

Complaint

IN THE MATTER OF

BROCHERS TRADING CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket 6403. Complaint, Aug. 24, 1955—Decision, Jan. 6, 1956

Consent order requiring importers in New York City to cease violating the Flammable Fabrics Act by importing into the United States from Japan and selling in commerce silk scarves which were so highly inflammable as to be dangerous when worn.

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

Mr. Brockman Horne for the Commission.

Barnes, Richardson & Colburn, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Brochers Trading Corporation, a corporation, Gregory Pasteur and Hershel Milner, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the rules and regulations promulgated thereunder, 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 Brochers Trading Corporation, is a New York corporation. Respondents Gregory Pasteur and Hershel Milner are president and secretary-treasurer, respectively of respondent Brochers Trading Corporation. The individual respondents formulate, direct, and control the policies of said corporation. The business address of all respondents is 1412 Broadway, New York, New York.

PAR. 2. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have imported into the United States articles of wearing apparel, as the term "articles of wearing apparel" is defined in the Flammable Fabrics Act, which, under the provisions of Section 4 of the said Act, as amended, were so highly flammable as to be dangerous when worn by individuals. Respondents have sold, offered for sale, introduced, delivered for introduction, and

Decision

52 F. T. C.

transported and caused to be transported in commerce, as "commerce" is defined in the Flammable Fabrics Act, the said articles of wearing apparel, imported as aforesaid. Respondents have also transported and caused to be transported the said articles of wearing apparel, imported as aforesaid, for the purpose of sale and delivery after sale in commerce.

Among the articles of wearing apparel mentioned hereinabove were silk scarves manufactured in Japan.

PAR. 3. Respondents, in the course of their business, are engaged in competition in commerce with others in the sale and offering for sale of scarves which are not flammable "articles of wearing apparel" under the definition of the Flammable Fabrics Act.

PAR. 4. The acts and practices of respondents were and are in violation of the Flammable Fabrics Act and of the rules and regulations promulgated thereunder, and as such 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.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding, issued August 24, 1955, charges the respondents Brochers Trading Corporation, a corporation existing by virtue of the laws of the State of New York, and Gregory and Pasteur and Hershel Milner, individuals and as officers of the respondent corporation, with violation of the Federal Trade Commission Act and of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder, in connection with the importation, sale, offering for sale and transporting in interstate commerce of articles of wearing apparel which articles were so highly flammable as to be dangerous when worn by individuals.

After the issuance of said complaint and the filing of their answer thereto, the respondents entered into an agreement for consent order with counsel in support of complaint, disposing of all the issues in this proceeding, which agreement was duly approved by the Director of the Bureau of Litigation. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the respondents 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. By said agreement, the answer heretofore filed by respondents was withdrawn

and the parties expressly waived a hearing 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, and all further and other procedure before the hearing examiner and the Commission to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission.

By said agreement, respondents further agreed that the order to cease and desist issued in accordance with said agreement 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 or privilege to challenge or contest the validity of such order.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement; and that the said order may be altered, modified or set aside in the manner provided by the statute for the orders of the Commission.

Said agreement recites that respondent Brochers Trading Corporation is a corporation existing under and by virtue of the laws of the State of New York; respondents Gregory Pasteur and Hershel Milner are individuals and, respectively, are President and Secretary-Treasurer of the corporate respondent and as such formulate, direct and control the policies of the corporation. The office and principal place of business of all respondents is located at No. 1412 Broadway, New York, New York.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and in consonance with the terms of said agreement, the hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named herein, and that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That the respondent Brochers Trading Corporation, a corporation, and its officers, and respondents Gregory Pasteur and Hershel Milner, individually and as officers of said corporation,

and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

1. (a) Importing into the United States; or
- (b) Selling, offering for sale, introducing, delivering for introduction, transporting or causing to be transported, in commerce, as "commerce" is defined in the Flammable Fabrics Act; or
- (c) Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce; any article of wearing apparel, which, under the provisions of Section 4 of the said Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner did, on the 6th day of January, 1956, become the decision of the Commission; and, accordingly:

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.

Complaint

IN THE MATTER OF
CHABETAYE CHRAIME DOING BUSINESS AS
Ch. CHRAIME

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket 6417. Complaint, Sept. 21, 1955—Decision, Jan. 6, 1956

Consent order requiring an importer in New York City to cease violating the Flammable Fabrics Act by importing into the United States from Japan and selling silk scarves so highly inflammable as to be dangerous when worn.

Before *Mr. James A. Purcell*, hearing examiner.
Mr. Brockman Horne for the Commission.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Chabetaye Chraime, an individual trading and doing business as Ch. Chraime, hereinafter referred to as respondent, has violated the provisions of said Acts, and the rules and regulations promulgated under the Flammable Fabrics Act, and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Chabetaye Chraime is an individual trading and doing business as Ch. Chraime, with his office and principal place of business located at 93 Worth Street, New York 13, New York.

PAR. 2. Respondent, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, has imported into the United States articles of wearing apparel, as the term "articles of wearing apparel" is defined in the Flammable Fabrics Act, which, under the provisions of Section 4 of said Act, as amended were so highly flammable as to be dangerous when worn by individuals. Respondent has sold, offered for sale, introduced, delivered for introduction, transported, and caused to be transported in commerce, as "commerce" is defined in the Flammable Fabrics Act, the said articles of wearing apparel, imported as aforesaid. Respondent has also transported and caused to be transported the said articles of wearing ap-

parel, imported as aforesaid, for the purpose of sale and delivery after sale in commerce.

Among the articles of wearing apparel mentioned hereinabove were silk scarves manufactured in Japan.

PAR. 3. Respondent, in the course and conduct of his business, is engaged in direct and substantial competition in commerce with other individuals, firms and corporations in the sale and offering for sale of scarves which are not flammable "articles of wearing apparel" under the definition in the Flammable Fabrics Act.

PAR. 4. The aforesaid acts and practices of respondent were and are in violation of the Flammable Fabrics Act and the rules and regulations promulgated thereunder, and as such 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.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding, issued September 21, 1955, charges the respondent, Chabetaye Chraime, an individual trading and doing business as Ch. Chraime, whose office and principal place of business is located at No. 93 Worth Street, New York, (13), New York, with violation of the Federal Trade Commission Act and of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder, in connection with the importation, sale, offering for sale and transporting in interstate commerce of articles of wearing apparel which articles were so highly flammable as to be dangerous when worn by individuals.

After the issuance of said complaint the respondent entered into an agreement for consent order with counsel in support of complaint, disposing of all the issues in this proceeding, which agreement was duly approved by the Director of the Bureau of Litigation. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint.

By the terms of said agreement, the respondent 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. By said agreement the parties expressly waived a hearing 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, and

639

Order

all further and other procedure before the hearing examiner and the Commission to which the respondent may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission.

By said agreement, respondent further agreed that the order to cease and desist issued in accordance with said agreement 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 or privilege to challenge or contest the validity of such order.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement; and that the said order may be altered, modified or set aside in the manner provided by the statute for the orders of the Commission.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and in consonance with the terms of said agreement, the hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent named herein, and that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That the respondent Chabetaye Chraime, an individual, his representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

1. (a) Importing into the United States; or
- (b) Selling, offering for sale, introducing, delivering for introduction, transporting or causing to be transported, in commerce, as "commerce" is defined in the Flammable Fabrics Act; or
- (c) Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce; any article of wearing apparel, which, under the provisions of Section 4 of the said Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 6th day of January, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein 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 to cease and desist.

