IN THE MATTER OF

BENJAMIN MALTZ AND MARSHALL MALTZ TRADING AS BENMAR SALES COMPANY

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

Docket 6128. Complaint, Oct. 26, 1953—Decision, Dec. 17, 1954

Order requiring an individual in Chicago to cease supplying push cards or other lottery devices designed for use in the sale of watches and other merchandise to the public, and selling merchandise by means of a game of chance, etc.

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

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

Mr. Asher Feren, of Chicago, Ill., for Marshall Maltz.

ORDERS AND DECISION OF THE COMMISSION

Order modifying initial decision and adopting such decision as modified and order to file report of compliance, Docket 6128, December 17, 1954, follows:

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

The Commission having determined that the contentions urged by that respondent in support of the appeal are without merit and that the appeal should be denied; and

The Commission, for reasons stated in its opinion which is separately issuing herein, having additionally determined that the findings as to the facts and conclusion contained in the initial decision are free from substantial error and should be adopted but that the provisions of the order to cease and desist as contained in the initial decision are inappropriate and that the record requires that they be modified:

It is ordered, That the appeal from the initial decision be, and it hereby is, denied.

It is further ordered, That the prohibitory language of the order to cease and desist as contained in the initial decision be, and it hereby is, modified to read as follows:

It is ordered, That respondent Marshall Maltz, individually and trading under the name of Benmar Sales Company, or under any other name or names, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches or other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others push cards, punchboards, or other lottery devices, either with other merchandise or separately, which said push card, punchboards, or other lottery devices are designed or intended to be used in the sale or distribution of said merchandise to the public.

2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

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

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

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on October 26, 1953, issued and subsequently served its complaint upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. Respondents filed their answer in due course whereupon hearings were held at which testimony and other evidence in support of, and in opposition to, the allegations of said complaint were received by the above-named Hearing Examiner theretofore designated by the Commission, said testimony and evidence being duly recorded and filed in the office of the Commission.

Thereafter the proceeding came on for final consideration by the Hearing Examiner on the complaint, the answer, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel, oral argument not having been requested; and the Hearing Examiner, having duly considered the record herein, finds that this proceeding is in the public interest and makes the following findings as to the facts, conclusions drawn therefrom, and order:

FINDING AS TO THE FACTS

PARAGRAPH 1. Respondent, Marshall Maltz, is an individual trading as Benmar Sales Company, having his principal place of business at 633 South Plymouth Court, Chicago, Illinois, and is now, and for more than six months prior to issuance of the complaint has been, engaged in the sale of watches and clocks, causing said merchandise when sold to be transported from his place of business aforesaid to purchasers located in the various states of the United States other than the State of Illinois, and in the District of Columbia, in the doing of which respondent has engaged in a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent, Benjamin Maltz, (who is the father of Marshall Maltz), is named and charged as a co-partner with his said son but the record wholly fails to substantiate this allegation of co-partnership, or his participation as a principal in the business, the testimony concerning which is hereinafter reviewed in Paragraph *Four*, and on the basis of such review and finding thereon the complaint as to Benjamin Maltz will be dismissed.

The Business Activities

PAR. 2. In the conduct of his aforesaid business respondent Marshall Maltz, to effect and facilitate sale of his merchandise, furnishes various plans of merchandising which involve operation of games of chance, gift enterprise or lottery schemes typical of which is the following:

Respondent has distributed to operators and members of the public certain literature and instructions including so-called "push cards," order blanks and circulars containing illustrations and descriptions of the merchandise, as also respondent's plan of selling and distributing same and alloting certain premiums or prizes to the operators of the push cards; the literature and plan also describes the prizes to members of the purchasing public who pay for chances or "pushes" on said cards. As example: One of said push cards bears eighty-eight proper names, singly imprinted on a partially perforated disc, with ruled columns on the reverse side of the card for recording the name of the purchaser of the "push" corresponding to the name selected. Concealed within each disc is the number which determines the price of the chance (none higher than 49¢) and which is disclosed only after the purchaser pushes and separates the disc from the card. The card also has a larger master seal concealed wherein is one of the names appearing on the disc and the purchaser selecting the name corresponding with the one under the master disc receives, as a prize, a watch. Said card bears the following printed matter or instructions:

LUCKY NAME UNDER SEAL RECEIVES CHOICE OF
EITHER THE LADIES' OR GENTS'

BENRUS WATCH

Official watch of famous airlines

FOR AS LITTLE AS 5¢
and Not More Than 49¢

17 Jewels. Handsome 10K Natural
Gold Rolled Plate Case Raised
Unbreakable Crystal. Gold Applied
Dial. Matching Expansion Band
Beautiful Gift Box

Every Watch has the World Famous
Benrus Guarantee

Nos. 1–2 FREE. No. 3 Pays 5¢ (Master
All Other Nos. Pay 49¢-None Higher Seal)

Push Out with Pencil—Do not Open Seal Until
Entire Card Is Sold.

Sales of respondent's merchandise by means of said push cards are made in accordance with the foregoing scheme, and whether the purchaser receives an article of merchandise, or nothing, for the money he paid, as well also the amount he is required to pay, are thus determined by lot or chance. The articles of merchandise thus awarded by chance have a value substantially greater than the price paid for the chance or push.

PAR. 3. The persons to whom respondent furnishes said push cards use the same in selling and distributing respondent's merchandise in accordance with his sales plan and respondent thus supplies and places in the hands of others the means of conducting games of chance, gift enterprises or lottery schemes in the sale of merchandise, a practice contrary to the established policy of the Government of the United States. Many persons are attracted by said sales plans and the element of chance involved therein and are thus induced to buy and sell respondent's merchandise.

Aside from the direct admission of sales by the respondent, there was stipulated into the record by counsel a specific instance of an interstate sale by respondent to an individual resident in Culver, Indiana, who disposed of merchandise according to the push card sales plan of respondent; that he, the purchaser, upon collecting the sum prescribed on the card remitted same to the respondent and in return received from respondent two watches, one of which he delivered to the purchaser who drew the "lucky number" on the push card, and the other watch he retained for himself as compensation for selling and disposing of the chances on the card.

As to Respondent Benjamin Maltz

PAR. 4. The testimony of Benjamin Maltz concerning his connection with the enterprise, fully corroborated by Marshall Maltz and unquestioned and uncontradicted by anything of record discloses:

Benjamin Maltz is engaged in the printing business at No. 940 Winona Street, Chicago, Illinois, and in his capacity as a printer produced the push cards which are the subject of this inquiry; that it was originally contemplated, (in the Fall of 1952), he and his son Marshall Maltz would form a co-partnership to engage in this business but it eventuated that he, Benjamin, was unable to make the necessary contribution toward capital requirements whereupon Marshall Maltz raised the necessary capital, had his own bank account and proceeded with operations on his own and separate account; Benjamin Maltz is, however, familiar with the operation of the business, he, as well also his wife, assisting their son Marshall in the daily operation of the business but only in the capacity of hired assistants; he testified concerning the details of operations; the extent of the mailings, (several of 100,000 each and in one instance over half a million); the method of operation of the push cards; related how some of the card purchasers disposed of merchandise by use of the cards and that although the business had been in operation but a comparatively short while it had sold $50,000.00 of merchandise; that he printed and produced the push cards used by respondent Marshall Maltz but did not have other customers for push cards, nor did he sell or ship cards to others, his dealings therein being limited to filling the requirements of respondent Marshall Maltz, they both operating their respective businesses in the City of Chicago; he was emphatic in stating that he has no financial interest in the business, never having "put any money into it"; that he does not share in the profits but is paid for whatever assistance he renders. Upon conclusion of the foregoing testimony of Benjamin Maltz counsel supporting the complaint called as a witness respondent Marshall Maltz who testified that the answers he would make to all of the questions propounded to his father would be substantially the same if such questions were propounded to him.

The Hearing Examiner, observing the demeanor, attitude, appearance and frankness of the two witnesses was sufficiently impressed with their truthfulness which, coupled with the circumstance of complete absence of contradictory evidence, real or inferential, compels him to find, as a fact, that Benjamin Maltz is not, and never was, a co-partner as alleged; that co-partnership is never inferred nor arises by operation of law but must be a voluntary act of the parties and that all of the legal elements and indicia necessary to constitute such must be present, none of which exists under the facts disclosed by this record, wherefore the complaint as to Benjamin Maltz will be dismissed.

CONCLUSIONS

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

On the basis of the facts above found, there has been a total failure of proof to sustain the allegations of the complaint as to respondent Benjamin Maltz, wherefore, as to him, the complaint will be dismissed.

ORDERS

It is ordered, That respondent Marshall Maltz, individually and trading under the name of Benmar Sales Company, or under any other name or names, and his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches or other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others push cards, punchboards, or other lottery devices, either with other merchandise or separately, which said push cards, punchboards, or other lottery devices are designed or intended to be used in the sale or distribution of said merchandise to the public.

2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to respondent Benjamin Maltz.

OPINION OF THE COMMISSION

By MEAD, Commissioner:

The initial decision of the hearing examiner held that respondent Marshall Maltz, hereinafter referred to as the respondent, has engaged in unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act, and this matter comes before the Commission upon the appeal filed by that respondent from the initial decision.

The complaint under which this proceeding was instituted, alleges that the foregoing respondent and another individual have engaged as co-partners in soliciting the sale of and selling watches and other merchandise, and, in such connection, furnished plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when such merchandise is sold and distributed to the purchasing public. Distributed and furnished by the parties named, the complaint additionally charges, has been advertising literature comprising order blanks, push cards and circulars containing instructions for distributing the merchandise by means of allotting it as premiums to the operators of the cards and as prizes to members of the public purchasing chances or pushes thereon. After the filing of answer, testimony and other evidence were received into the record during the course of a hearing before the hearing examiner.

The initial decision held that the evidence received in the proceeding fully sustained the allegations of the complaint as they refer to the respondent Marshall Maltz, the appellant here, and concluded, as noted previously, that the acts and practices engaged in by him were in violation of law. We mention in passing, too, that it was found below that the charges insofar as they related to the party additionally joined in the proceeding lacked adequate support particularly in reference to the nature of his participation in the practices. Provision, accordingly, was made for dismissal of the complaint as to him and there being no appeal from that ruling, further reference to this aspect of the proceeding is not warranted.

It was held additionally in the initial decision that persons to whom the respondent has furnished push cards have used them in selling his merchandise in accordance with the sales plan, and that the respondent thus supplies and places in the hands of others the means of conducting games of chance, gift enterprises, and lottery schemes in the sale of merchandise, which is a practice contrary to the established policy of the Government of the United States. The appeal contends that the foregoing conclusions lack adequate support in the record for the reason that no evidence was presented showing how many persons have been attracted by this plan and method and that there was no evidence that the sales plan has constituted a lottery or scheme which was contrary to established public policy. Challenged and excepted to as likewise unsupported by the record and assertedly based on conjecture and guess are related conclusions appearing in the initial decision to the effect that, under the program, the articles are awarded by chance and the amounts paid for pushes or chances likewise so determined, and that the articles awarded have been of greater value than prices paid for a chance or push.

The exhibits received into evidence attest that the chances or pushes available on the respondent's cards have ranged from free ones up to those calling for maximum payment of 49¢. On a typical push card and elsewhere in the literature, a value of $39.75 is ascribed to each of the watches. There accordingly can be no doubt but that the sales program comprises a lottery and game of chance. Supplying the means of conducting lotteries in the sale of merchandise is a practice contrary to the established public policy of the United States. *Jaffe* v. *Federal Trade Commission*, 139 F. 2d 112 (C. A. 7, 1943).

Although there is no arithmetical computation in the record as to the number of persons who have been attracted by and accepted the respondent's invitation to use his sale program, it was stipulated between counsel in the course of the hearing that a Culver, Indiana, customer, if called in this proceeding, would testify that he circulated the push card received by him from the respondent and that he awarded merchandise thereafter purchased from the respondent in the manner counseled in the advertising literature. In excess of 500,000 mailings of the advertising literature, including the push cards, have been made and the respondent has sold and shipped a substantial amount of merchandise in commerce. The respondent's push cards are clearly designed and obviously intended for use in the distribution of his merchandise and consideration of the exhibits compels conclusions that the persons to whom they were furnished by the respondent generally or in a substantial number of instances used them in accordance with his plan and program. Furthermore, it would be absurd to assume that the respondent would continue to engage in the empty and financially wasteful practice of enclosing push cards with various of his mailings of literature if such cards were not used in the manner intended. *In the Matter of Seymour Sales Company, et al.*, Docket No. 6060 (Decided November 25, 1953).

Without merit also is the respondent's contention that the decision in *United States* v. *Halseth*, 342 U. S. 277 (1952), precludes legal conclusions that the respondent's practices constitute a lottery or contravene public policy. That case involved an appeal from a criminal indictment for alleged violation of the Postal statutes. The question before the Court was "whether the mailing of gambling paraphernalia that may be used to set up a lottery or similar scheme in a violation of the statute" upon which the indictment was based. There was no determination that the sales plan or method involved did not constitute unfair acts and practices in violation of the Federal Trade

Commission Act. That decision is nowise dispositive of the issues here. *Seymour Sales Co., et al. v Federal Trade Commission*, 216 F. 2d 633 (C. A. D. C. No. 12064, November 4, 1954).

The respondent additionally urges that, because the standards of the Federal Trade Commission Act are assertedly vague and indefinite and provision lacking for adjudicating the fairness or unfairness of particular practices by means of jury trials, any sanctions which may be imposed under the Act should be deemed to impinge upon the due process clause of the Fifth Amendment to the Constitution. We think there is no merit in the contention that the Act is unconstitutional. *Sears Roebuck & Company* v. *Federal Trade Commission*, 258 Fed. 307 (C. A. 7, 1919); *Federal Trade Commission* v. *A. McLean & Sons*, 84 F. 2d 910 (C. A. 7, 1936).

Although we are denying the appeal, we have noted in the course of our consideration of this matter that the proscriptions of the order contained in the initial decision are not entirely responsive to the complaint. As stated previously, the complaint charges that the respondent in connection with soliciting sales of and selling his merchandise, has engaged in unfair acts and practices in commerce by furnishing various merchandising plans which involve the operation of games of chance, gift enterprises and lottery schemes when such merchandise is distributed to the consuming public. The complaint accordingly does not expressly charge that the respondent has engaged in unfair acts and practices in connection with the sale of push cards; but the order contained in the initial decision proposes, however, to forbid their sale and distribution. In the circumstances, we think that the provisions of the order should have been directed instead to forbidding the respondent from supplying or placing such devices in the hands of others in connection with the offering for sale, sale or distribution of the respondent's merchandise and from otherwise disposing of merchandise by means of a game of chance, gift enterprise, or lottery scheme. The order is being modified accordingly.

IN THE MATTER OF

RAM MANUFACTURING CORP. ET AL.

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

Docket 6207. Complaint, May 27, 1954—Decision, Dec. 17, 1954

Consent order requiring a seller in New York City to cease representing falsely on labels and tags that its jackets and outer coats, resembling in color, pattern, and style those issued to members of the U. S. Armed Forces, were manufactured for the Armed Forces and in accordance with their specifications; and dismissing a charge that it represented itself falsely to be a manufacturer.

Before *Mr. John Lewis*, hearing examiner.

Mr. Terral A. Jordan for the Commission.

Chambers & Chambers, of New York City, for respondents.

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 Ram Manufacturing Corp., a corporation, and Harry I. Spiewak, Albert Spiewak and Fred Roth, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ram Maunfacturing Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 1150 Broadway, New York, New York. Respondents Harry I. Spiewak, Albert Spiewak and Fred Roth are respectively President and Treasurer, Secretary, and Vice President of said corporate respondent. These individuals acting in cooperation with each other formulate, direct and control all of the policies, acts and practices of said corporation. Their address is the same as that of corporate respondent.

PAR. 2. Respondents are now, and have been for more than two years last past, engaged in the sale and distribution of jackets and outer coats to wholesalers and dealers in commerce, among and between the various States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said garments, in commerce, among and between the various States of the United States.

PAR. 3. The garments sold and distributed by respondents in the course and conduct of their business as aforesaid closely resemble the jackets and outer coats issued and furnished to members of the United States Armed Forces in color, pattern and style. Respondents also cause to be affixed to said garments certain markings, insignia, labels and tags which purport to designate the branch of service, model, contract number, specification number, stock number and directions as to the manner of use in substantially the same form, kind and manner as the markings, insignia, labels and tags prescribed and used by the United States Armed Forces on similar and like garments. Typical of the words and terms appearing on the markings, labels and tags are:

JACKET, TYPE B-15
Q. M.-O. D.-1953
SPEC. 9X-1540 N. Y. C.
STOCK NO. 1150-B-1112

THIS JACKET INCREASES GREATLY THE WARMTH OF CLOTHING WORN UNDER IT IN COLD AND TEMPERATE CLIMATES BECAUSE IT IS *WINDPROOF.*

Typical of insignias on said garments is that of the Army Air Forces under which the words "Army Air Forces" appear.

PAR. 4. Through the use of said colors, patterns and styles and the markings, insignia, labels and tags, as described in Paragraph Three hereof, respondents have represented and implied and do represent and imply that said jackets and outer coats, sold and distributed by them in commerce were manufactured for the United States Armed Forces and in accordance with specifications of said Armed Forces.

PAR. 5. Said representations and implications are false, misleading and deceptive. In truth and in fact, respondents' said garments were neither manufactured for the United States Armed Forces nor in accordance with specifications of said Armed Forces.

PAR. 6. By selling and distributing to wholesalers and dealers said products manufactured as aforesaid and having affixed to them the markings, insignia, tags and labels hereinabove described, respondents furnish to such wholesalers and dealers the means and instrumentalities through and by which they may mislead and deceive the purchasing public as to the origin, kind, type, and style of their said jackets and outer coats.

PAR. 7. Through the use of the words "manufacturing," "Mfrs. of," and "factory and receiving department," in their corporate name and on their stationery, invoices and price lists, respondents have represented and are now representing that they own, operate or control a factory or factories where their said merchandise is manufactured, and that they are the manufacturers of such merchandise. In truth and in fact, neither the corporate respondent nor any of the individual respondents own, operate or control a factory wherein is manufactured the merchandise sold and distributed by respondents.

PAR. 8. There is a perference on the part of wholesalers and dealers for dealing directly with manufacturers of products rather than with outlets, distributors, jobbers or other intermediaries such preference being due in part to a belief that by dealing directly with the manufacturer, lower prices and other advantages may be obtained.

PAR. 9. In the course and conduct of their business respondents are in direct and substantial competition with other corporations and firms and individuals engaged in the sale in commerce of jackets and outer coats.

PAR. 10. The sale and distribution in commerce of said garments in the color, style, design and with markings, as hereinabove alleged, has had and now has the tendency and capacity to and does mislead a substantial portion of the purchasing public into the belief that said garments were manufactured for the United States Armed Forces and in accordance with specifications of said Armed Forces, and the use of the words "manufacturing," "Mfrs. of," and "factory and receiving department" in their corporate name and on their stationery, invoices and price list, as herein alleged, further misleads the wholesalers and dealers who purchase the merchandise of the respondents into the erroneous mistaken belief that respondents are the manufacturers of their merchandise and own, operate or control the plant or plants where such merchandise is manufactured and into the purchase of substantial quantities of respondents' merchandise in commerce because of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

PAR. 11. The aforesaid acts and practices of the respondents, as herein alleged, are all to the prejudice and injury 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.

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 December 17, 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

The Federal Trade Commission issued its complaint against the above-named respondents on May 27, 1954, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the provisions of the Federal Trade Commission Act. After being duly served with said complaint, the respondents appeared by counsel and filed their joint answer on June 23, 1954. Thereafter a stipulation, dated August 11, 1954, was signed by the parties, providing for the entry of a consent order disposing of one of the two principal charges in the complaint. Respondents, pursuant to said stipulation, have admitted all the jurisdictional allegations of the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. Said stipulation provides that the answer heretofore filed by respondents is to be withdrawn as to the issues disposed of by such stipulation and that the parties expressly waive a hearing before the Hearing Examiner or the Commission, and all further and other procedure to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission. Respondents have agreed that the order to cease and desist issued in accordance with said stipulation shall have the same force and effect as if made after a full hearing and specifically waive any and all right, power, or privilege to challenge or contest the validity of said order. It has also been stipulated and agreed that the complaint herein may be used in construing the terms of the order provided for in said stipulation and, further, that the signing of said stipulation is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as to those issues disposed of by the stipulation.

The aforesaid stipulation for consent order, after being approved by the Director and Assistant Director of the Commission's Bureau of Litigation, was submitted to the above-named Hearing Examiner for his consideration, in accordance with Rule V of the Commission's

Rules of Practice. Following the submission of said stipulation, counsel in support of the complaint filed a motion on October 12, 1954, requesting that the remaining charge in the complaint be dismissed, without prejudice, for the reason that counsel does not have any information presently available to controvert the facts with respect thereto, submitted by respondents in the form of an affidavit

This proceeding having now come on for final consideration by the above-named Hearing Examiner, heretofore duly designated by the Commission, on the complaint; the answer of respondents, which is hereby deemed withdrawn as to the charge covered by the stipulation for consent order; the said stipulation for consent order, which is hereby accepted and ordered filed as part of the record herein; and the motion of counsel supporting the complaint to dismiss the remaining portion of the complaint, as to which no opposition has been filed; and said Hearing Examiner having duly considered the record herein, makes the following findings, for jurisdictional purposes, and order:

1. Respondent Ram Manufacturing Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 1150 Broadway, New York, New York. Respondents Harry I. Spiewak, Albert Spiewak and Fred Roth, are, respectively, President and Treasurer, Secretary, and Vice President of said corporate respondent. The address of said individual respondents is the same as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondents Ram Manufacturing Corp., a corporation, and Harry I. Spiewak, Albert Spiewak and Fred Roth, individually and as officers of said corporate respondent, and respondents' agents, representatives and employees, directly or through any corporate or other device, in the offering for sale, sale or distribution of wearing apparel, or of any 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, by marking, branding, labeling, tagging, or in any other manner, that such merchandise was manufactured for the Armed

Forces of the United States or in accordance with specifications of said Armed Forces.

