples tested reflect substantial variations in fiber content is it necessary to put the batting through a "carding" process in order to produce a more representative sample. The latter process was not used in this case since there was no significant variation between the two samples tested from each piece of batting. The test followed by the National Bureau of Standards is based on standard Government specifications which, according to respondents' own witness from the United States Testing Company, are substantially the same as the procedures which he follows in testing for fiber content. The examiner is satisfied as to the scientific accuracy of the methods used in, and the results achieved by, the tests conducted by the National Bureau of Standards. Respondents also rely on the testimony of the respondent Louis Silverstein that tests conducted on some of the wool stock which was later made up into batting disclosed that it was at least 95% wool. It may be noted that none of the reports of these tests were produced and no definitive testimony with respect to the results of the tests was given. In any event, whatever may have been the wool content of the samples referred to by Silverstein, there is no question but that the merchandise actually sold to the customers involved in this proceeding contained more than 5% non-wool fibers.

3. Respondents' final contention with respect to the false branding of their batting is based on an alleged guarantee which they received from their vendor, Western Wool & Fibre Company, from whom they claim they purchased substantially all of the stock which was later manufactured into batting, and sold to the customers above mentioned. This contention is based on Section 9 (a) of the Act which makes it a defense to a charge of misbranding if the person charged:

> * * * establishes a guarantee received in good faith signed by and containing the name and address of the person residing in the United States by whom the wool product guaranteed was manufactured and/or from whom it was received * * *.

The evidence of a guarantee offered by respondents is twofold. First there is the testimony of respondent Louis Silverstein that a representative of the vendor, Western Wool & Fibre Company, told him that the merchandise would be marked 100% reprocessed wool and the actual content would not vary from this by more than 5%, which was a permissible tolerance. This so-called guarantee does not meet the requirements of the Act since it is not in writing and, moreover, is not a guarantee that the merchandise would be 100% reprocessed wool, but rather that it would be at least 95% reprocessed wool. The second so-called guarantee relied upon by respondents is based upon the description of the raw material in the invoices from Western Wool & Fibre Company, covering the sale of the merchandise to respondents. In some of the invoices there is a stamped notation describing the merchandise as: "Reprocessed *100%*." In a number of other invoices the following stamp appears:

"To the best of our knowledge and belief the commercial fiber content of this shipment as defined in the Wool Products Labeling Act of 1939 is as follows:

Reprocessed Wool 100%."

In the opinion of the examiner none of these notations on invoices of the Western Wool & Fibre Company constitutes a guarantee within the meaning of Section 9 of the Act since (a) they are not signed by the person purporting to guarantee the product and (b) they do not contain a statement that the wool product is not misbranded under the terms of the Act. While it may not be necessary to follow precisely the form of guarantee suggested in Rule 32 of the Rules and Regulations, the stamped notations on the invoices of Western Wool & Fibre Company do not comply with the requirements of Section 9 even under a liberal interpretation of that section. The first type of stamp, merely referring to the merchandise as "100% Reprocessed," clearly is not a guarantee. While the second type of stamp stating what the wool content is: "To the best of our knowledge and belief" is somewhat fuller, it too, in the opinion of the examiner, cannot be construed as a guarantee as to wool content, even overlooking the fact that it is unsigned. Moreover, even if the second type of invoice could conceivably be considered a guarantee, there is no showing by respondents that the samples of batting which were the subject matter of this proceeding were made from merchandise purchased under that type of invoice.[8] In any event, even if both types of invoice could be considered as a guarantee, there is no showing that the guarantee was received "in good faith" as a representation that the merchandise was

[8] According to the witness Silverstein, during 1951 his company purchased 444,968 pounds of wool stock from Western Wool & Fibre, 11,755 pounds from another company, and 15,851 pounds of part-wool stock from a third company. According to the testimony of Silverstein and his foreman, the batting from which the samples here involved were taken was all manufactured from the wool stock purchased from Western Wool & Fibre Company. However, this does not necessarily establish that the wool stock from which the samples were made was covered by the second type of invoice.

actually 100% reprocessed wool since, according to the admission of respondent Silverstein, he was told by his vendor that the stock might contain up to 5% non-wool fiber.

C. *Concluding findings*

1. The record establishes, and it is so found by the hearing examiner, that respondents falsely and deceptively labeled or otherwise identified certain of their wool products, in the form of batting (samples of which were received in evidence in this proceeding as Commission's Exhibits 11, 12, 13 and 15), by describing them as 100% reprocessed wool, whereas in truth and in fact said products contain substantial quantities of miscellaneous fibers other than wool, as more particularly set forth in the results of the tests conducted by the National Bureau of Standards referred to above. Respondents' effort to justify their actions on the basis of the existence of an alleged understanding or practice in the trade permitting a 5% tolerance in the labeling of wool products does not constitute any legal justification for their misbranding of a wool product since the Act does not recognize any such tolerance or deviation and, moreover, is not deserving of recognition on the question of "public interest" since (a) respondents failed to establish any such trade understanding or practice and (b) all of the samples involved in this proceeding showed a deviation in excess of the alleged tolerance.

2. The second charge of misbranding is based on the fact that the invoices, packing slips and tags used by respondents in the sale and delivery of their batting contain thereon the printed statement: "Our Products Guaranteed 100% New." Respondents' explanation for the presence of this statement on these documents is that the corporate respondent had, prior to May of 1951, been manufacturing mainly cotton products and that this printed statement was intended as an explanation to the customers when they bought cotton that it was new cotton.

Since respondents' wool batting is made from reprocessed stock it clearly cannot be designated as "new," the latter designation denoting that it is composed wholly of new or virgin wool. While the invoices and packing slips also describe the product as "100% Reprocessed Wool," it is the opinion of the examiner, and is so found, that the presence of the printed words: "Our Products Guaranteed 100% New," has the tendency and capacity to deceive and mislead. Respondents' explanation for the presence of these words does not constitute a legal defense. While the fact that the old invoices were only used temporarily during a change-over from cotton to wool products might be taken into consideration as bearing on the question of public interest, the facts in this case do not establish that this was a temporary, passing situating, since respondents continued to use the same type of invoice, packing slip and tag from May 1951 to February 6, 1952 (the date of the last invoice received in evidence) and, so far as appears from the record, may still be using the same form. Accordingly, it is found that certain of respondents' wool products in the form of batting were misbranded within the intent and meaning of Section 4 (a) (1) of the Wool Products Labeling Act and of Rule 20 of the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively tagged, labeled or otherwise identified as 100% new materials whereas, in truth and in fact, the said products did not contain new wool, but were composed of reprocessed wool together with certain quantities of miscellaneous fiber other than wool.

3. The third form of misbranding alleged in the complaint is based on the respondents' failure to stamp, tag or label its batting, as required under Section 4 (a) (2) of the Act and the Rules and Regulations promulgated thereunder. Whereas the other two forms of misbranding discussed above involve a false or deceptive tagging or labeling, the third form alleged in the complaint is based on a failure to attach labels containing the required information as to wool content and other information set forth in Section 4 (a) (2) of the Act. The main claim of violation of Section 4 (a) (2) is apparently based on the fact that respondents have failed to place any stamp, tag, label or other means of identification on the individual pieces of batting, as distinguished from the cardboard cartons in which the rolls of batting are packed.[9]

In the opinion of the hearing examiner respondents' failure to tag or label the individual rolls of batting, as distinguished from the cartons in which the batting is enclosed for shipment to the customer, does not constitute misbranding within the meaning of Section 4 (a) (2) and the Rules and Regulations promulgated under the Act. Under Rule 15 the tag or label containing the required information may be affixed to the container in which the wool product is packed, where the product is "sold and delivered in sealed containers which remain unbroken and intact until after delivery of the product to, and receipt thereof by, the purchaser-consumer." In this case the record shows that the purchaser-consumer is a manufacturer who uses the batting in the manufacture of some other product and not for resale purposes in the same form. It also appears that the cartons are sealed and remain

[9] As previously indicated, the rolls are enclosed in tissue paper and are packed six to the carton.

unbroken and intact until delivery of the product to the manufacturer. It is clear, therefore, that under this rule the labeling of the carton, as distinguished from the individual rolls of batting, constitutes sufficient compliance with the Act. However, the record does show that in the case of the sales to L. Rimsky, Crown Quilting Company and Kasbar Quilting Company the cartons themselves did not contain any label or tag describing the wool content of the product therein enclosed, the only description of the merchandise being on the invoices and packing slips which were not affixed to the carton or the merchandise. It is, accordingly, found that by failing to label either the batting or the cartons in which it was enclosed, in these instances, respondents misbranded said batting within the meaning of Section 4 (a) (2) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder.

CONCLUSION OF LAW

The acts and practices of respondents, as hereinabove found, were and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder and, by virtue of Section 3 of said Act, constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act. It is accordingly concluded that this proceeding is in the interest of the public and that an order to cease and desist should issue against respondents.

ORDER

It is ordered that the respondent, Camden Fibre Mills, Inc., a corporation, and its officers, and respondents, Louis Silverstein, Raymond Silverstein and Frank N. Cooper individually, and respondents' respective representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of wool batts or battings 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 identifying such products as to the character or amount of the constituent fibers included therein;

plaint in this matter by issuing in lieu thereof the proposed amended and supplemental complaint filed with and made a part of the motion, and memorandum of respondent Luria Brothers and Company, Inc., opposing said motion.

Counsel supporting the complaint in their motion state that information obtained during a supplemental investigation in this matter discloses, in their opinion, that the complaint should be amended and supplemented in certain important respects. The two principal changes are (1) the addition as parties respondent of Bethlehem Steel Corporation and its two operating subsidiaries, Bethlehem Steel Company and Bethlehem Pacific Coast Steel Corporation, and (2) the addition of Hugo Neu Corporation as a party respondent, and the inclusion of a charge of conspiracy in restraint of trade involving Hugo Neu Corporation, unnamed Japanese steel mills, and Luria Brothers and Company, Inc.

The Commission having duly considered the motion, opposing memorandum of respondent Luria Brothers and Company, Inc., and the data and information in its confidential investigational files, and being of the opinion that the allegations of the proposed amended and supplemental complaint are within the general scope of the original complaint, and having reason to believe that the respondents named in the proposed amended and supplemental complaint have engaged in the acts and practices described therein, and it appearing that it would be to the interest of the public for it to issue its amended and supplemental complaint in the form proposed:

It is ordered that the motion of counsel supporting the complaint to amend and supplement the complaint in this matter be, and it hereby is, granted.

It is further ordered that the complaint in this matter be, and it hereby is, amended and supplemented to conform to the proposed amended and supplemental complaint submitted by counsel supporting the complaint, and that a copy of the amended and supplemental complaint be served on each of the parties to this proceeding.

It is further ordered that the amended and supplemental complaint specify the 14th day of September, A. D., 1954, at 10:00 o'clock as the time, and Philadelphia, Pennsylvania, as the place when and where a hearing will be had before Hearing Examiner John Lewis.

It is further ordered that this proceeding be, and it hereby is, remanded to the hearing examiner.

Commissioner Carretta dissenting.

DISSENTING OPINION OF COMMISSIONER ALBERT A. CARRETTA

This matter came on to be heard by the Commission upon motion of counsel supporting the complaint to amend and supplement the complaint herein by issuing, in lieu thereof, the proposed amended and supplemental complaint filed with and made a part of said motion, and upon answer of respondent Luria Brothers and Company, Inc., opposing said motion.

After due consideration, the majority of the Commission decided to grant the motion of counsel supporting the complaint and ordered a copy of the amended and supplemental complaint to be served upon each of the parties to this proceeding. With this action of my colleagues, I regret that I cannot agree.

History of Case

Under date of January 19, 1954, the Commission issued its original complaint in this matter charging the respondent brokers and the respondent mills with certain violations of Section 5 of the Federal Trade Commission Act, and charging respondent Luria Brothers and Company, Inc. with certain violations of Section 7 of the Clayton Act. It can fairly be presumed that prior to the issuance of said original complaint, the Commission had been furnished sufficient factual material relative to the allegations contained in Count I of the original complaint to cause at least a majority of the Commissioners to "have reason to believe" that the then proposed respondents had been or were using an unfair method of competition in commerce. As a matter of fact, Section 5 (b) of the Federal Trade Commission Act requires the Commission to reach such a conclusion before it may issue a complaint. As to Count II of the original complaint issued on January 19, 1954, which alleges certain violations of Section 7 of the Clayton Act, it can also fairly be presumed that prior to the issuance of said original complaint, the Commission had been furnished sufficient factual material to cause at least a majority of the Commissioners to "have reason to believe" that the then proposed respondent was violating or had violated the provisions of Section 7 of the Clayton Act. As a matter of fact, Section 11 of the Clayton Act requires the Commission to reach such a conclusion before it may issue a complaint.

On or before March 10, 1954, all of the original respondents had filed responsive pleadings.

On March 15, 1954, counsel supporting the complaint filed a motion with the Hearing Examiner seeking a cancellation of the initial hearing for the following reason:

"A short time before and subsequent to the issuance of the complaint in this matter information was received by counsel supporting the complaint concerning certain practices and activities in the iron and steel scrap industry. Supplemental investigation was promptly undertaken in several areas, but it has not yet been completed and evaluated. The information thus far received, however, indicates that the investigation now being made may have a vital bearing upon the course of this proceeding.

"Under the circumstances, therefore, it is requested that counsel supporting the complaint be allowed appropriate time to study and evaluate the information now being obtained so that it may be properly integrated into their plan and schedule of procedure. This should not require more than a few weeks and should result in more orderly proceedings and in the elimination of considerable waste and duplication of effort by all parties which may otherwise occur. Counsel supporting the complaint will take appropriate steps to resume the proceeding as promptly as circumstances permit."

On March 25, 1954, the Hearing Examiner granted said motion and ordered the initial hearing cancelled subject to being rescheduled upon five days notice.

Then, under date of May 25, 1954, before the Hearing Examiner had rescheduled the hearing in this matter, counsel supporting the complaint filed two motions: the first motion was addressed to the Hearing Examiner requesting him to certify this proceeding to the Commission, and the second was addressed to the Commission requesting it to amend and supplement the complaint herein. The motion addressed to the Hearing Examiner was properly filed pursuant to Rule X of the Commission's Rules of Practice, and no opposition to said motion having been filed by any of the respondents, the Hearing Examiner, on June 7, 1954, certified the proceeding to the Commission for the purpose of having it consider a simultaneously filed motion for the issuance of an amended and supplemental complaint.

On June 11, 1954, respondent Luria Brothers and Company, Inc. filed with the Commission its answer opposing the motion to amend and supplement the complaint.

*   *   *   *   *   *   *

Without considering at this time the minor changes sought to be made by the motion filed by counsel supporting the complaint, it can be briefly stated that the proposed amended and supplemental complaint would effect the following two substantial changes:

(1) It would add as parties respondent Bethlehem Steel Corporation, Bethlehem Steel Company, and Bethlehem Pacific Coast Steel Corporation.

(2) It would add Hugo Neu Corporation as a party respondent, and include a charge of conspiracy in restraint of trade involving said Hugo Neu Corporation, unnamed Japanese steel mills, and Luria Brothers and Company, Inc.

In its motion addressed to the Commission, counsel supporting the complaint stated:

"The information obtained during the supplemental investigation referred to in our motion of March 15 discloses, *in the opinion of counsel supporting the complaint*, that the complaint in this proceeding should be amended and supplemented in certain important respects." (Italics added.)

Counsel supporting the complaint also stated in their motion:

"*It is our opinion* that the Bethlehem Steel Corporation and its two operating subsidiaries should be included in the proceedings as respondent mills. *It is also our opinion* that Hugo Neu Corporation should be included as a new respondent and that a charge of conspiracy in restraint of trade involving Hugo Neu Corporation, unnamed Japanese steel mills, and Luria Bros. & Co., Inc. should be added to the complaint." (Italics added.)

I do not doubt for a moment that counsel supporting the complaint arrived at their "*opinions*" only after careful consideration of all of the information available to them in their investigational files. But after all, the Congress of the United States authorized the *Federal Trade Commission* to issue complaints when, among other things, *the Commission* "had reason to believe" that the person, partnership or corporation charged was violating or had violated any of the provisions of an Act administered by the Commission. This authority to issue complaints cannot, in my opinion, be delegated by the Commission to its staff members. Therefore, it must be the Commission, and not counsel supporting the complaint, which must reach the "opinion" that additional parties respondent should be named or that additional charges should be included in an already issued complaint.

The proposed amended and supplemental complaint attached to the motion of counsel supporting the complaint contained references to the new respondents, but, in my opinion, did not contain sufficient information within its four corners to cause me to have reason to believe that the four above-named new respondents had violated any law administered by the Federal Trade Commission. There undoubtedly was additional factual information available to counsel supporting the complaint, but it was not contained in any of the papers placed before the Commission. In this connection, it is interesting to note that in the Order adopted by the majority of my colleagues granting motion of counsel supporting the complaint, it is stated:

"The Commission having duly considered the motion, opposing memorandum of respondent Luria Brothers and Company, Inc., *and the data and information in its confidential investigational files*, . . ." (Italics added.)

It is clear from the foregoing quotation that in disposing of the pending motion, my colleagues considered more than that which was actually contained in the motion filed by counsel supporting the complaint, and in the answer filed by respondent Luria Brothers and Company, Inc. This represents the area of difference between me and my colleagues. The question which the subject motion has raised is:

"After issues have been joined in a proceeding brought by the Federal Trade Commission, may the Commissioners, for any purpose whatsoever, refer to data and information in the Commission's confidential investigational files which are not part of the record either before the Hearing Examiner or before the Commission?"

My answer to this question is in the negative.

This involves the very important question of separation of functions of administrative agencies. It is not a new problem. Much has been written about it, and there are many and varied opinions. As to my own attitude, I feel that *especially* because my duties as a Commissioner involve both administrative acts and quasi-judicial acts, I want to be very careful that I do not wear both cloaks at the same time, or interchangeably to suit my convenience.