Complaint

IN THE MATTER OF

ARKWRIGHT ACCESSORIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket 6402. Complaint, Aug. 24, 1955—Decision, Jan. 7, 1956

Consent order requiring an importer in New York City to cease violating the Flammable Fabrics Act by importing into the United States from Japan and selling silk scarves so highly inflammable as to be dangerous when worn.

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

Mr. Brockman Horne for the Commission.

Marlin & Sandberg, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Arkwright Accessories, Inc., a corporation, and Arthur Olshan, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the rules and regulations promulgated thereunder, 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 Arkwright Accessories, Inc., is a New York corporation. Respondent Arthur Olshan is president and secretary-treasurer of respondent Arkwright Accessories, Inc. The individual respondent formulates, directs, and controls the policies of said corporation. The business address of both respondents is 49 West 37th Street, New York, New York.

PAR. 2. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have imported into the United States articles of wearing apparel, as the term "articles of wearing apparel" is defined in the Flammable Fabrics Act, which, under the provisions of Section 4 of said Act, as amended, were so highly flammable as to be dangerous when worn by individuals. Respondents have sold, offered for sale, introduced, delivered for introduction, and transported and caused to be transported in commerce, as "commerce" is

Decision

52 F. T. C.

defined in the Flammable Fabrics Act, the said articles of wearing apparel, imported as aforesaid. Respondents have also transported and caused to be transported the said articles of wearing apparel, imported as aforesaid, for the purpose of sale and delivery after sale in commerce.

Among the articles of wearing apparel mentioned hereinabove were silk scarves manufactured in Japan.

PAR. 3. Respondents, in the course of their business, are engaged in competition in commerce with others in the sale and offering for sale of scarves which are not flammable "articles of wearing apparel" under the definition of the Flammable Fabrics Act.

PAR. 4. The acts and practices of respondents were and are in violation of the Flammable Fabrics Act and of the rules and regulations promulgated thereunder, and as such 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.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding issued on August 24, 1955, charges the respondents, Arkwright Accessories, Inc., a corporation existing by virtue of the laws of the State of New York, and Arthur Olshan, individually and as an officer of the respondent corporation, with violation of the Federal Trade Commission Act and of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder, in connection with the importation, sale, offering for sale and transporting in interstate commerce of articles of wearing apparel which articles were so highly flammable as to be dangerous when worn by individuals.

After the issuance of said complaint the respondents entered into an agreement for consent order with counsel in support of complaint, disposing of all the issues in this proceeding, which agreement was duly approved by the Director of the Bureau of Litigation. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the respondents 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. By said agreement the parties expressly waived a hearing before the hearing examiner or the Commission, the making of findings of fact or con-

643

Order

clusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission.

By said agreement, respondents further agreed that the order to cease and desist issued in accordance with said agreement 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 or privilege to challenge or contest the validity of such order.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement; and that the said order may be altered, modified or set aside in the manner provided by the statute for the orders of the Commission.

Said agreement recites that respondent, Arkwright Accessories, Inc., is a corporation existing under and by virtue of the laws of the State of New York; that respondent Arthur Olshan is an individual and is President and Secretary-Treasurer of the corporate respondent and as such formulates, directs and controls the policies of the corporate respondent. The office and principal place of business of both respondents is located at No. 49 West 37th Street, New York, New York.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and in consonance with the terms of said agreement, the hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named herein, and that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That the respondent Arkwright Accessories, Inc., a corporation, and its officers, and respondent Arthur Olshan, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

Decision

52 F. T. C.

1. (a) Importing into the United States; or
- (b) Selling, offering for sale, introducing, delivering for introduction, transporting or causing to be transported, in commerce, as "commerce" is defined in the Flammable Fabrics Act; or
- (c) Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce;
any article of wearing apparel, which, under the provisions of Section 4 of the said Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

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

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 7th day of January, 1956, become the decision of the Commission; and, accordingly:

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.

Complaint

IN THE MATTER OF

REPUBLIC NOVELTY COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket 6423. Complaint, Sept. 27, 1955—Decision, Jan. 7, 1956

Consent order requiring importers in New York City to cease violating the Flammable Fabrics Act by importing into the United States from Japan and selling silk scarves so highly inflammable as to be dangerous when worn.

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

Mr. Brockman Horne for the Commission.

Marlin & Sandburg, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Republic Novelty Company, Inc., a corporation, and Herman Katz and Samuel R. Cohen, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the rules and regulations promulgated under the Flammable Fabrics 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 Republic Novelty Company, Inc., is a New York corporation. Respondents Herman Katz and Samuel R. Cohen are president and secretary-treasurer, respectively, of respondent Republic Novelty Company, Inc. The individual respondents formulate, direct, and control the acts, practices and policies of said corporate respondent. The business address of all respondents is 39 West 37th Street, New York, New York.

PAR. 2. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have imported into the United States articles of wearing apparel, as the term "articles of wearing apparel" is defined in the Flammable Fabrics Act, which, under the provisions of Section 4 of said Act, as amended, were so highly flammable as to be dangerous when worn by individuals. Respondents have sold, offered for sale, introduced, delivered for introduction, and

Decision

52 F. T. C.

transported and caused to be transported in commerce, as "commerce" is defined in the Flammable Fabrics Act, the said articles of wearing apparel, imported as aforesaid. Respondents have also transported and caused to be transported the said articles of wearing apparel, imported as aforesaid, for the purpose of sale and delivery after sale in "commerce" as hereinabove defined.

Among the articles of wearing apparel mentioned hereinabove were silk scarves manufactured in Japan.

PAR. 3. Respondents, in the course and conduct of their business are in competition in commerce with others in the sale and offering for sale of scarves which are not flammable "articles of wearing apparel" under the Flammable Fabrics Act.

PAR. 4. The use by respondents of the acts, practices and policies as herein alleged has resulted in substantial trade in commerce being unfairly diverted to them from their competitors and substantial injury has been done to competition in commerce.

PAR. 5. The acts and practices of respondents herein alleged were and are in violation of the Flammable Fabrics Act and of the rules and regulations promulgated thereunder, and as such 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.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding, issued September 27, 1955, charges the respondents Republic Novelty Company, Inc., a corporation existing by virtue of the laws of the State of New York, and Herman Katz and Samuel R. Cohen, individually and as officers of the respondent corporation with violation of the Federal Trade Commission Act and of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder, in connection with the importation, sale, offering for sale and transporting in interstate commerce of articles of wearing apparel which articles were so highly flammable as to be dangerous when worn by individuals.

After the issuance of said complaint respondents entered into an agreement for consent order with counsel in support of complaint, disposing of all the issues in this proceeding, which agreement was duly approved by the Director of the Bureau of Litigation. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the respondents 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. By said agreement the parties expressly waived a hearing 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, and all further and other procedure before the hearing examiner and the Commission to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission.

By said agreement, respondents further agreed that the order to cease and desist issued in accordance with said agreement 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 or privilege to challenge or contest the validity of such order.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement; and that the said order may be altered, modified or set aside in the manner provided by the statute for the orders of the Commission.