It is further ordered, That the allegations of the complaint charging that said respondents have violated the Federal Trade Commission Act by representing that they own, operate or control manufacturing facilities be, and the same hereby are, dismissed without prejudice.

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 December 17, 1954].

IN THE MATTER OF

RICHARD H. DAVIMOS AND CASPER PINSKER, JR., TRADING AS ORCHIDS, ETC.

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

Docket 6129. Complaint, Oct. 27, 1953—Decision, Dec. 18, 1954

Consent order requiring two partners doing business in Harrison, N. J., and New York City, to cease representing falsely in advertising the kind and qualities of the orchids they sold, the properties and effectiveness of their chemical soil conditioner "Loamium", and that their private business was a "guild".

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

Mr. Terral A. Jordan for the Commission.

Mr. Harry T. Davimos, of Newark, N. J., for respondents.

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 Richard H. Davimos and Casper Pinsker, Jr., individually and as copartners, trading under the names of Orchids, Orchid Guild, and White House Company, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Richard H. Davimos and Casper Pinsker, Jr., are individuals trading and doing business, or have traded and done business, as a copartnership under the names of Orchids, Orchid Guild, and White House Company with their principal office and place of business located at 2 Kingsland Avenue, Harrison, New Jersey, and also doing business at 8 East 54th Street, New York, New York.

PAR. 2. The respondents have engaged in the sale and distribution of orchid plants and have sold and distributed and are presently selling and distributing a combination chemical soil conditioner and plant fertilizer designated as "Loamium." Respondents have caused and presently cause said products when sold to be transported from their aforesaid place of business in the State of New Jersey to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of their said business, respondents, by means of statements and depictions appearing in advertising inserted by them in newspapers and by means of circulars and other advertising matter represented, directly or by implication:

1. That the orchid plants sold and delivered by them will produce flowers of the beauty, coloring, conformation, size, value and other characteristics commonly associated with a species of cattleya orchid or a hybrid orchid involving a species of cattleya or an orchid of a species having similar characteristics.

2. That said orchid plants will bloom within a short time after receipt by the purchaser.

3. That the blooms will be the same as those costing \$5 to \$20 at floral shops.

4. Through the use of the word "guild," that respondents' business is an association of persons or corporations with kindred pursuits or common interests formed for furthering some common interest and operated without profit.

PAR. 4. The statements and depictions appearing in said advertising matter were false, misleading and deceptive. In truth and in fact:

1. Respondents' orchid plants were of a species capable of producing only small, relatively dull colored flowers and of little monetary value. Such flowers are wholly inferior to and in no wise comparable in value to the cattleya orchid or a hybrid orchid involving a species of cattleya or other species of orchid having characteristics similar to the cattleya or cattleya hybrid species.

2. It is highly improbable that said orchid plants would bloom within a short time, or even during the entire season, after receipt by the purchaser.

3. The blooms produced by respondents' plants are inferior to those commonly sold in flower shops for the sum of \$5 or more.

4. Respondents' business organization is not properly characterized as a guild but is a commercial enterprise maintained, existing and operating for a profit.

PAR. 5. Respondents' product Loamium is a combination chemical soil conditioner and commercial fertilizer.

The formula for Loamium is 15% hydrolized—polyacrylonitrile; 20% fertilizer of which 5% is nitrogen, 10% phosphoric acid and 5% potash; and 65% inert ingredients.

The directions for use are that one part of Loamium be diluted in 40 parts of water and sprinkled on with a watering can or sprayed on with proportioners.

PAR. 6. Further, in the course and conduct of their said business, and for the purpose of inducing the purchase of Loamium, respondents have made and are making many statements and representations concerning said product by means of advertisements in newspapers having national circulation and by the aforesaid statements appearing on the label of said product. Among and typical of said statements and representations appearing in newspapers, but not all inclusive thereof, are the following:

> Amazing new "Loamium" changes hard clay or sandy soil into rich, fertile loam—overnite!
>
> One gallon of Loamium makes 40,000 pounds of rich, fertile nourishing top soil!
>
> See for yourself the incredible difference in soil texture.
>
> No raking. No spading. No hoeing. Just sprinkle on!
>
> . . . one gallon diluted in water will transform up to 2000 square feet of dead, lifeless soil into the richest, most nourishing expensive loam.
>
> See how dry, caked dirt has become rich porous loam 6 inches deep.
>
> . . . a special penetrant in Loamium makes even the hardest packed clay absorb it instantly.

PAR. 7. Through the use of the statements and representations in connection with Loamium hereinabove set forth and others similar thereto, but not specifically set out herein, respondents represent and have represented, directly or by implication:

A. That said product changes soil texture and changes hard clay or sandy soil into loam and makes top soil.

B. That said product diluted with water and sprinkled on the surface will effectively condition the soil.

C. That one gallon of said product will condition 2,000 square feet of soil to a depth of six inches.

D. That said product contains a special penetrant which forces it into the soil.

PAR. 8. The foregoing claims, statements and representations with respect to Loamium are grossly exaggerated, false and misleading. In truth and in fact:

A. Said product will not change soil texture and will not change hard clay or sandy soil into loam and will not make top soil. Chemical soil conditioners such as said product do nothing more than affect soil structure. They stabilize aggregates that already exist or that are formed by mechanical manipulation of the soil.

B. Said product diluted in water and sprinkled on the surface will not effectively condition the soil. On the contrary, the soil must be prepared, worked or manipulated and the product thoroughly mixed with the soil mass with which it is to react in order to be effective.

C. One gallon of said product is wholly insufficient to condition 2,000 square feet of soil to a depth of six inches. Even minimum effective conditioning of said area and depth would require many times more than one gallon of Loamium. The exact amount would vary considerably depending upon the nature and condition of the soil and the degree of structural improvement sought.

D. Loamium does not contain a penetrant which forces it into the soil.

PAR. 9. Respondents, in the conduct of their said business, as aforesaid, have been and are in substantial competition in commerce with corporations and with other individuals and partnerships and others engaged in the sale of orchid plants and soil conditioners and fertilizers.

PAR. 10. The use by respondents of the aforesaid false and misleading statements, representations and pictorial depictions has had and now has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the statements, representations and pictorial depictions were and are true and to induce the purchase of substantial quantities of respondents' said products by reason of such erroneous and mistaken belief. As a result thereof, trade has been unfairly diverted and is now being diverted to respondents from their competitors in commerce and substantial injury has been and is being done to competition in commerce.

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

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 December 18, 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

The complaint in this proceeding charges the respondents with unfair and deceptive acts and practices in violation of the Federal Trade Commission Act, in the advertising of two products: orchid plants, and a chemical soil conditioner and plant fertilizer designated "Loamium."

On October 18, 1954, respondents entered into an agreement with counsel supporting the complaint, and, pursuant thereto, submitted to the hearing examiner a stipulation for a consent order disposing of all the issues in this proceeding.

Respondents are identified as individuals and copartners doing business as Orchids, Orchid Guild, and White House Company, located at 2 Kingsland Avenue, Harrison, New Jersey.

Respondents admit all the jurisdictional allegations set forth in the complaint, and stipulate that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. Respondents, in effect, request that their answer to the complaint herein, filed on November 20, 1953, be withdrawn, and expressly waive the filing of an answer to the complaint and further proceedings before the hearing examiner or the Commission.

It is stipulated that the signing of this stipulation is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

Respondents agree that the order contained in said stipulation shall have the same force and effect as if made after full hearing, presentation of evidence, and findings and conclusions thereon, and expressly waive all right, power and privilege to contest the validity of said order. Said stipulation recites that said complaint may be used in construing the terms of said order, and that said order may be altered, modified or set aside in the manner provided by statute for orders of the Commission.

It is specifically agreed that said Stipulation For Consent Order, together with the complaint, shall constitute the entire record in this proceeding. Inasmuch as this initial decision, and the decision of the Commission, if it affirms such initial decision, must hereafter also become part of the record, the aforesaid provision of the stipulation is interpreted to mean that it is agreed that the complaint and Stipulation For Consent Order shall constitute the entire record upon which the initial decision herein shall be based. It is further agreed that the order contained in said stipulation may be entered without further notice upon the record, in disposition of this proceeding.

The terms of the proposed order to cease and desist relating to the advertising of orchid plants are the same as those contained in the order accompanying the complaint. There are, however, variances between the order to cease and desist accompanying the complaint and the order proposed in the stipulation. The attorney supporting the complaint, in his memorandum transmitting the Stipulation For Consent Order to the hearing examiner, explains and justifies these variances, as follows:

"The terms of the order, * * *, as agreed to in the said Stipulation insofar as it relates to the sale and distribution of the combination chemical soil conditioner and fertilizer, designated Loamium, have been changed to reflect more recent information on the subject and to conform to the provisions of the Commission's very recently promulgated trade practice rules for the Chemical Soil Conditioner Industry. Chemical soil conditioners are a comparatively new product on the market and additional information respecting their possible uses, method of application and results has become increasingly available since this case was investigated and complaint issued. The Commission's trade practice conferences for this industry developed and clarified a great deal of this information so that it has been possible to redraft the proposed order set forth in the complaint and make its terms entirely consonant with the said trade practice rules.

* * * * * * *

"It is believed that the order which has been revised as to Loaminum is more nearly consonant with the Commission's trade practice rules for the Chemical Soil Conditioner Industry, is more accurate in light of recent developments in the Industry and will inhibit the false, misleading and deceptive representations stated in the complaint while permitting truthful statements respecting said product."

In view of the provisions of the stipulation as outlined above and the statements and explanations presented by counsel supporting the complaint, it appears that the Stipulation For Consent Order should be accepted and that such action, together with the issuance of 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 all 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; grants respondents' request that their answer to the complaint herein, heretofore submitted, be withdrawn; and issues the following order:

It is ordered, That respondents, Richard H. Davimos and Casper Pinsker, Jr., individually and as copartners, trading as Orchids or Orchid Guild, or under any other name, 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 their orchid plants in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

1. Misrepresenting the kind and type of orchid plants offered for sale and sold by them;

2. Misrepresenting the time within which their orchid plants will bloom;

3. Misrepresenting the retail value of the flowers which their orchid plants will produce;

4. Using the word "guild" or any other word of similar import or meaning as a part of a trade name, or otherwise, or representing in any other manner that respondents' business is other than a commercial enterprise operated for profit.

It is further ordered, That said respondents, Richard H. Davimos and Casper Pinsker, Jr., individually and as copartners trading as the White House Company, or under any other name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of their combination soil conditioner and fertilizer, designated Loamium, or any other product of substantially similar composition or possessing substantially similar properties, do forthwith cease and desist from representing directly or by implication:

1. That said product will change soil texture or change the clay, sand, silt ratio of soil or add to the soil elements other than those contained in said product;

2. That said product will effectively form and stabilize soil aggregates without revealing the extent to which the soil must be cultivated or the degree to which the product must be worked into the soil to effect the formation and stabilization of soil aggregates to the extent represented to result from the use of said product;

3. That any smaller amount of said product is needed to condition a given area of soil to a given depth than is actually required;

4. That said product contains a soil penetrant, when such is not a fact.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That respondents Richard H. Davimos and Casper Pinsker, Jr., individually and as copartners trading as Orchids, Orchid Guild, White House Company, 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 December 18, 1954].

IN THE MATTER OF

MERCURY MACHINE IMPORTING COPORATION ET AL.

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

Docket 6011. Complaint, July 18, 1952—Decision, Jan. 4, 1955

Consent order requiring an importer of sewing machine heads from Japan and its corporate sales agent, with headquarters in New York City, to cease offering and selling such heads and completed sewing machines of which they were a part, without conspicuous disclosure on the heads of the country of origin, and to cease representing falsely that they were the manufacturers of the merchandise they sold.[1]

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

Mr. William L. Taggart and *Mr. J. C. Williams* for the Commission.

Mr. Isaac Anolic, of New York City, for respondents.

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 Mercury Machine Importing Corporation, a corporation, and Emil Deligtisch and Philip S. Morse, individually and as officers of said corporation, and Morse Sewing Machine and Supply Corporation, a corporation, and Philip S. Morse and Marian Morse, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Mercury Machine Importing 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 50 West 27th Street, New York, New York. Respondents Emil Deligtisch and Philip S. Morse are President and Treasurer, respectively, of this corporate respondent, and, acting as such officers, formulate, direct and control the policies, acts and practices of said corporation. The address of these individual respondents is the same as that of the corporate respondent, Mercury Machine Importing Corporation.

[1] The issue as to the use of the word "Mercury," charged in the complaint, was adjudicated in *Pickow Distributing Corp. et al.*, D. 5890, March 10, 1954, 50 F. T. C. 783, in which the Commission found that it was not sustained by the evidence.

Respondent Morse Sewing Machine and Supply 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 40–42 West 27th Street, New York, New York, and acts as the sales agent for respondent Mercury Machine Importing Corporation. Respondent Philip S. Morse and Marian Morse are President and Secretary-Treasurer, respectively, of this corporate respondent and acting as such officers, formulate, direct and control the policies, acts and practices of said corporation. The address of these individual respondents is the same as that of the corporate respondent Morse Sewing Machine and Supply Corporation.

All of the aforesaid respondents cooperate and act together in performing the acts and engaging in the practices hereinafter set forth.

PAR. 2. Respondent Mercury Machine Importing Corporation, a corporation, is now and has been for several years last past, engaged in the distribution of sewing machine heads imported from Japan to respondent Morse Sewing Machine and Supply Corporation.

Respondent Morse Sewing Machine and Supply Corporation is now, and has been for several years last past, engaged in the sale and distribution of sewing machine heads imported from Japan and complete sewing machines, of which said heads are a part, to distributors and also to retailers who, in turn, sell the aforesaid complete sewing machines to the purchasing public.

PAR. 3. In the course and conduct of their business, respondents cause their said products, when sold, to be transported from their places of business in the State of New York to the purchasers thereof located in various other States of the United States and maintain, and at all times mentioned herein have maintained, a course of trade in said products in commerce among and between the various States of the United States. Their volume of trade in said commerce has been and is substantial.

PAR. 4. When the sewing machine heads are received by respondents, the word "Japan" appears on the back of the vertical arm. Before the heads are sold to the purchasing public as a part of a complete sewing machine, it is necessary to attach a motor to the head, in the process of which the aforesaid word is covered by the motor so that it is not visible. In some instances, said heads, when received by respondents, are marked with a medallion placed on the front of the vertical arm upon which the word "Japan" appears. This word is, however, so small and indistinct that it does not constitute adequate notice to the public that the heads are imported. Furthermore, said medallion can be readily removed and when the medallion is so removed, no visible mark of origin appears on the machine.

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

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

There is among the members of the purchasing public a substantial number who have a decided preference for products manufactured in the United States over products manufactured in whole or in part in foreign countries, including sewing machines.

PAR. 6. Respondents used the word "Mercury" and other well known domestic names as trade or brand names for their sewing machine heads and complete sewing machines, which words are printed or embossed on the front horizontal arm of the head in large, conspicuous letters and use said trade names in their advertising matter. The word "Mercury," and the other prominent domestic names, are the names or parts of the names of, or used as trade names, marks or brands by one or more business organizations transacting and doing business in the United States which are and have been well and favorably known to the purchasing public and which are and have been well and long established in various industries.

PAR. 7. By using a trade or brand name such as "Mercury" and other prominent domestic names, respondents represent, directly or by implication, that their product is manufactured by, or connected in some way with, the well and favorably known American firm or firms with which said names have long been associated, which is contrary to the fact.

PAR. 8. There is a preference among members of the purchasing public for products manufactured by well and favorably known and long established concerns whose identity is connected with the word "Mercury" and other prominent domestic names. The use of said trade names by respondents on their sewing machines and heads enhances the belief on the part of the public that the said sewing machines are of domestic origin.

PAR. 9. Respondents, in their advertising, make the following statements:

WHOLESALERS MANUFACTURERS EXPORTERS

By and through the use of the word "manufacturers," respondents represent, directly or by implication, that they manufacture the products sold by them. In truth and in fact, respondents do not own or control a factory or facilities in which their products are manufactured. Substantial numbers of distributors and dealers prefer to deal with concerns which manufacture the products sold by them.

PAR. 10. Respondent Mercury Machine Importing Corporation, by supplying the afore-described imported sewing machine heads to respondent Morse Sewing Machine and Supply Corporation, who, in turn, sells the said heads and complete sewing machines, of which the said heads are a part, to dealers, jointly provide said dealers a means and instrumentality whereby they may mislead and deceive the purchasing public as to the place of origin of said heads and the manufacturer thereof.

PAR. 11. Respondents, in the course and conduct of their business, are in substantial competition in commerce with the makers and sellers of domestic sewing machines as well as the sellers of imported sewing machines, some of whom adequately inform the public as to the source of origin of their product.

PAR. 12. The failure of respondents to adequately disclose on the sewing machine heads, in a manner which cannot be readily removed, hidden or obliterated, that they are manufactured in Japan and also the use of trade or brand names, such as "Mercury" and other prominent domestic names, have the tendency and capacity to lead members of the purchasing public into the erroneous and mistaken belief that their said product is of domestic origin and is manufactured by the well and favorably known firm or firms with which said trade or brand name has long been associated and to induce members of the purchasing public to purchase sewing machines, of which said heads are a part, because of such erroneous and mistaken belief.

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

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury 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.

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 January 4, 1955, 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 that Mercury Machine Importing Corporation, a New York corporation; Emil Deligtisch and Philip S. Morse, individually and as officers of said corporation; Morse Sewing Machine and Supply Corporation, a New York corporation, and Philip S. Morse and Marian Morse, individually and as officers of said corporation, all named as respondents, have violated the provisions of the Federal Trade Commission Act in connection with the selling and distribution in interstate commerce of sewing machines and sewing machine heads, in three respects:

1. Said sewing machines and sewing machine heads, although of foreign make and foreign origin, are not marked so as to disclose clearly that fact;

2. In using the word '"Mercury" or other similar name as part of the trade or brand name for said sewing machines or sewing machine heads, respondents have represented directly or by implication that their products have been manufactured by well-known American firms with which such name or names have long been associated; and

3. By the use of the term "manufacturers" in their advertising matter, respondents have represented, contrary to fact, that they own or control the factory in which their products are produced.

Hearings upon these issues were held, but, after the close of the taking of testimony and before the closing of the record and issuance of an initial decision, a stipulation for a consent order was entered into by respondents with counsel in support of the complaint. This stipulation provides, among other things, that respondents admit all the jurisdictional allegations of the complaint; that the stipulation, together with the complaint, shall constitute the entire record in this proceeding; that the order hereinafter set forth may be entered in the disposition of this proceeding, and shall have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon; that the complaint may be used in construing the terms of the order, which may be altered, modified, or set aside in the manner provided by the statute; and that the answer heretofore filed be withdrawn.

The stipulation provides that further hearings before the 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, as well as 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, are waived, including specifically any and all right, power or privilege to challenge or contest the validity of the order entered in accordance with the stipulation. It is also agreed that the signing of the stipulation is for settlement purposes only, and does not constitute an admission that respondents have violated the law as alleged in the complaint.

The issues raised by the complaint in this proceeding are similar or identical with the issues raised in numerous other proceedings, and the stipulated consent order conforms to the orders heretofore issued in such other proceedings. This is particularly true as regards the issue as to the use of the word "Mercury" in conjunction with the sale and distribution of foreign-made sewing machines and sewing machine heads, which was adjudicated in the Pickow Distributing Corporation proceeding, Docket No. 5890. Hence, the fact that evidence has been presented in this case does not militate against the acceptance of the stipulation.

Accordingly, this proceeding is found to be in the public interest; the stipulation is accepted; the answer of the respondents is withdrawn; the evidence heretofore taken is disregarded; and the order as contained in the stipulation is issued, as follows:

It is ordered, That respondents Mercury Machine Importing Corporation, a corporation, and Emil Deligtisch and Philip S. Morse, individually and as officers of said corporation, and Morse Sewing Machine and Supply Corporation, a corporation, and Philip S. Morse and Marian Morse, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device in connection with the offering for sale, 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 the

country of origin thereof, in such a manner that it cannot readily be hidden or obliterated;

2. Representing, through the use of the word "manufacture" or "manufacturer" or any other word of similar import or meaning, or in any other manner, that said respondents are the manufacturers of the sewing machine heads or sewing machines sold by them, unless and until such respondents actually own and operate or directly and absolutely control a manufacturing plant wherein said products are manufactured by them.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That respondents Mercury Machine Importing Corporation, a corporation, and Emil Deligtisch and Philip S. Morse, individually and as officers of said corporation, and Morse Sewing Machine and Supply Corporation, a corporation, and Philip S. Morse and Marian Morse, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of January 4, 1955].

IN THE MATTER OF

EASTMAN KODAK COMPANY

ORDER DISMISSING COMPLAINT

Docket 6040. Complaint, Sept. 8, 1952—Order, Jan. 6, 1955

Order adopting the initial decision of the hearing examiner dismissing, as within the exceptions of the McGuire Act, a complaint charging the leading concern in the photographic products industry in the United States, which operated its own 42 retail outlets in 24 States and the District of Columbia, with compelling some 75,000 independent retail stores to observe its fixed resale prices.