The desire to work out a more effective and more feasible method of preventing unwanted things from happening accounts for the formation of many Federal administrative agencies. The chief device for implementing the legislative process is the investigating power. But in addition to investigating suspected offenders of the law, an administrative agency such as the Federal Trade Commission also charges the suspected offender; prosecutes him; judges him; and fixes the remedy authorized by law. Thus an administrative agency is a composite detective agency, grand jury, prosecuting attorney, judge and public hangman. With all of these powers concentrated in the same individual or individuals, I am especially fearful lest one function be carried over into another to the detriment of the person charged. In my opinion, it is the commingling of these functions by administrative officers and administrative agencies which has brought to the term "bureaucracy" an invidious connotation. It seems to me that we are committed to big government, and today the bulk of government is administration. Consequently, problems of administrative procedure and control, the domain of administrative law, bulk large in the immediate future. The survival of Democracy may well depend upon an orderly development of administrative law and tribunals to give effective direction to the administrative process.

The legal professions both in England and in the United States have been slow to recognize administrative law as a separate body of law. It will be remembered that in 1933, the American Bar Association created a Special Committee on Administrative Law to inquire into the practicability and desirability of divorcing quasi-judicial functions and quasi-legislative and executive functions in some or all of those administrative tribunals in which a combination of functions then existed.

Roscoe Pound has made the following indictment of the administrative process:

"Perhaps the worst feature of administrative procedure, as it has developed since 1900, results from combining or not differentiating the receiving of complaints, investigation of them, bringing and conducting a prosecution upon them, advocacy before the agency itself by its own subordinates in the course of the prosecution and adjudication. Thus the adjudication becomes one by or with the advice and assistance of those who investigated, prosecuted, and were advocates for the prosecution. Such things are in clear derogation of the fundamental maxims of justice that no one is to be judge in his own case." [1]

From a recent Supreme Court decision familiar to practitioners in the field of anti-trust law, we obtain these words of caution:

"It must not be forgotten that the administrative process and its agencies are relative newcomers in the field of law and that it has taken and will continue to take experience and trial and error to fit this process into our system of judicature." *United States* v. *Morton Salt Company*, 338 U. S. 632, 642 (1950).

Mr. Chief Justice Hughes in 1938 stated in *Morgan* v. *United States*, 304 U. S. 1, 22:

"The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset,

[1] "Proposed Legislation as to Federal Administrative Procedure", 20 Indiana Law Journal (October, 1944), 45. See also address by Roscoe Pound before Phi Beta Symposium, February 20, 1939, 5 Vital Speeches (March 1939), 342; and speech before American Bar Association in Association's Report for 1941.

if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play." (Italics added.)

I should like to quote from the Final Report of the Attorney General's Committee on Administrative procedure dated January 24, 1941. The Attorney General at that time was Hon. Robert H. Jackson. Beginning at Page 203, there are printed additional views and recommendations of Messrs. McFarland, Stason, and Vanderbilt, members of the Attorney General's Committee. The first section thereof has to do with the separation of functions of administrative agencies. On page 209, the following language appears:

Shall deciding officers go beyond the formal record in contested proceedings and, after formal proceedings are commenced, consult with the agency's own prosecuting attorneys, investigators, experts, and specialists? Emphatically, we think (and the Committee fully agrees) that at this stage of procedure deciding officers should, except for proper use of official notice and clerical help, confine their consideration strictly to matters of record produced during formal proceedings.

It is this point which I am making in the subject proceeding—inasmuch as issues were joined after the issuance of the original complaint, the Commission was estopped to consider anything outside of the formal record before it in disposing of the subject motion. If the Commission can justify its recourse to data and information in its confidential investigational files in this case, why would it not also be able to justify recourse to such information after a proceeding has been terminated before the Hearing Examiner and is on appeal to the Commission from the decision of the Hearing Examiner? I believe it is wrong in both instances, and that once issues have been joined in any formal proceeding brought by the Commission, the Commission from then on may act only in its quasi-judicial authority and never "swap cloaks" for purposes of expediency.

In the subject case, there is no doubt in my mind that counsel supporting the complaint have additional information to that disclosed in the subject motion and in the proposed amended and supplemental complaint. In my opinion, said counsel and all counsel in future cases should submit to the Commission at least enough factual information to cause the individual Commissioners to have reason to believe that the law has been or is being violated. On the basis of the formal documents before me in this case, I can reach no such conclusion and inasmuch as I have not resorted to any data and information in the confidential investigational files of the Commission, I must vote to deny the motion of counsel supporting the complaint seeking the issuance of an amended and supplemental complaint.

SPECIAL CONCURRING OPINION OF COMMISSIONER LOWELL B. MASON

I concur with the majority view in the above case.

When a complaint is amended to include new parties and new charges either before or after issue is joined (but prior to trial), the Commission is functioning administratively, not judicially. Accordingly, we must give respondents those protections afforded them as to notice and opportunity to plead which are set out in Section 5 of the Federal Trade Commission Act. The order here does that. To do more would invest this part of the proceedings with an adjudicatory character which, in my opinion, it does not have.

I am mindful of the dangers inherent in any Government agency where the prosecuting function is closely aligned to the judicial process. Our ancestors looked upon a wedding of these functions with a bilious eye. Nevertheless we are, as the able dissent graphically pictures us, "a composite detective agency, grand jury, prosecuting attorney, judge and public hangman" (the latter perhaps only in a poetic sense).

Keeping in mind the historic tyrannies such misalliances have engendered in the past, I agree with the dissenting viewpoint that strict boundary lines between diverse functions must be scrupulously respected.

Perhaps this is our saving grace for, to use a homely metaphor, the combinations of functions within the Commission does not result in an entirely new single element such as you get when you mix sour milk with baking soda, sugar and flour to produce a cake. In a cake all the ingredients lose their original characteristics and become one.

As litigants will testify, there is nothing like cake about the Federal Trade Commission. It is more like a combination of clams, oysters, fish, lobsters and whatever else goes into a bouillabaisse. No matter how you cook a bouillabaisse, your end product tastes like and still is clams, oysters, fish, lobsters and whatever else goes into that kind of a soup.

So with the Commission, he who tastes its different functions must find each distinctive and apart, and no amount of cooking should blend them into one. As prosecutors, we are still prosecutors. As judges, we are still judges. The difficulty comes when we or litigants get confused as to which function we are performing at any given time.

For the Commission never gets away from any of its regalia. Look deep down into a Commissioner and you will still be able to recognize his policeman's uniform, his judge's robe and sometimes even his sheriff's star. But which costume goes on top is not set by the calendar or the timing sequence of a litigation. Each is donned not at our convenience, but by the mandates of the statute.

For instance, we cannot say that once a complaint is issued we die as administrators and are born as judges, with no chance of ever resurrecting the former character. For example, after weeks of trial during which the Commission sits in its judicial function, the attorney in charge of the complaint and respondent's counsel often come before us with a proffered settlement. At this point we drop our role as judges, and acting in our administrative capacity, consider their proposal. Thus our choice of function is determined not by the sequence of trial, but by the type of work the exigencies of litigation put in front of us.

In the instant case the order discloses that the Commission has considered the "data and information in its confidential investigational files." This serves notice on the world that we are acting as administrators, for no honest judge would peek into undisclosed records when formulating a judicial decision. So then as administrators we came to the conclusion that "having reason to believe that the respondents named in the proposed amended and supplemental complaint have engaged in the acts and practices described therein, and it appearing that it would be to the interest of the public for it to issue its amended and supplemental complaint in the form proposed:" we issued the instant order authorizing service of the new complaint on old and new parties.

Borrowing an idiom from the dissent I would say, "Here we are wearing our administrator's hat, not our judicial robes."

Perhaps if I were writing the order myself I would include that we did it neither on the motion nor the opposing motion of the parties litigant, for such consideration gives the appearance at least of basing our decision on the weighing of adversary contentions. Be that as it may; this order was arrived at not through the judicial but through the administrative process.

The danger pointed out in the dissenting opinion that the various functions may become confused unless separated by sequences may be very real, but it is one which our congressional creators must have long considered and taken as one of the calculated risks which cannot be avoided in administrative law.

IN THE MATTER OF

SUNSHINE BISCUITS, INC., STATLER MANUFACTURERS CORP., STATLER DISTRIBUTORS, INC., AND LAWRENCE S. REISS

PARTIAL CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (A) OF THE CLAYTON ACT AS AMENDED, AND OF THE FEDERAL TRADE COMMISSION ACT [1]

Docket 6191. Complaint, Mar. 11, 1954—Decision, July 20, 1954

Partial consent settlement order requiring Sunshine Biscuits, Inc., the second largest producer of bakery packaged food products in the United States, with gross sales for 1952 of about $120,000,000, to cease selling or contracting to sell its products on the condition that purchasers not use or deal in the merchandise of any of its competitors, and entering into or carrying out agreements with any seller of automatic vending machines that the latter's vendees, operators, etc., would dispense through said machines exclusively Sunshine bakery products; and requiring Statler Manufacturers Corp., a seller of some 7,000 automatic vending machines located throughout the country, with gross annual sales of about $500,000, to cease selling, or making or enforcing any contract for the sale of, vending machines on the condition that purchasers dispense through the machines exclusively Sunshine bakery products, among other things.

Before *Mr. John Lewis*, hearing examiner.

Mr. William H. Smith and *Mr. Brockman Horne* for the Commission.

Mr. A. W. DeBirny, of Long Island City, N. Y., and *Mr. Robert E. Freer*, of Washington, D. C., for Sunshine Biscuits, Inc.

Mr. Avel B. Silverman, of New York City, for Statler Manufacturers Corp., Statler Distributors, Inc. and Lawrence S. Reiss.

COMPLAINT

The Federal Trade Commission, having reason to believe that Sunshine Biscuits, Inc., hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act (U. S. C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, and pursuant also to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Commission, having reason to believe that said Sunshine Biscuits,

[1] Count I of the complaint, charging price discrimination in violation of Sec. 2 (a) of the Clayton Act as amended by Sunshine in the sale of its products, was settled a year later by a consent order to cease and desist, effective July 30, 1955, 52 F. T. C. —.

Inc., Statler Manufacturers Corp., a corporation, Statler Distributors, Inc., a corporation, and hereinafter more particularly designated and described, and Lawrence S. Reiss, individually and as an officer of Statler Manufacturers Corp. and Statler Distributors, Inc., have violated the provisions of Section 5 of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

COUNT I

PARAGRAPH 1. Respondent Sunshine Biscuits, Inc. (formerly Loose-Wiles Biscuit Company), hereinafter referred to as Sunshine, is a New York corporation with its office and principal place of business located at 29-10 Thomson Avenue, Long Island City, New York.

PAR. 2. Respondent Sunshine is now and for many years last past has been engaged in the manufacture, sale and distribution of bakery packaged food products, commonly referred to as cookies, crackers, biscuits and cakes. In certain avenues of distribution these products are sold under the trade name "Nicks." Said respondent is the second largest producer and distributor of bakery packaged food products in the United States. Its gross sales of said products for the year 1952 was in excess of $130,000,000.

Respondent Sunshine operates bakeries and maintains 115 warehouses for the temporary storage and to facilitate the delivery of said products; and also maintains numerous branch sales offices in various localities throughout the United States. Salesmen are employed to solicit orders and sell said products and subsequently said products are delivered by trucks owned by said respondent Sunshine to some 240,000 customers located in every city, town and village of the United States. The customers of respondent include chain retail stores (whether corporate or independently owned), voluntary and cooperative chain retail stores, independent store owners and customers who sell said products through automatic vending machines.

Respondent Sunshine causes said products, when sold, to be transported from its various bakeries and warehouses to purchasers located in the District of Columbia and in States other than the States where respondent's products are manufactured or sold. There is, and has been at all times mentioned herein, a continuous current of trade in commerce in said products across state lines from respondent Sunshine's bakeries and warehouses to the purchasers thereof. Said products are sold and distributed for use, consumption and resale in the various States of the United States and the District of Columbia.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent Sunshine is now, and during the times herein mentioned has been, in substantial competition with others engaged in the manufacture, sale and distribution of bakery packaged food products in commerce between and among the various States of the United States and in the District of Columbia.

Many of respondent Sunshine's customers are competitively engaged with each other and with customers of respondent Sunshine's competitors in the resale of bakery packaged food products within the trading areas in which said customers are engaged in business.

PAR. 4. Respondent Sunshine, in the course and conduct of its business, as aforesaid, has been and is now discriminating in price between different purchasers of their products of like grade and quality by selling said products to some of its customers at higher prices than to others of its customers.

PAR. 5. The discriminations in price referred to in Paragraph Four hereof have been and now are effected pursuant to the method by which respondent bases the price on which it sells such products to its purchasers. The basic method involves a volume discount plan whereby respondent sells its products at prices based upon the monthly purchases of said products of a particular customer. This volume discount plan is as follows:

Monthly Purchases	*Discount (Percent)*
\$0 to \$20.00	None
\$20.00 to \$149.00	2
\$150.00 to \$999.00	2½
\$1,000.00 to \$2,499.99	3
\$2,500.00 to \$4,999.99	3½
\$5,000.00 to \$7,499.99	4
\$7,500.00 and up	4½

PAR. 6. The effects of such discriminations in price as set forth in Paragraph 4 and Paragraph 5 hereof may tend to create a monopoly in the lines of commerce in which respondent Sunshine and its customers are respectively engaged; or to injure, destroy or prevent competition with respondent Sunshine, or with customers thereof who receive the benefits of such discrimination.

PAR. 7. The foregoing alleged acts and practices of said respondent Sunshine, as set forth herein, constitute violation of subsection (a) of Section 2 of the Clayton Act (U. S. C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936.

COUNT II

PARAGRAPH 1. For its charges under this paragraph of this count, said Commission relies upon the matters and things set out in Paragraph 1 of Count I of this complaint to the same extent as though the allegations of said Paragraph 1 of said Count I were set out in full herein, and said Paragraph One of said Count I is incorporated herein by reference and made a part of the allegations of this count.

PAR. 2. For its charges under this paragraph of this count, said Commission relies upon the matters and things set out in Paragraph 2 of Count I of this complaint to the same extent and as though the allegations of said Paragraph 2 of said Count I were set out in full herein, and said Paragraph 2 of said Count I is incorporated herein by reference and made a part of the allegations of this count.

PAR. 3. For its charges under this paragraph of this count, said Commission relies upon the matters and things set out in Paragraph 3 of Count I of this complaint to the same extent and as though the allegations of said Paragraph 3 of said Count I were set out in full herein, and said Paragraph 3 of said Count I is incorporated herein by reference and made a part of the allegations of this count.

PAR. 4. Respondents Statler Manufacturers Corp., and Statler Distributors, Inc., are New York corporations with their office and principal place of business located at 2112 Broadway, New York, New York.

Respondent Lawrence S. Reiss is vice-president of both respondents Statler Manufacturers Corp. and Statler Distributors, Inc. Respondent Lawrence S. Reiss formulates, directs and controlls the business, acts, practices and policies of said respective corporate respondents.

All three respondents named in this paragraph will hereinafter be referred to, unless specifically mentioned, as respondents "Statler."

PAR. 5. Respondents Statler are now and for many years last past have been engaged in the sale and distribution of automatic vending machines under franchise agreements. These machines are used in dispensing biscuits, crackers, and cookies to the consumer. The respondents Statlers' vending machines are located in industrial plants, hospitals, subways and other strategic locations. There are presently approximately 7,000 of these vending machines located throughout the country. Gross sales of respondent Sunshine's products sold through these machines approximate $500,000 annually.

In the course and conduct of their business, as aforesaid, respondents Statler are now, and during the time herein mentioned have been, in substantial competition with others engaged in the manufacture, sale and distribution of automatic vending machines used in dispensing biscuits, crackers and cookies.

PAR. 6. In the course and conduct of their businesses, respondents Statler cause the said vending machines, when sold, to be transported from their place of business in New York to the purchasers located in other States than the State of New York and in the District of Columbia. Respondents Statler 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 and in the District of Columbia.

PAR. 7. In the course and conduct of their businesses, as aforesaid, on or about July 27, 1940, respondent Sunshine and respondents Statler entered into an agreement wherein respondents Statler, for themselves, their vendees, operators, brokers and licensees, agreed to dispense through the vending machines, either operated by or sold by them, solely and exclusively, products manufactured and distributed by the said respondent Sunshine.

The aforementioned agreement by the said respondent Sunshine and respondents Statler, since the date of its original execution, which was for a period of five years, has been renewed from time to time, more particularly on November 17, 1944, and again on April 20, 1950. Respondent Sunshine agreed with respondents Statler not to enter into any similar agreement with any other person, firm or corporation for the advertisement, promotion or sale of its products through the means of vending machines.

For the purpose of carrying out the agreement between respondent Sunshine and respondents Statler, respondents Statler operate as follows:

Respondent Statler Manufacturers Corp. enters into a sales agreement with the buyer for the sale of a vending machine to be used by the buyer solely and exclusively in the sale of the products manufactured by respondent Sunshine "as provided in an agreement between Statler Distributors, Inc., with said buyer"; and as part of the same transaction, Statler Distributors, Inc. enters into a licensing agreement with the buyer of the vending machine which was purchased under the aforementioned sales agreement, under which agreement the buyer agrees to dispense through said vending machine, solely and exclusively, products manufactured and distributed by the respondent Sunshine. The buyer is also granted and limited to the sale of said products in a definite territory. The agreement extends not only to the vending machines purchased at the time the agreement is executed, but to all future machines purchased by the vendee. The terms of the agreement are allegedly for a period of five years; however, respondents Statler seek compliance therewith beyond said period.

PAR. 8. In the course and conduct of the business of the respective respondents hereinbefore described, and in pursuance of the practices and acts alleged in Paragraph 7 hereof, all of the respondents have cooperated in carrying out the agreement restricting the use of the vending machines sold by respondents Statler, solely and exclusively, to the sale of respondent Sunshine's products.

Respondent Sunshine pays a commission to respondents Statler on products sold by it to respondents Statlers' vendees. Respondent Sunshine keeps respondents Statler advised when sales of its products to respondents Statlers' vendees decline, thus indicating that said respondents Statlers' vendees are dispensing, through the vending machine, products other than those manufactured and distributed by respondent Sunshine.