Said agreement recites that respondent Republic Novelty Company, Inc., is a corporation existing under and by virtue of the laws of the State of New York; that respondents Herman Katz and Samuel R. Cohen are individuals and, respectively, are President and Secretary-Treasurer of the corporate respondent, and as such formulate, direct and control the policies of the corporation. The office and principal place of business of all respondents is located at No. 39 West 37th Street, New York, New York.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and in consonance with the terms of said agreement, the hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named herein, and that this proceeding is in the interest of the public, and issues the following order:

Decision

52 F. T. C.

ORDER

It is ordered, That the respondent Republic Novelty Company, Inc., a corporation, and its officers, and respondents Herman Katz and Samuel R. Cohen, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

1. (a) Importing into the United States; or
- (b) Selling, offering for sale, introducing, delivering for introduction, transporting or causing to be transported, in commerce, as "commerce" is defined in the Flammable Fabrics Act; or
- (c) Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce; any article of wearing apparel, which, under the provisions of Section 4 of the said Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 7th day of January, 1956, become the decision of the Commission; and, accordingly:

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.

Order

IN THE MATTER OF

POSTAL LIFE AND CASUALTY INSURANCE COMPANY

Docket 6276. Order and opinion, Jan. 10, 1956

Interlocutory order denying respondent's appeal from hearing examiner's action in quashing portion of its subpoena duces tecum and granting complaint counsel's appeal from his failure to quash subpoena in entirety; denying respondent's alternative request that the Commission order release and production of documents sought; and denying appeal of complaint counsel from hearing examiner's rulings on testimony.

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

Mr. Donald K. King and *Mr. J. W. Brookfield, Jr.* for the Commission.

Mr. A. Alvis Layne, Jr., of Washington, D. C., *Cobbs, Armstrong, Teasdale & Roos*, of St. Louis, Mo., and *Mr. Harold D. Knight*, of Kansas City, Mo., for respondent.

ORDER DENYING RESPONDENT'S APPEAL AND APPLICATION FOR RELEASE
OF INFORMATION AND GRANTING APPEAL OF COUNSEL SUPPORTING
THE COMPLAINT

This matter having come on to be heard by the Commission upon respondent's appeal from the hearing examiner's ruling quashing certain portions of a subpoena duces tecum directing the Secretary of the Commission to produce certain documents or information from the Commission's files and, in the alternative, application for release of information, and upon the appeal by counsel supporting the complaint from the hearing examiner's ruling refusing to quash the said subpoena duces tecum in its entirety, and from certain other rulings of the hearing examiner; and

The Commission having concluded that the appeals and application for release of information should be disposed of in the manner indicated in the accompanying opinion of the Commission:

It is ordered, That respondent's appeal from the hearing examiner's order limiting the subpoena duces tecum directing the Secretary of the Commission to produce certain documents or information and respondent's application for release of information, as well as respondent's request for oral argument on said appeal and application be, and they hereby are, denied.

It is further ordered, That the appeal of counsel supporting the complaint from the hearing examiner's order denying the motion of counsel supporting the complaint to quash the said subpoena duces

Opinion

52 F. T. C.

tecum be, and it hereby is, granted, and that the said subpoena duces tecum be, and it hereby is, quashed.

It is further ordered, That the appeal of counsel supporting the complaint from the hearing examiner's rulings relating to the testimony of witnesses Alvis Layne, Jr., Henry Miller, and Donald K. King be, and it hereby is, denied.

OPINION OF THE COMMISSION

Per Curiam:

This matter is before the Commission on cross-appeals from certain actions of the hearing examiner.

The complaint charges respondent with having used misleading and deceptive representations in connection with the advertising and sale of certain of its accident and health insurance policies. During the course of the hearings on the complaint, the hearing examiner, upon application of the respondent, issued a subpoena duces tecum directing the Secretary of the Commission to produce certain documents or information from the Commission's files. A motion by counsel supporting the complaint to quash the subpoena was granted in part and denied in part by the hearing examiner. Respondent has appealed from the hearing examiner's action of quashing that portion of the subpoena which demanded the production of certain memoranda or other writings prepared by members of the Commission's staff. In the alternative, respondent, in its appeal, has requested that the Commission order the release of the documents sought. Counsel supporting the complaint, on the other hand, has appealed from the hearing examiner's failure to quash the subpoena in its entirety. Counsel supporting the complaint has also appealed from the hearing examiner's action of permitting respondent to introduce testimony as to the past course of dealing between the respondent and the Commission and has requested the Commission to order certain testimony stricken from the record.

We consider first the subpoena duces tecum issued by the hearing examiner.

Pursuant to statutory authority, the Commission, like most other agencies and departments of the Federal Government, has prescribed rules and regulations covering the custody, use and protection of material and information coming into its possession, or within the knowledge of the Commission or any of its officers or employees in the discharge of their official duties. Respondent, in its appeal, does not question the legality of these rules and regulations. Under the prescribed rules, the release of confidential information or material from the Commission's files may be authorized only by the Commission itself. The procedure to be followed by a party desiring the

651

Opinion

disclosure of information or material from the Commission files is clearly set forth in § 1.134 of the Rules. No other method for obtaining the release of confidential information is provided for in the rules. It follows that the hearing examiner has no authority to require the production of information or material from the Commission's files by a subpoena duces tecum or otherwise. The hearing examiner, therefore, erred in issuing the subpoena and also in failing to grant in its entirety the motion of counsel supporting the complaint to quash the subpoena. Accordingly, insofar as the appeals relate to the subpoena duces tecum issued by the hearing examiner directing the Secretary of the Commission to produce certain documents or information, the appeal of the respondent is denied and the appeal of counsel supporting the complaint is granted, and the subpoena will be quashed.

We consider next respondent's alternative request, under § 1.134 of the Commission's Rules of Practice, that the Commission order the release and production of the documents sought. As indicated by the rule, the Commission in determining the action to take upon an application for the release of confidential information will consider not only whether or not the information or material sought is confidential or privileged so far as the applicant is concerned, but also the purpose for which the applicant intends to use the information or material. Here, the applicant states that the documents requested will be used as evidence in opposition to the Commission's complaint. It, therefore, is necessary to consider whether or not the data requested would in any way be helpful to the respondent in establishing a valid defense to the proceeding. This, in turn, requires a consideration of the asserted defense to which the applicant claims the information and material is relevant. This is especially required in connection with the application since some of the documents requested are already in evidence and, therefore, available to the applicant, and the applicant has made no showing that it does not have copies or originals of certain of the other documents requested.

As a defense to the proceeding, respondent alleges that it accepted and adhered to the Trade Practice Rules Relating to the Advertising and Sales Promotion of Mail Order Insurance promulgated by the Commission, that it submitted its insurance policies and literature to the staff of the Commission's Bureau of Consultation and that the Bureau approved, or failed to disapprove, the practices challenged by the complaint. In support of this defense, respondent cites the Commission's action in dismissing the complaints in *Argus Cameras, Inc.*, D. 6199, and *Wildroot Company, Inc.*, D. 5928. In both of those proceedings, the complaints were dismissed after a showing by the respondents that the particular practices challenged by the com-

plaints had been abandoned and that there was no likelihood of the practices being resumed. Evidence as to the respondent's past course of dealings with the Commission was considered in connection with the determination as to whether or not there was likelihood that the practices might be resumed.