Mr. Fletcher G. Cohn, *Mr. Paul H. LaRue* and *Mr. Lewis F. Depro* for the Commission.

Nixon, Hargrave, Devans & Dey, of Rochester, N. Y., and *Donovan, Leisure, Newton & Irving*, of New York City, for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The Federal Trade Commission on September 8, 1952, issued a complaint charging respondent, Eastman Kodak Company, with having violated Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act,[1] by entering into contracts and agreements with retail dealers whereby respondent fixes and maintains the resale prices of amateur photographic products manufactured by it. Specifically, it is charged that such contracts and agreements are illegal in that some of the retail stores which have signed such contracts are in competition with wholly owned and controlled retail outlets of the respondent in the sale of said products to the consuming public.

Thereafter, respondent filed its answer and a motion to dismiss the complaint which was denied by the hearing examiner, on the ground that he lacked jurisdiction to consider the motion.[2] Respondent then filed a similar motion with the Commission, based on two separate and distinct grounds; (1) that the complaint fails to state a cause of action, and (2) that the Commission lacks jurisdiction in that the complaint fails to include certain indispensable parties as respondents.

[1] Act of July 14, 1952, Public Law 542, 2d Congress, amending Section 5 (a) of the Federal Trade Commission Act.

[2] The Commission held that this motion was properly filed with the hearing examiner who did have jurisdiction and should have considered it; as a matter of expediency the Commission considered and ruled on the similar motion as hereinabove indicated.

This motion was denied by the Commission on both grounds, and the case remanded to the hearing examiner for proceedings in regular course. Subsequent thereto hearings were held during which counsel supporting the complaint and counsel for respondent stipulated certain facts and presented other evidence all of which was recorded and filed in the office of the Commission. Respondent renewed its motion to dismiss "for all of the reasons heretofore stated," but ruling has been withheld by the hearing examiner pending issuance of his initial decision. Counsel in support of the complaint and for the respondent have filed proposed findings of fact, conclusions and supporting briefs.

THE FACTS

PARAGRAPH 1. The respondent, Eastman Kodak Company, is a corporation organized and existing under the laws of the State of New Jersey with its principal office and place of business located at 343 State Street, Rochester, New York. It is now and for several years last past, has been engaged in the manufacture, sale and distribution of certain professional and amateur photographic and optical materials, apparatus and equipment, as well as certain related and other chemical products. In the course and conduct of its business for many years last past, respondent has been and is now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that it ships or causes to be shipped products manufactured by it from the states in which the several places of production and business of respondent are located, to purchasers thereof located in other states and in the District of Columbia. There is and has been at all times herein mentioned, a continuous and substantial current of trade and commerce in said products between and among the several states of the United States and in the District of Columbia. Respondent's professional and amateur photographic products are sold under trade names and trade-marks owned by it, including "Kodak." Respondent's trade names and trade-marks are assets of substantial value.

PAR. 2. Respondent is the successor to the business originally established by George Eastman in 1880, and is one of the leading concerns engaged in the photographic products industry in the United States. It is the parent of certain subsidiary corporations, among which are 24 corporations all of which are named Eastman Kodak Stores, Inc., except one, the Illinois Corporation, which is named Eastman Kodak Stores Co. (herein collectively referred to as the Stores Corporations), and which are the only subsidiary corporations of respondent engaged in the sale of amateur photographic products at retail in the United States.

PAR. 3. Some of respondent's photographic products are designed for use primarily by the general public and are often referred to as "amateur products." Other of respondent's photographic products are designed primarily for professional, commercial or scientific use and such products are often referred to as "professional products." This proceeding involves only those of respondent's amateur products which are covered by its resale price maintenance agreements, designated by respondent as Retailer Fair Trade Agreements and referred to hereinafter as fair trade agreements, entered into by the respondent with retail outlets in the 45 states authorizing such agreements. There are approximately 163 such products.

PAR. 4. Respondent's amateur products are sold directly by respondent to over 10,000 stores and similar outlets which are engaged, among other things, in reselling such products at retail to the consuming public. Respondent's amateur products are also sold directly by respondent to about 350 wholesale dealers who in turn distribute them to retail stores and similar outlets. Over 75,000 retail outlets in the United States handle some or all of respondent's amateur products. Respondent's said amateur products are sold at retail only by such retail outlets and by 35 retail outlets of the Stores Corporations. Respondent has no financial or corporate interest in the business of any of said retail outlets, except with respect to the aforesaid 35 retail outlets of the Stores Corporations.

PAR. 5. Each of the Stores Corporations is incorporated in a different state of the United States, except one, which is incorporated in the District of Columbia, and each is engaged in the sale at retail of amateur and professional photographic and related products manufactured and distributed by respondent and by others, including some or all of the amateur products covered by respondent's current fair trade agreements.

The Stores Corporations are wholly owned subsidiary corporations of respondent. Respondent supervises and controls the general corporate, financial and administrative matters of the Stores Corporations, and the Secretary, an Assistant Secretary and an Assistant Treasurer of the respondent hold offices of the same title in each of the Stores Corporations, and each of these officers resides and carries out his respective duties at the principal place of business of the respondent in the City of Rochester, New York. Subject to this supervision and control, the business of the retail outlets of the respective Stores Corporations is managed by the respective local managers. In the manner above-described, the 35 retail outlets are conducted by the Stores Corporations.[3]

For the purposes of this proceeding only, it is agreed that, with respect to sales of respondent's products by the 35 retail outlets of the Stores Corporations under respondent's fair trade agreements, respondent controls the Stores Corporations and the retail outlets operated by them and requires them to abide by the terms of said agreements, including the prices stipulated therein, in those states in which fair trade acts are in effect and in said states said retail outlets have maintained and are maintaining the minimum resale prices prescribed in said agreements.

PAR. 6. Beginning in 1938, after the enactment of the Miller-Tydings Resale Price Maintenance Act,[4] respondent offered fair trade agreements to its direct retail dealers in those states in which fair trade acts were in effect. These agreements fixed the minimum selling price, under specified conditions, at which certain of respondent's amateur products could be sold at retail. The minimum retail selling prices established under respondent's fair trade agreements relate only to products manufactured by respondent and sold under its trade-

[3] The place of incorporation of each Stores Corporations and the address of each retail outlet thereof are as follows:

Place of incorporation	Principal address	Address of other stores, if any
California	643 South Hill St., Los Angeles	219 Post Ave., San Francisco, and 1210 Fifth Ave., San Diego.
Colorado	1635 California St., Denver	
Florida	129 West Adams St., Jacksonville	
Georgia	231 Peachtree St., Atlanta	
Illinois	133 North Wabash Ave., Chicago	
Iowa	513 Locust St., Des Moines	417 Nebraska St., Sioux City, and 217 Brady St., Davenport.
Louisiana	928 Canal St., New Orleans	
Maine	22 Franklin St., Boston, Mass.	
Maryland	309 North Charles St., Baltimore	
Michigan	1055 Wayne St., Detroit	
Minnesota	112 Fifth St. South, Minneapolis	3 West Superior St., Duluth, and 91 East 6th St., St. Paul.
Missouri	1009 Olive St., St. Louis	1010 Walnut St., Kansas City.
Nebraska	1618 Harney St., Omaha	1221 "O" St., Lincoln.
New Jersey	1020 Chestnut St., Philadelphia, Pa	117 South 16th St., Philadelphia, Pa.
New York	1 West 39th St., New York	356 Madison Ave., New York.
Ohio	1015 Euclid Ave., Cleveland	27 West 4th St., Cincinnati.
Oklahoma	315 North Broadway, Oklahoma City	
Oregon	730 South Morrison St., Portland	
Pennsylvania	606 Wood St., Pittsburgh	
Texas	2012 North Akard St., Dallas	
Utah	1400 South Main St., Salt Lake City	
Washington	1319 Fourth Ave., Seattle	
Washington, D. C	607 14th St. NW.	
Wisconsin	745 North Milwaukee St., Milwaukee	

[4] Act of Aug. 17, 1937, Pub. Act No. 314, 75th Congress, 50 Stat. 693, amending Section 1 of the Sherman Act.

mark or name, and by agreement no question is raised in this proceeding as to whether or not such products are sold in free and open competition with products of the same general class produced and sold by other manufacturers. Approximately 5,500 of respondent's direct retail dealers voluntarily executed said agreements.

From the time said retailer fair trade agreements were first executed through the calendar year 1951, respondent enforced the provisions thereof to the extent authorized and required by federal and state laws. During said period, respondent obtained 39 injunctions in federal or state courts located in the States of California, Connecticut, Illinois, Massachusetts, New Jersey, New York and Pennsylvania, restraining retail dealers, some of whom were nonsigners of such agreements but who were bound thereby by applicable state laws, from selling respondent's amateur products covered by the terms of its fair trade agreements then in effect at retail prices lower than the minimum retail prices provided for therein. Execution of or compliance with any such agreement never has been a prerequisite to nor had any effect upon the availability of respondent's products to any dealer therein.

PAR. 7. On May 21, 1951, the Supreme Court of the United States decided the case of *Schwegmann Brothers*, *et al.* v. *Calvert Distillers Corporation*, and *Seagram Distillers Corporation*, 341 U. S. 384, 95 L. Ed. 1035, in which it was held that the Miller-Tydings Act did not exempt from the Sherman Antitrust Act the enforcement of a price agreement for the maintenance of minimum resale prices of trademarked commodities against a nonsigner of the said agreement. Subsequent to this decision by the Supreme Court of the United States, which rendered unenforceable its fair trade agreements except against those retailers who had actually signed the same, respondent, in accordance with the provisions of said agreements, canceled and terminated the same on May 28, 1952.

PAR. 8. The McGuire Act amending Section 5 (a) of the Federal Trade Commission Act, was passed by Congress and approved by the President on July 14, 1952. Beginning on July 28, 1952, respondent offered new fair trade agrements to its direct retail dealers in those states in which fair trade acts were in effect. Since that time, approximately 6,500 of its direct buying retail dealers in said states have entered into said agreements with respondent under which minimum selling prices are prescribed under specified conditions for the resale at retail of respondent's amateur products covered by said agreements and as prescribed therein. Said agreements are now in effect and are the only such agreements in effect.

Each of the fair trade agreements provides that it is between respondent, "the manufacturer of certain products now or hereafter made subject to this Agreement," and a dealer "engaged in selling said products at retail" and that "the parties hereto as manufacturer and retailer respectively, desire to avail themselves of the benefits of the Fair Trade Act of the state in which the dealer's principal place of business is located * * *." The products covered by said agreements are manufactured by respondent, sold under respondent's trademark or trade name for resale and are in free and open competition with products of the same general class produced and sold by other manufacturers. To the extent permissible under the McGuire Act and applicable state laws, retail dealers in respondent's amateur products are bound by said agreements whether or not they have signed the same.

PAR. 9. In those states in which fair trade acts are in effect, and in which are located retail outlets of the Stores Corporations, these retail outlets sell products manufactured by respondent and subject to respondent's fair trade agreements in the same marketing area where some other retail stores sell the said products, and pursuant to said agreements all retail outlets in said area are bound by the same prescribed minimum resale prices specified in such agreements. Each of the 35 retail outlets of the Stores Corporations is one of the leading outlets for the sale of respondent's amateur photographic products in the market area where it is located, and sells respondent's amateur products in competition with other retail outlets selling said products in the same market area.[5]

PAR. 10. For the calendar year 1951, the last full year of operation by respondent during which its fair trade agreements were in effect

[5] For a selected list of cities, the number of other retail outlets selling amateur products manufactured by respondent within a radius of five blocks of the retail outlet of a Stores Corporation is as follows—(shown also is the number of such retail outlets buying direct from respondent)

	Other outlets	Direct buying
Atlanta, Georgia	45	16
Cincinnati, Ohio	49	15
Davenport, Iowa	21	5
Denver, Colorado	55	23
Des Moines, Iowa	35	10
Detroit, Michigan	82	23
Omaha, Nebraska	32	8
Seattle, Washington	55	29

and for which statistics are available,[6] the net sales of the respondent and its subsidiaries totaled $542,284,000 of which $111,737,000, slightly less than 21%, represents sales of fair traded products; total net sales of the retail outlets of the Stores Corporations amounted to $34,806,000 of which $3,104,000, approximately 9%, represents sales of respondent's fair traded products; net sales of respondent's amateur products by other retail outlets was $154,769,000 of which $108,632,000, about 70%, represents sales of respondent's fair traded products. Sales of respondent's fair traded products by the retail outlets of the Stores Corporations amounted to less than 3% of the sales of such products by other retail outlets and less than 0.6 of 1% of respondent's total sales.

THE ISSUE

Paragraph 9 of the complaint reduces the controversy in this proceeding to a single issue, namely, whether

"The contracts and agreements entered into by respondent with its retail store customers, whereby it fixes and maintains the resale prices of many of its amateur photographic products, are illegal in that some of the said retail store customers are in competition with respondent's wholly owned and controlled retail stores in the sale of such products to the consuming public."

[6] Net sales by respondents, by stores corporations, by other outlets:*

	1950	1951	1952
(1) By Respondent and Subsidiaries	$461, 389, 980	$542, 284, 510	$575, 022, 750
By Stores Corporations' Outlets:			
(2) Total	34, 329, 612	34, 806, 105	33, 124, 035
(3) Respondent's Professional & Products of other Mnfrs.	26, 947, 198	27, 004, 056	25, 555, 272
(4) Respondent's Amateur Products	7, 382, 414	7, 802, 049	7, 568, 763
(5) ***Respondent's fair traded Products	2, 911, 880	3, 104, 956	**2, 509, 522
By Other than Stores Corporations:			
(6) Respondent's Amateur Products	142, 642, 500	154, 769, 300	184, 324, 900
(7) ***Respondent's Fair Traded Products	97, 203, 600	108, 632, 900	**95, 976, 900
By 4 Outlets of Stores Corporations' Located in Areas not Subject to Fair Trade:			
(8) Total—All Products	4, 241, 777	4, 285, 794	3, 963, 577
(9) ***Respondent's Products Elsewhere Subject to Fair Trade.	281, 701	298, 531	242, 566

NOTES

*Figures in all except line (1) have been adjusted to reflect selling price to the consumer.

**Cover 10-month period only, since from May 28, 1952 to July 28, 1952, respondent's fair trade agreements were not in effect.

***Estimated since respondent's records do not show separately sales of amateur products not fair traded—Cine-Kodak film in magazines, sales to federal, state and local governments, sales to commercial and professional photographers, etc.

Do respondent's fair trade agreements fail to come within the protective provisions of the McGuire Act because respondent is not only a manufacturer but is also engaged in the operation of 35 retail outlets which compete with some of the independently-owned retail stores that are parties to the fair trade agreements?

THE STATUTE

The pertinent sections of the Federal Trade Commission Act as amended by the McGuire Act are as follows:

SEC. 5 (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

* * * * * * *

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum, or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. * * *

The McGuire Act, as "H. R. 5767, a bill to amend the Federal Trade Commission Act with respect to certain contracts and agreements which establish resale prices and which are extended by State law to non-signers, [was] introduced by Rep. McGuire (N. Y.), October 17, 1951, enacted into law by the 82nd Congress and signed by the President of the United States on July 14, 1952." [7]

The purpose of the McGuire Act is clearly set forth in the report of the Committee on Interstate and Foreign Commerce of the House.[8]

> The primary purpose of the bill is to reaffirm the very same proposition which, in the committee's opinion, the Congress intended to enact into law when it passed the Miller-Tydings Act (act of August 17, 1937, title VIII, 50 Stat. 673, 15 U. S. C. sec. 1), to the effect that the application and enforcement of State fair-trade laws—including the nonsigner provisions of such laws—with regard to interstate transactions shall not constitute a violation of the Federal Trade Commission Act or the Sherman Antitrust Act. This reaffirmation is made necessary because of the decision of a divided Supreme Court in *Schwegmann* v. *Calvert Distiller Corporation* (341 U. S. 384, May 21, 1951). In that case, six members of the Court held that the Miller-Tydings Act did not exempt from these Federal laws enforcement of State fair-trade laws with respect to nonsigners. Three members of the Court held that the Miller-Tydings Act did so apply.
>
> The end result of the Supreme Court decision has been seriously to undermine the effectiveness of the Miller-Tydings Act and, in turn, of the fair-trade laws enacted by 45 States. H. R. 5767, as amended, is designed to restore the effectiveness of these acts by making it abundantly clear the Congress means to let State fair-trade laws apply in their totality; that is, with respect to nonsigners as well as signers.

In the House discussion, Congressman McGuire said with reference to his proposal—"The McGuire bill adds no new powers to the Federal Trade Commission Act. It merely exempts from the Federal Trade Commission Act and the Antitrust Acts, so far as interstate commerce is concerned, that type of resale price maintenance contract which is permitted by the fair trade acts of 45 States." [9]

Counsel in support of the complaint rely on that portion of Section 5 (a) (5) of the Act which states that the preceding provisions of the Act shall not make lawful price maintenance agreements "between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." This qualifying provision of the McGuire Act is in exactly the same words as a similar proviso in the Miller-Tydings Act. Hence, so far as the issue in this case is concerned, the purpose of the two Acts is identical. Likewise, as to this issue, the interpretation of both Acts should be the same.

[7] Resale Price Maintenance, Legislative History H. R. 5767, title page. The Bill passed the House May 8, 1952 by a vote of 196 to 10 (Cong. Record May 8, 1952, p. 5033) and the Senate July 2, 1952 by a vote of 64 to 16 (Cong. Record, July 2, 1952, p. 9145).

[8] Rept. 1437 82d Cong., 2d Sess., pp. 1 and 2, House of Representatives.

[9] 98 Cong. Rec. 4979, May 7, 1952.

CONSTRUCTION OF THE ACT

For the purposes of this case it is established that the requirements of Section 5 (a) (2) of the Act have been met in that (a) the fair traded products are manufactured by the respondent and bear its trade-mark, brand or name, (b) the contracts are with vendees who resell respondent's products at fair trade prices, (c) the products are in free and open competition with products of the same general class produced by others, and (d) fair trade agreements are lawful as applied to intrastate transactions under statute, law or public policy in each of the states in which the agreements are in effect.

The Act clearly authorizes vertical price fixing agreements when these conditions are met. But counsel in support of the complaint contend that the agreements are illegal because (1) respondent is a retailer and therefore the agreements are between retailers, and (2) respondent, as a retailer, is in competition with some of the other retailers who have entered into the agreements; hence the agreements are not vertical but horizontal and fail because they fall within the non-exempt classifications of Section 5 (a) (5) of the Act.

Counsel in support of the complaint assert that the language of the Act is clear and that it is an elementary principle of law that where the language of a statute is clear and unambiguous, legislative history and other aids may not be used to support a construction which adds to or takes from the significance of the words employed. Counsel for respondent agree that the language of the statute is clear but they and counsel in support of the complaint arrive at diametrically contradictory interpretations of the Act. The Commission, ruling upon the motion to dismiss in this preceeding, were not unanimous in their conclusions, and there was disagreement in the Doubleday case [10] where the same issue was presented in an interlocutory appeal. In neither case has a final decision been rendered. It is evident that the meaning of the Act is not clear and that interpretation is required.

How shall that interpretation be made? In 1928, Justice Holmes, speaking for the Court, in *Boston Sand & Gravel Co.* v. *United States*, 278 U. S. 41, 48, stated:

> It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists.

Earlier, Chief Justice Marshall stated the rule in *United States* v. *Fisher*, 2 Cranch 358, 386 ,1805) :

[10] *In the Matter of Doubleday and Company, Inc.*, Federal Trade Commission Docket No. 5897, Complaint issued June 29, 1951.

It is undoubtedly a well-established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole. * * * Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived.

Justice Frankfurter, in his dissent in *United States* v. *Monia*, 317 U. S. 424, 431 (1943), suggested the proper approach to this problem, as follows:

The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. * * * A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute * * * is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining an inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning.

In 1943, the Supreme Court, in *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479 states its position:

But words are inexact tools at best, and for that reason there is wisely no rule forbidding resort to explanatory legislative history no matter how clear the words may appear on "superficial examination."

The decisions uniformly hold that in determining the purpose and intent of a statute the entire legislative history of the statute may be searched for every possible explanation.

The cardinal rule in statutory interpretation is to seek the legislative intent and purpose so that statutes may be properly administered and enforced.[11]

When the Miller-Tydings bill was first offered it did not contain the proviso clause but this was added by Senator Tydings before the enactment of the measure at the suggestion of the Attorney General. In speaking of the amendment, Senator Tydings said: [12]

The amendment provides that nothing in this particular provision shall permit manufacturers to combine with manufacturers, wholesalers with wholesalers, factors with factors, or retailers with retailers. That is made absolutely certain. I do not think it was necessary, but I was glad to put it in to place the matter beyond the peradventure of a doubt.

In the Congressional debates on the Miller-Tydings Act, Representative McLaughlin pointed out that it was the purpose of the Act to permit fair trade agreements between the seller and the retailer buyer of an article but not to permit horizontal agreements. He said:

The act does not legalize contracts to maintain prices between manufacturers or sellers of different trade-marked articles of the same class or character.

[11] *U. S.* v. *N. E. Rosenblum Truck Lines,* 315 U. S. 50, 53 (1942).
[12] 81 Cong. Rec., p. 7496 (1937).