Respondents Statler, upon learning, either from its own policing, or from information furnished by respondent Sunshine, that its vendees are dispensing through their vending machines products other than those manufactured by respondent Sunshine, they, among other things, coerce or intimidate said vendees to carry out the terms of their agreement by threatening to cancel said agreement unless the vendee confines his sale through the said vending machine solely and exclusively to products manufactured and distributed by respondent Sunshine.

As a result of threats and intimidations made by respondents Statler, many of respondents Statlers' vendees have been induced to stop selling, through said vending machines, products of respondent Sunshine's competitors.

PAR. 9. The acts and practices of the respondents, as herein alleged, are all to the injury and prejudice of competitors of respondents, of customers and purchasers of respondents and of the public; have a tendency and effect of obstructing, hindering and preventing competition in the sale of vending machines and bakery packaged food products in commerce within the intent and meaning of the Federal Trade Commission Act; have a tendency to, and have, obstructed and restrained such commerce in such merchandise, and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

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 July 20, 1954, the initial decision in the instant matter of hearing examiner John Lewis, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BASED ON STIPULATION FOR CONSENT ORDER AS TO COUNT II OF COMPLAINT BY JOHN LEWIS, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on March 11, 1954, issued and subsequently served its complaint in this proceeding upon the corporations and the individual named in the caption hereof, hereinafter called respondents, charging the respondent Sunshine Biscuits, Inc., in Count I of said complaint, with having violated the provisions of subsection (a) of Section 2 of the Clayton Act (U. S. C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, and charging all of said respondents, in Count II of the complaint, with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. Following the issuance of said complaint, the respondents appeared by counsel and entered into a stipulation consenting to the entry of a cease-and-desist order in disposition of Count II of said complaint. Said stipulation provides that respondents admit all the jurisdictional allegations of the complaint and, with respect to Count II of the complaint, provides that respondents waive the filing of answer, a hearing before a hearing examiner of the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission, and further, that the aforesaid consent cease-and-desist order shall have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon, and that respondents specifically waive any and all right, power, or privilege to challenge or contest the validity of the order entered in accordance with said stipulation.

The said stipulation having been filed with the above-named hearing examiner, theretofore duly designated by the Commission, for consideration by said examiner in accordance with Rule V of the Commission's Rules of Practice, is hereby accepted and made a part of the record herein by the hearing examiner who, after considering the complaint and said stipulation, finds that this proceeding is in the interest of the public and, in disposition of Count II of the complaint, makes the following:

JURISDICTIONAL FINDINGS

PARAGRAPH 1. Respondent Sunshine Biscuits, Inc. (formerly Loose-Wiles Biscuit Company), hereinafter referred to as Sunshine, is a New York corporation with its office and principal place of business located at 29–10 Thomson Avenue, Long Island City, New York.

PAR. 2. Respondent Sunshine is now and for many years last past has been engaged in the manufacture, sale and distribution of bakery packaged food products, commonly referred to as cookies, crackers, biscuits and cakes. In certain avenues of distribution these products are sold under the trade name "Nick." Said respondent is the second largest producer and distributor of bakery packaged food products in the United States. Its gross sales of said products for the year 1952 was approximately $120,000,000.

Respondent Sunshine operates bakeries and maintains approximately 110 warehouses for the temporary storage and to facilitate the delivery of said products; and also maintains numerous branch sales offices in various localities throughout the United States. Salesmen are employed to solicit orders and sell said products and subsequently said products are delivered by trucks owned by said respondent Sunshine to some 240,000 customers located in numerous cities, towns and villages of the United States. The customers of respondent include chain retail stores (whether corporate or independently owned), voluntary and cooperative chain retail stores, independent store owners and customers who sell said products through automatic vending machines.

Respondent Sunshine causes said products, when sold, to be transported from its various bakeries and warehouses to purchasers located in the District of Columbia and in states other than the states where respondent's products are manufactured or sold. There is, and has been at all times mentioned herein, a continuous current of trade in commerce in said products across state lines from respondent Sunshine's bakeries and warehouses to the purchasers thereof. Said products are sold and distributed for use, consumption and resale in the various states of the United States and the District of Columbia.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent Sunshine is now, and during the times herein mentioned has been, in substantial competition with others engaged in the manufacture, sale and distribution of bakery packaged food products in commerce between and among the various states of the United States and in the District of Columbia.

Many of respondent Sunshine's customers are competitively engaged with each other and with customers of respondent Sunshine's competitors in the resale of bakery packaged food products within the trading areas in which said customers are engaged in business.

PAR. 4. Respondents Statler Manufacturers Corp., and Statler Distributors, Inc., are New York corporations with their office and principal place of business located at 2112 Broadway, New York, New York.

Respondent Lawrence S. Reiss is vice-president of both respondents Statler Manufacturers Corp. and Statler Distributors, Inc. Respondent Lawrence S. Reiss formulates, directs and controls the business, acts, practices and policies of said respective corporate respondents.

All three respondents named in this paragraph will hereinafter be referred to, unless specifically mentioned, as respondents "Statler."

PAR. 5. Respondents Statler are now and for many years last past have been engaged in the sale and distribution of automatic vending machines under franchise agreements. These machines are used in dispensing biscuits, crackers, and cookies to the consumer. The respondents Statler's vending machines are located in industrial plants, hospitals, subways and other strategic locations. There are presently approximately 7,000 of these vending machines located throughout the country. Gross sales of respondent Sunshine's products sold through these machines approximate $500,000 annually.

In the course and conduct of their business, as aforesaid, respondents Statler are now, and during the time herein mentioned have been, in substantial competition with others engaged in the manufacture, sale and distribution of automatic vending machines used in dispending biscuits, crackers and cookies.

PAR. 6. In the course and conduct of their businesses, respondents Statler cause the said vending machines, when sold, to be transported from their place of business in New York to the purchasers located in other states than the State of New York and in the District of Columbia. Respondents Statler 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 and in the District of Columbia.

ORDER

It is ordered that respondent Sunshine Biscuit, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of bakery packaged food products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling or making any contract for sale of any such products on the condition, agreement or understanding that the purchasers thereof shall not use, or deal in, or sell the goods, wares or merchandise of a competitor or competitors of respondent Sunshine Biscuits, Inc.

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 will not use or deal in the goods, wares or merchandise of a competitor or competitors of the respondent Sunshine Biscuits, Inc.

3. Entering into any agreement or understanding with a seller of automatic vending machines, that its vendees, operators, brokers or licensees would dispense through said vending machines, solely and exclusively, products manufactured and sold by said respondent Sunshine Biscuits, Inc.

4. Cooperating with respondents Statler Manufacturers Corp., Statler Distributors, Inc., and Lawrence S. Reiss, or any of them, to carry out any conditions, agreements or understandings made by them, jointly or severally, with their vendees, operators, brokers and licensees to dispense through the vending machines, sold by them, solely and exclusively, products manufactured and sold by respondent Sunshine Biscuits, Inc.

It is further ordered that respondents Statler Manufacturers Corp., a corporation, Statler Distributors, Inc., a corporation, their respective officers, agents, representatives and employees, and respondent Lawrence S. Reiss, individually and as an officer of said corporations, directly or through any corporate or other device, jointly or severally, in connection with the offering for sale, sale and distribution of automatic vending machines in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling or making any contract for sale of such vending machines on the condition, agreement or understanding that the purchasers, operators, brokers or licensees thereof, dispense, through said vending machines, solely and exclusively products manufactured and sold by respondent Sunshine Biscuits, Inc.

2. Enforcing or continuing in operation or effect any condition, agreement or understanding, in or in connection with any existing

sales contract or franchise agreement, which condition, agreement or understanding is to the effect that the purchasers, operators, brokers, or licensees of said vending machines will dispense through said vending machines, solely and exclusively, products manufactured and sold by respondent Sunshine Biscuits, Inc.

3. Cancelling, or directly or by implication threatening the cancellation of any contract or franchise or selling agreement with the vendees, operators, brokers or licensees of said products because of the failure or refusal of said vendees, operators, brokers or licensees to dispense, through said vending machines, solely and exclusively products manufactured and sold by respondent Sunshine Biscuits, Inc.

4. The performance of any act of intimidation or coercion, either through statements, oral or written, or during the course of calls made upon the vendees, operators, brokers or licensees of said vending machines, at their place of business or at any other place, or the use of any other plan, practice, system or method of doing business for the purpose or having the effect of intimidating or coercing respondents' vendees, operators, brokers or licensees, or other purchasers to dispense, through vending machines sold by them, solely and exclusively, products manufactured and sold by respondent Sunshine Biscuits, Inc.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered that respondents Sunshine Biscuits, Inc., a corporation, Statler Manufacturers Corp., a corporation, Statler Distributors, Inc., a corporation, and Lawrence S. Reiss, individually and as an officer of Statler Manufacturers Corp. and Statler Distributors, Inc., 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 July 20, 1954].

IN THE MATTER OF

HILLMAN PERIODICALS, INC.

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

Docket 6033. Complaint, Aug. 22, 1952—Decision, July 22, 1954

Where a corporate publisher of magazines and books, including its "Confessions" magazine, the contents of which consisted almost exclusively of stories and features which had been previously published in other of its magazines—

Failed adequately to disclose that the contents of its said magazine consisted of reprinted stories and articles, through a statement in small type (later enlarged, following conferences with Commission representatives) below the table of contents on the masthead "All stories reprinted by request from Real Story and Real Romances Magazines", and the added statement, at or near the beginning of each story and frequently in connection with the use of a picture illustration, as "Copyrighted 1943 by Real Story, Inc.":

Held, That such acts and practices were to the prejudice and injury of the public and constituted unfair and deceptive acts and practices.

Before *Mr. J. Earl Cox*, hearing examiner.

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

Mr. Henry E. Schultz, of New York City, for respondent.

ORDERS AND DECISION OF THE COMMISSION

Order denying respondent's appeal from initial decision of hearing examiner and decision of the Commission and order to file report of compliance, Docket 6033, July 22, 1954, follows:

This matter having come on to be heard by the Commission upon respondent's appeal from the initial decision of the hearing examiner and briefs of counsel in support of and in opposition thereto, oral argument not having been requested; and

The Commission having duly considered said appeal and the record herein and being of the opinion, for the reasons appearing in the accompanying opinion of the Commission, that the appeal should be denied and that the said initial decision is appropriate in all respects to dispose of this proceeding:

It is ordered that respondent's appeal from the initial decision of the hearing examiner be, and it hereby is, denied.

It is further ordered that the attached initial decision of the hearing examiner shall, on the 22d day of July 1954, become the decision of the Commission.

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 the order to cease and desist.

Said initial decision, thus adopted by the Commission as its decision, follows:

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 22, 1952, issued and subsequently served its complaint in this proceeding upon the respondent Hillman Periodicals, Inc., a corporation, charging it with the use of 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 respondent's answer thereto, a hearing was held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before the above-named hearing examiner theretofore duly designated by the Commission, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the hearing examiner filed his Initial Decision from which the respondent appealed, and after due consideration thereof the Commission, on June 17, 1953, entered its order vacating and setting aside the Initial Decision and remanding the case to the hearing examiner for the purpose of taking additional evidence on the issues raised by the pleadings. Thereafter a further hearing was held at which additional testimony and evidence were received in support of and in opposition to the allegations of the complaint, and said additional testimony and evidence were duly recorded and filed in the office of the Commission. The proceeding then regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, the testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel, and said hearing examiner, having duly considered the entire record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusions drawn therefrom, and order.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Hillman Periodicals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and place of business located at 535 Fifth Avenue in the City of New York.

PAR. 2. Respondent is now, and for more than one year last past has been, engaged in the business of publishing, selling and distributing magazines and books. Respondent causes its said products, when sold, to be transported from its place of business in New York or from the printing plant in New Jersey where its magazines are printed to purchasers thereof at their respective points of location in various other States of the United States and in the District of Columbia, and maintains, and at all times mentioned herein has maintained, a course of trade in said products in commerce between and among the various States of the United States and the District of Columbia. Its volume of trade in said commerce has been and is now substantial.

PAR. 3. In the course and conduct of its business, respondent since August 1950 has published, sold and distributed as aforesaid a magazine designated "Confessions". The contents of said magazine consist almost exclusively of stories and features which have been previously published in other of respondent's magazines. On the front cover of the magazine, in addition to the title "Confessions" and the date of issue, there is printed one or more story titles and the words "Complete Novels Plus Short Stories and Features".

In the early issues of the magazines the only disclosure of the fact that the stories and features contained in it were reprints was a statement in small type below the table of contents on the masthead page, usually page 4, "All stories reprinted by request from Real Story and Real Romances Magazines." Following conferences with representatives of the Federal Trade Commission, respondent has increased the size of the type in which the last above-quoted statement is printed and at or near the beginning of each story, frequently in connection with the use of a picture or illustration, has added a statement as to copyright of which the following are typical: "Copyrighted 1943 by Real Story, Inc." and "Copyrighted 1949 by Real Romances, Inc."

PAR. 4. In the original initial decision in this proceeding the conclusion was reached that the disclosure made on the masthead page and at the beginning of each story is inadequate to inform the purchasing public that the contents of the magazine consist chiefly of stories and articles previously published and an order was issued requiring that such disclosure be made also on the front cover of the magazine. This part of the order was contested, the respondent stating in oral argument, "The sole point of contention, therefore, before this Commission is whether any disclosure should be made on the cover of the magazine." The Commission found that there was insufficient evidence in the record upon which to base an informed decision as to the merits of respondent's appeal and remanded the case "for the purpose of taking additional evidence on the issues raised by the pleadings."

Thereafter, counsel in support of the complaint presented evidence consisting of the testimony of nine magazine vendors, some of whom had observed the habits of their customers and testified that purchasers of confession type magazines are predominantly female; that sometimes they look only at the cover, sometimes at the table of contents, sometimes glance through the entire magazine, some seem to know what they want in advance, others buy every available magazine of this type.

During the hearing respondent offered to take the statement now appearing at the bottom of the contents page which states, "All stories reprinted by request from Real Story and Real Romances Magazines" and place it at the top of the contents page under the title of the magazine in conspicuous bold type. This, the respondent urged would be adequate disclosure.

PAR. 5. The offering for sale of a magazine, such as "Confessions," constitutes an implicit representation, in the absence of an obvious disclosure to the contrary, that the magazine contains new stories and new articles, not reprints of stories and articles previously published and circulated in other magazines.

In the Matter of *The New American Library of World Literature, Inc.*, Docket No. 5811, the Commission in its decree of January 6, 1953, found that:

> The offering of a book for sale constitutes an implicit representation that the book contains the entire original text and that the title under which it is offered is the original title. In the absence of a clear and conspicuous disclosure of the fact of abridgement or change of title, the offering of an abridged book or of an old book under a new title unquestionably has the capacity and tendency to deceive and mislead prospective purchasers.

The Commission found further in that case that, although on the covers of many of their abridged books respondents had placed the words "A Special Edition" or in small type words such as "Original Title: Horseshoe Combine," there was still inadequate disclosure by respondents of the fact concerning the abridgement and change of title of many of their books, even though "there was almost without exception a further disclosure inside the books on the copyright page, the title page, in the introduction, as a publisher's note or elsewhere, in small type." The Commission added that "two poor disclosures do not add up to one good one," and ordered that disclosure be made "upon the front cover and upon the title page * * * in clear, conspicuous type."

The New American Library case is not on all fours with the instant proceeding but the facts are so similar that the principles therein enunciated are clearly applicable.

Upon the basis of all the facts in the instant proceeding, the statement that all stories are reprinted from other magazines, whether made at the bottom or the top of the masthead page even in reasonably conspicuous type, does not constitute adequate disclosure of the fact that the contents of respondent's magazine "Confessions" consist of reprinted stories and articles, and such statement even in conjunction with the copyright notice at the beginning of each story or article is still inadequate. The offering for sale of respondent's magazine with such inadequate disclosure has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such magazine contains new stories and new articles, not reprints and to induce the purchase of said magazine by the public because of such erroneous and mistaken belief.

There can be no doubt that purchasers are first attracted to a magazine by its cover and title. Such further examination as is made varies widely. Some purchasers examine the table of contents, others look through the entire magazine. Hence, any disclosure to be adequate to avert deception of the public must be made on the front cover of respondent's magazine, on the table of contents or masthead page and at the beginning of each article.

CONCLUSION

The acts and practices of respondent as hereinabove found were and are 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 respondent, Hillman Periodicals, Inc., a corporation, its officers, 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 its magazine "Confessions" or any other publication or periodical consisting entirely or substantially of reprints of previously published stories, articles or other materials do forthwith cease and desist from offering for sale, selling or distributing such magazine or other publication, unless the fact that the stories, articles or other materials contained therein are reprints is clearly disclosed on the front cover and on the masthead page thereof and at the beginning of each reprinted story, article, or other material.

OPINION OF THE COMMISSION BY MEAD, COMMISSIONER

This matter is before the Commission upon respondent's appeal from the hearing examiner's initial decision. Oral argument on the appeal was not requested.

Respondent publishes and sells magazines, including a magazine designated "Confession." The stories and features which appear in respondent's "Confession" magazine are reprints of stories and features which previously have been published in other of respondent's magazines. Formerly, the only disclosure of the fact that the stories and features in the magazine were reprints was a statement in small type below the table of contents on the masthead page that "All stories reprinted by request from Real Story and Real Romances Magazines." After conferences with representatives of the Commission, respondent enlarged the size of the type in which the quoted statement is printed on the masthead page, and in addition, at or near the beginning of each story, frequently in connection with the use of a picture or illustration, added a statement such as "Copyrighted 1943 by Real Story, Inc." or "Copyrighted 1949 by Real Romances, Inc."

The hearing examiner found that respondent does not disclose adequately the fact that the stories and articles in the magazine are reprints and his order would require that this fact be clearly disclosed on the front cover, on the masthead page, and at the beginning of each story, article or other material.

Respondent contended before the hearing examiner that the evidence does not support a finding that respondent's present disclosures are inadequate, and that, therefore, an order requiring further disclosure is not warranted. Respondent has requested that its memorandum filed with the hearing examiner in support of its proposed findings, conclusion and order be considered as its appeal brief, and it has been so considered.