In the instant case, respondent makes no claim that it has discontinued any of the practices challenged by the complaint. The question here is whether or not the respondent has engaged in unfair and deceptive acts and practices as alleged in the complaint. Respondent's prior course of dealing with the Commission, or with members of its staff, has no bearing on whether the respondent has engaged in the alleged unlawful practices. If it were established that the Commission, or a member of its staff, had at some time in the past conveyed to the respondent the impression that the practices involved were not objectionable, that fact would constitute no valid defense to this proceeding. (*Book-of-the-Month Club v. F.T.C.*, 202 F. 2d 486, 1953; *In the Matter of Cappel Frosted Foods, Inc.*, et al., 48 F.T.C. 581, 1951.) Aside from the fact that certain of the documents requested, namely, memoranda prepared by members of the Commission's staff, are confidential material to which the respondent has shown no legal right and the disclosure of which would be contrary to the public interest, we do not believe that the applicant has shown any real or actual need for the disclosures requested. Respondent's application for the release of information, therefore, is denied.

This leaves for consideration that portion of the appeal by counsel supporting the complaint relating to the hearing examiner's rulings permitting the introduction of testimony as to the past course of dealing between the respondent and the Commission and the hearing examiner's refusal to rule on the motion of counsel supporting the complaint that the testimony of Alvis Layne, Jr., Henry Miller, and Donald K. King be stricken. The reception of evidence is the function of the hearing examiner, Administrative Procedure Act, Section 7 (b), 60 Stat. 241, 5 U.S.C. 1006 (b), Commission Rules of Practice, § 3.15 (c), and it is for him, during the course of trial, to admit or exclude testimony and other evidence. The correctness of his rulings in that regard can best be determined at the conclusion of the hearing when the matter comes before the Commission for final decision on the merits. We therefore deny this portion of the appeal by counsel supporting the complaint.

In the view we take on the appeals and the application, oral argument thereon, which was requested by respondent, is not necessary and would serve no useful purpose.

An appropriate order will be entered.

Complaint

IN THE MATTER OF

WINDSOR PEN CORPORATION ET AL.

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

Docket 6356. Complaint, June 6, 1955—Decision, Jan. 10, 1956

Consent order requiring distributors in New York City to cease selling to jobbers and dealers for resale watches under the brand names "Windsor Jeweled" and "Sinsa Jeweled" with the word "jeweled" appearing on the face, when the watches were not "jeweled" and did not contain "jeweled" movements as understood in the industry.

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

Mr. Frederick McManus for the Commission.

Mr. Samuel J. Ernstoff and *Mr. Martin J. Forgang*, 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 Windsor Pen Corporation, a corporation, and Morris Fink and Sadie Fink, 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. Windsor Pen Corporation 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 at 352 Fourth Avenue, New York 10, New York.

Individual respondents, Morris Fink and Sadie Fink, are the president and secretary, respectively, of said corporation, and formulate, direct and control the policies, acts and practices of said corporate respondent. Said individual respondents have their office at the same place as the corporate respondent.

PAR. 2. Respondents are now, and for more than two years last past have been, engaged in the business of selling and distributing watches. Respondents' watches, under the brand name "Windsor Jeweled" and "Sinsa Jeweled," have been sold and distributed to jobbers and dealers for resale to retailers and to the purchasing public.

Decision

52 F. T. C.

PAR. 3. In the course and conduct of their business, respondents now cause, and for more than two years last past have caused, their watches, when sold, to be transported from their place of business in the State of New York to jobbers and dealers, for resale to the general public, 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 watches in commerce between and among the various States of the United States and the District of Columbia.

PAR. 4. In the course and conduct of their aforesaid business and for the purpose of inducing the purchase of their said watches, respondents have sold and distributed, and do now sell and distribute, in commerce, as aforesaid, said watches with the word "jeweled" appearing on the face of said watches. By means of the word "jeweled," respondents represent, directly and by implication, that the said watches are jeweled watches and contain movements that are jeweled movements. In truth and in fact, the said watches, described and sold by respondents are not "jeweled" watches nor do they contain "jeweled" movements. As generally understood in the industry, a "jeweled" watch or a "jeweled" movement watch is one which contains at least 7 jewels, each of which serves a mechanical purpose as a frictional bearing.

PAR. 5. In the course and conduct of their business, respondents are in direct and substantial competition with other corporations, firms and individuals engaged in the sale, in commerce, of watches.

PAR. 6. The practice of respondents, as aforesaid, in selling and distributing their above-described watches with the word "jeweled" appearing on the faces of said watches has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the false and erroneous belief that said watches are jeweled movement watches and into the purchase of substantial quantities of said watches because of such erroneous and mistaken belief.

PAR. 7. The 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.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on June 6, 1955, charging them with false, misleading and deceptive practices in the sale of watches in violation

of the Federal Trade Commission Act. Thereafter, on November 25, 1955, (filed herein on November 29, 1955), respondents Windsor Pen Corporation, and Morris Fink, entered into an agreement with counsel supporting the complaint providing for the entry of a consent order disposing of all of the issues in this proceeding. Said agreement has been approved by the Director of the Bureau of Litigation and has been submitted to the hearing examiner, heretofore duly designated, for his consideration pursuant to Sections 3.21 and 3.25 of the Commission's Rules of Practice.

The signatory respondents, in and by the aforesaid agreements, have admitted all of the jurisdictional allegations of the complaint and agreed that the record herein may be taken as though the hearing examiner and the Commission had made findings of jurisdictional facts in accordance with such allegations. Said agreement provides for the waiver of hearing before a hearing examiner; the making of findings of fact or conclusions of law by the hearing examiner or the Commission; the filing of exceptions and oral argument before the Commission and all further and other procedure before the hearing examiner and the Commission to which the respondents might otherwise, but for the execution of said agreement, be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission. Respondents signatory have also agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if made after a full hearing, presentation of evidence and findings and conclusions thereon, and specifically waive any and all right, power or privilege to challenge or contest the validity of said order. It was further agreed that the answer to the complaint, filed herein on June 29, 1955, shall be withdrawn, permission so to do being hereby granted.

It was further agreed that the said agreement, together with the complaint, shall constitute the entire record herein; that the complaint may be used in construing the terms of the order provided for in said agreement; that said agreement is subject to approval in accordance with Sections 3.21 and 3.25 of the Commission's Rules of Practice; that said agreement and order issued in this Initial Decision shall not become a part of the official record of this proceeding unless and until they become a part of the decision of the Commission; and that the signing of said agreement is for purposes of settlement only and does not constitute an admission by respondents signatory that they have violated the law as alleged in the complaint.

Said agreement further recites and provides that respondent, Sadie Fink, although the Secretary of the respondent corporation, does not, in any manner, formulate, control or direct the acts and prac-

Order

52 F. T. C.

tices of the corporation, such direction residing solely in the respondent, Morris Fink. Accordingly the order hereinafter contained will provide for the dismissal of the complaint as to the named respondent Sadie Fink.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid agreement for consent order, and it appearing that said agreement provides for an appropriate disposition of this proceeding, the same is hereby accepted by the hearing examiner who, on the basis of the record as constituted makes the following findings for jurisdictional purposes:

1. That the Federal Trade Commission has jurisdiction of the subject matter of this proceeding, as well also of the parties signatory to said agreement and that the complaint herein states a valid cause of action against the signatory respondents under the provisions of the Federal Trade Commission Act.