It only authorizes or permits contracts between the seller and the buyer, regarding resale price, *as to a particular article*, and then only provided that article is in free and open competition with articles of a similar character produced or distributed by others, and further provided only that the contract is authorized under the laws of the State in which it is to be carried out. The act, as amended in the Senate, and as now before the House in the conference report, specifically provides that the act shall not make lawful any contract or agreement providing for establishment or maintenance of minimum resale prices on any commodity covered by the act, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. As an example, *the act would not allow two manufacturers of similar trade-marked articles*, as, for instance, articles of food or drugs or clothing or soap or fountain pens, or any other competing articles of similar kind, to agree between themselves as to the price at which their respective articles shall be sold. The act does not alter the provisions nor the effect of the Sherman Act as to such contracts. In other words, it simply *authorizes contracts*, permitted by the States, *between the seller and buyer of one article*—contracts known as vertical contracts. It *does not permit contracts between seller and seller of different articles*—contracts known as horizontal contracts.[13] (Italics added.)

The Congressional consideration of the McGuire Act provides further light. The House Judiciary Committee, favoring the enactment of resale price maintenance legislation, said:

The necessity and desirability of protecting the manufacturer's property right in trade-marks and brand names from diminution in value, is to that segment of our economy, the most important argument for the restoration of resale price maintenance.[14]

* * * * * * *

In the case of all fair-traded products, * * *, competitive forces and prices are supported by consumer-demand preference and not destroyed by the fixing of a price under a fair-trade contract or by means of the nonsigners' clause.[15]

During the debates, Congressman Hunter of California stated:

Growth of the use of trade-marks, brands and producer names has come about through a feeling of responsibility on the part of the manufacturer to produce a consistently good article at a fair price. If better manufacturing methods, increased sales and better distribution have produced a fine article at a competitive price, I feel that the manufacturer should have the right to protect his product with fair-trade provisions which apply even to nonsigners. * * *

Competition under fair-trade laws is stimulated between manufacturers who have the power to react with better products and lower prices, while competition between dealers who have no constructive effect over the product is eliminated.[16]

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[13] 81 Cong. Rec., p. 8141 (August 3, 1937).
[14] House Report No. 1516, 82d Cong. 2d Session, p. 9 (1952).
[15] Ibid, p. 15.
[16] Cong. Record May 7, 1952, p. 4985.

In testimony before the House Subcommittee of the Committee on Interstate and Foreign Commerce, Representative Patman, whose Small Business Committee supported the enactment of fair trade legislation, indicated his belief that horizontal agreements have to do with different products whereas vertical agreements relate to fixing of the resale price of a single product.[17]

Senator Humphrey was recognized as the leading proponent of the McGuire bill in the Senate. On July 2, 1952, shortly before the vote was taken and following spirited discussion in which query was made as to the difference between vertical and horizontal pricing arrangements Senator Sparkman directed a pointed inquiry to Senator Humphrey in the following language: [18]

It would dispel any misunderstanding concerning lawful vertical resale price-maintenance agreements and unlawful horizontal resale price-maintenance agreements if the Senator from Minnesota would explain further for the Record the differences between the types of agreement.

To this Senator Humphrey replied:

I talked with the Senator about this matter, and I want to be very accurate. I have gone into it very carefully. * * *

In general, the test of whether a resale price maintenance contract is vertical is if the contract is between a seller and buyers who resell the original seller's product; whereas, *the test of whether a resale price maintenance contract is horizontal is if it is between competing sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved.*

It is important to keep this distinction in mind, because many producers of trade-marked items sell them to consumers, retailers, and wholesalers alike.

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[17] Hearings before Subcommittee of the Committee on Interstate and Foreign Commerce on H. R. 5767, p. 14, 82nd Cong., 2nd Sess., (1952). Part of the colloquy between Congressman Hale and Congressman Patman follows—

Mr. HALE. Why is not the vertical price fixing still monopolistic?

Mr. PATMAN. The vertical still monopolistic?

Mr. HALE. Yes.

Mr. PATMAN. Because it is in open competition with other articles of like grade and quality where they cannot agree on price.

Now if you permit horizontal price fixing too where Articles A, B and C are exactly the same, or similar, where they could go and make an agreement and say what they were going to sell for, that would be bad; that would be vicious; but that is still opposed under existing law and this does not change it.

This will permit A to fix the price on down to the retailer; it will permit B to do the same thing, and C to do the same thing; but they cannot agree among themselves. That makes competition. Then B will say, now, there is A, he is selling his commodity for so much, why can't I sell mine for just a little lower; and C will say; "Now, there is A and B. They are selling theirs at a certain price, and I believe I will put mine in a little lower."

You see this brings about competition there between them from the top clear on down, but it is still unlawful to have horizontal or across-the-board price fixing, but permits vertical price fixing.

Mr. HALE. Then your argument in brief is that vertical price fixing does not suppress competition whereas horizontal price fixing suppresses competition.

Mr. PATMAN. That is better than I could state it myself.

[18] Cong. Rec., July 2, 1952, p. 9124.

Under the bill, such firms may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers. *While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make contracts with other wholesalers and retailers, when in making such contracts they act as producers of a trade-marked or branded commodity,* rather than as wholesalers and retailers entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers. (Italics added.)

The legislative history indicates that Congress saw no incongruity in a manufacturer entering into fair trade agreements establishing retail selling prices in his branded products even though at the same time he might be engaged in selling those same products at retail. Congress does not act in a vacuum but takes note of current business and industrial customs and practices. It is common knowledge that individuals, corporations and business organizations frequently act in dual capacities—often in conflicting dual capacities, carrying on practices and performing acts in one capacity which cannot be undertaken in any other capacity, the only restriction being that the functions relevant to the various capacities be kept separate.

Many manufacturers sell direct to the retail trade. Some sell to wholesalers exclusively. Others sell to wholesalers, to retailers and to the public, direct or through subsidiary organizations.[19] These are all common business practices of which Congress was cognizant when it enacted the McGuire Act, as is shown by the debates upon the bill. The argument of counsel in support of the complaint ignores the complexity of the marketing structures of the present day business world and, if accepted, would to a great extent nullify and frustrate the purpose and intent of the McGuire Act.

CONSTRUCTION OF THE ACT BY THE COURTS

During the Congressional debates frequent references were made to the decisions of the courts. Senator Hunt said:

It is significant that prevailing interpretations and court decisions during a 13-year period following passage of the Miller-Tydings Act enabled the State fair-trade laws to be effective.[20]

[19] "Selling the U. S. Market" issued by the U. S. Dept. of Commerce in 1951 shows distribution methods for manufactured products of all industries based on 1939 sales, as follows (p. 29):

	Percent
Sales to or through own wholesale branches	22.4
Sales to or through own retail stores	2.1
Sales to wholesalers, jobbers and retailers	44.7
Sales to consumers at retail	1.6
Sales to industrial and other large users	26.0
Export sales	3.2
Total	100.0

[20] Cong. Rec. July 2, 1952, p. 9138.

The fact is significant that since 1937, no court has found any fair trade agreement invalid because the manufacturer-signer was also engaged in wholesale, or retail operations. It is significant too that in the many cases that have been brought in the various courts, both state and federal, to enforce fair trade agreements, the fact that one of the signers was operating in a dual capacity has been noticed but few times and never has been made the basis of a decision. The latest case cited by counsel in support of the complaint and discussed by respondent's counsel, is *General Electric Co.* v. *S. Klein on the Square, Inc.*[21]

This was an action to enjoin defendant Klein from selling merchandise at less than the resale price established by plaintiff in its fair trade agreements. Defendant, among its defenses, alleged that General Electric in violation of the antitrust acts was a party to various price-fixing combinations and conspiracies with retailers, wholesalers and other manufacturers, particularly that it had entered into a conspiracy with its wholesale subsidiary, General Electric Supply Company, some of its other wholesalers and a large number of retailers to establish wholesale prices and retail prices. The court pointed out that violation of the antitrust acts would not in itself be a defense to the injunction action, and disregarding the dual capacity in which the plaintiff was operating, granted the injunction, stating (p. 57):

> * * * there is no evidence that plaintiff has agreed or conspired with other producers or with any wholesalers to fix any prices. It has exercised its clear legal right to have retailers agree that they will not sell at less than the prices stipulated by plaintiff, and it has suggested to wholesalers the prices at which it thinks such wholesalers should sell to retailers, but further than that it has not gone.

The Klein case does not support the position of counsel supporting the complaint. In *Old Dearborn Distributing Company v. Seagram Distillers Corporation*,[22] an injunction was allowed to prevent violation of appellee's resale price agreements applicable on the retail level, even though in other branches of appellant's business it was a wholesaler as was appellee. There was no discussion of this relationship.

In *Doubleday, Doran & Company, Inc. v. R. H. Macy & Co., Inc.*[23] the decision denying an injunction was based on the grounds that the defendant was a nonsigner of the fair trade agreements and that the New York Fair Trade Act was unconstitutional in that it attempted to bind nonsigners as well as signers of fair trade agreements. The

[21] 121 N. Y. S. 2d 37, Supreme Court of N. Y. County, February 20, 1953.
[22] 299 U. S. 183 (1936).
[23] 269 N. Y. 272 (1936).

fact that the agreement sought to be enforced was between Doubleday, Doran & Company, Inc., and its subsidiary corporation, Doubleday Doran Book Shops, Inc., a distributor and seller, did not enter into the decision.

In the case of *Gillette Safety Razor Co.* v. *Green, et al.*, [24] an action to enforce a fair trade agreement, the court said, "There is nothing in the law to prohibit a manufacturer or producer from selling both wholesale and retail * * *." However, the decision rested on other grounds.

In *General Electric Co.* v. *R. H. Macy & Co.*,[25] relief was granted to enforce a fair trade agreement through a General Electric subsidiary was selling direct to consumers in competition with defendant. A similar situation existed in *Westinghouse Elec. Corp.* v. *Disco N. Y., Inc.*[26] where an injunction was issued.

Respondent has obtained 39 injunctions in fair trade enforcement actions in seven different states yet its right to relief has never been challenged in any court because of its retail activities. The presumption that may arise from this judicial silence will be discussed under the next subheading.

The purpose of protecting good will by fair trade legislation has been adverted to repeatedly by the courts. In the *Old Dearborn* case previously referred to, the court said (pp. 193, 195):

> The primary aim of the law is to protect the property—namely, the good will—of the producer which he still owns. * * * It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates "unfair competition."

In *Eli Lilly & Co.* v. *Saunders*,[27] the court said:

> This good will is as much property as is coal or pig iron or wheat, subject to audit, appraisal, taxation, purchase and sale, and is the most valuable asset of many businesses. But, unlike the tangibles mentioned, it is vulnerable to assault, through the brand which symbolizes it, since it is built up principally through reputation and may be destroyed by its loss. * * *
>
> It is not conceivable how any horizontal restriction of trade can be effected through the provisions of the statute. The restraint intended does not apply to the commodity, in its generic sense, upon which the manufacturer has expended his care and skill—it is the commodity plus the brand which identifies it, guarantees its quality, and is symbolic of the good will which rightfully belongs to the manufacturer. It is this alone which the statute desires to protect, and to the piratical use of which it applies restraint. As stated by Justice Sutherland in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, supra [299 U. S. 183, 57 S. Ct. 145, 81 L. Ed. 109, 106 A. L. R. 1476]: "The ownership of the

[24] 3 N. Y. S. 2d 822, 824 (Sup. Ct. N. Y., 1938) Aff'd 15 N. Y. S. 2d 142.

[25] 103 N. Y. S. 2d 440 (Sup. Ct. N. Y., 1951).

[26] 123 N. Y. L. J. 2293 (Sup. Ct. 1950).

[27] 216 N. C. 163; 4 S. E. 2d 528, 532, 535 (1939).

good will, we repeat, remains unchanged, notwithstanding the commodity has been parted with. Section 2 of the Act does not prevent a purchaser of the commodity bearing the mark from selling the commodity alone at any price he pleases. It interferes only when he sells with the aid of the good will of the vendor; and it interferes then only to protect that good will against injury. It proceeds upon the theory that the sale of identified goods at less than the price fixed by the owner of the mark or brand is an assault upon the good will, and constitutes what the statute denominates "unfair competition." See *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-op. Marketing Ass'n.*, 276 U. S. 71, 91, 92, 96, 97, 48 S. Ct. 291, 295, 296, 297, 72 L. Ed. 473. There is nothing in the act to preclude the purchaser from removing the mark or brand from the commodity—thus separating the physical property, which he owns, from the good will, which is the property of another—and then selling the commodity at his own price, provided he can do so without utilizing the good will of the latter as an aid to that end."

In *General Electric Co.* v. *Macy* (supra), p. 445, it was said:

"The chief purpose of the statute is expressed as being to protect a producer against injury of his good will, resulting from price cutting of goods bearing his trade-mark," and, "it is the duty of the courts to interpret and enforce it [the act] so as to carry out the purposes of the Legislature."

CONSTRUCTION OF THE ACT BY LAW ENFORCING AGENCIES

Since 1937 when the Miller-Tydings Act became effective, except for the Federal Trade Commission *Doubleday* case filed in June, 1951, and this proceeding started in September, 1952, no one charged with the administration and enforcement of the fair trade acts has undertaken any action based on the fact that a manufacturer engaged in fair trade practices has at the same time been acting as a retailer of the fair traded products even though violation of the Miller-Tydings Act, amending Section I of the Sherman Act, carried a penalty of a fine not exceeding $5000 and/or imprisonment not exceeding one year.

In 1940 the Federal Trade Commission instituted a proceeding against the Eastman Company [28] charging that some of its fair traded products were not in free and open competition with other products of the same general character. Continuing jurisdiction of this matter was retained until July, 1947, yet no issue was raised as to respondent's retailing activities although they were the same during that period as they are now.[29] This inaction is significant.

The rule as stated in *Federal Trade Commission* v. *Bunte Bros.*[30] is:

[28] *In the Matter of Eastman Kodak Company,* Docket 4322, 39 F. T. C. 154, complaint issued September 23, 1940, decision, September 9, 1944; decision modified September 12, 1945, 41 F. T. C. 137; decision further modified July 3, 1947, 44 F. T. C. 14.

[29] Respondent's first fair trade contracts were executed in 1938.

[30] 312 U. S. 349, 352 (1941).

> * * * Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.

In *Federal Power Commission* v. *Panhandle Eastern Pipeline Co.*,[31] the court said:

> * * * for over ten years the Commission has never claimed the right to regulate dealings in gas acreage. Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed.

A course of conduct indicating a particular understanding of a statute has value in determining its meaning especially where that course of conduct has been participated in by an administrative agency charged with enforcing the Act, by the Justice Department in its law enforcement capacity, by defendants in civil proceedings arising under the Act and by the courts. Non-application of the particular proviso of the Act which is sought to be invoked in this proceeding, is a practical construction which when considered with the avowed purposes of the Act leads to a strong presumption, in the absence of cogent reasons to the contrary, that the proviso is not applicable to the factual situation involved in the proceeding.

The desirability of federal fair trade legislation is not at issue. That is a matter exclusively within the province of Congress. If there is to be any change in governmental policy that too rests with Congress. The sole objective of this proceeding is to construe and apply the law as it is to the facts of this case.

CONSTRUCTION OF THE ACT—CONCLUSIONS

From the foregoing, the conclusion is reached that as far as the issues in this case are involved, the Act

(1) has among its purposes the protection of the good will of the manufacturer of trade-marked and branded articles;

(2) was intended to and does permit, when valid in the state of resale, the establishment by vertical agreement of uniform resale prices with respect of trade-marked and branded products of a manufacturer so long as those products are in free and open competition with products of the same general class produced by others; vertical agreements being between a manufacturer selling his own branded products and a buyer for resale;

(3) was not intended to and does not deprive a manufacturer of the right to make fair trade agreements with his retailers so long as

[31] 337 U. S. 498, 513 (1949).

those agreements are entered into by him as a manufacturer, notwithstanding the fact that the same manufacturer may be carrying on other activities, including the retailing of his own products, provided the agreements meet the other conditions of the Act.

The remaining problem is to determine whether the respondent entered into its fair trade agreements as a manufacturer or as a retailer.—Are the agreements vertical or are they horizontal?

DID RESPONDENT ENTER THESE AGREEMENTS AS A MANUFACTURER?

The fair trade contracts involved in this proceeding are signed by "Eastman Kodak Company" which is referred to therein as Kodak. They recite that Kodak is the manufacturer of certain products which are to be distributed under trade-marks, brands or trade names owned by Kodak and are in free and open competition with commodities of the same general class produced or distributed by others; that the dealers with whom the agreements are made are engaged in selling said products at retail; and that the parties, as manufacturer and retailers respectively, desire to avail themselves of the benefits of the various applicable fair trade acts.

The record supports the averments of the contracts. The name used by respondent in its contracts is the corporate name under which its manufacturing activities are carried on; [32] the articles involved are exclusively those produced and distributed by respondent as a manufacturer; the trade-marks and brand names belong to respondent as a manufacturer; the free and open competition mentioned is that between respondent as a manufacturer and other producers; the relationship between respondent and the retailer signers of the contracts is that of manufacturer and retail seller of specifically named branded products; the retailer signers of the contracts buy the trade-marked or branded products from the respondent for purposes of resale and do resell them to the public under those trade-marks or brand names.

Through the retail outlets of the Stores Corporations which are owned and controlled by respondent, the respondent, as a retailer, is in substantial competition with some of the retail stores which are bound by respondent's fair trade agreements. That competition is entirely at the retail level and involves amateur photographic supplies produced and distributed by many manufacturers. As to the amateur photostatic supplies manufactured and distributed by respondent under the fair trade agreements there is no price competition because respondent's retail outlets observe the fair trade prices, but as to all

[32] The separate corporate entity theory was not suggested in this proceeding and is not here invoked or endorsed as a defense.

other amateur photographic products of the same general type and character which are sold alike by respondent's retail outlets and by the other retailers with whom respondent's outlets compete, there is full competition at the retail level. So far as the record shows none of the retail outlets selling respondent's fair traded products is engaged in the manufacture of any competing products so there is no competition between any of them and respondent at the manufacturing level.

Respondent's interest in protection of its trade-marked or branded products from price competition between retailers is a manufacturer's interest. If price competition existed, respondent's retail outlets would be in a most advantageous competitive position and could readily meet the lowest price any competitor could offer. In fact, if respondent were interested in reducing the competition of its retail outlets, price competition would be encouraged and respondent would not fair trade its amateur photographic products. Fair trade helps rather than injures the independent retail stores which are in competition with respondent's outlet stores. At the same time it protects respondent's good will as a manufacturer, good will being represented by respondent's trade marks and brand names. Respondent's financial interest in its fair trade contracts is a manufacturer's interest.

If these contracts were between retailers the contracts would relate normally to all articles of the same general class regardless of manufacturing source. They would fix retail selling prices on all lenses; not just on CineKodak lenses; on all 2½ x 4¼ roll film; not just on Kodak roll film; on all projectors; not just on Kodaslide projectors. Respondent's agreements do not fix the selling prices of competing products.

Further indication that respondent is functioning as a manufacturer in relation to these contracts is shown by the fact that sales of respondent's fair traded products by its own outlet stores represent only about 0.6 of 1% of respondent's over-all sales and about 3% of the total sales of respondent's fair-traded products. Respondent is primarily a manufacturer.

Some writers have suggested that the capacity in which contracts have been entered can be determined by looking at the benefits which may follow as a result of the contracts, the presumption being that if the benefits accrue to the manufacturing activities then the contracts were entered into in that capacity, and if the benefits accrue to the retail portion of the business then the contracts must have been entered into from that standpoint. No breakdown of respondent's profits was presented in this case but there is such a preponderance of respondent's business in the manufacturing field that it is not reasonable to believe that its business or profits as a manufacturer have been sacrificed in order to bolster its profits as a retailer.

Regardless of the approach taken the conclusion reached is that respondent has entered into these fair trade contracts as a manufacturer, not as a retailer; that the contracts are vertical rather than horizontal, and are protected by the McGuire Act. Only by interpreting the McGuire Act as denying the right of a manufacturer to engage in any retail activities whatsoever, either directly or indirectly, can an opposite conclusion be reached. Such a conclusion would receive support only by an undue and unwarranted extension of the meaning of the Act and by a strained and unrealistic interpretation of the facts of this case.

The price control resulting from respondent's fair trade agreements is neither increased nor diminished by reason of respondent's operation of its retail outlets. The fact that respondent's fair trade agreements result in uniform retail prices on the fair traded products and prevent price competition at the retail level is the natural concomitant of all fair trade agreements and is made legal by the fair trade acts.

CONCLUSION

Upon the basis of the foregoing and all the facts of record in this proceeding, the conclusion is reached that the respondent has not violated Section 5 of the Federal Trade Commission Act as charged in the complaint and that the complaint should be dismissed.[33]

ORDER

It is ordered, therefore, That the complaint in this proceeding be, and the same hereby is, dismissed.

Chairman HOWREY delivered the opinion of the Commission.

The McGuire Act,[34] like the earlier Miller-Tydings Act,[35] was enacted by the Congress for the purpose of exempting resale price main-

[33] In view of this conclusion and the order which follows no separate ruling is required on respondent's motion to dismiss.

[34] 66 Stat. 632, 15 U. S. C. Sec. 45.

[35] 50 Stat. 693, 15 U. S. C. Sec. 1. The Miller-Tydings Act ceased to afford adequate protection to the "fair-trading" manufacturer by reason of the decision of the Supreme Court in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 334 (1951) which held that enforcement of resale price maintenance against a non-signing dealer was not included in the Miller-Tydings exemption from the Sherman Act. The McGuire Act, which is the same as the Miller-Tydings Act in most other respects, went beyond the statutory provisions of the latter to the extent felt necessary by the Congress to remove any doubt as to the binding effect of fair trade contracts upon non-signers who "wilfully and knowingly" advertise, offer for sale, or sell the commodity at a lower price. See Section 3 of the McGuire Act.

tenance agreements from the price-fixing prohibitions of the antitrust and Federal Trade Commission Acts.