There is no contention that there should be no disclosure made of the fact that the stories and articles appearing in respondent's "Confession" magazine are reprints. As already indicated, respondent has always made some disclosure. Our problem is to determine whether respondent's present disclosure is adequate and, if not, what disclosure should be made.

The record contains the testimony of a number of magazine vendors, some of whom had observed the buying habits of their customers. It appears from this testimony that many purchasers of the type of magazine here involved look only at the cover of the magazine. Others examine the table of contents or glance through the entire magazine. The hearing examiner correctly found that the offering for sale of a magazine, such as respondent's "Confession" magazine, constitutes an implicit representation, in the absence of obvious disclosure to the contrary, that the stories and articles in the magazine are new, not reprints of stories and articles previously published in other magazines. Clearly, any disclosure, to prevent such representation, must be made at a place where it is likely to be seen. In the case of a purchaser who looks only at the cover, this would be on the cover itself. Any disclosure, no matter how clearly stated, made only on the inside of the magazine would be wholly ineffective.

It is immaterial that the record contains no evidence that any individual has actually purchased one of the magazines believing that it contained new stories and articles rather than reprints of stories and articles previously published in other magazines. It is sufficient that there is evidence to support a finding that there is a fair probability that the purchasers of respondent's magazine may be misled and deceived into the erroneous belief that the stories and articles appearing therein are new and not reprints. (*Charles of the Ritz Dist. Corp.* v. *F. T. C.*, 143 F. 2d 676 1944; *Herzfeld*, *et al.* v. *F. T. C.*, 140 F. 2d 207 1944.)

Respondent vigorously contended before the hearing examiner that an order which would require it to make disclosure on the outside cover of its magazine that the stories and articles therein are reprints should not be entered. Among other arguments, respondent said that the cover of the magazine is the only place a publisher has to advertise his product and that to impose the obligation that there be an explanatory statement on the cover to the effect that the stories and articles therein are reprints would be an unnecessary and burdensome restriction.

The hearing examiner was not persuaded by respondent's arguments and neither are we. As we have already said, the evidence clearly shows that many purchasers and prospective purchasers look only at the cover of the magazine. They make their decision on whether or not to purchase the magazine on the basis of the information and pictures appearing on the cover. We agree with the hearing examiner that any disclosure to be adequate to avert deception of the purchasing public must be made on the front cover of the magazine as well as on the masthead page and at the beginning of each story or article.

We are of the opinion that the hearing examiner's initial decision is adequate and appropriate in all respects to dispose of this proceeding and that respondent's appeal should be denied.

IN THE MATTER OF

BELL DIRECTORY PUBLISHERS, INC., ET AL.

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

Docket 5986. Complaint, May 12, 1952—Decision, July 27, 1954

Where a corporation and its responsible officers, engaged in the sale of advertising space in their business directories or buyers' guides, which contained names of manufacturers and dealers listed under headings denoting products handled, and which were distributed to purchasers of advertising space and prospective buyers of the products listed—

Pasted or otherwise attached to their own contract order forms, advertisements clipped from other directories, particularly classified telephone directories published by the Bell Telephone System, which they then mailed or presented by their sales agents to prospective purchasers whose names appeared in the clippings, thereby creating the impression that the contract represented nothing more than a renewal of the advertisement in the local telephone directory:

Held, That such practice constituted an unfair and deceptive act and practice and an unfair method of competition in commerce.

Before *Mr. William L. Pack*, hearing examiner.
Mr. Jesse D. Kash for the Commission.
Perlmutter & Reich, of New York City, 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 July 27, 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

1. The complaint in this matter charges respondents, who are engaged in the publishing of business directories and in the sale of advertising space therein, with the use of certain unfair and deceptive practices in connection with the sale of such advertising. After the filing of respondents' answer to the complaint, hearings were held at which evidence both in support of and in opposition to the charges in the complaint was received, such evidence being duly recorded and filed in the office of the Commission. Proposed findings and con-

clusions were submitted by counsel supporting the complaint (counsel for respondents having elected not to submit such proposals) and the matter argued orally. The case now comes on for final consideration on the merits.

2. Respondent Bell Directory Publishers, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1860 Broadway, New York, New York. Respondents Benjamin L. Hill and Michael M. Bell are officers of the corporation and formulate its policies and direct and control all of its acts and practices. While respondent Sydney Kopp has been Secretary of the corporation, he has had no active part in formulating the policies of the business nor in its management or control. It is therefore concluded that the complaint should be dismissed as to respondent Kopp in his individual capacity, although not in his capacity as an officer of the corporation, and the term "respondents," as used hereinafter, will not include this respondent in his individual capacity.

3. As indicated above, respondents' publications are business directories, one, for example, being entitled "Eastern Manufacturers and Industrial Directory" and carrying the subtitle "Buyers Guide and Classified Telephone Directory." The publications contain lists of manufacturers of and dealers in numerous and varied products, the names being listed under appropriate headings denoting the particular product handled by the manufacturer or dealer. The listings show, in addition to the name, the address and telephone number of the party listed. The directories are intended to serve as a guide to buyers, assisting them in locating sellers of products and services in which they are interested. The profits to respondents come from the sale of advertising space in the directories to manufacturers and dealers listed therein. While the directories themselves are occasionally sold by respondents, this constitutes only a very small part of their business. The business concerns purchasing the advertising space are located in various States of the United States, and the directories are distributed to such purchasers of advertising and to numerous prospective buyers of the various products listed in the directories, such buyers being likewise located in various States. Respondents are thus engaged in commerce as that term is defined in the Federal Trade Commission Act.

4. In the conduct of their business, respondents are in substantial competition in such commerce with other corporations and individuals engaged in the publishing of business directories and in the sale of advertising space therein.

5. One method which has been employed by respondents in the sale of advertising space in their directories involved the use of advertisements which had been physically clipped or removed by respondents from other directories, particularly classified telephone directories published by or for the Bell Telephone System. Such clippings were pasted or otherwise attached by respondents to their own contract or order forms, which were then either mailed to the prospective purchasers whose names appeared in the clippings or presented in person by respondents' sales agents. While close examination of the contract form would have been sufficient to put prospective purchasers on notice as to the identity of respondents and their publication, usually prospects gave the contract no more than a cursory examination, being misled by the attached clipping into the belief or impression that the contract represented nothing more than a renewal of their advertisement in the local telephone directory. This state of facts brings the case within the decisions of the Commission in the Independent Directory Corporation case, Docket No. 5486 and the Directory Publishing Corporation case, Docket No. 5920, both of which were affirmed by the United States Court of Appeals for the Second Circuit.

6. The record indicates that the use of advertisements clipped from other directories was discontinued by respondents some three or four years ago. There appears to be no assurance, however, that the practice will not be resumed in the future, and it is therefore concluded that the public interest requires the issuance of an order directing that respondents cease and desist from the practice.

7. While the complaint contains other charges against respondents, it is concluded that such charges are not supported by the record. One of these involves the use of the word "Bell" in the name of the corporate respondent, the complaint charging that the use of the word causes prospective advertisers to confuse respondents with the Bell Telephone System. There appears to be no evidence supporting this charge. As to the other charges, while there is some testimony which tends to support them, such testimony falls short of constituting substantial evidence. On the whole, the testimony was not impressive. In some instances it appears highly improbable in the light of the attendant circumstances, and in the face of express provisions in the contracts executed by the witnesses. In others, the testimony was materially weakened by cross-examination. In still other instances, the testimony was contradicted by that of the salesman who was alleged to have made the misrepresentation. At best, the testimony shows only a few isolated instances of misrepresentation on the part of re-

spondents' sales agents, no general pattern or practice being established.

CONCLUSIONS

It is concluded:

1. The proceeding is in the public interest.

2. Respondents' practice of soliciting advertising through the use of advertisements which have been clipped or otherwise removed from other publications has the tendency and capacity to confuse and mislead prospective purchasers with respect to the identity of respondents and their publications, and the tendency and capacity to cause such persons to purchase advertising space in respondents' publications when they would not otherwise have done so. In consequence, substantial trade has been diverted unfairly to respondents from their competitors. Respondents' practice is to the prejudice of both the public and respondents' competitors, and constitutes an unfair and deceptive act and practice and an unfair method of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

3. The other charges in the complaint have not been sustained.

4. The complaint should be dismissed as to respondent Sydney Kopp in his individual capacity, but not in his capacity as an officer of the corporate respondent.

ORDER

It is ordered that respondent Bell Directory Publishers, Inc., a corporation, and its officers, and respondents Benjamin L. Hill and Michael M. Bell, individually and as officers of said corporation, and respondent Sydney Kopp, as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of advertising in respondents' publications, do forthwith cease and desist from:

Using in the solicitation of such advertising, by mail or through agents by personal solicitation, advertisements which have been physically clipped or removed by or for respondents from any publication issued by others than respondents.

Is is further ordered that the complaint be, and it hereby is, dismissed as to respondent Sydney Kopp in his individual capacity.

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 July 27, 1954].

Commissioner Carretta not participating.

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IN THE MATTER OF

BENJAMIN L. HILL, MICHAEL M. BELL AND ELIZABETH HILL DOING BUSINESS AS INDUSTRIAL DIRECTORY PUBLISHERS

Docket 5987. Complaint, May 12, 1952—Decision, July 27, 1954

Order dismissing for lack of proof complaint charging a manufacturer of business directories with using in the solicitation of advertising therein, advertisements of prospective purchasers clipped from other directories and attached to its own contract or order forms, implying thereby that they represented a renewal of the prospects' advertisements in the local telephone directory, among other things.

Before *Mr. William L. Pack*, hearing examiner.
Mr. Jesse D. Kash for the Commission.
Perlmutter & Reich, of New York City, for respondents.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, the attached initial decision of the hearing examiner shall, on July 27, 1954, become the decision of the Commission.

Commissioner Carretta not participating.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter (which is a companion case to Docket No. 5986, Bell Directory Publishers, Inc., et al.) charges respondents, who are engaged in the publishing of business directories and in the sale of advertising space therein, with the use of certain unfair and deceptive practices in connection with the sale of such advertising. After the filing of respondents' answer to the complaint, hearings were held at which evidence both in support of and in opposition to the charges in the complaint was received, such evidence being duly recorded and filed in the office of the Commission. Proposed findings and conclusions were submitted by counsel supporting the complaint (counsel for respondents having elected not to submit such proposals) and the matter argued orally. The case now comes on for final consideration on the merits.

2. As indicated above, respondents' publications are business directories, one, for example, being titled "Midwest Manufacturers and Industrial Directory" and carrying the subtitle "Classified Telephone

Directory and Buyers Guide." The publications contain lists of manufacturers of and dealers in numerous and varied products, the names being listed under appropriate headings denoting the particular product handled by the manufacturer or dealer. The listings show, in addition to the name, the address and telephone number of the party listed. The directories are intended to serve as a guide to buyers, assisting them in locating sellers of products and services in which they are interested. The profits to respondents come from the sale of advertising space in the directories to manufacturers and dealers listed therein. While the directories themselves are occasionally sold by respondents, this constitutes only a very small part of their business.

3. (a) The principal charge in the complaint is that respondents, in soliciting the sale of advertising in their directories, have used advertisements which had previously been inserted by prospective purchasers in other directories, particularly local telephone directories, and which had been physically clipped or otherwise removed by respondents from such directories. The complaint further charges that such clipped advertisements were then pasted or otherwise attached by respondents to their own contract or order forms, which were then either mailed to prospective purchasers or were presented in person by respondents' sales agents. It is further charged in substance that prospective purchasers were misled by the attached clipping, and as a result they made only a cursory examination of the contract and executed it under the belief or impression that it represented nothing more than a renewal of their advertisement in the local telephone directory.

(b) There is no question as to the use by respondents of advertisements clipped by them from other directories, although the practice appears to have been discontinued some three or four years ago. The record, however, fails to establish the element of deception, that is, that purchasers or prospective purchasers were misled as a result of the practice. There appears to be testimony from only one witness that he was under the impression that in signing respondents' contract he was renewing his advertisement in the telephone directory. And the testimony of this witness is materially weakened by reason of the fact that he further testified that his chief objection to the advertisement published in respondents' directory was not that he was misled as to the identity of the directory, but that the advertisement was classified under an incorrect product heading. Moreover, the advertisement was renewed by him in respondents' directory for a second year, although at a reduced rate. Giving full effect to the testimony, it shows only one instance of deception, which falls short of constituting substantial evidence supporting this charge in the complaint.

(c) This failure of proof requires dismissal of the charge unless it can be said that evidence of deception is unnecessary. The case appears to have been tried on the theory that the use by directory publishers of advertisements which have been physically removed from other directories is per se deceptive and illegal; that this was established by the decisions of the Commission in the Independent Directory Corporation case, Docket No. 5486, and the Directory Publishing Corporation case, Docket No. 5920, both of which were affirmed by the United States Court of Appeals for the Second Circuit. The hearing examiner does not so understand those decisions. Rather, the decisions appear to have been based upon the factual situations there presented, and particularly upon evidence showing the misleading effect of the practice in question. There being no substantial evidence here on that point, it is concluded that this charge in the complaint has not been sustained.

4. Other charges in the complaint are that respondents' sales agents represented, contrary to fact, that the order form provided only for the insertion of a free advertisement; that prospects were led into the signing of binding contracts by statements of the sales agent that the contract was merely evidence that the prospect had been solicited by the agent; that respondents have inserted in their directories advertisements or renewals thereof without authorization and then sought to exact payment therefor, etc. While there is some testimony which tends to support these charges, such testimony falls short of constituting substantial evidence. On the whole, the testimony was not impressive. In some instances it appears highly improbable in the light of the attendant circumstances and in the face of express provisions of the contracts executed by the witnesses. In others, the testimony was materially weakened by cross-examination. In still other instances, the testimony was contradicted by that of the salesman who was alleged to have made the misrepresentation. At best, the testimony shows only a few isolated instances of misrepresentation on the part of respondents' sales agents, no general pattern or practice being established.

In view of the conclusion reached that the charges in the complaint have not been sustained,

It is ordered that the complaint be, and it hereby is, dismissed, such dismissal, however, being without prejudice to the right of the Commission to institute such further proceeding in the future as may be warranted by the then existing circumstances.

IN THE MATTER OF

FRANK F. TAYLOR COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (A) OF THE CLAYTON ACT AS AMENDED

Docket 6198. Complaint, Mar. 26, 1954—Decision, July 29, 1954

Consent settlement order requiring a manufacturer of baby walker-strollers and children's three-wheel velocipedes to cease discriminating in price in the sale of its products through favoring mail order houses and chain automotive supply stores, for example, over other competing customers.

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

Mr. Peter J. Dias and *Mr. Rice E. Schrimsher* for the Commission.

Frost & Jacobs, of Cincinnati, Ohio, for respondent.

COMPLAINT

The Federal Trade Commission having reason to believe that Frank F. Taylor Company is violating and has violated the provisions of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Frank F. Taylor Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 2801 Highland Avenue, Cincinnati, Ohio.

PAR. 2. Respondent is now and, since June 19, 1936 has been engaged in the manufacture of baby walker-strollers and children's three wheel velocipedes, and has sold and now sells such products to different purchasers located in the various States of the United States and the District of Columbia for use, consumption, or resale therein. In connection with such sales respondent transports said products, or causes the same to be transported, from Cincinnati, Ohio, to said purchasers so located, thereby creating a continuous current of commerce in said products.

PAR. 3. The respondent, in the course and conduct of its business, has been and is in competition with other corporations, individuals, partnerships and firms engaged in manufacturing, selling and distributing said products in commerce between, and among the various States of the United States and the District of Columbia.

Respondent's purchasers are competitively engaged in the resale of its products at retail in the various territories and places where said purchasers respectively carry on their business. Included among such purchasers are mail order houses, department stores, chain automotive supply stores, drug stores, infants' stores and hardware stores.

PAR. 4. In the course and conduct of its business, as above-described, respondent has sold and now sells its products to some of said purchasers at higher prices than it has sold and now sells such products of like grade and quality to other of said purchasers. Respondent's favored purchasers are now, and have been, competing with its non-favored purchasers in the resale of said products.

An example of the discrimination involved herein is found in connection with sales of the two most popular items of baby walker-strollers sold by respondent. The prices charged a few favored purchasers, such as mail order houses and chain automotive supply stores, as compared with the prices charged the many other competing purchasers are set forth below. The prices charged said other competing purchasers vary according to the quantity of respondent's products purchased in a single order as indicated. The price paid by the favored purchasers is the same regardless of quantity purchased. The prices set forth below, effective during 1952, are per unit, f. o. b. Cincinnati, Ohio:

	1 to 11 pieces (assorted)	12 to 23 pieces (assorted)	24 pieces or more (assorted)
Model No. P-45			
Price to favored purchasers	$5.20	$5.20	$5.20
Price to other purchasers	$6.57	$6.24	$5.92
Price discrimination:			
Dollars per unit	1.37	1.04	.72
Percent per unit	20.8	16.7	12.2
Model No. P-55			
Price to favored purchasers	$6.15	$6.15	$6.15
Price to other purchasers	$7.77	$7.38	$6.99
Price discrimination:			
Dollars per unit	1.62	1.23	.84
Percent per unit	20.9	16.7	12

PAR. 5. The effect of such discriminations in price made by respondent, as set forth in Paragraph 4 hereof, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and its purchasers are respectively engaged; or to injure, destroy, or prevent competition with respondent and its purchasers who receive the benefit of such discriminations.

PAR. 6. The foregoing acts and practices of the respondent, as above alleged, violate Section 2 (a) of the Clayton Act, as amended, (U. S. C. Title 15, Sec. 13).

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 July 29, 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

The complaint in this matter charges respondent with price discrimination in violation of Section 2 (a) of the Clayton Act, as amended. Since the issuance and service of the complaint and the filing of respondent's answer thereto, a stipulation has been entered into by respondent and counsel supporting the complaint which provides, among other things, that respondent admits all of the jurisdictional allegations in the complaint; that the answer heretofore filed by respondent shall be withdrawn; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission to which respondent may be entitled under the Clayton Act, as amended, or the rules of practice of the Commission; and that the order hereinafter set forth may be entered in disposition of this proceeding, such order to have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon, respondent specifically waiving any and all right, power or privilege to challenge or contest the validity of such order.