2. That Windsor Pen Corporation is a corporation 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 No. 352 Fourth Avenue, New York (10), New York; that respondent, Morris Fink, is the President of the respondent corporation and as such formulates, directs and controls the acts and practices of the corporate respondent; that the office and principal place of business of respondent, Morris Fink, coincides with that of the corporate respondent, as above.

Consonant with the express agreement of the parties, as evidenced by the agreement hereinbefore described and referred to, the following order is passed:

ORDER

It is ordered, That respondents Windsor Pen Corporation, a corporation, and Morris Fink, individually and as an officer of respondent Windsor Pen Corporation, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication, that a watch is a "jeweled" watch, or that it contains a jeweled movement, unless said watch contains at least 7 jewels, each of which serves a mechanical purpose as a frictional bearing.

It is further ordered, That the complaint be and it is hereby dismissed as to respondent Sadie Fink.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 10th day of January, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That the respondents Windsor Pen Corporation, a corporation, and Morris Fink, individually and as officer 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.

Complaint

52 F. T. C.

IN THE MATTER OF

ABE MARKS TRADING AS SUMLAR COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 6407. Complaint, Aug. 24, 1955—Decision, Jan. 10, 1956*

Consent order requiring a seller in Brooklyn, N. Y., to cease advertising falsely in newspapers, etc., that a drug product designated "Vertasol" was a reliable treatment and cure for all kinds of arthritis, rheumatism, and neuritis; would relieve the pain of such conditions; was a new formula, with its effectiveness verified by clinical tests; and that all the ingredients had analgesic and therapeutic value.

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

Mr. Charles S. Cow for the Commission.

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 Abe Marks, an individual trading as Sumlar Company, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Abe Marks, is an individual trading as Sumlar Company, with his office and principal place of business located at 3120 Tilden Avenue, Brooklyn 26, New York.

PAR. 2. Respondent is now, and has been for more than nine months last past, engaged in the business of selling and distributing a certain drug product as "drug" is defined in the Federal Trade Commission Act.

The designation used by respondent for said product, and the formula and direction for use thereof are as follows:

Designation: Vertasol.

Formula: "Each tablet contains—

Active ingredients:

Salicylamide 2 gr.;

Sodium Salicylate 2½ gr.;

Caffeine, ½ gr.

Inactive ingredients:

Potassium Salicylate ½ gr.;

Niacin 5 mg."

660

Complaint

Directions: "Adults: 3 tablets 4 times daily taken with water before meals and at bedtime or as directed by physician. Dosage may be decreased to 2 tablets 4 times daily if acute symptoms have subsided. Do not exceed 12 tablets in 24 hours."

PAR. 3. Respondent causes said product, when sold, to be transported from his place of business in the State of New York to purchasers thereof located in other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said product in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of his said business, respondent, subsequent to March 21, 1938, has disseminated and caused the dissemination of certain advertisements concerning Vertasol by United States mail, and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in newspapers and other advertising literature, for the purpose of inducing and which were likely to induce directly or indirectly the purchase of said product; and respondent has disseminated and caused the dissemination of advertisements by various means, including but not limited to the aforesaid means, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of Vertasol in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements and representations, contained in said advertisements disseminated and caused to be disseminated by the United States mails, by insertion in newspapers and other advertising literature are the following:

A R T H R I T I S
RHEUMATISM SUFFERERS

Find New Curb For Pain

Users Rejoice—Supply Rushed Here

Victims of crippling arthritis, rheumatism and neuritis pain can take joyous new hope from announcement of dramatic success with a new formula which combines 4 drugs into one tablet capable of relieving agonizing pain in joints and muscles. According to clinical reports, this new compound, called VERTASOL, acts internally to curb tortuous arthritis, rheumatism, neuritis pain in back, hands, arms, legs and shoulders yet is safe to take, requires no prescription. With tears of joy in their eyes, men and women who formerly suffered dread stabbing torture of arthritis and rheumatism pain in swollen joints and muscles now tell of blessed relief after using it.

Complaint

52 F. T. C.

VERTASOL costs \$3.00 but considering results is not expensive, is only pennies per dose. Sold with money back guarantee by

ALL GROVE DRUG STORES

Mail Orders Filled

PAR. 5. Through the use of the said advertisements, respondent has made, directly and by implication, the following representations shown in the following subparagraphs identified as (A) through (F), inclusive. The said advertisements, by reason of the said representations, are false and misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act by reason of the true facts which are set forth in subparagraphs (1) to (6), inclusive.

(A) That Vertasol is an adequate, effective, and reliable treatment for all kinds of arthritis, rheumatism, and neuritis.

(1) Vertasol, however taken, is not an adequate, effective or reliable treatment for any kind of arthritis, rheumatism, or neuritis.

(B) That Vertasol will arrest or curb the progress of, will correct the underlying causes of, and will cure arthritis, rheumatism and neuritis.

(2) Vertasol, however taken, will not arrest or curb and cure arthritis, rheumatism, and neuritis, nor will it correct the underlying causes of same.

(C) That Vertasol will afford blessed relief of dread stabbing torture of arthritis and rheumatism pain in swollen joints and muscles, and will curb the pain of crippling arthritis, rheumatism and neuritis.

(3) Vertasol, however taken, will not afford relief from stabbing torture of arthritis and rheumatism pain in swollen joints and muscles nor will it curb the pain of crippling arthritis, rheumatism and neuritis, and at best will only afford temporary relief of minor aches, pains and fever in cases of arthritis, rheumatism, and neuritis.

(D) That Vertasol is a "new formula which combines four drugs into one tablet capable of relieving agonizing pains in joints and muscles."

(4) Vertasol is not a new formula and only three of the ingredients therein are capable of exerting any analgesic activity, and these ingredients have been used many times in the past for pain dulling action; furthermore, Vertasol is not capable of relieving agonizing pain in joints and muscles.

(E) That Vertasol's effectiveness has been verified and substantiated through clinical tests performed therewith and reports made thereon.

(5) Respondent has had no clinical tests made with Vertasol and the claimed or purported effectiveness of Vertasol when used as directed is not supported by clinical tests.

(F) That all the ingredients in Vertasol have therapeutic value in the treatment of arthritis, rheumatism, neuritis or symptoms thereof.

(6) The caffeine and niacin in the formula for Vertasol are devoid of any analgesic properties and have no therapeutic value for any kind of arthritis, rheumatism, neuritis, or symptoms thereof.

PAR. 6. The use by respondent of the said advertisements with respect to Vertasol has had the capacity and tendency to mislead and deceive and has misled and deceived a substantial portion of the purchasing public into the erroneous and mistaken belief that the representations and statements contained therein were true and into the purchase of substantial quantities of Vertasol by reason of said erroneous and mistaken belief.

PAR. 7. The aforesaid acts and practices of respondent, 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.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The Federal Trade Commission issued its complaint in this proceeding on August 24, 1955, charging the respondent, Abe Marks, an individual trading as Sumlar Company, with violation of the Federal Trade Commission Act in the sale and distribution of a drug product designated "Vertasol," the specific charges being misrepresentations and false and misleading advertisements concerning the therapeutic and analgesic effects of his aforescribed product in the treatment of arthritis, rheumatism and neuritis.