This exemption, in favor of trade-marked commodities which are "in free and open competition with commodities of the same general class" sold by others, contains one important limitation:

> Nothing contained in * * * [the Act] shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity * * * between manufacturers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other.[36]

This proviso has been considered by the Commission on two prior occasions, namely, In the Matters of *Doubleday and Company, Inc.*, Docket No. 5897, decided September 25, 1953, and *Eastman Kodak Company*, Docket No. 6040, decided September 25, 1953. Both were interlocutory appeals with only four Commissioners participating. In the first the Commission divided 2–2; in the second appeal the Commission divided 3–1. Anything contained in those decisions contrary to the decision and opinion in the instant case is hereby expressly overruled.

The complaint in this case is based on the premise that since respondent maintains company-owned stores, it is not permitted to establish fair-trade pricing agreements with any independent retailer who may be in competition with said stores. The charging paragraph of the complaint reads as follows:

> The contracts and agreements entered into by respondent with its retail store customers, whereby it fixes and maintains the resale prices of many of its amateur photographic products, are illegal in that some of the retail store customers are in competition with respondent's wholly owned and controlled retail stores in the sale of such products to the consuming public. Par. Nine.

This theory would apply, of course, with equal force to any manufacturer or producer who maintains retail or wholesale outlets or who engages in any other form of direct selling. In practical effect it would require such a manufacturer to choose between his partially integrated marketing system and a system of resale price maintenance. He could not retain both selling methods in the same market area.

The facts as found by the hearing examiner are not in dispute.[37] They can be briefly summarized as follows:

Respondent is one of the leading concerns in the photographic products industry in the United States. Its professional and amateur

[36] Sec. 5 (a) (5) of the Federal Trade Commission Act, as amended. 66 Stat. 632, 15 U. S. C. Sec. 45.

[37] Said findings are therefore adopted by the Commission.

products are sold under well known and valuable trade names and trade-marks, including the name "Kodak."

Some of respondent's photographic products are designed for use primarily by the general public and are referred to as amateur products. Others of its products are designed primarily for professional, commercial or scientific use. This proceeding involves only those amateur products which are covered by resale price maintenance agreements, about 163 separate items in all.

Respondent's products are sold at retail by about 75,000 outlets located throughout the country. Included among these are some 10,000 independent retail stores to whom Eastman sells direct and 35 retail stores which are controlled by respondent through wholly owned subsidiary corporations. It was agreed, for the purpose of this proceeding, that respondent controls the latter stores and requires them to abide by the terms of the so-called fair-trade agreements in those States in which fair-trade acts are in effect.

Respondent has entered into approximately 6,500 fair-trade agreements with said independent outlets under which minimum selling prices are prescribed. Each agreement provides that it is between respondent, "the manufacturer of certain products," and a dealer "engaged in selling said products at retail" and that "the parties as Manufacturer and Retailer respectively, desire to avail themselves of the benefits of the Fair Trade Act * * *" The products covered by the agreements are manufactured by respondent and are sold under respondent's trade-mark or trade name. By agreement, no question was raised in the proceeding as to whether or not such products are sold in free and open competition with similar products produced and sold by other manufacturers.[38]

Each of the 35 company-owned stores is one of the leading outlets in the market area where it is located, and sells respondent's products in competition with other retail outlets selling the same products in the same market area.

For the calendar year 1951, the last full year of operation by respondent during which its fair-trade agreements were in effect and for which statistics were available, the net sales of respondent and its subsidiaries totaled $542,824,000, of which $111,737,000 (slightly less than 21 percent) represented sales of fair-traded products. The

[38] Included among the 163 items involved in this proceeding are two types of color film which were also involved in the Government's case against Eastman in the United States District Court for the Western District of New York (Civil Action No. 6450), culminating in the entry of a consent judgment on December 21, 1954. Under the terms of the consent judgment Eastman is prohibited from entering into or enforcing fair trade contracts which fix or control the resale price of any of this film. As to those items, therefore, this proceeding is moot.

total net sales of the company-owned stores amounted to $34,806,000, of which $3,104,000 (approximately 9 percent) represented sales of fair-traded products. Net sales of respondent's amateur products by other retail outlets was $154,769,000, of which $108,632,000 (about 70 percent) represented sales of respondent's fair-traded products.

Sales of such products by the company-owned stores amounted to less than 3 percent of the sales of fair-traded products by other retail outlets and less than six-tenths of 1 percent of respondent's total sales.

Upon the basis of the foregoing and all the facts of record, the hearing examiner reached the conclusion that the respondent had not violated the law as charged in the complaint and that the complaint should be dismissed.

The sole issue before the Commission on this appeal is whether respondent's resale price maintenance agreements are excluded, by the proviso quoted above, from the protection of the McGuire Act by reason of the fact that respondent is not only a manufacturer but is also engaged in the operation of 35 retail outlets which compete with other retail outlets dealing in the same fair-traded products. There is no contention that the contracts may for some other reason violate the Federal Trade Commission Act or fail to come within the McGuire Act exemption. There is no suggestion that a bona-fide relationship of seller and buyer did not exist between respondent and its independent retail customers or that respondent, as a retailer, combined or conspired with other retailers to maintain prices.

The provision of the McGuire Act upon which this proceeding is based was copied without substantial change from the Miller-Tdyings amendment. The language of the proviso was not contained in the original Miller-Tdyings bills and therefore did not receive Committee consideration, although the Committees did point out in their reports that the bills would not authorize "horizontal" contracts fixing resale prices of competing products.[39] Senator Tydings introduced it from the floor of the Senate as an amendment worked out between himself and the Attorney General to remove some of the Administration's objections to the bill, that is, in order to make it very clear that existing laws against horizontal price fixing were not changed by the proposed measure. Senator Tydings said, however, that he considered the amendment unnecessary:

In my judgment, Mr. President, the Amendment is unnecessary because the provision as now found in the bill allows none of the things which the amend-

[39] Sen. Rep. 2053, p. 2, 74th Cong. 2d Sess.

ment specifically eliminates; but in order that there may be no misunderstanding * * * the amendment has been offered * * *.[40]

* * * * * * *

Mr. SCHWELLENBACH. Will the Senator explain just what the amendment does as compared with what is printed in the bill?

Mr. TYDINGS. Originally, as the Senator from Washington will recall, there was a message from the Administration in opposition to the measure. I may say that I have been in consultation with the Attorney General's Office, and the amendment I have offered was suggested by me and accepted by the Attorney General as curing the objections of the Administration; * * *

The amendment provides that nothing in this particular provision shall permit manufacturers to combine with manufacturers, wholesalers with wholesalers, factors with factors, or retailers with retailers. That is made absolutely certain. I do not think it was necessary, but I was glad to put it in to place the matter beyond the peradventure of a doubt.[41]

Representative McLaughlin, in a statement on the conference report, explained the proviso as follows:

The act does not legalize contracts to maintain prices between manufacturers or sellers of different trade-marked articles of the same class or character. It only authorizes or permits contracts between the seller and the buyer, regarding resale price, as to a particular article. * * * The act, as amended in the Senate and as now before the House in the conference report, specifically provides that the act shall not make lawful any contract or agreement providing for establishment or maintenance of minimum resale prices on any commodity * * * between manufacturers, or * * * between wholesalers, * * * or between retailers, * * * or between persons, firms or corporations in competition with each other. As an example, the act would not allow two manufacturers of similar trademarked articles, as, for instance, articles of food or drugs or clothing or soap or fountain pens, or any other competing articles of similar kind, to agree between themselves as to the price at which their respective articles shall be sold. The act does not alter the provisions nor the effect of the Sherman Act as to such contracts. In other words, it simply authorizes contracts, permitted by the States, between the seller and buyer of one article—contracts known as vertical contracts. It does not permit contracts between seller and seller of different articles—known as horizontal contracts. The latter contracts, if violative of the Sherman Act now, will still be violative of the act if H. R. 1611 becomes a law.[42]

From this and other statements made in debate and in the hearings on the bills,[43] "it seems reasonable to conclude that one purpose of

[40] 81 Cong. Rec. 7487 (1937).

[41] 81 Cong. Rec. pp. 7495–96 (1937).

[42] 81 Cong. Rec. 8141 (1937).

[43] In testimony before the House Subcommittee of the Committee on Interstate and Foreign Commerce, which held hearings on the McGuire Bill, Representative Patman used a somewhat similar test to differentiate between proscribed horizontal agreements and permissible vertical agreements:

"Now if you permit horizontal price fixing too where Articles A, B and C are exactly the same, or similar, where they could go and make an agreement and say what they were adding the proviso at the last moment was to make it very clear that manufacturers or wholesalers or retailers of different competing trade-marked articles could not by means of fair-trade agreements prevent price competition between competing brands. For example, that would mean Eastman could not agree with its competitor, General Analine & Film Corp., that 'Kodak' and 'Ansco' films would both be fair traded at the same price by the subterfuge of each selling some of its product to the other. The best means of accomplishing this objective was thought to be the insertion of a proviso to preclude any fair-trade pricing agreements except where it was a bona fide relationship of seller and buyer * * * between the contracting parties. No other explanation of the proviso was given in the debates." [44]

Counsel for respondent take the position that this was the sole purpose of the proviso, namely, to exclude from the exemption, agreements designed to curtail price competition between articles bearing *different* trademarks. While there is some support for this view in the legislative history, we cannot agree that this was its only purpose. We believe Congress also intended to prohibit horizontal price fixing agreements between parties at the same functional level with reference to the *same* trade-marked commodity. It has been suggested that this latter interpretation is unsound because "the very purpose of resale price maintenance is to establish horizontally a fixed price which the consumer must pay for the particular trade-marked article regardless of where he purchases it." [45] That may be the effect of resale price agreements but the ostensible legislative purpose in sanctioning fair trade agreements, or at least the legal justification therefor, was to protect the good will of their branded or trade-marked products against

going to sell for, that would be bad; that would be vicious; but that is still opposed under existing law and this does not change it.

"This [The McGuire Bill] will permit A to fix the price on down to the retailer; it will permit B to do the same thing, and C to do the same thing; but they cannot agree among themselves. That makes competition. Then B will say, now, there is A, he is selling his commodity for so much, why can't I sell mine for just a little lower; and C will say, 'Now, there is A and B. They are selling theirs at a certain price, and I believe I will put mine in a little lower.'

"You see this brings about competition there between them from the top clear on down, but it is still unlawful to have horizontal or across-the-board price fixing, but permits vertical price fixing.

"Mr. HALE. Then your argument in brief is that vertical price fixing does not suppress competition whereas horizontal price fixing suppresses competition.

"Mr. PATMAN. That is better than I could state it myself." (Hearings before Subcommittee of the Committee on Interstate and Foreign Commerce on H. R. 5767, pp. 13–14, 82d Cong., 2d Sess. (1952).)

[44] Weston, *Resale Price Maintenance and Market Integration: Fair Trade or Foul Play?,* 22 Geo. Wash. L. Rev. 658, 670–71 (1934).

Likewise if several integrated companies, controlling a substantial part of the market, enter into fair trade contracts with each others' outlets, a conspiracy to reduce product competition might be established. 67 Har. L. Rev. 892, 894. See *U. S.* v. *Paramount Pictures, Inc.,* 334 U. S. 131, 141–144 (1948).

[45] Weston, Id., 678.

"loss leader" practices.[46] Agreements permitting one selling a commodity bearing his brand or trade-mark to dictate resale prices to his purchaser had been recognized by many jurisdictions as valid at common law,[47] but were early held to be a violation of the Sherman Act. *Dr. Miles Medical Co.* v. *John D. Park and Son Co.*, 220 U. S. 373 (1911).

Another purpose, of course, was the protection of small or independent retailers against price cutting by larger stores and chain outlets.[48] These values were thought by Congress to compensate for the consequent diminution of competition.[49]

While it may be that a horizontal agreement between two wholesalers or between two retailers with reference to the same fair-traded product would rarely lessen competition to a greater extent than vertical contracts between the manufacturer and the same outlets,[50] it is enough to say that in our opinion Congress simply was not engaged in exempting any form of horizontal contract when it enacted the Miller-Tydings and McGuire statutes. It was dealing exclusively with vertical contracts involving sellers and buyers at different levels of distribution.

"The purpose of the McGuire Act, * * * was to exempt from the operation of the Federal Trade Commission Act and the antitrust acts vertical agreements prescribing minimum or stipulated resale prices. Horizontal agreements of the same type were expressly *not* exempted. The ultimate question therefore is whether the agreements under scrutiny are 'vertical' or 'horizontal.' When negotiating the fair trade agreements with retailers was respondent acting in its capacity as a manufacturer * * * or in its capacity as a retailer? In other words, it is necessary to study the particular agreement, examine its form, economic purpose, intent and effect and then decide whether it is a vertical or horizontal * * * agreement. Form alone, of course, is not conclusive—the vertical form must not be used as a subterfuge or a cloak to cover a [horizontal] arrangement." [51]

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[46] See *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183, 193, 196 (1936); *Lionel Corp.* v. *Grayson-Robinson Stores*, 98 A. 2d 323, 626 (N. J. Super. 1953). See also 81 Cong. Rec. 8141 (1937).

[47] 67 Har. L. Rev. 892, 893.

[48] See 98 Cong. Rec. 4898, 4933, 8820 (1952); *Broxmeyer* v. *Polikoff*, 39 Pa. D. & C. 224, 228-29 (1940); 1 Callman, *Unfair Competition and Trade Marks*, 449-50 (2d ed. 1950); McLaughlin, *Fair Trade Acts*, 36 U. of Pa. L. Rev. 803, 817 (1938); 49 Yale L. J. 145, 146-147 (1939).

[49] 34 Columbia L. Rev. 282, 285.

[50] One example of further diminution of competition might be a horizontal agreement between two competing outlets fixing minimum prices higher than those contained in the vertical agreements.

[51] Separate Opinion of Chairman Howrey in *Doubleday and Company, Inc.*, Docket No. 5897, September 25, 1953, p. 7.

Senator Humphrey, the leading proponent of the McGuire Act in the Senate, specifically discussed vertical and horizontal arrangements and their relationship to partially integrated concerns. He said:

> In general, the test of whether a resale price maintenance contract is vertical is if the contract is between a seller and buyers who resell the original seller's product; whereas, the test of whether a resale price maintenance contract is horizontal is if it is between competing sellers between whom the relation of buyer and seller or reseller does not exist as to the product involved.
>
> It is important to keep this distinction in mind, because many producers of trade-marked items sell them to consumers, retailers, and wholesalers alike.
>
> Under the bill, such firms may make resale price-maintenance contracts with both wholesalers and retailers because such contracts are vertical, that is, between sellers and buyers. While in one sense firms in this position function not only as producers but also as wholesalers and retailers, they may still lawfully make contracts with other wholesalers and retailers, when in making such contracts they act as producers of a trade-marked or branded commodity, rather than as wholesalers and retailers entering into forbidden horizontal resale price-maintenance contracts with other wholesalers or other retailers.[52]

Prior to the initial decision in this case no reported cases were found dealing with the precise question involved here.[53] However, several cases had been before the courts involving partially integrated companies in which the issue could have been raised but was not.[54] And a few of these contained broad dicta which might be interpreted as sustaining fair-trade pricing by partially integrated concerns. In the *Sunbeam* case, for example, the court said: "There is no indication in the Miller-Tydings Act itself or in its legislative history that Congress intended to * * * alter established systems of distribution in order [for a manufacturer] to avail himself of the benefits of the Act." [55]

Since the filing of the initial decision two courts have dealt with the issue. The *McKesson* case,[56] decided July 1, 1954, because of its differing facts and because the ruling was made on a motion for summary judgment, is by no means conclusive. However, isolated state-

[52] 98 Cong. Record 9124 (1952). While floor remarks of a single Senator need not necessarily be persuasive of legislative intention, the statement is of interest in that no one opposed this view and the Committee reports were silent on the point.

[53] Counsel in support of the complaint urge that the case of *General Electric Co.* v. *S. Klein-on-the-Square, Inc.*, 121 N Y. S. 2d 37 (1953) is in point. A full analysis of that case compels us to agree with the hearing examiner that it does not support counsel's view.

[54] See, for example, *Doubleday, Doran & Co., Inc.* v. *R. H. Macy & Co.*, 269 N. Y. 272 (1936)—this was prior to the Miller-Tydings Act but the New York statute contained a similar provision; *Gillette Safety Razor Co.* v. *Green*, 3 N. Y. S. 2d 822 (1938), aff. 258 App. Div. 723, 15 N. Y. S. 2d 142 (1939); *General Electric* v. *R. H. Macy Co.*, 103; N. Y. S. 2d 440 (1951).

The initial decision in the instant case (p. 4) says that Eastman had obtained 39 injunctions against retail dealers in various jurisdictions.

[55] *Sunbeam Corp.* v. *Payless Drug Stores*, 113 F. Supp. 31, 39 (N. D. Cal. 1953).

[56] *U. S.* v. *McKesson & Robbins, Inc.*, S. D. N. Y., CCH Trade Regulation Reports, par. 67, 805.

ments of the court clearly support, as a matter of law, the position of the hearing examiner. The court said:

The heart of the problem presented arises from defendant's dual role as manufacturer and wholesaler. The language of the statute could provide an unerring guide to its speedy solution only if one of the defendant's capacities is carefully considered and the other happily ignored * * *

* * * * * * *

We reject the suggestion that either of alternate horns must be followed in the dilemma of fair trade agreements with independent wholesalers by a manufacturer who is also a wholesaler. * * * This court is unwilling at this stage of case law development of legislatively sanctioned resale price fixing, to hold illegal *per se* fair trade agreements because the producer is also a wholesaler * * *

* * * * * * *

Merely to establish a fair trade agreement with an independent wholesaler by a dual producer-wholesaler is insufficient to make out a *prima facie* case of restraint of trade under the Sherman Act.

* * * * * * *

Since every fair trade agreement made by a producer who acts in no other capacity necessarily restrains competition, the "true test of legality" in the situation of the producer-wholesaler of dual capacity is whether some *additional* restraint destructive of competition is occasioned * * *

The precise issue involved here was passed upon by a New York court in a recent injunction suit brought by Eastman for violation of its fair trade agreements. *Eastman Kodak Co.* v. *Aljan Camera Co.*, 131 N. Y. L. J., No. 108, p. 7, June 3, 1954. Modified and reaffirmed, 132 N. Y. L. J., No. 91, p. 8, Nov. 10, 1954. (CCH Trade Regulation Reports, par. 67, 770.) The defense was raised in that proceeding that the McGuire Act does not authorize fair trade agreements with retail stores that are in competition with Eastman's own retail stores. The court rejected this defense and approved the fair trade agreements. The court said:

At no time in the debates * * * was there the slightest intimation that any member of the Congress understood that a resale price agreement entered into by a manufacturer who also sold directly to consumers would not come within the exemption from the antitrust laws provided by the McGuire Act. On the contrary, the debates clearly establish that it was the understanding and intention of Congress that such agreements would be authorized and permitted by the McGuire Act. Furthermore, at no time did the Federal Trade Commission, in presenting its views to Congress in writing and by oral testimony, oppose the McGuire Act on such grounds.

Therefore, if Eastman distributed its products directly at retail, it is clear that Congress did not intend to deprive it of the right to enter into fair trade agreements with other retail distributors of its products. * * *

In analyzing the competition protected by the McGuire Act the court said:

Eastman Kodak Company, by its vertical price maintenance agreements, has eliminated price competition in Kodak fair-traded products among retailers, but that is exactly the result that Congress intended to accomplish by the McGuire Act. It is equally true that competition between "Kodak" products and products of the same general class manufactured by competing manufacturers remains free and open and there is no agreement between Eastman Kodak Company and other manufacturers of similar products or between retailers of those products fixing the prices at which all such products shall be sold. It is only the latter type of horizontal agreements which Congress intended to prohibit by the McGuire Act.

* * * To hold otherwise would be to completely frustrate the intent of Congress with respect to a large area of the nation-wide market, since, as stated by Senator Humphrey, many manufacturers who have fair-traded their products also engage in some wholesaling or retailing of said products. So long as Congress has determined that the public interest of the United States is best served in the continuance of fair trade, this court should not emasculate the full effectiveness thereof. As was stated by Justice Shientag in the leading case on this subject, *Calvert Distillers Corporation v. Nussbaum Liquor Store* (166 Misc. 342; Sup. Ct., New York County, 1938):

"The attitude of the courts, however, must not be one of hostility to the new law 'as an alien intruder in the house of common law but a guest to be welcomed and made at home there as a new and powerful aid in the accomplishment of its appointed task of keeping the law to social, and it may be added parenthetically, business needs.' Stone's Common Law in the United States (1936), 50 Har. L. R. 4, 15."

The merchandising practices of respondent are in no sense unique. We can take judicial notice of the fact that many manufacturers are partially integrated and engage to a lesser or greater degree in some form of wholesaling or retailing activity. In fact the volume of direct selling in this country has reached tremendous proportions. [57] This is so of manufacturers who "fair trade" as well as with others.[58] As a matter of fact the practice of selling exclusively through the "regular

[57] In a recent marketing guidebook for manufacturers and distributors issued by the United States Department of Commerce ("Selling the United States Market," by Gustav E. Larson and Marshall N. Poteat, 1951) the following figures of distribution channels for manufactured products of all industries are given:

	Percent
Sales to or through own wholesale or retail branches or stores	24.5
Sales to other wholesalers, jobbers or retailers	44.7
Sales to consumers at retail	1.6
Sales to industrial and other large users	26.0
Export sales	3.2
Total	100.0

See also Engle, Development of Marketing Channels in the United States since 1920, in Marketing Channels for Manufactured Products (Clewett ed. 1954) 69.