The stipulation is hereby accepted and made a part of the record herein, and the following order issued:

ORDER

It is ordered that respondent Frank F. Taylor Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale or distribution of its products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products:

By selling such products of like grade and quality to any purchaser thereof at a higher price than the price charged any other purchaser or purchasers who in fact compete with the nonfavored purchaser in the sale and distribution of such products.

For the purpose of comparison, the term "price" as used in this order takes into account discounts, rebates, allowances and other terms and conditions of sale.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered that the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist [as required by said declaratory decision and order of July 29, 1954].

IN THE MATTER OF

ANTHONY W. HAGEDORN DOING BUSINESS AS BUCHANAN HEARING AID COMPANY

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

Docket 6205. Complaint, May 5, 1954—Decision, July 30, 1954

Consent settlement order requiring a seller of devices represented to be hearing aids to cease advertising falsely the qualities or acceptance of said products and from "bait" advertising in the sale of the devices.

Before *Mr. James A. Purcell*, hearing examiner.
Mr. John J. McNally for the Commission.
Mr. Carl L. Shipley, of Washington, D. C., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Anthony W. Hagedorn, an individual, doing business as Buchanan Hearing Aid Company, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Anthony W. Hagedorn is an individual doing business as Buchanan Hearing Aid Company with his principal place of business located at 726 Fourteenth Street, N. W., Washington, D. C.

PAR. 2. Respondent is now, and for more than one year last past has been, engaged in the sale of devices represented to be hearing aids, to members of the purchasing public. In the course and conduct of said business, respondent causes some of said devices when sold, to be transported from his place of business located in the District of Columbia to the purchasers thereof located in the District of Columbia and in adjacent states, and maintains, and at all times mentioned herein has maintained, a course of trade in commerce among and between the various States of the United States.

PAR. 3. Among the various devices sold by respondent as aforesaid is the "Dahlberg Tru-Sonic Canal Earphone," a device, as "device" is defined in the Federal Trade Commission Act, which is so designed that a part thereof is inserted into the ear canal. The complete device consists of a tip, a length of plastic tubing, an adaptor and a receiver, plus a wire cord with a plug attachment.

PAR. 4. In the course and conduct of his business as aforesaid, respondent has disseminated, and caused the dissemination of, advertisements concerning said device 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 advertisements inserted in newspapers, circulars and other advertising media for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said device.

Respondent has also disseminated and caused the dissemination of advertisements concerning said device by various means for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said device in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical, but not all inclusive, of the statements contained in said advertisements, disseminated as aforesaid, are the following:

HARD OF HEARING?

NEW Dahlberg Tru-Sonic

Canal Earphone

Yesterday's dream—today's reality

(depiction of a human ear with a device inserted into the ear canal. A diagram indicates the placement of the device in the ear canal through use of the letters A, B and C)

Dahlberg
Hearing Aids
are accepted by
the American
Medical Association

You'll thrill to a new and different hearing experience when you hear with the Dahlberg Tru-Sonic Canal Earphone. The new canal earphone (A) with soft, air-light tube and foam rubber tip (B) so small, it's hidden within ear canal (C)—so near eardrum (D) gives amazing hearing power.

Out of Sight! No earmold!

Fits any ear—all hearing aids.

PAR. 5. Through the use of the aforesaid statements and others of the same import not specifically set forth herein, respondent represented that the "Dahlberg Tru-Sonic Canal Earphone" will fit the ear canals of all persons and when inserted therein will be hidden or out of sight; that the device is so constructed as to fit all hearing aids and that it has been accepted by the American Medical Association.

PAR. 6. The said advertisements are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, the "Dahlberg Tru-Sonic Canal Earphone" will not fit the ear canals of all persons and when inserted therein will not be hidden nor out of sight. Said device is not so constructed as to fit all hearing aids and has not been accepted by the American Medical Association.

PAR. 7. The use by respondent of the aforementioned false and misleading statements and representations had the tendency and capacity to induce 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 the respondent's devices by reason of such erroneous and mistaken belief.

PAR. 8. In the course and conduct of his business, respondent, through the use of newspapers, radio broadcasts, circulars disseminated through the United States mails, and other forms of advertising, has made certain other statements respecting the devices offered by him and the prices thereof.

Among and typical, but not all-inclusive of the statements made by respondent, as aforesaid, were the following:

SUPER POWER HEARING

WITH

THE

NEW

(depiction of a human hand with a small disk-like object about the size of a dime held between the thumb and forefinger)

Actual size of receiver

ELECTRONIC RECEIVER
FOR HEARING AID USERS

This tiny receiver will take the place of Old Fashioned Hearing Air Receivers. Yes, it is true! We now offer the world's first real aid-powered receiver small enough to fit INSIDE your ear. Sound is heard in the most natural way ever invented for the hard of hearing * * * $19.50 full price.

* * * * * * *

STOP BEING DEAF!

Remarkable *New* Hearing Discovery

(depiction of a policeman holding up a disproportionately large hand)

(arrow bearing the phrase "All you need"! pointing to a depiction of a thin fork-shaped device, the tines of which are rounded and the stem of which appears to pierce through a disc to a coil-shaped terminal)

Here is the sensational new hearing aid that your friends don't see. No cords—no batteries—no plastic tubes—no box of any kind. Improve your appearance—be comfortable—at ease—get a new lease on life. $39.50 complete * * *

* * * * * * *

I'm very deaf but I HEAR everything with my new TRU-SONIC Hearing Aid.

Read what Mrs. Gladys Jones, Washington mother, says:

I am very deaf. I have worn hearing aids for 20 years. Some of the most expensive models on the market. Believe me, I know the trials, discomforts, irritation and embarrassment of wearing the average hearing aid—no matter how costly. Now I wear TRU-SONIC, the hearing aid which operates on a brand new principle of electronics, and I hear better than I did in 20 years! Best of all TRU-SONIC cost only $39.50—Just about one-fifth of most hearing aids.

Won't you hard-of-hearing folks let me send you the complete TRU-SONIC story? It's FREE, fascinating—and could revolutionize your life as it did mine! * * *

* * * * * * *

Revolutionary New TRU-SONIC D-2 Hearing Device

WEAR NOTHING

in your ear except this tiny device

39.50

FULL PRICE

. . . not a gadget!
. . . not a come on!
. . . but a truly fine complete hearing aid
. . . unseen on women
. . . inconspicuous on men
. . . as low as 1.25 per week
. . . low down payment
. . . free tryout

TRU-SONIC ATTACHMENT

WHERE DEAFNESS STRIKES

(depiction showing a human ear with a device inserted in the ear canal and a cross-section of the various tissues comprising the human auditory system. Said device appears to consist of a series of six centered, rounded blocks of varying size and thickness, the portion closest to the eardrum being disk-shaped)

Fitted utterly unlike old fashioned hearing aids. The most modern ear attachment of today * * * the TRU-SONIC CANAL EARPHONE pictured above. A hearing aid you'll be proud to own. Better hurry! Supplies are limited! * * *

* * * * * * *

PAR. 9. Through the use of the statements set forth in Paragraph 8 hereof, and others of similar import not specifically set forth herein, respondent represented, directly or by implication, that he was making a bona fide offer to sell the devices referred to or described in said advertisements.

PAR. 10. The aforesaid representations were false, misleading and deceptive. In truth and in fact, respondent's said offers were not bona fide offers to sell the devices referred to or described in said advertisements. On the contrary, respondent's said offers were made for the purpose of developing leads as to prospective purchasers of different or more expensive devices than those referred to or described in said advertisements.

In numerous instances persons attracted by respondent's advertisements, upon visiting respondent's place of business or upon being visited by respondent or his sales people in their homes or offices, were informed by respondent or his salespeople in effect, that the advertised devices would not aid their hearing, were not as described in the advertisements, or were not desirable as hearing aids. Respondent or his salespeople often failed to even demonstrate said devices to prospective purchasers, but attempted to and did describe, demonstrate and in many instances sold, different or more expensive devices than those described or referred to in said advertisements, to such persons, many of whom would not have contacted respondent except for the representations made in said advertisements.

PAR 11. Respondent's false and misleading statements and representations, set forth in Paragraphs Eight through Ten hereof, had the tendency and capacity to induce members of the purchasing public to contact respondent, and to purchase devices which they would not have otherwise purchased from respondent except for such practices.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

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 July 30, 1954, the initial decision in the instant matter of hearing examiner James A. Purcell, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 5, 1954, issued and subsequently served its complaint upon respondent, Anthony W. Hagedorn, an individual doing business as Buchanan Hearing Aid Company, engaged in the sale of hearing aid devices, with his principal place of business located at No. 726 Fourteenth Street, Northwest, Washington, D. C.

On June 23, 1954, there was filed with the Federal Trade Commission a stipulation between the parties for a consent order, which stipulation appears of record in these formal proceedings. By the terms thereof the parties agree that the complaint and said stipulation shall constitute the entire record herein; that respondent admits all of the jurisdictional allegations set forth in the complaint; that both parties waive the making of findings of fact or conclusions of law by the Hearing Examiner or by the Commission; that respondent waives the right to file exceptions or to demand oral argument before the Commission, as well also all further and other procedure before the Hearing Examiner or the Commission to which, but for the execution of said stipulation, respondent may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission. Said stipulation further recites that it was executed for settlement purposes only, does not constitute an admission by respendent of violation of law as alleged in the complaint, and that said complaint may be used in construing the terms of the order herein, which order may be altered, modified or set aside in the manner provided by law.

On the basis of the foregoing the undersigned Hearing Examiner concludes that this proceeding is in the public interest and, in conformity with the action therein contemplated and agreed, makes the following order:

ORDER

It is ordered that respondent Anthony W. Hagedorn, an individual doing business as Buchanan Hearing Aid Company, or under any other name, and respondent's agents, representatives and employees. directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the device designated as the "Dahlberg Tru-Sonic Canal Earphone," or any device of substantially similar character, whether sold under the same or any other name, do forthwith cease and desist from directly or indirectly:

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

(a) will fit the ear canal of all persons;

(b) is hidden and out of sight when inserted in the ear canal;

(c) will fit all hearing aids;

(d) has been accepted by the American Medical Association.

2. 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 device in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph (1) above.

It is further ordered that respondent, Anthony W. Hagedorn, an individual doing business as Buchanan Hearing Aid Company, or under any other name, and respondent's agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of hearing aids or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that hearing aids or other merchandise are offered for sale when such offer is not a bona fide offer to sell the merchandise so offered.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered that the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist [as required by said declaratory decision and order of July 30, 1954].

IN THE MATTER OF

WOODY FASHIONS, INC., ET AL.

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

Docket 6123. Complaint, Sept. 21, 1953—Decision, Aug. 3, 1954

Where a manufacturer of wool products—

(a) Misbranded certain ladies' coats which contained none of the hair of the Cashmere goat as "Imported Cashmere and All Wool, Exclusively Blended", "Exclusively Blended, Wool and Cashmere, 80% Wool, 20% Cashmere", etc.; and

(b) Misbranded certain of said coats labeled as "Imported Cashmere and All Wool, Exclusively Blended", in that it failed to set out the percentage, by weight, of cashmere contained therein:

Held, That such misbranding of wool products was in violation of the Wool Products Labeling Act of 1939 and constituted unfair and deceptive acts and practices in commerce.

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

Mr. Henry D. Stringer for the Commission.

Ducker & Feldman and *Mr. Samuel R. Friedman*, of New York City, for respondents.

DECISION AND OPINION OF THE COMMISSION

This matter has come before the Commission upon respondents' appeal from the initial decision of the hearing examiner which concludes that they have violated the Wool Products Labeling Act of 1939 by falsely labeling ladies' wool coats as containing cashmere. Briefs in support of and in opposition to the initial decision have been filed. Oral argument has not been requested.

In support of their appeal respondents take exception to rulings of the hearing examiner excluding reports of tests by Adolph Marklin and by Josephine V. Lawida of the content of certain of the material in question. They were rejected by the hearing examiner because the person making the tests were not present as witnesses and available for cross-examination as to the contents of the reports. The report of the tests by Josephine V. Lawida was identified by Arthur B. Coe, Chief Microscopist for the United States Testing Company, Inc., who was her superior. He testified that he did not participate in the actual testing and could not recall whether or not he had examined respondents' fabric at all. Similarly, as set out in detail in the initial decision, the President of Hatch Textile Research, Inc., who identified the report of the tests by Adolph Marklin, had no knowledge of the actual tests covered by the report.

Respondents contend that under a recognized exception to the hearsay rule a report of a test made in the regular course of business can be placed in evidence without making the person conducting the test available for cross-examination. However, this record shows that it is extremely difficult to identify cashmere fiber in a fabric. This is not a routine busines operation with which a supervisor would be thoroughly familiar. The testing procedure and the personal qualifications of the persons conducting the tests are extremely important in this case as the different persons testing the same fabrics have obtained such opposite results. Under these circumstances, the Commission is of the opinion that the hearing examiner correctly barred from evidence reports of tests where the person conducting the test was not made available for cross-examination.

Respondents further take exception to the findings in the initial decision that respondents' products contained no hair of the cashmere goat and that they misbranded them by labeling them as containing 20% and 30% cashmere in violation of the Wool Products Labeling Act. The Commission has fully considered the record and is of the opinion that the initial decision correctly so held and that the initial decision is correct and proper in all respects.

It is ordered, therefore, that respondents' appeal is hereby denied, and that the initial decision is hereby adopted as the decision and opinion of the Commission.

It is further ordered that respondents Woody Fashions, Inc., a corporation, and Harry D. Graff and Harry Zucker shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the initial decision, a copy of which is attached hereto.

Said initial decision, thus adopted by the Commission as its decision follows:

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

1. The complaint in this proceeding was issued on September 21, 1953, charging Moody Fashions, Inc., and Harry D. Graff and Harry Zucker, individually, with misbranding ladies' wool coats by affixing thereto tags or labels falsely representing that such coats were a blend of cashmere and wool, and by failing to reveal on one of such labels the percentage by weight, if any, of the cashmere fiber contained in

such coat. These labels are alleged to have been used in violation of Sections 4 (a) (1) and (2), respectively, of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and to constitute unfair and deceptive acts and practices within the intent and meaning of the Federal Trade Commission Act.

2. Respondents, in their answer, admit that Woody Fashions, Inc. is a corporation located at 237 West 37th Street, New York 18, New York, and is organized and existing under and by virtue of the laws of the State of New York; that individual respondents Harry D. Graff and Harry Zucker are the President and Sales Manager, respectively, of the corporate respondent, and that they direct and control the acts, policy and practices thereof. Respondents further admit manufacturing wool products; offering them for sale, and introducing, selling, transporting and distributing such wool products in commerce, subsequent to 1951, within the intent and meaning of the Wool Products Labeling Act of 1939. They deny, however, that they have misbranded their wool products in any way, or that they have committed any acts or engaged in any practice in violation of the Wool Products Labeling Act of 1939 or the Federal Trade Commission Act.

3. The denials in respondents' answer were modified during the course of the hearing by an admission, which is herein accepted as true, that one label, used on these products, which bore the legend "Imported Cashmère and All Wool, Exclusively Blended," and the use of which had been discontinued early in 1953, had failed to show the percentage by weight of cashmere present in the product, and was therefore in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder.

4. In the light of the above facts, the issues remaining in controversy are whether respondents' products contained cashmere, and, if so, whether they contained the respective percentage of cashmere represented, respectively, on two of respondents' labels, namely, 20% cashmere, 80% wool, and 30% cashmere, 70% wool.

B. In order to understand these issues clearly, it must be remembered that the term "wool" is defined as "* * * the fiber from the fleece of the sheep or lamb or hair of the Angora or Cashmere goat * * *" and other specialty fibers not here involved (Sec. 2 (b), Wool Products Labeling Act of 1939). Accordingly, any fabric composed of a combination of the fleece of the sheep or lamb with hair of the Cashmere or Angora goat may lawfully be labeled "All Wool" or "100% Wool." On the other hand, although "mohair" and "cashmere" are included within the general statutory definition of wool, these words may not, under the provisions of Rule 19 of the Rules and Regulations promulgated under the Act, lawfully be used on a label together with the word "wool" or other fiber designations, unless the respective percentage of each such fiber is shown thereon.

5. In the latter part of 1951 the respondents were buying fabrics from a source other than Wyandotte Worsted Company, with a fiber content of 20% cashmere and 80% wool, for a price of $4.00 to $5.00 per yard, which they had labeled accordingly. Thereafter, in the early part of 1952, respondents began buying fabrics from the Wyandotte Worsted Company at a price of approximately $3.50 per yard. These fabrics were delivered to the respondent with the representation that they were 100% wool. Such a representation might lawfully have been made to describe a fabric composed wholly of the fleece of the sheep or lamb, or of mohair or the hair of the Angora or Cashmere goat, or of any blending thereof. In 1952, shortly after the respondents began their purchases of the fabrics in question, the president of the respondent corporation caused samples of such fabrics to be sent to two separate testing laboratories, requesting reports on the amount of cashmere and wool fiber contained in the submitted samples. After the United States Testing Company, Inc., Hoboken, New Jersey, rendered a report to respondents, to the effect that one of the samples contained a blend of 30% cashmere, 35% wool, and 35% mohair, whereas the other sample contained a blend of 80% Iranian and similar cashmeres, 20% mohair, and negligible traces of wool, the respondents began placing on their ladies' coats, made from the fabrics purchased from the Wyandotte Worsted Company, labels showing, in one instance, a content of 20% cashmere, 80% wool, and, in another instance, 30% cashmere and 70% wool.

6. A. The evidence presented in support of the complaint is in sharp contradiction to that presented by the respondents, and it is necessary, therefore, to evaluate the credibility of the witnesses, and to determine the relative probative strength of all the evidence.