After the issuance of said complaint the respondent entered into an agreement for consent order with counsel in support of complaint, disposing of all the issues in this proceeding, which agreement was duly approved by the Director of the Bureau of Litigation. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint.

By the terms of said agreement, the respondent 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. By said agreement the parties expressly waived a hearing before the hearing examiner or the Commission, the making of findings of fact or con-

Order

52 F. T. C.

clusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which the respondent may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission.

By said agreement, respondent further agreed that the order to cease and desist issued in accordance with said agreement 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 or privilege to challenge or contest the validity of such order.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement; and that the said order may be altered, modified or set aside in the manner provided by the statute for the orders of the Commission.

Said agreement further recites that the respondent, Abe Marks, is an individual trading under the firm name and style of Sumlar Company, with his office and principal place of business located at No. 3120 Tilden Avenue in the Borough of Brooklyn, State of New York.

The Hearing Examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Commission's Rules of Practice, and consonant with the terms of said agreement, the Hearing Examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent named herein and that this proceeding is in the interest of the public wherefore the following order is issued:

ORDER

It is ordered, That the respondent Abe Marks, individually and trading as Sumlar Company, or under any other name, his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of the drug preparation "Vertasol" or any product of substantially similar composition or possessing substantially similar properties, whether sold under the same name or any other name, do forthwith cease and desist from directly or indirectly:

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

(a) that the taking of said preparation will constitute an adequate, effective, or reliable treatment for any kind of arthritis, rheumatism, or neuritis;

(b) that said preparation will arrest or curb the progress of, correct the underlying causes of, or cure any kind of arthritis, rheumatism or neuritis;

(c) that said preparation will afford relief of the severe pains of arthritis, rheumatism or neuritis or have any therapeutic effect upon any of the symptoms or manifestations of any such condition in excess of affording temporary relief of minor aches, pains or fever;

(d) that said preparation is a new formula;

(e) that said preparation's effectiveness has been verified or substantiated through clinical tests;

(f) that the caffeine and niacin in said preparation have analgesic properties.

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

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 10th day of January, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein 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 to cease and desist.

Complaint

52 F. T. C.

IN THE MATTER OF

MILNER PRODUCTS COMPANY ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT*Docket 6268. Complaint, Dec. 22, 1954—Decision, Jan. 11, 1956*

Consent order requiring manufacturers in Jackson, Miss., to cease advertising falsely in newspapers and magazines and by radio and television that their disinfectant "Pine-Sol" was more concentrated and contained more active ingredients than any other pine oil product, that a few drops would sanitize garbage cans and keep them sweet smelling, and that the product was not a soap or detergent.

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

Mr. Edward F. Downs for the Commission.

Mr. Richard L. Underwood, of Washington, D. C., 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 Milner Products Company, a corporation, and R. E. Dumas Milner, Howard S. Cohoon and Thurman L. Pitts, 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 Milner Products Company is a corporation organized and existing under and by virtue of the laws of the State of Mississippi, with its office and principal place of business located at 4349 N. View Drive, Jackson, Mississippi.

Respondents R. E. Dumas Milner, Howard S. Cohoon and Thurman L. Pitts are officers of corporate respondent. These individuals formulate, direct and control the policies, acts and practices of corporate respondent. Their address is the same as that of the corporate respondent.

PAR. 2. The respondents are now and for more than one year last past have been engaged in the manufacture, sale and distribution of a disinfectant designated by them as "Pine-Sol," the formula of which is:

666

Complaint

Steam Distilled Pine Oil -----	77.2%
Soap -----	10 %
Isopropyl Alcohol -----	2 %
Inert ingredients: Water and Coumarin Derivative	
Optical Bleach -----	10 %

Respondents cause their said product, when sold, to be transported from their place of business in the State of Mississippi, to purchasers thereof, located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a course of trade in said product in commerce among and between the various States of the United States and in the District of Columbia. Their volume of trade in such commerce is and has been substantial.

Respondents are now and at all times hereinafter mentioned have been in substantial competition with other corporations and with individuals, partnerships and firms engaged in the sale of disinfectants in commerce.

PAR. 3. In the course and conduct of their said business and for the purpose of inducing the purchase of their said product in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondents, by means of advertisements inserted in newspapers and magazines and by radio and television commercial announcements, have made certain claims and representations with respect to their said product. Among and typical, but not all inclusive, of such claims and representations are the following:

PINE-SOL contains up to 4½ TIMES AS MUCH ACTIVE INGREDIENTS.

CONCENTRATED Pine-Sol gives you the best results per ounce.

— — — *concentrated* * * * it is 90% active ingredients.

Pine-Sol gives you more for your money—a full 16 ounce bottle.

Amazing Pine-Sol has more active ingredients than any other pine oil product.

Few drops keeps garbage can sweet smelling. Sanitizer.

Repels Flies.

Not a soap * * * or detergent.

PAR. 4. Through the use of the statements and representations hereinabove set forth, and others of similar import not specifically set out herein, respondents have represented, directly or by implication:

1. That Pine-Sol is more concentrated and contains more or a greater percentage of active ingredients than any other pine oil product.

2. That Pine-Sol is so strong that only a few drops are required to sanitize and prevent odors in garbage cans.

3. That Pine-Sol will repel flies.

4. That Pine-Sol is not a soap or detergent.

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

1. Pine-Sol is not more concentrated and does not contain a higher percentage of active ingredients than many other pine oil disinfectants on the market.

2. A "few" drops of Pine-Sol would be insufficient to sanitize, nor would such amount prevent odors in, garbage cans.

3. Pine-Sol is not a fly repellent.

4. Pine-Sol is a soap as it contains 10% of soap and since it contains both soap and a solvent it is a detergent.

PAR. 6. The use by respondents of the foregoing false, misleading and deceptive statements and representations, and others similar thereto, has the tendency and capacity to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true, and to induce a substantial portion of the purchasing public, because of such mistaken and erroneous belief, to purchase respondents' said product. As a direct result of the practices of respondents, as aforesaid, substantial trade in commerce is and has been diverted to respondents from their competitors and injury has been and is being done to competition in commerce between and among the various States of the United States.

PAR. 7. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and of the competitors of respondents 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.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges respondents with misrepresenting a disinfectant sold by them, in violation of the Federal Trade Commission Act. After the filing of respondents' answer to the complaint, hearings were held at which evidence in support of the complaint was received, at the conclusion of which respondents moved for dismissal of the complaint for failure of proof. The hearing examiner denied the motion except as to one issue, that as to whether respondents' product is a fly repellent. As to this issue, the examiner was of the view that a prima facie case in support of the complaint had not been established and he announced his

666

Order

intention of dismissing the complaint as to this issue, upon final consideration of the case. An agreement for a consent order has now been entered into by respondents and counsel supporting the complaint which provides, among other things, that respondents admit all the jurisdictional allegations in the complaint; that respondents' answer to the complaint shall be considered as having been withdrawn, and that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission to which respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if made after a full hearing, respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified or set aside in the manner provided by statute for orders of the Commission; and that the agreement 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 hearing examiner having considered the agreement and proposed order (which covers all of the charges in the complaint except the one referred to above), and being of the opinion that they provide an adequate basis for an appropriate settlement and disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent Milner Products Company is a corporation existing and doing business under and by virtue of the laws of the State of Mississippi, with its office and principal place of business located at 4349 North View Drive, Jackson, Mississippi. Respondents R. E. Dumas Milner, Howard S. Cohoon and Thurman L. Pitts are officers of the corporation, their respective addresses being the same as that of the corporation.