[58] A recent survey of certain manufacturers who "fair trade" some or all of their products, disclosed that 253 out of 322 manufacturers sell their fair traded products both directly or through fully owned subsidiaries at wholesale to retail dealers therein and also sell to other wholesalers, and that 108 of these manufacturers sell these products directly or through wholly owned subsidiaries at retail to consumers and also sell to other retailers (Tr. 66).

channels" of distribution is almost becoming the exception rather than the rule.[59] Sound business or economic reasons may justify such methods of distribution.[60]

This common business practice was well known and generally accepted at the time of the enactments of the Miller-Tydings and McGuire Acts. In determining Congressional intent there is a strong presumption that Congress does not act in a vacuum and is fully informed as to contemporaneous conditions of common knowledge.[61]

If resale price maintenance and partial integration are to be permitted when existing separately, the question is pertinent as to whether the combination of the two practices is detrimental to our

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[59] Weston, Id. 675–76. "For an excellent new publication showing that the amount of partial integration is tremendous, see Marketing Channels of Manufactured Products (Clewett ed. 1954). As an indication of what the real effect on fair-trade pricing will be if the present theory is accepted, one chapter in this work shows that almost every manufacturer of well-known washing machines sells them through mixed channels. Cascino, *Channels Used in Marketing Selected Manufactured Products: Washing Machines*, 189, shows that as of December 1952, *Maytag* sold 60% direct to dealers, 23% to independent distributors and 17% through factory branches; *General Electric* sold 30% through independent distributors and 70% through factory branches; *Westinghouse* sold 25% through independent distributors and 75% through factory branches; *Frigidaire* sold 30% through independent distributors and 70% through factory branches; *Bendix* sold 96% through independent distributors and 4% through factory branches; *Blackstone* sold 10% direct to retailers and 90% through independent distributors; *Easy* sold 58% direct to dealers and 42% through independent distributors; *Thor* sold 97.9% through independent distributors and 2.5% through factory branches. A few other brands listed will not be given here.

"It is believed that most of these same manufacturers sell their other appliances in a similar manner. While no information is available on the extent to which mixed channels of this type are used in the same area, it is likely to be fairly substantial. Consider also that to some extent many independent wholesalers are in competition with the retailers they supply. Many wholesalers sell directly to large commercial users or, in the case of appliances, to building contractors, which are essentially retail sales.

"'Sometimes a manufacturer finds it profitable to sell through two different channels because of different market conditions. Proctor & Gamble have their own warehouses and sell direct to grocery stores in the metropolitan districts. Throughout the country territory served by the rural towns, wholesalers still distribute their products. This is true of many other firms. Again the nature of the product sometimes requires a variety of distributive channels. One of the great silverware manufacturers sells the large retailers direct. He sells the wholesalers who supply some 40,000 jewelers. Then again he sells the great hotels, dining cars, and steamships direct.' Agnew, Conner and Doremus, Outlines of Marketing (3d ed. 1950). See also Nystrom, Economics of Retailing 5 (3d ed. 1930)."

[60] In addition to the reasons given in note 26, Duncan, *Channels of Distribution for Consumers' Goods,* Marketing by Manufacturers 195 (Phillips ed. 1951) gives the following reasons why manufacturers do some direct selling to consumers; (1) to secure distribution under conditions that the manufacturer desires, as, for example, the control of prices; (2) to enable the manufacturer to "keep his fingers" on the pulse of the market; (3) to act as laboratories in which to test market reactions to certain products, etc.; (4) to act as "service stations" for the manufacturer's products.

"A further reason for some direct sales may be that in many instances of large scale buying the local retailer or even wholesaler may not be able to handle the sale, because of limited capital, limited warehouse facilities, lack of personnel, or inability to service such large accounts."

[61] *Holy Trinity Church* v. *U. S.*, 143 U. S. 457 (1891); *Chesapeake and Potomac Telephone Co.* v. *Manning,* 186 U. S. 238 (1901); *United States* v. *Champlin Ref. Co.,* 341 U. S. 290 (1950).

economy. The present litigation which seeks to divorce them is supposed to be "in the public interest" but counsel in support of the complaint give no hint of an economic basis for the action. It is true, of course, that as a result of respondent's fair trade agreements there is a uniformity of retail prices. But this would continue to exist even if respondent were ordered to divest itself of the 35 stores.

An interesting discussion of several economic theories which might be broached for precluding the combination is contained in Prof. Weston's article on resale price maintenance.[62] He suggests that it is unlikely that the combination either stimulates further integration, or tends to injure independent dealer competition. On the contrary there is respectable authority, he says, to the effect that resale price maintenance laws eliminate one of the strong incentives for integration [63] and tend to increase the number of independent retailers and wholesalers.

The interpretation of the statute now being suggested by counsel in support of the complaint comes rather late. It would require thousands of manufacturers, if they want to fair trade, to make major changes in their present marketing methods with uncertain but admittedly large economic consequences.

It would require the Commission to rely on an unrealistic reading of the proviso in face of the fact that there is nothing whatsoever in the legislative history to suggest that Congress intended to discriminate against partially integrated concerns.

Whatever this Commission or anyone else may think about the desirability or wisdom of eliminating price competition in a fair-traded product, that feeling must be laid aside. By the enactment of the Miller-Tydings and McGuire Acts, sanctioning the enforcement of State fair-trade laws, Congress declared that the practice was not unlawful and not against the public interest.

The initial decision of the hearing examiner is affirmed.

Commissioner Mason did not participate.

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[62] Weston, Id. 676–80.

[63] "One of the stronger motives for market integration is a desire to control price. Duncan, *op. cit. supra*, note 59, at 195; Grether, Price Control Under Fair Trade Legislation, Ch. 10 (1939). 'The reasons why manufacturers have attempted to control distributive trades * * * are numerous. Foremost has been the desire to divert the price pressure to which producers are exposed if cutthroat competition prevails among dealers.' Wolff, *Monopolistic Competition in Distribution*, 8 Law & Contemp. Prob. 303 (1940). *United States* v. *General Electric Co.*, 272 U. S. 476 (1926) is illustrative of how the desire to achieve resale price maintenance prior to its legislative authorization was responsible for market integration.

"It must be conceded that there may be *some* counter-trend. A guaranteed price could make it more profitable for a manufacturer to maintain a retail or wholesale outlet. Moreover, chain stores and other mass distributors may be encouraged to integrate backward." Id. 677.

ORDER DENYING APPEAL FROM INITIAL DECISION

This matter coming on to be heard by the Commission upon an appeal, filed by counsel in support of the complaint, from the initial decision of the hearing examiner dismissing the complaint; and

The Commission having concluded that the initial decision constitutes an appropriate disposition of this proceeding, and having set forth its reasons for such conclusion in the attached written opinion:

It is ordered, That the appeal of counsel in support of the complaint from the hearing examiner's initial decision be, and it hereby is, denied.

It is further ordered, That said initial decision, a copy of which is also attached, be, and it hereby is, adopted.

Commissioner Mason not participating.

IN THE MATTER OF

AUTOMATIC CANTEEN COMPANY OF AMERICA

Docket 4933. Complaint, Mar. 19, 1943—Order, Jan. 12, 1955 [1]

Order—following reversal by the Supreme Court and remand to the Commission—dismissing Count II of the complaint which charged respondent with violation of sec. 2 (f) of the Clayton Act as amended, by knowingly inducing or receiving prohibited discriminations in price.

Before *Mr. Charles B. Bayly*, hearing examiner.

Mr. Austin H. Forkner for the Commission.

Sanders, Gravelle, Whitlock & Howrey, of Washington, D. C., and *Friedlund, Levin & Friedlund*, of Chicago, Ill., for respondent.

Mr. William A. Quinlan, of Washington, D. C., for National Candy Wholesalers Association, Inc., amicus curiae.

Mr. David Carliner, of Washington, D. C., for Automatic Merchandise Co., Davidson Bros., Keystone Vending Co., National Distributors, George E. Leach, Inc., Pack Shops Co., Southern Venders, Sterling Vending Co., W. W. Tibbals, Vendex Inc., and Vendomat Corp. of America, amici curiae.

OPINION OF THE COMMISSION

By MASON, Commissioner:

The complaint in this matter was issued March 19, 1943, and charged respondent in two counts with violation of Sections 2(f) and 3 of the Clayton Act, as amended. Extensive evidence was taken in support of the charges and when the case-in-chief was completed respondent filed a motion to dismiss as to both counts. After a review of the record the Commission denied that motion, holding that a prima facie case had been established with respect to the charges in both counts of the complaint.

Respondent elected to stand on its motion, made no attempt to bring forward any evidence other than that it adduced by cross examination of the government's witnesses, and the proceedings were thereupon terminated. The trial examiner's decision recommended a cease and desist order on both counts. Thereafter, the matter again came before the Commission for final disposition. Again the Commission reviewed the record, made findings of fact, concluded that respondent had violated Sections 2 (f) and (3) as charged, and thereupon issued an order

[1] For original case see 46 F. T. C. 861.

to cease and desist.[2] That order was reviewed and affirmed in its entirety by the Court of Appeals for the Seventh Circuit.[3] On respondent's appeal from the holding with respect to the 2(f) charge, the Supreme Court reversed the judgment of the Court of Appeals on that particular count and the proceeding has been remanded to us for such further action on that count as is open under the opinion of the Supreme Court.[4]

In the findings we initially made in this matter we pointed out that Automatic Canteen occupied a dominant position with respect to the purchase of confection items of the 1¢ and 5¢ variety. In the operation of its business it competed with many different types of outlets including jobbers and wholesalers of such items. Some eighty of respondent's suppliers were called during the Commission's case-in-chief. The evidence adduced showed that on sales of like goods these suppliers accorded Automatic Canteen lower prices than they accorded competitive outlets. The price differentials favoring respondent varied from seller to seller and from product to product of the same seller.

We further found that Automatic Canteen knew that the prices accorded it were lower than the prices accorded competitors because (1) these confections were so-called standard priced items, it knew the standard price and knew that sales to most competitors were made at those prices and (2) because in some instances it was advised that the prices to it were lower than the prices charged others.

In our findings we emphasized that in negotiating for these prices Automatic used a variety of methods. We found that at times it informed prospective suppliers of the prices and terms of sales which would be acceptable to it without any inquiry on its part as to whether or not the supplier could justify the price on a cost basis. At other times it refused to buy unless the price to it was reduced below the price at which the supplier sold the same merchandise to others. We also found that in many cases respondent sought to explain to prospective suppliers that certain savings would accrue from selling to respondent which would, in respondent's opinion, justify a lower price.

The findings summarized above were before the Supreme Court and the Court held them insufficient. In a carefully pin-pointed opinion the Court held that the Commission had the burden in the first instance of going forward with evidence which would show that the

[2] 46 F. T. C. 861.
[3] 194 F. 2d 433 (1952).
[4] *Automatic Canteen Co. of America* v. *F. T. C.*, 346 U. S. 61. 73 S. Ct. 1017 (1953).

buyer knew or should have known that the differentials constituted prohibited discriminations.

In terms of the present record this means that as a basis for a conclusion that a prima facie case has been established the Commission must find further that Automatic Canteen knew or should have known that the prices it received were not justified under the cost proviso of 2 (a).[5] That brings us to the first question on this remand: whether or not at the close of the Commission's case-in-chief there was evidence sufficient to warrant a finding against respondent in accordance with the criteria set up by the Supreme Court.

The prosecution tried the case on the theory that cost justification was a matter of defense to be established by the buyer charged with violation of 2 (f). While this position was emphasized throughout the trial, the prosecution on the motion to dismiss did claim by way of further argument that it had actually proved that respondent knew or should have known that the prices it received were not cost justified. Neither the citations offered in this respect by the prosecution nor a review of the record disclosed any evidence of probative value which would warrant this necessary further finding.

Automatic Canteen knew its market and even had considerable knowledge of seller's cost; but this knowledge was not related in the record to specific sellers and specific price situations. Certainly there is no evidence that respondent had direct knowledge that the prices it received were not cost justified. And a careful and studied analysis of the evidence adduced fails to reveal any evidence to support a finding of constructive knowledge. Incidentally, many of the transactions involved took place at or about the time of the passage of the amendment to the Clayton Act in 1936.

We can find, as we have, that (1) respondent received a lower price and (2) respondent knew that it received a lower price than its competitors; but it is also evident that there is some reason for that differential because of the different manner in which suppliers served respondent.

Respondent's price was an f. o. b. while the standard price to competitors was a delivered price.

Respondent obtained its confection items in plain cartons while suppliers shipped the same items to competitors in lithographed cartons.

[5] In the present case, with unimportant exceptions, the record shows that the lower prices made to Automatic Canteen were said to be based upon savings in cost. It may be that this could be taken as showing knowledge of lack of justification upon other bases. A conclusion upon this however is not necessary because knowledge on the part of the buyer of lack of cost justification was not shown.

Respondent obtained a straight price which would reflect the elimination of free deals and the right to make returns of stale and unsaleable merchandise. The price to competitors did not reflect the elimination of these factors.

It also appears that in dealing with respondents, suppliers achieved some savings in selling expense.

We have found in the record situations which may suggest the possibility that the prices accorded respondent were not cost justified. But, consistent with the theory on which the case was tried, no attempt was made to circumscribe the area in which cost savings would be operative. Thus, we are left with no foundation for an inference that respondent should have known that the prices it received were not justified by differences in cost of manufacture, sale, or delivery.

The conclusion is inescapable that the prosecution has not established a prima facie case in this record and that respondent's motion to dismiss the 2 (f) charge should have been granted.[6] We do so now.

This case has been in litigation for over a decade and is based upon evidence many years older than its onset. Lapse of time alone has made most all of the evidence now on record unresponsive to present market conditions.

Our final authority, the Supreme Court of the land, has rejected the original contention of the Commission. Whether or not the prosecution could have ultimately succeeded had it tried the case on some other theory is hardly pertinent at this time. If facts are such today in the course of the respondent's business as would warrant instigation of new proceedings on a new theory, such new facts can in nowise put the breath of life into the instant case. Nor does the final determination of this aged litigation preclude inquiry into the validity of present-day practices.

As we have said heretofore in a unanimous opinion, "At some stage there must come an end to litigation if our regulatory processes are to be effective." [7]

The proceedings as to 2 (f) are therefore dismissed.

Commissioner Mead dissented and Commissioner Howrey did not participate.

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[6] In similar vein we have already dismissed certain other 2 (f) proceedings which were initiated by us prior to the decision of the Supreme Court and which were predicated on our erroneous interpretation of this subsection of the Act. See, In the Matter of Safeway Stores, Incorporated, Docket 5990 (1953) ; In the Matter of The Kroger Company, Docket 5991 (1953) ; As to respondent, Philco Corporation, in the Matter of Sylvania Electric Products, Inc. and Philco Corporation, Docket 5728 (1954).

[7] Opinion by Gwynne, Commissioner, In the Matter of Revlon Products Corp., Docket 5685, Nov. 22, 1954.

DISSENTING OPINION OF COMMISSIONER MEAD

In this case a large buyer, Automatic Canteen, was charged with knowingly inducing or receiving illegal price discriminations from various sellers. The applicable statute is Section 2 (f) of the Clayton Act as amended by the Robinson-Patman Act.

It is an obvious economic fact that in the absence of an extreme sellers' market a large buyer is capable, directly and indirectly, of exerting substantial economic pressure on sellers. Unless the large buyer economic pressure is restricted to the limits of fair equality of opportunity bargaining, competition may be injured and monopolies created.

The extent of the operations of Automatic Canteen was described in the Opinion of the Commission rendered by Commissioner Mason in this case when it was initially before the Commission on the merits. Commissioner Mason stated:

> For a number of years respondent has been engaged in the business of purchasing candy, gum, nuts and other confectionery products from approximately 115 producers thereof and selling them as a wholesaler or jobber to various persons, firms, and corporations which lease its automatic vending machines and which are known as "Canteen Distributors." These distributors resold these products to the public by means of such machines. Respondent has also been engaged in the development, acquisition, ownership, operation and leasing of automatic vending machines. It has occupied a dominant position with respect to these two activities. On January 11, 1946, it owned 230,150 candy, nut and gum vending machines, most of which were leased to its 83 distributors located in 112 separate territories in 33 states and in the District of Columbia. Sales through such machines increased from $1,937,117 for the year ending September 30, 1936 to $14,253,547 for the year ending September 30, 1944.

Commissioner Mason concluded that the respondent "has occupied a dominant position." The strength and virility of competition depends substantially on the diffusion of economic power and choice. Congress in enacting Section 2 (f) of the Clayton Act directed this Commission to curb monopolistic and other trade restraining tendencies resulting from the unfair use of economic power by large buyers.

The questions presented in this case were and are twofold: (1) Statutory construction; and (2) Factual.

The public interest in this case is very great. The questions involved are important to (1) the general consuming public; (2) large business; and (3) small business. Basic rules of the road relative to buying and selling are at issue. Interested parties should have the answers to these questions if this Commission is authorized and able to give the answers. Economic power begets economic power. This dynamic expansion will not pause while regulatory agencies tinker with the traffic lights. In my opinion the Commission should exert every effort in this case to answer the timely questions presented in *this* case.

This complaint was issued in 1943. Generally speaking, justice demands reasonably prompt proceedings and decisions by Courts and administrative bodies. However, the way of the law is not precipitous. It is deliberate, as it should be. Commission case law makes rules relating to business conduct. These rules have general application to business practices. Cases of first impression that formulate new and important trade rules should be carefully and deliberately initiated, tried and decided. In such cases not only the participants but the public at large has a strong and abiding interest. They are truly matters affected with a public interest. Time is, of course, an important element in such cases. It is more important, however, that the pertinent questions be answered as a guide for future conduct not only for the respondents in the cases but for the tens of thousands of members of the business community.

This is a case of first impression. The road has been long and perhaps weary to the participants. Some measure of blame for the delay in the case is due to World War II. The Supreme Court of the United States considered the case—not on the merits—but on an important question of statutory construction. We now have the answer to that question of law. We should now proceed to take appropriate measures to determine whether or not under the law as interpreted by the Supreme Court, Automatic Canteen has violated Section 2 (f) of the Clayton Act as amended. That is why the complaint was issued. We are now better informed as to the applicable law than when the complaint was issued.

The discriminations in price received by respondent are described by Commissioner Mason in his initial Opinion of the Commission on the merits. Commissioner Mason stated as follows:

> Respondent has induced and received discriminations in price from approximately 80 of its suppliers of candy, gum, nuts, and other confectionery products. It has consistently paid these suppliers and sellers from slightly less than 1.2 percent to slightly more than 33 percent less than its competitors paid the same sellers for products of like grade and quality. These price differentials or discriminations varied from seller to seller and from product to product of the same seller. Officers, agents, and representatives of respondent were thoroughly aware that such price discriminations were being induced and received. They knew the prices at which their suppliers were selling candy, gum, nuts, and other confectionery products of like grade and quality to other customers, and employed various means to induce lower prices on purchases by respondent. The evidence of record clearly establishes that respondent at times informed prospective suppliers of the prices and terms of sale which would be acceptable

to it without consideration or inquiry as to whether such suppliers could justify such a price on a cost basis or whether it was being offered to other customers of the supplier. At other times the respondent refused to buy unless the price to it was reduced below the prices at which its supplier sold the same merchandise to others. In other instances, respondent sought to, and did, persuade its suppliers and sellers that they could effect certain savings in freight, sales, cartons, return and allowances, free deals and samples, and shipping container costs in selling to respondent, and thus could afford to sell to respondent at a net price of 21 to 27 percent below the price at which products of like grade and quality were being sold to respondent's competitors.

The evidence of record reveals that any discrimination in the price of candy, gum, nuts, and other confectionery products will divert business from any manufacturer or jobber of such products who does not grant such price discriminations to a manufacturer or jobber who does grant them. Such a condition is demonstrated beyond any doubt by respondent's refusal to buy in most instances except where it could induce and receive a discrimination in price.

Commissioner Mason noted in that Opinion of the Commission that the Commission had found from the evidence of record that the effect of the price discriminations induced and received by Automatic Canteen "has been, and may be, substantially to lessen competition and tend to create a monopoly."

In other words, the Commission found that Automatic Canteen was in a dominant position, that Automatic Canteen had induced and received price discriminations, and that the result of such price discriminations was the lessening of competition and the tendency to create a monopoly in Automatic Canteen. This case was reviewed on the merits by the United States Court of Appeals for the Seventh Circuit and that Court did not reverse any finding by the Commission.

Prior to the decision by the Supreme Court, Government counsel contended before the Commission that the record affirmatively showed that Automatic Canteen knew that the lower prices it was receiving could not be cost justified by the sellers. The Commission held in effect, however, that it was not necessary for Government counsel to prove this knowledge by the seller. The Commission held that this was a matter for defense on the part of Automatic Canteen and not a matter of required proof for the Government to make out a prima facie case. In the words of the Opinion of the Commission, "The statute places squarely on respondent the burden of showing that price differentials are thus justified."

The Supreme Court held that the Commission was in error in ruling that the burden of showing that price differentials are justified was on the respondent. The Court held that a necessary element of a prima facie case for the Government was an affirmative showing on the record that the respondent had actual or constructive knowledge that the lower prices received by it could not be cost justified.