B. The president of the Wyandotte Worsted Company, and the manager of that company's mill which manufactured the particular fabrics in question, both testified that the fabrics were made of a blend of sheep's-wool and mohair, and contained no cashmere. Neither of these executives represented themselves as experts in the analysis of wool and kindred fibers, and neither executive personally observed the actual blending of the fibers which comprised the finished product, later sold to respondents. The manager of the mill, however, exercised general supervision over the blending of fibers in the fabrics in question; and the reports which these executives received, in the ordinary and usual course of business, from their subordinates in the textile mill, to the effect that the fabrics in question were made of sheep's-wool and mohair fleece and contained no cashmere, and upon which, in part, they based their testimony, appear to be reliable and trustworthy. In fact, there appears to be no motive why they should represent their product as less desirable on the market than they stated it would have been, if represented as part cashmere.

C. Two samples of fabrics cut from two of respondents' coats, labeled, respectively, "20% Cashmere, 80% Wool" and "30% Cashmere, 70% Wool," were submitted to Dr. John R. Hardy, of the Nittany Laboratory, State College, Pennsylvania, for a determination of the fiber content thereof. Dr. Hardy reported in his testimony that, according to his analysis, neither coat contained cashmere. but that they consisted rather of lamb's-wool and mohair. It was uncontradicted that Dr. Hardy was a scientist of specialized education and experience. He had received the degrees of Bachelor of Science, Master of Science, and Doctor of Philosophy; had been employed for many years, until his recent retirement, by the United States Department of Agriculture, where he was placed in charge of animal fiber research work. In 1948 he had received a distinguished award from the Department of Agriculture for the invention of a device for making cross-sections of all kinds of fibers. His testimony as to the exact procedure followed by him in the analysis of the samples of fabric submitted to him, which had been removed from two of respondents' coats, was clear, objective, impartial and convincing, creating the strong impression that he was an authority on the subject of animal fibers, and had performed a careful and minutely detailed analysis of the fabrics in question. His testimony was, in every respect, worthy of belief.

D. Respondents sought, by means of the testimony of the president of Hatch Textile Research, Inc., to place in evidence a report of a fiber analysis made by a technician of that laboratory. The president's testimony revealed, however, that he was not himself a technician, and that he had not personally supervised the analysis in question. In fact, the analysis was shown to have been performed by the technician in his own home, and such technician did not appear as a witness herein. In view of this evidence, and since the record shows that the analysis in question required the exercise of special technique and judgment, the report, which was clearly heresay in character, was not admissible, as contended by respondents, under the theory of an act performed in the ordinary and usual course of business. Accordingly, it was excluded from the record.

E. Respondents, in their letter transmitting samples of the fabrics in question to the United States Testing Company, Inc., asked for a report on the amount of cashmere and wool fiber contained therein. The two reports of these requested fiber analyses were received in evidence after the two technicians who had performed the tests reported therein had testified. The first of these technicians, Miss Muriel Albanesius, testified that she was a high-school graduate, with no college training and no experience in the analysis of fibers previous to that gained during the past six years, when she had been working for the United States Testing Company, Inc. Her knowledge of wool was very scanty; for example, she did not know the native habitat of the cashmere goat, nor did she know the characteristics of the growth of the hair or fur fiber on a cashmere goat. She had done no systematic reading on the subject of fiber in general. The second technician, Mr. Felix S. Eichelbaum, had received a Bachelor of Science degree in textile manufacturing, and had been employed for a year and a half by the United States Testing Company, Inc., as a technician. Although he recognized the report of the fabric analysis in question, showing that such sample contained 80% cashmere and 20% mohair, he stated that he had performed so many similar tests that he could not remember the details of this particular one. He testified, in effect, that he knew the report to be correct at the time it was made. Although his testimony was legally sufficient to warrant the reception into evidence of the report itself, his failure to remember the details of his analysis detracted from the probative strength of such report.

F. The president of the respondent corporation testified that it was at his direction that samples of the fabric purchased from the Wyandotte Worsted Company were sent to the United States Testing Company, Inc., for determination of the content of cashmere fiber therein. He gave no satisfactory answer to the question of why he had expected cashmere to be present in a fabric which he had purchased as 100% wool, when in fact cashmere, in most instances, sold for considerably more than ordinary wool. When asked why he sent samples of the fabrics purchased from the Wyandotte Worsted Company to a laboratory with a request that the content of cashmere therein be determined, thereby implying that the fabric did in fact contain cashmere, he was evasive, asserting that he did not write the letter and that the letter did not imply a content of cashmere in the samples submitted for testing. He admitted that he had, prior to the hearing, described cashmere as a selling "gimmick," but when asked to define the word "gimmick," he was again evasive, and it was only after repeated questions that he could be induced to testify respecting the word "gimmick." He finally stated that "gimmick," in relationship to the word "cashmere," signifies, to the purchasing public, an "extra feature." When asked why he did not mark the coats made from the fabric purchased from Wyandotte Worsted Company as 100% wool "if they would sell just as well" as if marked part wool and part cashmere, he answered, "we were using, we were selling at the time 20% cashmere from other sources." Obviously his reply was not a satisfactory answer to the question. In view of such evasions, the probative value of his testimony was materially lessened.

7. On the basis of the entire record, and after a comparative evaluation of all the testimony and other evidence, it is concluded that the evidence adduced in support of the complaint is reliable, probative and substantial, and establishes that respondents' wool products, namely, ladies' coats, in truth and in fact, contained none of the hair of the cashmere goat, and that, consequently, respondents have misbranded such coats by tagging or labeling them "Imported Cashmere and All Wool, Exclusively Blended," "Exclusively Blended, Wool and Cashmere, 80% Wool, 20% Cashmere," and "Exclusively Blended, Wool and Cashmere, 70% Wool, 30% Cashmere," in violation of the Wool Products Labeling Act of 1939.

8. It is further concluded that the misbranding of wool products herein found constitutes unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act; and, consequently, that this proceeding is in the public interest. Accordingly,

It is ordered that respondent Woody Fashions, Inc., a corporation, and its officers, and respondents Harry D. Graff and Harry Zucker, individually, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of ladies' coats 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;

2. Failing to securely affix to or place on each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner:

(a) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five percentum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is five percentum or more, and (5) the aggregate of all other fibers;

(b) The maximum percentage of the total weight of such wool product, of any non-fibrous loading, filling, or adulterating matter;

(c) The name or the registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce, or in the offering for sale, sale, transportation, distribution or delivering for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

3. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as containing the hair or fleece of the Cashmere goat when such is not the fact.

4. Stamping, tagging, labeling or otherwise identifying such products as containing the hair or fleece of the Cashmere goat without setting out in a clear and conspicuous manner on each such stamp, tag, label or other identification the percentage of such Cashmere therein;

Provided that the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by paragraphs (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.

IN THE MATTER OF

SEWING MACHINE SALES CORPORATION ET AL.

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

Docket 6149. Complaint, Dec. 3, 1953—Decision, Aug. 3, 1954

Order requiring a corporate seller with main office in New York City and branch in Atlanta, Ga., to cease selling sewing machines, heads of which were imported from Japan, without adequate disclosure thereon of the country of origin, and to cease misrepresenting the maker of the machines by prominent use of the brand name "Admiral" on the main horizontal arm.

Before *Mr. William L. Pack*, hearing examiner.
Mr. Harold A. Kennedy for the Commission.
Mr. Samuel Woolan, of New York City, 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 August 3, 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

1. The complaint in this matter charges respondents with the use of certain unfair and deceptive practices in violation of the Federal Trade Commission Act. After the filing of respondents' answer, hearings were held at which evidence in support of the complaint was introduced, no evidence being offered by respondents. Counsel for all parties elected not to file proposed findings and conclusions, and oral argument was not requested. The matter now comes on for final consideration on the merits.

2. Respondent Sewing Machine Sales Corporation 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 1435 Boone Avenue, New York, New York. A branch establishment is located at 128 Marietta Street, N. W., Atlanta, Georgia. Respondents Samuel S. Cohen, Herman Smith and Eli Cohen are President, Treasurer and Secretary, respectively, of the corporation and formulate its policies and direct and control all of its acts and practices.

3. Respondents are engaged in the sale of sewing machines and sewing machine heads, their sales being made either to retail dealers who resell to the consuming public or to wholesale distributors who in turn resell to such retailers. The business is interstate in character, respondents selling and shipping their products to numerous purchasers located in various States of the United States other than New York and Georgia. Respondents are thus engaged in commerce as that term is defined in the Federal Trade Commission Act. In the conduct of their business, respondents are in competition in such commerce with other corporations and individuals engaged in the sale of similar products.

4. The complaint contains two charges: first, that the "heads" used by respondents in their sewing machines, that is, the mechanical part of the machine or the entire machine except the cabinet, are imported from Japan; that this fact is not disclosed or is not sufficiently disclosed to the public; and as a result the public purchases or is likely to purchase respondent's machines under the erroneous impression that the machines are manufactured in the United States; and, second, that respondents use as a trade name for their machines the word "Admiral" or the words "Admiral Crescent," thus causing the public to believe that such machines are products of another company, which sells household appliances under the trade name "Admiral."

5. The heads used in respondents' machines are in fact imported from Japan. When sold by respondents, the machines bear on the front of the machine or head a medallion on which there appears in large type the legend "Reg. Appld. For" and in somewhat smaller type the words "The Family Sewing Machine." There also appears, in type much smaller than that used in either of the above, the legend "Japan" or "Made in Japan." Only as a result of a very close examination would a member of the public see this last legend and thereby become apprised of the fact that the machine was made in Japan. There is testimony from a substantial number of customers that when purchasing respondents' machine they did not notice the legend, and that it was not until much later, when the legend was specifically called to their attention, that they became aware that the machine was not manufactured in the United States but in Japan. In the absence of adequate disclosure to the contrary, the public assumes that sewing machines are of domestic rather than foreign origin, and there is a preference on the part of the public for sewing machines manufactured in the United States over those made in Japan. Upon examination of the medallion in question and in the light of the testimony,

it is concluded that here the disclosure of foreign origin was not sufficiently conspicuous to inform the public.

6. (a) On the issue as to the trade name, the evidence fails to establish use by respondents of the single word "Admiral." Respondents have, however, used the name "Admiral Crescent," the word "Admiral" being prominently displayed in very large type on the front of the main horizontal arm of the machine, and the word "Crescent" appearing immediately below in much smaller and much less conspicuous type. On the top of this horizontal arm but in relatively small and inconspicuous type appears respondents' corporate name "Sewing Machine Sales Corp."

(b) Some nine members of the public who had purchased respondents' machines from a dealer in Pittsburgh, Pennsylvania, testified that upon seeing the word "Admiral" on the machine they assumed the machine to be a product of the well known American company which sells household appliances under the trade name "Admiral." The company in question is the Admiral Corporation, and the word "Admiral" is the trade name or mark of that company. For many years the company has advertised and sold its products, particularly television sets, radios and refrigerators, under this trade name, and the name and products are well and favorably known to the public. There is no connection between the Admiral Corporation and respondents or their machines.

(c) The use by respondents of the word "Crescent" in connection with the word "Admiral" and the imprinting of respondents' corporate name on the machine is not sufficient to prevent the erroneous impression of the public as to the identity and origin of the machines. It is evident from the testimony that prospective purchasers either do not notice these additional words at all or attach no significance to them.

CONCLUSIONS

It is concluded:

1. The proceeding is in the public interest.

2. The failure of respondents to disclose adequately on their sewing machine heads that such products are made in Japan, and the use of the word "Admiral" as a part of the trade name for their machines, have the tendency and capacity to mislead and deceive a substantial portion of the public as to the origin and identity of respondents' products, and the tendency and capacity to cause such members of the public to purchase such products as a result of the erroneous and mistaken belief so engendered. In consequence, substantial trade has been diverted unfairly to respondents from their competitors. Re-

spondents' practices serve also to place in the hands of retail dealers means and instrumentalities whereby such dealers may be enabled to mislead and deceive the public. Such practices are all to the prejudice of the public and of 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 the respondents, Sewing Machine Sales Corporation, a corporation, and its officers and Samuel S. Cohen, Herman Smith and Eli Cohen, 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 of sewing machines or sewing machine heads 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 manner that it will not be hidden or obliterated, the country of origin thereof.

2. Using the word "Admiral" or any simulation thereof, either alone or in connection with any other word or words, to designate, describe or refer to respondents' sewing machines or sewing machine heads; or representing through the use of any other word or words, or in any other manner, that said sewing machines or sewing machine heads are manufactured by anyone other than the actual manufacturer.

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 August 3, 1954].

IN THE MATTER OF

H. J. HEINZ COMPANY ET AL.

Docket 5994. Order and opinion, August 10, 1954

Order denying appeal from initial decision holding evidence insufficient to support allegations of concerted action to follow a price leadership plan.

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

Mr. Leslie S. Miller, *Mr. William J. Boyd, Jr.*, *Mr. Floyd O. Collins* and *Mr. Wilmer L. Tinley* for the Commission.

Covington & Burling, of Washington, D. C., for various corporations, individuals and officers of said corporations, and along with—

Reed, Smith, Shaw & McClay, of Pittsburgh, Pa., for H. J. Heinz Co., Joseph J. Wilson, Howard E. McKinley, Everitt E. Richard and Cyril P. Roberts;

Marshall, Melhorn, Block & Belt, of Toledo, Ohio, for Campbell Soup Co., Joseph Campbell Co., Walter A. Scheid, Edgar W. Montell and Harold R. Collard;

Barnes, Hickam, Pantzer & Boyd, of Indianapolis, Ind., for Stokely Van-Camp, Inc., Herbert F. Krimendahl and A. A. Ehrman;

Mr. G. Lincoln Lewis, of Indianapolis, Ind., for Stokely Van-Camp, Inc., Herbert F. Krimendahl, Samuel Hammond, Russell Kline and A. A. Ehrman;

Holloway, Peppers & Romanoff, of Toledo, Ohio, for Foster Canning, Inc.;

True & Meyer, of Port Clinton, Ohio, for Lake Erie Canning Co. of Sandusky, J. Weller Co. and George Wenger.

Marchal & Marchal, of Greenville, Ohio, for Beckman & Gast Co., Inc., Greenville Canning Co., Inc., St. Mary's Packing Co., Inc., Robert H. Timmer, Thomas G. Timmer, Luke F. Beckman and Charles F. Stemley Canning Co.

Avery & Avery, of Bowling Green, Ohio, for Buckeye Canning Co., Inc.

Estabrook, Finn & McKee, of Dayton, Ohio, for Gibsonburg Canning Co., Inc. and St. Mary's Packing Co., Inc.

Mr. Joseph R. Harmon, of Fullerton, Calif., and *Fuller, Harrington, Seney & Henry*, of Toledo, Ohio, for Hunt Foods, Inc. and Hunt Foods of Ohio, Inc.

Short & Dull, of Celina, Ohio, for Sharp Canning Co.

Ham & Ham, of Wauseson, Ohio, and *Mr. Carl C. Leist*, of Circleville, Ohio, also for Winorr Canning Co. and George W. Conelly.

Gebhard & Hogue, of Bryan, Ohio, for Richard C. Boucher.
Lusk & Shaw, of Wapakoneta, Ohio, for Henry A. Diegel.

Order Denying Appeal from Initial Decision

This matter coming on to be heard by the Commission upon the appeal of counsel in support of the complaint from that portion of the initial decision of the hearing examiner dismissing the price fixing allegations contained in subparagraphs 8 and 9 of Paragraph Ten of the complaint herein, and the respondents' briefs in opposition to said appeal; and

The Commission having considered the entire record, including the exceptions raised by counsel in support of the complaint, and having determined that the hearing examiner's initial decision was correct:

It is ordered, in conformity with the written opinion of the Commission being issued simultaneously herewith, that the appeal of counsel in support of the complaint be, and it hereby is, denied.

It is further ordered that the case be, and it hereby is, remanded to the hearing examiner for further proceedings in regular course.

Commissioner Carretta not participating.

OPINION OF THE COMMISSION BY GWYNNE, COMMISSIONER

Respondents include 24 companies engaged in the processing of tomatoes in Ohio, the Ohio Canners' Association, Inc. (a trade association), individuals who are officers, directors, employees, or owners of the above companies, and officers or directors of the Ohio Canners' Association, Inc. or the Indiana Canners' Association (also a trade association).

Briefly stated, the complaint charges respondents with violation of Section 5 of the Federal Trade Commission Act by entering into an understanding, agreement and combination to restrain trade in interstate commerce in raw tomatoes, and as a part of said understanding, with engaging in a planned common course of action to, first, boycott and otherwise illegally interfere with said tomato growers, and second, to fix and maintain prices to be paid for raw tomatoes.

At the conclusion of the evidence in support of the complaint, the hearing examiner dismissed the entire complaint as to the Ohio Canners' Association, Inc., its officers and directors, the secretary-treasurer of Indiana Canners' Association, Inc., and certain canning companies and individuals named in the initial decision. He also dismissed the complaint as to the allegations in Subparagraphs 2, 6, 8 and 9 of Paragraph 10 as to all respondents. Counsel supporting the complaint appealed from the decision only insofar as it dismissed the allegations in Subparagraphs 8 and 9 of Paragraph 10 as to the "remaining respondents," that is, the respondents not included in the list set out in the initial decision as to whom the complaint was dismissed in its entirety. The appeal was submitted on written briefs without oral argument.

The only question involved in this appeal has to do with the sufficiency of the evidence to make a prima facie case as to the following allegations in Paragraph 10 of the complaint:

"The respondents herein have been, and are now, engaged in unfair methods of competition and unfair acts or practices in commerce, as 'commerce' is defined in the Federal Trade Commission Act, in that they have entered into an understanding, agreement and combination to restrain trade and interstate commerce in raw tomatoes. The respondents, as a part of the aforesaid understanding, agreement and combination, have engaged in a planned common course of action:

* * * * * * *

8. To fix and establish, and in fixing and establishing, prices to be paid by respondent processors to the growers for their raw tomatoes; and

9. To adopt and use, and in adopting and using, as a part of the aforesaid understanding, agreement and combination to fix and establish prices, a price leadership plan whereby respondent, H. J. Heinz Company, respondent Campbell Soup Company, or respondent Joseph Campbell Company, or two or more of said respondents, at times have led in the announcement and publication of their price or prices for raw tomatoes, after which, pursuant to mutual understanding among all respondent processors, the other respondent processors adopted, announced, published, and followed the same prices."