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

ORDER

It is ordered, That respondent Milner Products Company, a corporation, and its officers, and respondents R. E. Dumas Milner, Howard S. Cohoon and Thurman L. Pitts, individually and as offi-

cers 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 in commerce, as "commerce" is defined in the Federal Trade Commission Act, of the pine oil disinfectant designated "Pine-Sol," or any other disinfectant of substantially similar composition or possessing substantially similar properties, whether sold under the same name or under any other name or names, do forthwith cease and desist from representing, directly or by implication:

1. That said product is more concentrated or contains more or a greater percentage of active ingredients than any or all other pine oil products, unless such is the fact.
2. That any specified amount of said product will sanitize or be of any other benefit unless such is the fact.
3. That said product is not a soap or detergent.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 11th day of January, 1956, become the decision of the Commission; and, accordingly:

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.

Complaint

IN THE MATTER OF

FOOD TOWN, INC.

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

Docket 6424. Complaint, Oct. 3, 1955—Decision, Jan. 11, 1956

Consent order requiring a corporation operating a chain of supermarkets in Washington, D. C., to cease suggesting that the oleomargarine it sold was a dairy product through intermixing advertisements thereof among such items as cheese under the heading "DAIRY FOODS" in newspapers.

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

Mr. Morton Nesmith for the Commission.

Reasoner & Davis, of Washington, D. C., for respondent.

COMPLAINT¹

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

PARAGRAPH 1. Respondent, Food Town, Inc., is a corporation, organized and existing under and by virtue of the laws of the State of Delaware, with its principal place of business located at 1400 S. Capitol Street in the city of Washington, District of Columbia.

PAR. 2. Respondent Food Town, Inc., is now and for more than one year last past has been engaged, among other things, in the distribution and sale of oleomargarine, a food. Respondent, or its subsidiaries, causes said oleomargarine, when sold, to be transported from a warehouse located in the District of Columbia to purchasers thereof located in various States of the United States and in the District of Columbia. Respondent, or its subsidiaries, maintains, and at all times mentioned herein has maintained, a substantial course of trade in said product in commerce in the District of Columbia and among and between the various States of the United States.

¹ Complaint is published as amended by order of hearing examiner granting motion to amend complaint dated November 8, 1955.

Complaint

52 F. T. C.

PAR. 3. In the course and conduct of its aforesaid business, respondent has disseminated and is now disseminating, and has caused and is now causing the dissemination of, advertisements concerning said oleomargarine, by the United States mails, and by other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements in newspapers having general interstate commerce circulation, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of said oleomargarine; and respondent has also disseminated and is now disseminating, and has caused and is now causing the dissemination of, advertisements concerning said oleomargarine, by the aforesaid means, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of said oleomargarine in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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

DAIRY FOODS
 COOPER—Black Rind
 EXTRA SHARP
 CHEESE
 KRAFT—Parkay MARGARINE
 Kraft—Handy Snax Kraft—Natural
 Cheeses SWISS
 CHEESE

[picture of market basket with following enclosed therein:]

FOOD TOWN
 CHEESE
 FOOD
 All Sweet
 MARGARINE
 Imported
 SWEITZER
 CHEESE

PAR. 4. The respondent, by placing its advertisements of oleomargarine or margarine under the heading of dairy foods and intermixing such between the advertisements of dairy foods, clearly suggests to many members of the purchasing public that said oleomargarine or margarine is a dairy product.

PAR. 5. The advertisements containing the various expressions set out in Paragraph 3 are misleading in material respects and constitute false advertisements, as such term is defined in Section 15(a)(2) of the Federal Trade Commission Act, in that they serve as repre-

sentations or suggestions that respondent's product is a dairy product, which is contrary to the fact.

PAR. 6. The aforesaid acts and practices of the respondent, 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.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on October 3, 1955, charging it with having violated the Federal Trade Commission Act by the use of unfair and deceptive acts and practices in commerce in the sale of oleomargarine. Said complaint was amended by the hearing examiner by order dated November 8, 1955. In lieu of submitting answer to the complaint as amended, respondent entered into an agreement for consent order with counsel supporting the complaint, disposing of all the issues in this proceeding, which agreement has been duly approved by the Acting Director of the Bureau of Litigation.

Respondent, pursuant to the aforesaid agreement, has admitted all the jurisdictional allegations of the complaint as amended and agreed that the record may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. Respondent in the agreement waived any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with said agreement. It was further provided that said agreement, together with the complaint as amended, shall constitute the entire record herein; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; and that said agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint as amended. The agreement also provided that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing; that it may be altered, modified or set aside in the manner provided for other orders; and that the complaint as amended may be used in construing the terms of the order.

This proceeding having now come on for final consideration by the hearing examiner on the complaint as amended and the aforesaid agreement for consent order, and it appearing that said agreement provides for an appropriate disposition of this proceeding, the afore-

said agreement is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and in consonance with the terms of said agreement, the hearing examiner makes the following jurisdictional findings and order:

1. Respondent Food Town, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1400 South Capitol Street, in the City of Washington, District of Columbia.

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

ORDER

It is ordered, That Respondent Food Town, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of oleomargarine or margarine, do forthwith cease and desist from, directly or indirectly:

1. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any statement, word, grade designation, design, device, symbol, sound, or any combination thereof, which represents or suggests that said product is a dairy product;

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

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 11th day of January, 1956, become the decision of the Commission; and, accordingly:

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

Complaint

IN THE MATTER OF

REGAL ACCESSORIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS*Docket 6353. Complaint, May 16, 1955—Decision, Jan. 12, 1956*

Consent order requiring importers in New York City to cease violating the Flammable Fabrics Act by importing into the United States from Japan and selling in commerce silk scarves so highly inflammable as to be dangerous when worn.

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

Mr. Brockman Horne for the Commission.

Marlin & Sandberg, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Regal Accessories, Inc., a corporation, Irving Alpert and Mack Nord, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the rules and regulations promulgated thereunder, 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 Regal Accessories, Inc., is a New York corporation. Respondents Irving Alpert and Mack Nord are President-Treasurer and Vice President-Secretary, respectively, of respondent Regal Accessories, Inc. The individual respondents formulate, direct and control the policies of said corporation. The business address of all respondents is 15 West 37th Street, New York, New York.

PAR. 2. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have imported into the United States articles of wearing apparel, as the term "articles of wearing apparel" is defined in the Flammable Fabrics Act, which, under the provisions of Section 4 of said Act, as amended, were so highly flammable as to be dangerous when worn by individuals. Respondents have sold, offered for sale, introduced, delivered for introduction, and transported and caused to be transported in commerce, as "commerce" is defined in the Flammable Fabrics Act, the said articles of wearing

apparel, imported as aforesaid. Respondents have also transported and caused to be transported the said articles of wearing apparel, imported as aforesaid, for the purpose of sale and delivery after sale in commerce.