The case was remanded to the Commission for further consideration in the light of the Opinion by the Supreme Court. It is now the duty of the Commission to ascertain whether or not the respondent had the knoweldge relative to cost justification or lack of it as delineated by the Supreme Court in its majority opinion.

I assume that now that the Supreme Court has held that knowledge as to cost justification by the respondent is a necessary element in the Government's case, Government counsel would again contend that the record affirmatively shows the requisite knowledge by respondent.

In my opinion the Commission should strike from the record the findings of fact, order to cease and desist and other documents based on the Commission's original concept of the law which was reversed by the Supreme Court and should now set the case down for oral argument on the merits in the light of the opinion by the Supreme Court. Government counsel could specifically point in their brief and argument to those portions of the record which they contend support the theory that respondent had knowledge that the lower prices which it received could not be cost justified. Respondent would, of course, be accorded the privilege of making any appropriate arguments to the contrary. I would permit interested parties to intervene and file briefs and make oral arguments.

It may be, of course, that after hearing oral arguments the Commission would be of the opinion that further testimony should be taken so that the case would be clarified by additional development of the facts.

In any event, I would not dismiss this case at this time. Both the government and the respondent have many thousands of dollars invested in this case. Extensive testimony has been taken. There is obviously great continuing public interest in this case. The basic question of whether or not this "dominant" buyer legally received the substantial price concessions, which the Commission found tended to create a monopoly, should be answered clearly and unequivocally.

The Majority of the Commission has decided to dismiss the complaint. The Commission, of course, has not disposed of this matter by dismissing this complaint. The complaint is not being dismissed for the reason that Automatic Canteen has not violated the law. That question remains unsettled. The Commission must investigate again the practices of Automatic Canteen to determine whether or not Automatic Canteen is inducing and receiving illegal price discriminations. Such an investigation will, of course, require considerable time and the expenditure of a substantial amount of additional public funds. The investigation may result in the Commission issuing a new complaint against Automatic Canteen and thereafter the taking of testimony under the new complaint. In such events the Commission, perhaps two or three years from now, may have before it again the question of whether or not Automatic Canteen is inducing and receiving illegal price discriminations. It may be that the case will be appealed to the Courts and additional delays will be experienced in finally concluding the case on the merits. In the meantime, I trust the smaller competitors of Automatic Canteen will be patient. I trust that these smaller competitors can withstand the economic pressures until it is finally concluded whether or not the practices of Automatic Canteen, which the Commission has heretofore found tended to create a monopoly, are in violation of the Robinson-Patman Act.

The Majority of the Commission has dismissed this complaint. From that action by the Majority I dissent.

ORDER DISMISSING COUNT II OF THE COMPLAINT

Whereas, the United States Court of Appeals for the Seventh Circuit by judgment entered on March 10, 1952, in the matter of *Automatic Canteen Company of America, Petitioner* v. *Federal Trade Commission*, No. 10239 (193 F. 2d 433), affirmed the order of the Commission in this matter; and

Whereas, the Supreme Court of the United States by its decision of June 8, 1953, in the matter of *Automatic Canteen Company of America, Petitioner*, v. *Federal Trade Commission* (346 U. S. 61) reversed the judgment of the Court of Appeals as to the charges in Count II of the complaint; and

Whereas, the case was on August 1, 1953, remanded by the Court of Appeals to the Federal Trade Commission for such further action as is open under the opinion of the Supreme Court entered in said cause on June 8, 1953; and

The Commission having reconsidered the matter, and, for the reasons appearing in the accompanying opinion of the Commission, having determined that the record herein does not make out a prima facie showing of a violation of Section 2 (f) of the Clayton Act, as amended, as interpreted by the Supreme Court in said decision, and that Count II of the complaint should be dismissed:

It is ordered, That Count II of the complaint herein be, and it hereby is, dismissed.

Commissioner Mead dissenting and Commissioner Howrey not participating.

IN THE MATTER OF

THE NEW AMERICAN LIBRARY OF WORLD LITERATURE, INC., ET AL.

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

Docket 5811. Complaint, Sept. 19, 1950—Decision, Jan. 13, 1955

Modified order [1]—following reversal and remand by the Court of Appeals for the Second Circuit [2] of the Commission's order of Jan. 6, 1953, 49 F. T. C. 760, and reconsideration by the Commission of the matter—requiring the publisher of "Signet" and "Mentor" pocket-sized book reprints to cease offering for sale, etc., any abridged book unless the fact of abridgement appears *in clear, conspicuous type upon the front cover and title page of the book either in immediate connection with the title or in another position adapted readily to attract the attention of a prospective purchaser;* and to cease using or substituting a new title for the original title of a reprinted book unless the original title appears conspicuously on the front cover and title page. (The wording in italics was added upon modification.)

Before *Mr. William L. Pack*, hearing examiner.
Mr. William L. Pencke for the Commission.
Littauer & Ullman, of New York City, for respondents.

MODIFIED DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on September 19, 1950, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the proceeding regularly came on for final consideration by said hearing examiner on the complaint, the answer thereto, testimony and other evidence, oral arguments of counsel and proposed findings as to the facts and conclusions pre-

[1] Affirmed by Court of Appeals for the Second Circuit, 227 F. 2d 384.
[2] 213 F. 2d 143.

sented by counsel, and said hearing examiner, on April 16, 1951, filed his initial decision.

Within the time permitted by the Commission's Rules of Practice, counsel for respondents filed with the Commission an appeal from said initial decision, and thereafter this proceeding regularly came on for final consideration by the Commission upon the record herein, including briefs in support of and in opposition to said appeal and oral arguments of counsel; and the Commission having issued its order granting said appeal in part and denying it in part and being fully advised in the premises, found that this proceeding was in the interest of the public and on September 19, 1952, made its findings as to the facts and its conclusion drawn therefrom and order, the same to be in lieu of the initial decision of the hearing examiner. Said decision was modified in certain respects on January 6, 1953.

Respondents petitioned the United States Court of Appeals for the Second Circuit for a review of the Commission's modified order and after hearing the cause on briefs and oral argument said Court on July 6, 1954, entered its final decree reversing the Commission's order to cease and desist and remanding the cause to the Commission for further proceedings consistent with the Court's opinion rendered on May 10, 1954.

Thereafter, the Commission having reconsidered the matter, on October 11, 1954, issued and subsequently served upon the parties an order granting leave to respondents and to counsel supporting the complaint to present their views with respect to whether the tentative modified decision of the Commission, attached to and served with said order, was in conformity with the said final decree and opinion of the United States Court of Appeals for the Second Circuit, and the Commission, having received and considered the views of the respondents and of counsel supporting the complaint and, for the reasons appearing in the accompanying opinion, having rejected the views expressed by the respondents to the effect that the said tentative modified decision is not in conformity with said final decree and opinion, now makes this its modified decision in lieu of its modified decision herein issued on January 6, 1953.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent The New American Library of World Literature, Inc., hereinafter sometimes referred to as the corporate respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with an office and principal place of business located at 501 Madison Avenue, city and State of New York. Respondent Kurt Enoch is president, treasurer and general manager of the said corporation. Respondent Victor Weybright is chairman of the board of directors and secretary of the said corporation and is also its editor-in-chief. The two individual respondents jointly formulate the policies of the corporation and direct and control its operation and practices.

PAR. 2. Respondents are now, and have been for more than two years last past, engaged in the business of publishing and selling small books, commonly referred to as pocket-size books. The said books are printed and warehoused in Chicago, Illinois, and are shipped therefrom to purchasers located in various other States of the United States and in the District of Columbia. Respondents maintain and have maintained a course of trade in the said books in commerce among and between the various States of the United States and in the District of Columbia. Respondents' volume of business in such commerce is and has been substantial.

PAR. 3. Practically all of respondents' books are reprints of books which have theretofore been published by others, and include both fiction and nonfiction. The books of fiction and nonfiction are designated by respondents as "Signet" and "Mentor," respectively. Respondents obtain from the original publisher the right to reissue the book and then proceed to publish and sell it in a small or pocket-size volume. The books are marketed by respondents almost exclusively through a national distributor and eventually reach the public through book stores, drug stores, newsstands in railroad and bus stations and otherwise. Respondents are one of the leading publishers of pocket-size books, with annual sales of many millions of copies.

PAR. 4. Since the latter part of 1947 a substantial percentage of the books published by respondents have been abridged. In 1948, 1949 and 1950 the percentages of abridgements were approximately 10%, 22% and 27%, respectively. The extent of the abridgement has varied from "5.5% or less" to 66⅔%. Out of forty-eight abridgements published by respondents in the years 1947–1950 (both inclusive), thirty-four were abridged from 20% to 66⅔%.

PAR. 5. While the original titles of the books reprinted by respondents have usually been retained, they have been not infrequently changed by respondents. These changes have been made in cases where respondents felt that the original title was lacking in popular appeal or failed to indicate correctly the type or subject matter of the book.

PAR. 6. 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.

PAR. 7. In offering for sale and selling books which are in fact abridgements and books which have been previously published under different titles, respondents have in numerous instances failed to disclose adequately the facts of abridgement and change of title. For example, on the covers of many of their abridged books, respondents have placed the words "A Special Edition" which, they claim, was intended to signal to the reader that the book was unique in some way and that further information was contained inside the book. "Special" is by no means synonymous with "abridged" or "condensed."

In other instances, the respondents' efforts have been somewhat more frank. For example, a statement "Original Title: Horseshoe Combine" appeared on the cover of one of the exhibits on a narrow stripe of contrasting color. This statement was, however, removed about as far as possible from the new title "Gunsmoke," and in much smaller type. In immediate connection with the title on the broader stripe of the same contrasting color appeared the words "Six-Guns Settle a Range War."

In addition to such disclosure as was made on the covers of respondents' books, 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. Such a disclosure was wholly inadequate by itself and its combination with another inadequate disclosure on the cover did not result in an adequate disclosure; two poor disclosures do not add up to one good one.

It is apparent that the most conspicuous words on the covers of respondents' books are the titles. The titles are plainly intended to catch the eye, and there can be no doubt that to prospective purchasers they are initially the subjects of the greatest interest; even if nothing else on the cover is scanned, the title will be.

The Commission is of the opinion, and finds, that respondents have not disclosed adequately the facts concerning the abridgement and change of title of many of their books, and that the offering of said books for sale has had the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such abridged books contained the complete original text, and that such newly titled books were new books, separate and different from the original publications from which they were copied.

PAR. 8. The Commission has given consideration to the places in which the disclosures with respect to abridgement and change of title must be made in order to avert deception of the public and is of the opinion, and finds, that these disclosures, in order to be adequate, must be made on the front cover and on the title page of the book either in immediate connection with the title under which the book is offered for sale or in a position adapted readily to attract the attention of a prospective purchaser.

CONCLUSION

(*a*) The acts and practices of respondents, as hereinabove found, 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.

(*b*) The complaint alleged that respondents had falsely stated upon the covers of certain books that such books were "Complete and Unabridged." The single instance of this, due to accident or inadvertence, which was shown by the record, is not regarded as sufficient to support this allegation.

(*c*) The complaint further alleged that respondents had represented all their books to be complete and unabridged by statements on book covers and on display stands. The representations in question were voluntarily abandoned by respondents under circumstances of such a nature that there is no present public interest in further considering them.

ORDER

It is ordered, That the respondent, The New American Library of World Literature, Inc., a corporation, and its officers, and the respondents, Kurt Enoch and Victor Weybright, individually and as officers of said corporation, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of books in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale or selling any abridged copy of a book unless one of the following words, namely: "abridged," "abridgement," "condensed" or "condensation," or any other word or phrase stating with equal clarity that said book is abridged, appears in clear, conspicuous type upon the front cover and upon the title page of the book either

in immediate connection with the title or in another position adapted readily to attract the attention of a prospective purchaser.

2. Using or substituting a new title for, or in place of, the original title of a reprinted book unless a statement which reveals the original title of the book and that it has been published previously thereunder appears in clear, conspicuous type upon the front cover and upon the title page of the book, either in immediate connection with the new title or in another position adapted readily to attract the attention of a prospective purchaser.

It is further ordered, That the charges of the complaint hereinbefore referred to and considered in paragraphs (b) and (c) of the Conclusion be, and the same hereby are, dismissed without prejudice to the right of the Commission to take such further or other action in the future as may be warranted by the then existing circumstances.

It is further ordered, That the respondents, The New American Library of World Literature, Inc., Kurt Enoch and Victor Weybright, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

OPINION OF THE COMMISSION

By MEAD, Commissioner:

The Commission on January 6, 1953, issued its modified decision in this matter in which it found that respondents have offered for sale, and sold, books which were abridgements and books which had previously been published under different titles, without adequate disclosure of the fact of abridgement or of title change and entered an order which had the effect of requiring respondents to make disclosure of the fact of abridgement and of title change in a specified manner.[1]

Respondents petitioned the United States Court of Appeals for the Second Circuit for a review of the Commission's order and that Court on July 6, 1954, entered its final decree reversing the Commission's order and remanding the cause for further proceedings consistent with the court's opinion rendered on May 10, 1954 (213 F. 2d 143). Though agreeing with the Commission's findings that respondents'

[1] The order directs respondents to cease and desist from: 1. Offering for sale or selling any abridged copy of a book unless one of the following words, namely: "abridged," "abridgement," "condensed" or "condensation," or any other word or phrase stating with equal clarity that said book is abridged, appears upon the front cover and upon the title page thereof in immediate connection with the title, and in clear, conspicuous type.

2. Using or substituting a new title for, or in place of, the original title of a reprinted book unless, upon the front cover and upon the title page thereof, such substitute title is immediately accompanied, in clear, conspicuous type, by a statement which reveals the original title of the book and that it has been published previously thereunder.

practices were deceptive, the Court held that the requirement of the order that the disclosures be made "in immediate connection with the title" was not warranted by the findings. The Court said, in substance, that there was no sufficient showing that the only way to prevent the deception shown to result from respondents' failure to make adequate disclosures was to require that the disclosures be made in immediate connection with the titles. The Court suggested that the public interest and the legitimate interest of the publisher could be sufficiently protected by a more flexible requirement as to the placement of the disclosure, "such as that the notice of abridgement or new title should be carried on the cover in immediate connection with the title or in a position adapted readily to attract the attention of a prospective purchaser."

The Commission reconsidered the matter in the light of the Court's opinion and thereafter made its tentative modified decision incorporating the Court's suggestion with respect to the requirements of the order as to the placement of the disclosure.[2] Counsel supporting the complaint and respondents were afforded opportunity to present their views with respect to whether the tentative modified decision was in conformity with the final decree and opinion of the Court.

Both counsel supporting the complaint and counsel for respondents have filed memoranda setting forth their views in the matter. Counsel supporting the complaint in his memorandum expresses the view that the tentative modified decision conforms in all respects to the final decree and opinion of the Court. Counsel for respondents, on the other hand, expresses the view that the tentative modified decision, while appearing to conform in words with the decision of the Court, in fact, violates the substance of that decision. Respondents suggest that the action which the Commission may take most consistent with the proceedings and the evidence in the case, and the opinion of the Court, is to dismiss the complaint. As alternative proposals, respondents suggest that any order which is entered be limited to the requirement that disclosures be made only on the front cover of the books,

[2] The order in the tentative modified decision directs respondents to cease and desist from: 1. Offering for sale or selling any abridged copy of a book unless one of the following words, namely: "abridged," "abridgement," "condensed" or "condensation," or any other word or phrase stating with equal clarity that said book is abridged, appears in clear, conspicuous type upon the front cover and upon the title page of the book, either in immediate connection with the title or in another position adapted readily to attract the attention of a prospective purchaser.

2. Using or substituting a new title for, or in place of, the original title of a reprinted book unless a statement which reveals the original title of the book and that it has been published previously thereunder appears in clear, conspicuous type upon the front cover and upon the title page of the book, either in immediate connection with the new title or in another position adapted readily to attract the attention of a prospecive purchaser.

or that the proceedings be reopened for the taking of additional evidence.

In support of their proposal that the complaint be dismissed, respondents contend that there is no finding, or evidence to support a finding that respondents' present disclosures of the fact of abridgement and of title change are not in positions readily adapted to attract the attention of prospective purchasers. The Commission's findings that respondents' disclosures, other than those which were discontinued prior to the issuance of the complaint, are inadequate, respondents argue, are based primarily on the premise that any disclosure which is not in immediate connection with the title is inadequate. The Commission's findings with respect to the inadequacy of respondents' disclosures are set forth in Paragraph Seven of the Commission's modified decision. There is no change in these findings in the tentative modified decision, and the Commission does not believe that the evidence in the record, or the Court's decision, requires any change. The principal finding is that "respondents have not disclosed adequately the facts concerning the abridgement and change of title of many of their books * * *." Some of the evidence in the record on which this finding is based is discussed in Paragraph Seven. It is readily apparent that in making this finding the Commission did not rely solely on the fact that respondents' disclosures in some instances were not made in immediate connection with the title. Neither did it rely solely on the fact that respondents in some instances have purported to have made disclosure of the fact of abridgement by placing the words "A Special Edition" on the cover of abridged books. Rather, the Commission found that in many instances all of the disclosures combined, nor any one of them alone, did not adequately inform prospective purchasers of the fact of abridgement or of title change. There was no holding by the Court that these findings by the Commission were erroneous. To the contrary, a majority of the Court was of the view that "some of the books in evidence as exhibits sufficiently demonstrated deceptive acts or practices which 'in the interest of the public' the Commission was empowered to prevent by a proper order to cease and desist." Some examples of the respondents' books on which the disclosures were inadequate appear in a footnote to the separate opinion of Judge Clark. Respondents' proposal that the complaint be dismissed is rejected.

In support of its alternate proposal that the order be limited to requiring that the disclosures be made only on the cover of the books, respondents contend that the Court's decision does not require that disclosure be made on the title page as well as on the cover, and also that the Commission itself in its findings discounts the efficacy of a disclosure made on the title page. The Court's opinion does not discuss the requirement of the Commission's order that disclosures be made on the title page as well as on the cover. In the absence of a holding by the Court that such requirement is not warranted, it must be assumed that the Court approved of the requirement. Respondents' contention that the Commission's findings discount the efficacy of the disclosure on the title page is without merit. The finding to which respondents refer (subparagraph (3) of Paragraph Seven of the findings) is a finding that the disclosures heretofore made by the respondents on the title page, on the copyright page, in the introduction, as a publisher's note, or elsewhere, in small type, are inadequate to prevent deception. The Commission was, and is still of the opinion that, in order to avert deception, it is necessary that the disclosures be made on the title page as well as on the cover.

The findings in the tentative modified decision, except those in Paragraph Eight which deal with the nature of the remedy required, are the same in all respects as those in the Commission's original decision. There was no holding by the Court that these findings are not supported by the record. These findings fully support the order in the tentative modified decision. Under these circumstances there is no need to reopen this proceeding for the taking of further evidence, as respondents suggest as one of their alternate proposals.

The tentative modified decision will be made the decision of the Commission.

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IN THE MATTER OF

ANN H. HARTMAN DOING BUSINESS AS FASHION ACADEMY ET AL.

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

Docket 6194. Complaint, Mar. 12, 1954—Decision, Jan. 13, 1955

Consent order requiring the operator of a vocational school in New York City offering courses in fashion designing, to stop granting "Fashion Academy Gold Medal Awards" to manufacturers and distributors of various products which enabled the recipient to advertise falsely that his product had been granted a distinction as a result of a competitive contest.

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

Mr. Edward F. Downs for the Commission.

Mr. Charles Segal and *Mr. Maurice Knapp*, of New York City, for Ann H. Hartman.

Mr. Henry Steinberg, of New York City, for Alexander H. Cohen.

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 Ann H. Hartman, an individual doing business as Fashion Academy and Alexander H. Cohen, an individual doing business as Alexander H. Cohen and Associates, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ann H. Hartman is an individual doing business under the name Fashion Academy with her principal office and place of business located at 812 Fifth Avenue, New York, New York. Fashion Academy is a vocational school offering courses in fashion designing and operated by this respondent.

Respondent Alexander H. Cohen is an individual doing business under the name Alexander H. Cohen and Associates with his office and principal place of business located at 598 Madison Avenue, New York, New York.

PAR. 2. Respondents Ann H. Hartman and Alexander H. Cohen, in cooperation with each other, are now and for more than one year last past have been engaged in the practice of making so-called awards to manufacturers and distributors of various products. Said award is designated the "Fashion Academy Gold Medal Award" and it is designed and intended by respondents to be used by the recipients thereof in advertising the products for which it is granted.

PAR. 3. In the course of granting the aforesaid award respondents send and have sent said award, accompanying citation and other correspondence and information, and products submitted for consideration, at the request of respondents, from the State of New York to recipients and prospective recipients of said award who were and are located in the various other States of the United States.

Respondents also maintain and at all times mentioned herein have maintained a constant course of correspondence from their offices within the State of New York with recipients and prospective recipients of their said award who were and are located in the various other States of the United States.

The activities of respondents as herein described constitute acts and practices in commerce among and between the various States of the United States as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. By making or granting the aforesaid "award," and through the use of the name "Fashion Academy Gold Medal Award" in connection therewith, respondents represent directly or by implication, and place in the hands of others the means of representing directly or by implication:

(*a*) That products for which said "award" is or has been presented have been selected to receive it because they have been adjudged the most outstanding from the standpoint of design, quality or utility in their respective fields of competition, in a competitive contest in which a representative number of competing products were considered and in which all competitive products were afforded an equal opportunity to compete.

(*b*) That products receiving said "award" were selected by a group of impartial and qualified individuals representing the field of fashion design as a whole.

(*c*) That the purpose of said "award" is to encourage and give recognition to products of the most outstanding design in their respective fields of competition without regard to any financial reward inuring to the benefit of the grantors thereof.