All of the companies included among the remaining respondents operate tomato processing plants in Ohio. Most of the raw tomatoes to be processed are bought from individual growers under written contracts entered into just prior to the planting season, although some are bought later on the open market from growers or brokers. It is the practice for individual processors to announce their prices shortly before contracts are offered to the growers. In determining its opening price, each processor takes into consideration many circumstances, often including prices already announced by other processors.

Late in 1949, certain tomato growers formed a cooperative organization known as Cannery Growers, Inc. Under the contract between

Cannery Growers, Inc. and its members, the cooperative was designated as the sole agent of the members to negotiate contracts with the processors for the growing and selling of tomatoes and the members agreed not to enter into a contract with any processor unless such contract had previously been approved by Cannery Growers, Inc.

In January 1951, Cannery Growers, Inc. notified the processors that it was ready to negotiate contracts in behalf of its members at a price of $40–$34, that is, $40 per ton for U. S. Government Grade 1, and $34 for Grade No. 2. Most of the processors did not negotiate with the cooperative for various reasons, among which was that the asking price was too high. Early in 1951, various processors announced their prices and began the effort to sign up growers. The prices announced by some processors were identical. For example Joseph Campbell Company (buying agent for Campbell Soup Company), H. J. Heinz, Hunt Foods, Inc., and Winorr Canning Company, announced $33–$21. Other opening prices varied from $36 to $33 for Grade No. 1 and from $26 to $20 for Grade No. 2.

In their appeal brief, counsel supporting the complaint "do not contend that the record establishes that the prices announced at the meetings were agreed upon in advance by the respondent companies; nor * * * that the record establishes that there was uniformity among the respondents as to those prices or as to prices they actually paid for tomatoes." They do contend, however, that there was cooperation and agreement among the respondents to adopt and adhere to the prices previously announced by certain of them and that such cooperation and agreement was for the purpose of negotiating with the growers for advance contracts during the critical period, that is, the "contracting season." In other words, the claim is that there was concerted action to adhere to the prices individually announced (even though different) to further the boycott of Cannery Growers, Inc.

The record in the case is very voluminous both in regard to the allegations of boycotting and price fixing. The evidence shows that meetings were held on March 17, March 31 and April 13, of 1951, at which most of the respondents were represented. At these meetings, many things of mutual interest were discussed and some mention was made of prices already announced by some processors. Among the many exhibits are letters from the manager of the Toledo, Ohio plant of respondent Hunt Foods, Inc. to his immediate superior giving a running account of the situation as the local manager observed it. After the opening price announcements, some processors changed their prices. For example, after announcing $33–$21 in March, Hunt Foods, Inc. went to $34–$22.50 in April, and to $36–$26 in May. Other respondents also made changes, although some did not occur until after the normal contracting season was over.

The hearing examiner held that there was not sufficient competent evidence in the record to support the allegations of Subparagraphs 8 and 9 of Paragraph 10 of the complaint. After considering the record, we conclude that the hearing examiner decided this issue correctly.

The appeal is therefore denied and it is directed that an order issue accordingly.

Commissioner Carretta did not participate herein.

IN THE MATTER OF

SANITARY FEATHER CO., INC., AND DANIEL HUTTNER

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

Docket 6202. Complaint, Apr. 22, 1954—Decision, Aug. 14, 1954

Consent settlement order requiring a Chicago manufacturer of wool products to cease misbranding "wool" products as defined by the Wool Products Labeling Act through labeling or tagging bed comforters containing cotton batting or padding as "All New Material Consisting of Wool Batting", and through failing to stamp or label certain bed comforters as required by the Act.

Before *Mr. J. Earl Cox*, hearing examiner.
Mr. George E. Steinmetz for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Sanitary Feather Co., Inc., a corporation, and Daniel Huttner, individually, and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sanitary Feather Co., Inc., is a corporation, organized and existing under and by virtue of the laws of the State of Illinois. Daniel Huttner is president and treasurer of said respondent corporation, and this individual formulates, directs, and controls the acts, policies, and practices of said corporate respondent. The offices and principal place of business of said respondents are located at 5034 South State Street, Chicago 9, Illinois.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since January 1953, respondents have manufactured for introduction into commerce, introduced, sold, transported, distributed, delivered for shipment, and offered for sale in commerce, as "commerce" is defined in said Wool

Products Labeling Act, wool products, as "wool products" are defined therein.

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

Among such misbranded wool products were bed comforters labeled or tagged by respondents as consisting of "All New Material Consisting of Wool Batting"; whereas, in truth and in fact, the batting or padding contained in said wool products did not consist of wool as the term "wool" is defined in said Wool Products Labeling Act and the Rules and Regulations promulgated thereunder but consisted of cotton.

PAR. 4. Certain of said wool products described as bed comforters were misbranded in that they were not stamped, tagged, or labeled as required under the provisions of Section 4 (a) (2) of said Wool Products Labeling Act, and in the manner and form provided by Rule 24 of the Rules and Regulations promulgated thereunder.

Among such misbranded wool products were bed comforters bearing labels or tags which failed to set forth the name or the registered identification number of the manufacturer thereof; or of one or more persons subject to Section 3 of said Act with respect to said wool products.

PAR. 5. The acts and practices of respondents as herein alleged, were and are in violation of the Wool Products Labeling Act of 1939 and of Rule 24 of the Rules and Regulations made pursuant thereto, 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.

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 August 14, 1954, the initial decision in the instant matter of hearing examiner J. Earl Cox, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint in this proceeding charges respondents now located at 5034 South State Street, Chicago, Illinois, with violating the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939, and the Rules and Regulations made pursuant thereto by the misbranding of certain wool products manufactured by them for introduction into commerce.

After the issuance and service of the complaint, a stipulation was entered into by respondents and counsel supporting the complaint. By the terms of said stipulation the respondents admit all jurisdictional allegations set forth in the complaint and waive the filing of an answer, a hearing before a hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission and all further and other procedure before the hearing examiner and the Commission to which the said respondents and each of them may be entitled under the Federal Trade Commission Act, the Wool Products Labeling Act of 1939, or the Rules of Practice of the Commission.

Respondents agree that the order hereinafter set forth shall have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon, and specifically waive any and all right, power, or privilege to challenge or contest the validity of the order entered in accordance with this stipulation, and that this stipulation, together with the complaint, shall constitute the entire record in this proceeding.

The stipulation is made a part of the record herein. This proceeding is found to be in the public interest, and in conformity with the terms of the stipulation the following order is issued:

It is ordered that the respondent Sanitary Feather Co., Inc., a corporation, and its officers, and respondent Daniel Huttner, individually, and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, and the Wool Products Labeling Act of 1939, of bed comforters or other "wool products," as such products are defined in and are subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain, or are in any way represented as containing "wool," "reprocessed wool," or "reused

ORDER

wool," as those terms are defined in said Act, to forthwith cease and desist from misbranding such products by:

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

2. Failing to securely affix to or place on each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner:

(a) The percentage of the total fiber weight of such wool products, exclusive of ornamentation not exceeding five percentum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight is five percentum or more, and (5) the aggregate of all other fibers.

(b) The maximum percentage of the total weight of such wool products of any nonfibrous loading, filling, or adulterating material.

(c) The name or the registered identification number of the manufacturer of such wool products or of one or more persons engaged in introducing such wool products into commerce, or in the offering for sale, sale, transportation, distribution, or delivery for shipment thereof in commerce, as "commerce" is defined in the Wood Products Labeling Act of 1939.

3. Failing to separately set forth on the required stamp, tag, label, or other means of identification the character and amount of the constituent fibers contained in the batting or padding of said wool products as provided by Rule 24 of the Rules and Regulations promulgated under said Act.

Providing that the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by Paragraphs (a) and (b) of Section 3 of the Wool Products Labeling Act of 1939.

Providing further, that nothing contained in this order shall be construed as limiting any applicable provision of said Act or the Rules and Regulations promulgated thereunder.

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 August 14, 1954].

IN THE MATTER OF

TOPCO ASSOCIATES, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (C) OF THE CLAYTON ACT AS AMENDED

Docket 6160. Complaint, Feb. 2, 1954—Decision, Aug. 17, 1954

Consent settlement order requiring a cooperative of 27 super markets and grocery chains, to cease accepting from any seller, commissions or brokerage in connection with the purchase of merchandise for its own account or when acting for a purchaser.

Before *Mr. Abner E. Lipscomb*, hearing examiner.
Mr. Edward S. Ragsdale and *Mr. Cecil G. Miles* for the Commission.
Bell, Boyd, Marshall & Lloyd, of Chicago, Ill., for respondent.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has been and is now violating the provisions of subsection (c) of Section 2 of the Clayton Act (U. S. C. Title 15, Section 13), as amended by the Robinson-Patman Act approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Topco Associates, Inc., hereinafter sometimes referred to as the respondent and as Topco, is a cooperative corporation, organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business located at 30 West Washington Street, Chicago, Illinois. It was incorporated on October 10, 1944 under the name of Food Cooperative, Inc. However, on or about June 14, 1949 the name was changed to Topco Associates, Inc. Its membership is composed of twenty-seven super markets and grocery chains located in various cities throughout the United States, which members in turn own or control approximately four thousand smaller stores. The respondent is a substantial factor in the purchase and distribution of food products.

PAR. 2. Respondent is authorized to issue 13,000 shares of 3% noncumulative preferred stock with a par value of $100 per share and 2,000 shares of common stock with a similar par value per share. As of August 16, 1951, it had issued and outstanding 7,040 shares of preferred stock and 1,400 shares of common stock. To be eligible for membership in the association, each member is required to subscribe to a minimum of 50 shares of the common stock which entitles it to one vote. In addition to the common stock each member is required to purchase preferred stock of the association in proportion to its reported sales volume, as described in Article 3, Sections 3 and 5 of the association's By-Laws amended to November 30, 1950.

PAR. 3. Topco was organized to engage principally in food procurement and to render advisory service to its members. It maintains facilities for procurement, research and quality control programs. Until about 1947 the respondent dealt almost exclusively in dairy products, principally cheese and butter. However, since that time it has expanded its operations to include frozen foods and canned fruits and vegetables. Topco's purchases for the fiscal year ended March 31, 1951 amounted to approximately $22,000,000. These purchases consisted principally of frozen foods such as fruit juices, berries, fruits, vegetables, chickens and sea foods, and nonfrozen foods consisting principally of corn, peas, tomatoes, green beans, peaches, coffee, cheese, butter, rice, and various other dry grocery food items, all of which are hereinafter referred to as food products.

Respondent is one of the largest distributors of food products in the Middle West. It purchases these products from a number of competitive sellers and has these products shipped or transported to its members located in various cities throughout the United States. The food products purchased by respondent are purchased principally, but not entirely, under the several private brands of respondent. Representative of such private brands are:

Food Club	Bo-Peep	Kol
Elna	Gaylord	Dog Club
Mel-O-Sweet	Top Frost	Top Speed
Hampshire	Baby Soft	Dartmouth

Top Frost, Hampshire and Dartmouth apply only to frozen foods.

Private brands, as referred to herein, designate brands utilized by respondent buyer as distinguished from those of the original sellers. These private brands identify the food products with the respondent buyer and permit the respondent buyer to promote the sale of these food products independently of manufacturers or sellers. Under such arrangement, the respondent buyer, as distributor, rather than the packers, manufacturers or original sellers, assumes the responsibility all the way through the channels of distribution to the consumer, and whatever good will is established for the product accrues to the respondent buyer and not to the original sellers. Respondent buyer determines the sales and pricing policies with reference to the sale and distribution of such food products purchased for its own account for resale, and makes a profit or suffers a loss on each transaction, as the case may be.

PAR. 4. In the course and conduct of its business from 1948 to the present time, the respondent has purchased direct from a large number of sellers at lower net prices, and one of the major items which determined these lower net prices was the elimination of the cost of brokerage and other sales expense. Normally, these sellers sold their products through brokers but in all, or substantially all, of their dealings with respondent, and at respondent's request and insistence, they sold it direct, and the savings in the cost of brokerage was reflected in the lower net prices granted respondent.

The brokerage customarily paid by the sellers to their brokers for effecting sales for them usually ranged from 2 to 5 percent, except on certain items such as rice on which the rate was 10 cents per hundredweight.

Topco was never at any time an agent of any of the sellers but acted at all times for or in behalf of itself or its members in the outright purchase of its food products for resale. In all or substantially all instances, the seller negotiated the sale with Topco direct without the aid of brokers, but shipped the products of the various members of Topco as instructed by respondent. The seller invoiced the goods to respondent, who remitted to the seller. Topco in turn invoiced or billed its respective members.

Among the methods employed by respondent in obtaining these lower net prices which reflect brokerage are the following:

(1) One method respondent devised in obtaining and arriving at these lower net prices was on the basis of what respondent termed a "cost plus" arrangement whereby the seller would furnish the respondent a break-down of the costs of his raw materials plus the cost of manufacture, cost of cans, cartons, packaging, etc., but excluding all sales expenses which included the cost of brokerage.

(2) Another method used in arriving at these lower net prices was by taking the seller's regular published price list at which he sold his products to his other customers and deducting the cost of brokerage therefrom.

An example of the manner in which respondent received a lower net price in lieu of, or which reflects, brokerage by buying direct was in the purchase of rice from Wonder Rice Mills, Inc. (formerly Adolphus Rice Mills, Inc.), of Houston, Texas. Respondent was for a time in 1950 receiving a base price 10 cents per hundredweight lower than the seller was charging its other customers who were buying through brokers, and this difference in price was the same, or approximately the same, the seller was paying its brokers who usually negotiated sales for it. It was customary for the seller to price and sell its rice at a specified amount per hundred-weight, plus a certain amount for packaging, usually referred to as "packaging mark-ups." In the early part of March 1951, however, the seller discontinued this difference in base price to respondent, but about the same time he continued this very same brokerage allowance to respondent by reducing his packaging mark-ups by an equal amount. The seller notified the respondent of the change in the method of allowing brokerage at the time the change was made.

Representative of a few of the suppliers from whom respondent made substantial purchases during 1950 and/or 1951 and from whom respondent received lower net prices in lieu of, or which reflect brokerage, are:

G. S. Suppiger Company, St. Louis, Missouri.
Wonder Rice Mills, Inc. (formerly Adolphus Rice Mills, Inc.), Houston, Texas.
Meeter Brother & Company, Union Grove, Wisconsin.
Purity Cheese Company, Mayville, Wisconsin.
Butterfield Canning Company, Muncie, Indiana.
Fireside Marshmallow Company, Chicago, Illinois.
Marshall Canning Company, Marshalltown, Iowa.

PAR. 5. In the course and conduct of its business the respondent purchased food products for resale from the above-named vendors, and many others, who, at respondent's direction, transported these food products from the several vendors' places of business located in various States of the United States to respondent's members located in many States different from the States in which the vendors were located. Such purchases and transportation of these food products were made during the three or four years last past.

PAR. 6. In receiving and accepting lower prices in lieu of, or which reflect, brokerage as hereinbefore alleged and described, the respondent in the course and conduct of its business in commerce, as "commerce" is defined in the aforesaid Clayton Act, has received and accepted something of value as a commission, brokerage or other compensation or allowance or discount in lieu thereof from numerous vendors in connection with the purchase of food products for its own account for resale during the three or four years last past.

PAR. 7. The acts and practices of the respondent as hereinabove alleged and described violate subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U. S. C. Title 15, Section 13).

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 August 17, 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

On February 2, 1954, the Federal Trade Commission issued its complaint against Topco Associates, Inc., charging that corporation with acts and practices in violation of the Clayton Act, as amended. Subsequent to service of this complaint upon the respondent, respondent, by its president and its attorney, entered into an agreement with counsel in support of the complaint, and, pursuant thereto, submitted to the hearing examiner a Stipulation For Consent Order.

In this stipulation respondent is identified as a corporation organized under the laws of the State of Wisconsin, with its office and principal place of business located at 431 South Dearborn Street, Chicago, Illinois. Respondent admits all the jurisdictional allegations set forth in the complaint and stipulates that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. The filing of an answer to the complaint and all further procedure before the hearing examiner and the Commission are expressly waived. Respondent agrees that the order hereinafter set forth shall have the same force and effect as if made after full hearing, presentation of evidence, findings and conclusions thereon, and specifically waives all right, power or privilege to contest the validity of said order. Said stipulation recites that it was executed for settlement purposes only; that its execution does not constitute an admission by respondent of the violations of law alleged in the complaint; that said complaint may be used in construing the terms of the order herein; and that said order may hereafter be altered, modified or set aside in the manner prescribed by law.

It is further agreed therein that said Stipulation For Consent Order, together with the complaint, shall constitute the entire record of this proceeding, and that the order contained therein may be entered upon the record, in disposition of this proceeding, without further notice.

In view of the provisions of the Stipulation For Consent Order as outlined above, it appears that the order contained therein will resolve all the issues arising by reason of the complaint in this proceeding, and will safeguard the public interest to the same extent as could be accomplished by full hearing and other adjudicative procedure waived in said stipulation. Accordingly, the hearing examiner, in consonance with the terms of said agreement, accepts the Stipulation For Consent Order submitted herein, and issues the order contained therein, as follows:

ORDER

It is ordered that the respondent, Topco Associates, Inc., a corporation and its officers, directors, associates or employees, directly or through any corporate or any other device, in connection with the purchase of food products or any other merchandise in interstate commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from: Receiving or accepting from any seller, directly or indirectly, anything of value as a commission, brokerage, or other compensation, reflected in a lower price, or otherwise, or any allowance, or discount in lieu thereof, on or in connection with purchases made for respondent's own account or for the account of any of its members, or while acting for or in behalf of a purchaser as an intermediate agent, or subject to the direct or indirect control of such purchaser.

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

IN THE MATTER OF

KAY WINDSOR FROCKS, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (D) OF THE CLAYTON ACT AS AMENDED

Docket 5735. Complaint, Jan. 25, 1950—Decision, Aug. 18, 1954

Order requiring two associated corporate manufacturers of women's and misses' dresses, with factories in Boston and Fall River, Mass., respectively, and common New York show rooms and a common manager, to cease violating Sec. 2 (d) of the Clayton Act as amended, by granting credits to certain customers as compensation for advertising services without advising their competitors that any advertising credit plan was in effect, and by granting credits to other customers at disproportionate unit rates and upon unequal minimum purchases.

Before *Mr. Clyde M. Hadley*, hearing examiner.

Mr. William H. Smith, *Mr. Peter J. Dias*, and *Mr. Richard E. Ely* for the Commission.

Mr. Bernard E. Singer, of New York City, and *Mr. J. J. Spiegel*, of Boston, Mass., for respondents.

ORDER ADOPTING INITIAL DECISION AS THE DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This case having come on for hearing before the Commission upon the appeal filed by the respondents from the initial decision of the hearing examiner; and

The Commission, for reasons stated in its opinion which is separately issuing herein, having determined that the appeal should be denied and that the findings as to the facts, conclusion and order contained in the initial decision are appropriate:

It is ordered that the respondents' appeal be, and it hereby is, denied.

It is further ordered that the initial decision of the hearing examiner, a copy of which is attached, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered that the 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.

Said initial decision, thus adopted by the Commission as its decision, follows:

INITIAL DECISION BY CLYDE M. HADLEY, TRIAL EXAMINER

Pursuant to the provisions 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), as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U. S. C., Sec. 13), the Federal Trade Commission on January 25, 1950, issued and subsequently served its complaint in this proceeding upon Kay Windsor Frocks, Inc., a corporation, Aaron Shapiro, individually and as its president and treasurer, Winnie Peck, Inc., a corporation, and Lou Swartz, individually and as its president and treasurer, charging them with violation of subsection (d) of Section 2 of said Act as amended. After the filing of answer to the complaint, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before the above-named trial examiner theretofore duly designated by the Commission, 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 trial examiner on the complaint, answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions presented by counsel, oral argument not having been requested; and said trial examiner, having duly considered the record herein makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. (a) Respondent Kay Windsor Frocks, Inc., is a Massachusetts corporation, with its office and principal place of business located at 75 Kneeland Street, Boston, Massachusetts.

(b) Respondent Aaron Shapiro, an individual, is the President and Treasurer of said respondent Kay Windsor Frocks, Inc., at the same address; and directs, controls and is responsible for its acts and practices.

(c) Respondent Winnie Peck, Inc., is a Massachusetts corporation, with its office and principal place of business located at Eddy Mill No. 1, Fall River, Massachusetts.

(d) Respondent Lou Swartz, an individual, is the President and Treasurer of said respondent Winnie Peck, Inc., at the same address; and during the time mentioned herein, has directed, controlled, and been responsible for its acts and practices.

PAR. 2. During the period of time from about September, 1948, to the present, respondents, have engaged in the business of manufacturing women's dresses in factories located in Massachusetts and of selling them to customers with places of business located in various States of the United States and in the District of Columbia, for resale within the United States. In the conduct of their business such dresses were shipped and caused to be transported by respondents from their factories to the places of business of said customers.

PAR. 3. During said period of time, Kay Windsor Frocks, Inc., owned 50% of the stock of respondent Winnie Peck, Inc., and acted as selling agent for that respondent. Both corporate respondents shared the same showrooms at 1350 Broadway and later 1400 Broadway, New York, N. Y., and employed the same individual as sales manager. Kay Windsor Frocks, Inc., maunfactured misses' sizes and Winnie Peck, Inc. manufactured ladies' sizes in the same or similar styles of dresses. The corporate respondents sold their merchandise to the same customers, at the same prices, and granted some customers advertising credits, based upon the size of the purchase of merchandise of either or both corporate respondents. The respondents proportionalized between themselves the credits so granted. In thus conducting their business, respondents jointly engaged in the acts and practices hereinafter found.

PAR. 4. In the course of their business in commerce, respondents sold their garments direct to retailers. In some cases such retailers placed their orders with respondents through buying syndicates and resident buyers, for whose services the retailer paid. In all instances the retailers were invoiced directly by the respondents; in all instances the merchandise was shipped directly to the retailer by the respondents, and in all instances payments were made directly by the retailers to the respondents. In those instances where credits were granted, they were granted directly by the respondents to the retailers. It is therefore found that all retailers to whom respondents sold their garments were customers of the respondents.

PAR. 5. During said period of time, in the course of selling their dresses in commerce, respondents granted or contracted to grant credits to various customers in consideration or as compensation for advertising services furnished or to be furnished by or through said customers in connection with their handling, offering for resale or resale of said dresses. Such credits were in reduction of the purchase prices of respondents' dresses which they sold to their customers.

PAR. 6. During the same period of time, in the course of selling their dresses in commerce, respondents did not offer or otherwise make available any advertising credits to other customers engaged in the resale of respondents' dresses.

PAR. 7. Respondents offered advertising credits to certain of their customers on the following basis: for off-season initial purchases of a minimum of 600 units, an advertising allowance of 25 cents per unit when advertised by the customer; or half the cost of the advertising, whichever was less. Notwithstanding the terms of this offer, such advertising credits were granted by respondents to customers who purchased much less, in varying amounts, than the so-called requisite 600-unit minimum initial purchase; the credits as granted by respondents varied in amount and percentage, often exceeding the prescribed 25-cent maximum, as, for example, 31, 33, 43, 44 and 50 cents per unit; and the stated limitation of such credits to off-season purchases was not enforced by respondents.

PAR. 8. It is found that such payment or consideration was not available to all customers on proportionally equal terms, in that respondents failed to advise some customers of the fact that any advertising credit plan was in effect, while to other customers, respondents granted credits at disproportionate unit rates, and upon unequal minimum purchases.

PAR. 9. Those customers of respondents to whom advertising credits were granted, offered or made available, were in competition in the sale of respondents' dresses with other customers of respondents to whom no advertising credits were granted, offered, or made available; and various customers of respondents to whom advertising credits were granted at disproportionate unit rates and for unequal minimum purchases were in competition with each other.

CONCLUSION

The acts and practices of the respondents as herein found violate subsection (d) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (U. S. C. Title 15, Sec. 13).

ORDER

It is ordered, That the respondents, Kay Windsor Frocks, Inc., Aaron Shapiro, individually and as president and treasurer thereof, Winnie Peck, Inc., and Lou Swartz, individually and as president and treasurer thereof, their representatives, agents, and employees, jointly or severally, directly or through any corporate or other device, in connection with the sale of any of respondents' dresses in commerce, as "commerce" is defined in the Clayton Act as amended, do forthwith cease and desist:

From paying or contracting to pay, or granting or contracting to grant, or allowing anything of value, including credits for advertising services, to or for the benefit of any customer as compensation or in consideration of any newspaper advertising or other services or facilities furnished by or through said customer in connection with the sale or offering for sale of respondents' dresses, unless such payments, credits, or allowances are available on proportionally equal terms to all other customers competing in the distribution of such dresses.

OPINION OF THE COMMISSION

Per Curiam:

This case comes before us upon the appeal of respondents from the initial decision of the hearing examiner, which held that respondents have engaged in acts and practices in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

The respondent corporations have engaged in the manufacture of cotton dresses which have been sold in commerce by the respondents to department stores, specialty shops and other retailers for resale to the public. The initial decision held, in effect, that the respondents had granted to some customers credits or payments in consideration for advertising services furnished by those stores in offering respondents' garments for sale and that credits or payments for such services were not available on proportionally equal terms or available at all to others competing in the distribution of respondents' dresses with the customers to whom payments were granted. Representatives of the respondents testified to the effect that the respondents' program of granting compensation for newspaper advertising was limited to crediting customers at the rate of 25¢ per garment purchased or one-half the cost of that advertising, whichever happened to be the lesser amount, in the event the customer (a) purchased on an initial order a minimum of 600 cotton dresses, and (b) made such purchase during certain off-season periods for sales promotions in January or immediately after Easter. As the initial decision in effect found however, the respondents did not adhere to those terms but, on the contrary, granted credits or compensation for advertising services to customers who bought much less than the requisite 600 minimum initial purchase and as granted by respondents these credits, in instances, varied in amount and percentage often exceeding the prescribed 25¢ maximum. Neither was the stated limitation to off-season purchases adhered to.

The evidence presented in this proceeding which is pertinent to the matters raised under the appeal relates primarily to sales made by respondents to stores located in New York City, Newark, New Jersey, and Hartford, Connecticut, and respondents, among other things, contend that the hearing examiner erroneously rejected certain findings proposed for his adoption and that he erred in those connections also in ruling that the practices engaged in by respondents in each of such areas were unlawful. Turning first to the New York City area, the evidence shows that the respondents' deliveries of their garments to one of their customers, Franklin Simon, upon its purchases extended from January 13, 1949, when an initial shipment exceeding 1400 garments was made, to June 30 of that year. During such period, Franklin Simon received in excess of $3,500 as credits toward their advertising of respondents' dresses and of this amount two credits totaling approximately $900 were accorded in June of that year. Two of the newspaper advertisements for respondents' lines of garments, as inserted by Franklin Simon, appeared on April 24, 1949, and May 22, 1949, both dates being subsequent to Easter of that year. Respondents' deliveries to R. H. Macy & Company, Inc., a retailer competing in the resale of their dresses, extended from April 18, 1949, the day following Easter, to June 17 of that year on its purchase of approximately 300 garments. The record clearly shows that R. H. Macy & Company, Inc., received no advertising allowances or credits, that none was offered to it and that the respondents did not inform that concern's representative as to any terms or conditions under which the customer might receive compensation or allowances for services in advertising respondents' garments.

In this connection, the respondents urge that it cannot be properly found that credits or compensation for advertising services were not available on proportionally equal terms to these two competing customers for the reason that R. H. Macy & Company, Inc., made no off-season purchases. However, the circumstance that one store may have made one or more off-season original purchases of more than 600 dresses prior to the time when its competitor did its buying and perhaps placed various reorders thereon does not justify the respondents' failure to inform as to the conditions under which credits would be granted or to offer allowances to R. H. Macy & Company, Inc., on terms proportionally equal to those being granted to its competitor.

We accordingly conclude that the hearing examiner correctly rejected those of respondents' proposed findings which were to the effect that the record fails to support conclusions that respondents' credits were not available among its New York City customers as required under the Act. Rejected also is the respondents' contention that the hearing examiner erred in concluding in effect that the Act requires that sellers must inform customers as to the terms under which they may receive compensation for services or otherwise offer such credits when they have been made available to resellers competing with such customers. Although the word "available" rather than "offered" appears in the relevant subsection of the Act, the statute contemplates that customers competing in the resale of a seller's merchandise be afforded equal opportunity to share in payments for promotional services in the event the seller elects in the first instance to provide it to one of their competitors. A course of conduct under which a seller fails to inform respecting such compensation or make known his terms or otherwise to offer them to one customer while granting payment for services to his rival reseller essentially represents concealment. In such case, the credit or allowance is not "available" to the unfavored competitor, for all practical purposes a withholding and denial of opportunity to share occur, and the law is violated.

In Newark, the respondents were selling their merchandise to three retailers. Of the two to whom no advertising credits were offered and who were not informed by respondents of conditions under which advertising credits could be received, one purchased directly from respondents and the other purchased through a resident buyer. The third, Kresge-Newark, made its purchases through Mutual Purchasing Syndicate. Illustrative of the respondents' several transactions with this concern was the group or bulk purchase made on March 18, 1949, for April 18th delivery which was placed by Mutual's subsidiary for 6,386 dresses. Respondents agreed to grant $1,645 in advertising credits and permitted Mutual to allocate that amount among the retailers whose names appeared on the distribution sheets. Kresge-Newark received an advertising credit of $150 on its purchase of 300 dresses representing a portion of that bulk purchase. To it and the other participating retailers, respondents shipped the merchandise directly and in all instances billed them for the merchandise and granted them credits directly. Payment for their dresses likewise came to respondents from the stores and not through Mutual. Respondents, however, contend that Mutual alone was the customer in these transactions and that the credits or payments made to Kresge-Newark have not been paid to a "customer" of respondents within the meaning of the Act.

In the circumstances here, however, whatever legal relationship and rights were created as between Mutual Purchasing Syndicate and the respondents as a result of their negotiations is not controlling to a determination as to whether the retail stores named at the outset to receive the merchandise and designated as future recipients of respondents' advertising credits were customers of the respondents.

Consummation of the transactions, as contemplated by Mutual Buying Syndicate and the respondents, necessarily entailed a course of direct dealing between the respondents and the merchants identified in the distribution sheets with respect to all essential phases of the transactions. In a very real sense therefore, each of the stores for which this group buyer was acting must be regarded as a "customer" of the respondents and the Commission accordingly is of the opinion that the challenged rulings of the hearing examiner relating to the practices engaged in by respondents in the Newark area are free from prejudicial error and that the objections thereto as interposed by the respondents in support of their appeal are without merit.

With respect to the Hartford area, several retailers were competitively engaged in the resale of the respondents' garments. Of the two customers who received advertising credits, one bought his merchandise from the respondents directly, the other made his purchases through Mutual, and in February, 1949, they were accorded credits of $77.24 and $75.00, respectively. Another of the respondents' Hartford customers was Blue Bird Shops, Inc. This purchaser received no credits or payments, it was not informed by the respondents of any program under which credits would be accorded by them and none was offered. Respondents contend that it cannot be properly concluded that credits were not available to this customer for the reason that it made no purchases in January. Although the record indicates that this customer made no January purchases, on its purchases it received March and early April deliveries prior to Easter, the date when one of the respondents' so-called off-season promotions was effective. Everything considered, it is evident from the record that credits and compensation for advertising services were not available on any terms to one competing customer in the Hartford area and that as between the two others which received payments, they received credits at differing or proportionally unequal rates per garment, neither of which rates reflected the 25¢ per unit amount which respondents have stated represented their unit rate. Respondents' objections to the conclusions reached by the hearing examiner in reference to these matters must be rejected.

The respondents contend that the order to cease and desist as contained in the initial decision is too broad in scope and that it is not sufficiently specific and they propose certain language of limitation for adoption into the order. It is not correct, as respondents in effect contend, that the order is deficient in specificity because of the similarity of its language and import to that of the subsection of the Act to which the respondents' violations of law relate. Since they are intended to prevent occurrence in the future of illegal activities and are prospective in their operation, the Commission's orders necessarily must be somewhat general in scope. To be effective, such orders must proscribe the unlawful practice or course of conduct typified by the acts performed in the past. Inasmuch as the prohibition of the order is directed to the respondents' practice of failing to make compensation for services or facilities available on proportionally equal terms during the course of their performance of the acts referred to in the initial decision and this commercial practice is the one with which the subsection here pertinent is concerned, the order is not to be regarded as unduly broad in its scope. It would not be in the public interest, however, to restrict the order as requested by respondents so that it would be applicable only to credits for advertising services. To do so, would exclude therefrom any payments in lieu of the aforesaid ones which the respondents might elect to provide in the future for other types of facilities or services similarly furnished by or through customers. With respect to respondents' additional request that a definition of the term "customer," as defined by the hearing examiner, be included in the order, it is to be noted that the initial decision has not undertaken to enumerate all situations under which the relationship of seller and customer may arise but instead sets forth the reasons why the retail stores which purchased through Mutual Buying Syndicate or through resident buyers must be regarded as customers of the respondents in the circumstances here. There appears no necessity, however, for incorporating in our order definitive language in general reference to seller-customer relationships. Moreover, the difficulties attendant to an undertaking to define all conditions of commercial dealing through which such relationship may be created are obvious. These requests of the respondents are not being granted.

Respondents contend also in connection with the foregoing matters that the order should specify in what fashion the respondents' allowances were not "available" and the manner in which they were not granted on proportionally equal terms. Counsel supporting the complaint do not oppose these particular requests and in the brief additionally offer for our consideration certain statements bearing on these matters which they suggest be appended to the order. First to be considered in these connections is the request, among others, of counsel supporting the complaint that the order to cease and desist as issued by the Commission be supplemented to the end that it in effect contain a description of the allowances not available heretofore from the respondents on proportionally equal terms and include in such category credits for services granted only upon initial minimum purchases of 600 garments. It is evident from the record that the respondents essentially had no uniform terms with respect to purchases and credits but granted credits to some and withheld offering them to competing retailers to accommodate their own purposes. On the other hand, the decision and rulings below have not determined whether this minimum purchase requirement, had it been uniformly imposed as a condition to the granting of credits to competing customers, would or would not have constituted proportionally equal terms among customers in the light of conditions prevailing in the women's apparel industry. The issues as framed by the pleadings and otherwise cannot be deemed to permit or require a decision on that question at this time. The requests of counsel supporting the complaint are not being granted.

Reverting now to the respondents' request for specificity, an instance previously noted in which allowances were not granted on proportionally equal terms by the respondents is revealed by the evidence which relates to the payments reflecting different rates per garment unit as accorded to two of the Hartford customers. The initial decision clearly identifies the competitive situations in which allowances were not "available" at all as being those in which customers in competition with grantees of respondents' credits were not offered credits or wherein there was a failure to inform as to terms under which they likewise could receive compensation for services. In connection with these situations, it is apparent that in instances unfavored customers (a) engaged in in-season resale of garments while in-season discounts were being granted to competing customers, or (b) made some purchases before Easter or during the course of one of the respondents' out-of-season promotional periods and resold competitively with other retailers who were contemporaneously receiving or who previously had been granted out-of-season credits on similar quantities purchased in the course of another sales promotion period. Having determined that an order broad enough to proscribe the unlawful course of conduct engaged in is fully warranted here, we likewise conclude that it would not be appropriate to restrict its application unduly and that no useful purpose would be served by granting the requests to supplement the order by adding reference to the specific acts from which respondents' violations of law have stemmed.

Subsequent to the date upon which the oral arguments of counsel were held before the Commission in this case, changes in the membership of the Commission have occurred. The determinations as made here are based on our consideration of the entire record and the Commissioners participating, who were not members at the time when such arguments were presented, have duly considered the official transcript of those arguments. The decision, as separately issuing here, adopts the initial decision as the decision of the Commission.

Commissioner Carretta did not participate in this case.