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

(*a*) Products for which the aforesaid "award" is or has been granted have not been adjudged the most outstanding in their respective fields of competition because no competitive contests are or have been held in which a representative number of competing products were entered nor were all competitive products afforded an equal opportunity to be considered.

(*b*) Products receiving said "award" are not selected by a group of impartial and qualified individuals representing the field of fashion design as a whole, but are selected by respondent Hartman, or by her and others who are under her control, with the approval of respondent Cohen.

(*c*) The purpose of said "award" is not to encourage or give recognition to products of outstanding design in their respective fields of competition, but rather it is actually the essential element of a plan or scheme engaged in by respondents whereby they enrich themselves personally by (1) obtaining contributions from recipients of said "award" to a so-called scholarship fund which contributions inure to the benefit of respondent Hartman as the sole owner of Fashion Academy, (2) obtaining the employment of respondent Cohen as public relations counsellor, by recipients of the "award" to exploit its receipt, and (3) collecting a fee from recipients, allegedly to cover the "expenses" of making the "award," which fee is shared by respondents Hartman and Cohen.

PAR. 6. Respondents by granting the aforesaid "Fashion Academy Gold Medal Award" to manufacturers and distributors, as hereinabove set forth, who use it in advertising the products for which it has been received, place and have placed in the hands of recipients the means and instrumentality whereby such recipients have been and are enabled to mislead and deceive members of the purchasing and consuming public as to the significance or nature of said "award."

PAR. 7. The acts and practices of respondents as aforesaid have had and now have the tendency and capacity to mislead and deceive a substantial portion of the purchasing and consuming public as to the significance or nature of the aforesaid "award" and as a result thereof have caused members of the public to purchase a substantial number of the products receiving said "award."

PAR. 8. The aforesaid acts and practices of respondents as herein alleged are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

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 January 13, 1955, the initial decision in the instant matter of hearing examiner Earl J. Kolb, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding charges the respondents Ann H. Hartman, an individual doing business as Fashion Academy, and Alexander H. Cohen, an individual doing business as Alexander H. Cohen and Associates, with unfair and deceptive acts and practices in connection with the issuance of awards, to manufacturers and distributors of various products, known as the "Fashion Academy Gold Medal Award," in violation of the Federal Trade Commission Act. Answers were filed by said respondents and testimony and other evidence were introduced in support of the allegations of the complaint before the undersigned Hearing Examiner.

Before the taking of any testimony in opposition to the allegations of the complaint the respondent Alexander H. Cohen filed a motion to dismiss this proceeding as to him, which motion was supported by an affidavit to the effect that he had severed all connections with the Fashion Academy prior to the issuance of the complaint herein and that he will not engage in any of the practices charged in the complaint in the future.

Thereafter, respondent Ann H. Hartman entered into a stipulation for a consent order with counsel supporting the complaint dated November 22, 1954. By the terms of said stipulation said respondent Ann H. Hartman admitted all of the jurisdictional allegations set forth in the complaint and expressly withdrew the answer previously filed herein by her, waiving a hearing before the Hearing Examiner or the Commission, the making of findings of fact and conclusions of law before 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 she may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission. In said stipulation said respondent further agreed 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 waived any and all right, power and privilege to challenge or contest the validity of said order. It was further provided in said stipulation that the complaint shall constitute the entire record herein as to said respondent Ann H. Hartman, and that said complaint may be used in construing the terms of the order and that the order may be altered, modified or set aside in the manner provided by statute for other orders of the Commission.

The Hearing Examiner having given consideration to said motion and affidavit filed in support thereof, and answer of counsel supporting complaint not opposing said motion, the stipulation for consent order hereinabove described, and being now duly advised in the premises hereby accepts said stipulation for consent order submitted by respondent Ann H. Hartman and issues the following order:

ORDER

It is ordered, That respondent Ann H. Hartman, individually and doing business as Fashion Academy, whether doing business under this name or any other name, her representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

Granting, making or presenting any award, citation or other such commendation, under the name "Fashion Academy Gold Metal Award" or under any other name, in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents directly or by implication, or placing in the hands of others the means or instrumentality whereby they are enabled to represent, directly or by implication, that competitive contests are or have been conducted by impartial and qualified individuals to determine the relative quality or merits of competing products or that any product has been presented with an award or other distinction as a result of a competitive contest, unless such a contest has actually been conducted in which a representative number of competing products were afforded an opportunity to compete.

It is further ordered, That the complaint herein be dismissed as to the respondent Alexander H. Cohen, an individual doing business as Alexander H. Cohen and Associates, without prejudice to the right of the Commission to institute further proceedings should other and future facts warrant.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent Ann H. Hartman, an individual doing business as Fashion Academy, shall, within sixty (60) days after service upon her of this order, file with the Commission a report in writing setting forth in detail the manner and form in which she has complied with the order to cease and desist [as required by said declaratory decision and order of January 13, 1955].

IN THE MATTER OF

NATHAN FARBER ET AL. DOING BUSINESS AS S. FARBER AND SONS

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

Docket 6234. Complaint, Sept. 17. 1954—Decision, Jan. 16, 1955

Consent order requiring a furrier in New York City to cease violating the Fur Products Labeling Act by invoicing which failed to show clearly the name of the animal producing certain fur and the country of origin of imported furs; and by using descriptive terms which denoted false geographical origin.

Before *Mr. Loren H. Laughlin*, hearing examiner.
Mr. John J. McNally for the Commission.
Mr. Leonard Feldman, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Nathan Farber, Jack Farber, Samuel Farber and Max Farber, individuals and copartners doing business as S. Farber and Sons, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Nathan Farber, Jack Farber, Samuel Farber and Max Farber are individuals and copartners trading as S. Farber and Sons with their principal office and place of business located at 345 Seventh Avenue, New York, New York.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have introduced into commerce, sold and offered for sale in commerce, and have transported and distributed in commerce, as "commerce" is defined in the Fur Products Labeling Act, fur, as "fur" is defined in said Act.

PAR. 3. Certain of said fur was falsely or deceptively invoiced in that:

(*a*) the respondents did not invoice such fur to show:

(1) the name or names of the animal producing the fur, as set forth in the Fur Products Name Guide and as permitted under the Rules and Regulations.

(2) the name of the country of origin of imported fur.

(*b*) the respondents used certain terms on invoices descriptive of the breed, species, strain or coloring of an animal which connoted a false geographical origin of the animal. Exemplifying said practice, but not limited thereto, is respondents' use of the term "Aleutian Mink," in violation of the Fur Products Labeling Act and Rule 7 of the Rules and Regulations promulgated thereunder.

PAR. 4. The acts and practices of the respondents, as herein alleged, were in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce under 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 January 16, 1955, the initial decision in the instant matter of hearing examiner Loren H. Laughlin, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (hereinafter referred to as the Commission) on September 17, 1954, issued its complaint herein under the Federal Trade Commission Act, and the Fur Products Labeling Act against the above-named respondents, charging them in certain particulars with having violated the provisions of said Acts and the Rules and Regulations promulgated by the Commission under the Fur Products Labeling Act. The respondents were duly served with process and thereafter requested and obtained time from the Hearing Examiner in which to file answer, which time was last extended to December 8, 1954.

On November 23, 1954, the respondents, however, stipulated in writing with counsel supporting the complaint, therein waiving the filing of an answer and agreeing that a consent order against the respondents be entered herein in terms identical with those contained in the notice issued and served on respondents as a part of the complaint herein. Such written stipulation was approved in writing by the Director and Assistant Director of the Commission's Bureau of Litigation.

By said stipulation, among other things, respondents have admitted all the jurisdictional allegations of the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations; that the parties expressly waive a hearing before the Hearing Examiner or the Commission and all further and other procedure to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission; and that the order to cease and desist issued in accordance with said stipulation shall have the same force and effect as if made after a full hearing, the parties having waived specifically therein any and all right, power or privilege to challenge or contest the validity of said order. It was also stipulated and agreed therein that the complaint herein may be used in construing the terms of the order provided for in said stipulation, and, further, that the signing of said stipulation is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The aforesaid stipulation for consent order as so approved was submitted on November 30, 1954, to the above-named hearing examiner for his consideration in accordance with Rule V of the Commission's Rules of Practice. And upon due consideration of the complaint and the stipulation for consent order, which is hereby accepted and ordered filed as part of the record herein, it having been stipulated they shall be the entire record herein on which such order may be entered, the hearing examiner finds that the Commission has jurisdiction of the subject matter of this proceeding and of each and all of the parties respondent herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act, and the Fur Products Labeling Act, and the Rules and Regulations promulgated by the Commission under the latter Act against the respondents as a whole and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said stipulation is appropriate for the disposition of this proceeding, the same to become final when it becomes the order of the Commission; and that said order therefore should be, and hereby is, entered as follows:

ORDER

It is ordered, That respondents Nathan Farber, Jack Farber, Samuel Farber, and Max Farber, as individuals and as copartners trading as S. Farber and Sons, or under any other name, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, or offering for sale in commerce, or the transportation or distribution in commerce, of fur, as "commerce" and "fur" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

(1) Failing to invoice furs to show in a clear and conspicuous manner:

(*a*) the name or names of the animal or animals producing the fur as set forth in the Fur Products Name Guide and as permitted under the Rules and Regulations.

(*b*) the name of the country of origin of imported furs.

(2) Using terms descriptive of the breed, species, strain, or coloring of an animal which connotes a false geographical origin of the animal.

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 January 16, 1955].

IN THE MATTER OF

SAM SMITH SHOE CORPORATION TRADING AS THE YANKEE SHOEMAKERS

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

Docket 6206. Complaint, May 17, 1954—Decision, Jan. 18, 1955

Consent order requiring a dealer in Newmarket, N. H., to cease representing on labels and in advertising that his "Little Yankee Shoes", etc., for children were designed and constructed to prevent foot troubles and had orthopedic qualities generally.

Before *Mr. James A. Purcell*, hearing examiner.
Mr. Michael J. Vitale for the Commission.
Lourie & Cutler, of Boston, Mass., 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 Sam Smith Shoe Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. The respondent, Sam Smith Shoe Corporation, is a corporation organized and existing under and by virtue of the laws of the State of New Hampshire. Its office and principal place of business is located in Newmarket, New Hampshire. It trades and does business under the name of The Yankee Shoemakers.

PAR. 2. The respondent is now, and has been for several years last past, engaged in the sale and distribution of children's shoes designated by it as "Little Yankee Shoes," "Little Yankee Normal-Izers" and "Little Yankee Toddler" shoes.

PAR. 3. Respondent causes, and has caused, said shoes, when sold, to be transported from its place of business in the State of New Hampshire to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a course of trade in its said shoes in commerce between and among the various States of the United States. Respondent's volume of business in the sale of said shoes in commerce is and has been substantial.

PAR. 4. In the course and conduct of its business for the purpose of inducing the purchase of its said shoes, the respondent has made various statements and representations concerning the nature and usefulness of said shoes by means of labels on its shoe boxes, advertisements inserted in newspapers and magazines of general circulation, and by means of folders, circulars, and radio continuities. Among and typical of such statements and representations are the following:

(1) Advertisements with respect to "Little Yankee Shoes":

* * * Give your child a good start on the road to foot health with "Little Yankees" * * *. Designed to keep little feet normal * * *.

* * * Time to safeguard your youngster's foot health. Bring them in to be fitted with Little Yankee Shoes * * *.

Correctly designed and constructed shoes help prevent foot troubles which undermine health.

* * * Weak ankles and arches are troublesome not only in themselves, but tend to produce poor posture * * *.

* * * Little Yankee Shoes follow the normal shape of the growing foot, and give proper support and balance.

Make sure that your youngster grows up sound and strong—in sturdy smart-looking, HEALTH-PROTECTING Little Yankees.

* * * Assure foot health for your youngster * * *.

* * * Plenty of support for correct balance * * *.

* * * Designed to promote good posture * * *.

* * * Help keep little dancing feet straight and strong * * *.

* * * Has every foot health feature needed to insure straight, sturdy growth * * *.

Promote good posture and protect growing feet * * *.

(2) Advertisements with respect to "Little Yankee Normal-Izers" shoes:

* * * corrective shoes—Little Yankee Normal-Izers * * * restores proper position of heel bones—promotes normal balance * * * promotes normal foot health and posture * * * for normal correction of inturned ankles, flat feet, weak arches and poor posture * * *.

* * * No Doctor can prescribe better corrective shoes than Little Yankee Normal-Izers * * * Gentle orthopedic correction for children's feet * * *.

(3) Advertisements with respect to "Little Yankee Toddler Shoes":

* * * Little Yankee Toddler scientifically designed to promote normal foot growth * * *.

* * * that one out of every three infants develop weak feet during the first year of walking. You have given your baby a healthy start in the Little Yankee "Toddler".

This expertly crafted shoe is built to give needed support and balance to Baby's every step during the important formative period.

PAR. 5. Through the use of the statements and claims hereinabove set forth, and others similar thereto not specifically set out herein, respondent has represented, directly or by implication, with respect to its shoes:

(1) That the "Little Yankee Shoes" will keep and help to keep the feet strong, healthy and normal, will assure foot health, will guard or safeguard foot health, will protect, promote and save foot health, contain health features and are affirmatively conducive to the health of the feet; that said shoes will prevent and help prevent foot troubles, will prevent weak arches and weak ankles, will insure or promote straight and sturdy growth of the feet, will keep the feet straight and strong, will give proper posture control and promote and effect good posture and provide correct balance.

(2) That the "Little Yankee Normal-Izers" are a corrective shoe and provide orthopedic correction; will restore proper position of heel bones; will improve posture and promote normal posture; will correct and prevent inturned ankles, flat feet, weak arches, poor posture, and defects, deformities and abnormalities of the feet.

(3) That use of the "Little Yankee Toddlers" shoe will prevent development of weak feet and promote normal foot growth.

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

(1) Respondent's "Little Yankee Shoes" will not keep or help keep the feet strong, healthy or normal; will not assure foot health; will not guard or safeguard foot health; will not protect, promote or save foot health; do not contain health features and are not affirmatively conducive to the health of feet. Said shoes will not prevent or help prevent foot troubles; will not prevent weak arches or ankles; will not insure or promote straight or sturdy growth of the feet; will not keep the feet straight or strong; will not give proper posture control or promote or effect good posture and will not provide correct balance.

(2) Respondent's "Little Yankee Normal-Izers" are not a corrective shoe and will not provide orthopedic correction; will not improve posture or promote normal posture; will not correct or prevent flat feet, weak arches, poor posture or defects, deformities or abnormalities of the feet. Although said shoes embody devices or factors which are often approved by physicians as beneficial in preventing the persistence of displaced heel bones and inturned ankles and alleviating the symptoms of these conditions when such measures are found to be individually indicated, said shoes cannot be relied upon to restore proper position of the heel bones or to correct or prevent inturned ankles.

(3) Respondent's "Little Yankee Toddlers" shoe will not prevent the development of weak feet or promote normal foot growth.

PAR. 7. Through the use of the word "Normal-Izers," in the brand name "Little Yankee Normal-Izers," respondent has represented and now represents that said shoes will keep feet normal and correct or prevent abnormalities of the feet.

PAR. 8. The said representations are false, misleading and deceptive. In truth and in fact, the use of respondent's shoes, designated as "Little Yankee Normal-Izers," will not keep feet normal or correct or prevent abnormalities of the feet.

PAR. 9. In the course and conduct of its business and for the purpose of inducing the purchase of said shoes, the respondent furnishes to its dealers advertising matter containing various statements and representations concerning methods of selling said shoes. Among and typical of such statements and representations contained in said advertising matter are the following:

> We study the way your child walks without shoes, watching weight placement, gait and posture.
>
> * * * Our check-up precautions are also designed to keep little feet normal.
>
> * * * selling children's shoes must go beyond supplying the correct size * * * with platform fitting each child's needs become a distinct study. The first steps are foot analysis, thereafter come size tests. Such a combination is health promoting. Posture fitting dramatizes your care of children's feet and labels you "expert" to the parents of your community * * * special regard for arch condition and posture defects * * * gait is analyzed and walking defects, if any, are detected. The conclusions of the first two studies indicate the kind of shoe or correction needed * * * some retailers add a generous mixture of showmanship to their methods * * * women are impressed * * * and like to be waited on by obvious experts * * *.

PAR. 10. Through the use of the advertising material set forth in Paragraph Nine, respondent represented, directly or by implication, that the fitters employed by dealers selling respondents said shoes and the dealers themselves are qualified as experts to diagnose foot conditions and to prescribe corrective and preventive measures for defects of weight placement, gait and posture and corrective and preventive measures for defects, deformities and abnormalities of the feet.

PAR. 11. The said statements and representations are false, misleading and deceptive. In truth and in fact, most fitters of said shoes employed by dealers and most dealers themselves are not qualified as experts to diagnose foot conditions or to prescribe corrective or preventive measures for defects of weight placement, gait or posture or corrective or preventive measures for defects, deformities or abnormalities of the feet.

By furnishing said advertising matter to its dealers respondent placed in the hands of said dealers a means and instrumentality by and through which said dealers may mislead and deceive the public as to the qualifications of themselves and of the fitters employed by them and the results which may be expected in purchasing and using respondent's shoes.

PAR. 12. In the course and conduct of its business respondent is in substantial competition in commerce with other corporations and with firms and individuals also engaged in the sale of children's shoes.

PAR. 13. The use by respondent of the foregoing false, deceptive and misleading statements and representations with respect to its shoes has had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true and to induce them, because of such erroneous and mistaken belief, to purchase substantial quantities of respondent's shoes, and has placed in the hands of dealers in such shoes a means and instrumentality whereby they may deceive and mislead the purchasing public in the respect stated herein. As a consequence substantial trade in commerce has been unfairly diverted to respondent from its competitors and substantial injury has thereby been done to competition in commerce.

PAR. 14. The aforesaid advertisements and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and of respondent's 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.

ORDERS AND DECISION OF THE COMMISSION

Order modifying initial decision, adopting initial decision as modified, as Commission's decision and directing that report of compliance be filed, Docket 6206, January 18, 1955, follows:

This matter having come on to be heard by the Commission upon the initial decision of the hearing examiner herein, and request of counsel supporting the complaint that the initial decision be changed to conform to a stipulation between respondent and counsel supporting the complaint, executed subsequent to the filing of said initial decision, by substituting the word "of' for the word "or" immediately following the word "defects" in Paragraph 5 of the order in said initial decision; and

The Commission having duly considered the initial decision, request of counsel supporting the complaint, and the record herein, and being of the opinion that the initial decision should be modified by making the change requested, and that with such modification said initial decision is adequate and appropriate to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner herein be, and it hereby is, modified by substituting the word "of" for the word "or" immediately following the word "defects" in Paragraph 5 of the order in said initial decision.

It is further ordered, That the attached initial decision of the hearing examiner, as herein modified, shall, on the 18th day of January 1955, become the decision of the Commission.

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

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on May 17, 1954, issued and subsequently served its complaint upon the respondents, Sam Smith Shoe Corporation, a corporation, trading also as The Yankee Shoemakers, with its office and principal place of business located in Newmarket, New Hampshire. Respondent is engaged in the sale and distribution of children's shoes designated as "Little Yankee Shoes," "Little Yankee Normal-Izers" and "Little Yankee Toddlers."

On June 30, 1954, there was filed with the Federal Trade Commission a stipulation between the parties providing for entry of a consent order, which stipulation appears of record in these formal proceedings. By the terms thereof both 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, the respondent might be entitled under the Federal Trade Commission Act or the rules of practice of the Commission. Said stipulation further provides that said complaint may be used in construing the terms of the order herein, which latter may be altered, modified or set aside in the manner provided by statute for other orders by the Commission.

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 the respondent, Sam Smith Shoe Corporation, a corporation, and 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 respondent's shoes now designated "Little Yankee Shoes," "Little Yankee Normal-Izers" and "Little Yankee Toddlers," or of any other shoe of similar construction or performing similar functions irrespective of the designation applied thereto, do forthwith cease and desist from:

(1) Representing directly or by implication that "Little Yankee Shoes":

(*a*) Will keep or help keep the feet strong, healthy or normal; assure foot health; guard or safeguard foot health; promote or save foot health; contain health features or are affirmatively conducive to the health of the feet;

(*b*) Will prevent or help prevent foot troubles, weak ankles or arches; insure or promote straight or sturdy growth of the feet; keep the feet straight or strong; give proper posture control or promote or effect good posture or provide correct balance.

(2) Representing directly or by implication that the "Little Yankee Normal-Izers" shoe is a corrective shoe or provides orthopedic correction, improves posture or promotes normal posture; corrects or prevents flat feet, weak arches, poor posture, defects, deformities or abnormalities of the feet; that said shoes can be relied upon to restore proper position of the heel bones or to correct or prevent inturned ankles, provided, however, that nothing herein contained shall prevent respondent from representing that said shoes embody devices or factors which are often approved by physicians as beneficial in preventing the persistence of displaced heel bones and inturned ankles and alleviating the symptoms of these conditions when such measures are found to be individually indicated;

(3) Representing directly or by implication that the "Little Yankee Toddlers" shoe prevents the development of weak feet or promotes normal foot growth;

(4) Using the word "Normal-Izers," or any other word or words of similar import or meaning alone or in combination with any other word or words, to describe, designate, or refer to its shoes;

(5) Representing directly or by implication that fitters employed by dealers selling respondent's shoes or the dealers themselves are qualified as experts to diagnose foot conditions or to prescribe corrective or preventive measures for defects of weight placement, gait or posture or corrective or preventive measures for defects, deformities or abnormalities of the feet.