Among the articles of wearing apparel mentioned hereinabove were silk scarves manufactured in Japan.

PAR. 3. Respondents, subsequent to July 1, 1954, have furnished their customers with a guaranty with respect to the articles of wearing apparel mentioned in Paragraph 2 hereof, to the effect that reasonable and representative tests made under the procedures provided in Section 4 of the Flammable Fabrics Act, as amended, and the rules and regulations promulgated thereunder, show or will show that the said articles of wearing apparel are not, in the form delivered or to be delivered by respondents, so highly flammable under the provisions of the Flammable Fabrics Acts as to be dangerous when worn by individuals. There was reason for respondents to believe that the articles of wearing apparel covered by such guaranty might be introduced, sold, or transported in commerce.

Said guaranty was and is false in that (1), with respect to some of the said articles of wearing apparel, respondents have not made such reasonable and representative tests, and (2), with respect to other of the said articles of wearing apparel, the tests which were made did not show that the articles of wearing apparel were not so highly flammable as to be dangerous when worn by individuals. In truth and in fact, the said articles of wearing apparel, under the provisions of Section 4 of the Flammable Fabrics Act, as amended, were so highly flammable as to be dangerous when worn by individuals.

PAR. 4. The acts and practices of respondents were and are in violation of the Flammable Fabrics Act and of the rules and regulations promulgated thereunder, and as such constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding, issued on May 16, 1955, charges the respondents, Regal Accessories, Inc., a corporation existing by virtue of the laws of the State of New York, and Irving Alpert and Mack Nord, individuals and as officers of the respondent corporation, with violation of the Federal Trade Commission Act and of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder, in connection with the importation, sale, offering

for sale and transporting in interstate commerce of articles of wearing apparel which articles were so highly flammable as to be dangerous when worn by individuals.

Respondents were further charged with having furnished to their customers false guaranties to the effect that reasonable and representative tests of such wearing apparel disclosed same to be not so highly flammable as to be dangerous when worn by individuals, all in contravention of the Flammable Fabrics Act and the Rules and Regulations thereunder affecting guaranties, as well also in violation of the Federal Trade Commission Act.

After the issuance of said complaint and the filing of their answer thereto, the respondents entered into an agreement for consent order with counsel in support of complaint, disposing of all the issues in this proceeding, which agreement was duly approved by the Director of the Bureau of Litigation. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the respondents 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. By said agreement, the answer heretofore filed by respondents was withdrawn and the parties expressly waived a hearing 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, and all further and other procedure before the hearing examiner and the Commission to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission.

By said agreement, respondents further agreed that the order to cease and desist issued in accordance with said agreement 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 or privilege to challenge or contest the validity of such order.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement; and that the said order may be altered, modified or set aside in the manner provided by the statute for the orders of the Commission.

Order

52 F. T. C.

Respondent Regal Accessories, Inc., is a corporation existing under and by virtue of the laws of the State of New York. Respondents Irving Alpert and Mack Nord are individuals and respectively President-Treasurer and Vice-President-Secretary of the corporate respondent and as such formulate, direct and control the policies of the corporate respondent. The office and principal place of business of all respondents is located at No. 15 West 37th Street, New York, New York.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and in consonance with the terms of said agreement, the hearing examiner finds that the Federal Trade Commission had jurisdiction of the subject matter of this proceeding and of the respondents named herein, and that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That the respondent Regal Accessories, Inc., a corporation, and its officers, and respondents Irving Alpert and Mack Nord, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

1. (a) Importing into the United States; or
- (b) Selling, offering for sale, introducing, delivering for introduction, transporting or causing to be transported, in commerce, as "commerce" is defined in the Flammable Fabrics Act; or
- (c) Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce; any article of wearing apparel, which, under the provisions of Section 4 of the said Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

2. Furnishing to any person a guaranty with respect to any article of wearing apparel which respondents, or any of them, have reason to believe may be introduced, sold or transported in commerce, which guaranty represents, contrary to fact, that reasonable and representative tests made under the procedures provided in Section 4 of the Flammable Fabrics Act, as amended, and the rules and regulations promulgated thereunder, show and will show that the article of wearing apparel, or the fabrics used or contained therein, covered by the guaranty, is not, in the form delivered or to be delivered

675

Decision

by the guarantor, so highly flammable under the provisions of the Flammable Fabrics Act as to be dangerous when worn by individuals, provided, however, that this prohibition shall not be applicable to a guaranty furnished on the basis of, and in reliance upon, a guaranty to the same effect received by respondents in good faith signed by and containing the name and address of the person by whom the wearing apparel was manufactured or from whom it was received.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 12th day of January, 1956, become the decision of the Commission; and, accordingly:

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.

Complaint

52 F. T. C.

IN THE MATTER OF

VIRCHAND PANACHAND & COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS*Docket 6396. Complaint, Aug. 23, 1955—Decision, Jan. 12, 1956*

Consent order requiring importers in New York City to cease violating the Flammable Fabrics Act by importing into the United States from Japan and selling in commerce silk scarves so highly inflammable as to be dangerous when worn.

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

Mr. Brockman Horne for the Commission.

Mr. Jesse Cohen, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Virchand Panachand & Company, Inc., a corporation, Peter Commercial Corporation, a corporation, U. M. Shah, V. V. Shah, N. R. Shah, C. Ferlazzo, N. B. Shah and Arnold Berke, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts, and the rules and regulations promulgated thereunder, and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Virchand Panachand & Company, Inc., and Peter Commercial Corporation, are corporations organized, existing and doing business under and by virtue of the laws of the State of New York. Respondents U. M. Shah, V. V. Shah, N. R. Shah, C. Ferlazzo, N. B. Shah and Arnold Berke are President, Vice President, Vice President, Secretary, Treasurer and General Manager, respectively, of above named corporate respondents. The individual respondents formulate, direct and control the policies, acts and practices of said named corporate respondents. The business address of all respondents is 15 Park Row, New York 38, New York.

PAR. 2. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have imported into the United States articles of wearing apparel, as the term "articles of wearing apparel"

680

Decision

is defined in the Flammable Fabrics Act, which, under the provisions of Section 4 of said Act, as amended, were so highly flammable as to be dangerous when worn by individuals. Respondents have sold, offered for sale, introduced, delivered for introduction, transported and caused to be transported in commerce, as "commerce" is defined in the Flammable Fabrics Act, the said articles of wearing apparel, imported as aforesaid. Respondents have also transported and caused to be transported the said articles of wearing apparel, imported as aforesaid, for the purpose of sale and delivery after sale in commerce.

Among the articles of wearing apparel mentioned hereinabove were silk scarves manufactured in Japan.

PAR. 3. Respondents, in the course and conduct of their business, are engaged in direct and substantial competition in commerce with other corporations, firms and individuals in the sale and offering for sale of scarves which are not flammable "articles of wearing apparel" under the definition of the Flammable Fabrics Act.

PAR. 4. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Acts and of the rules and regulations promulgated thereunder, and as such 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.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding, issued August 23, 1955, charges the respondents Virchand Panachand & Company, Inc., and Peter Commercial Corporation, both of the foregoing being corporations existing and doing business under and by virtue of the laws of the State of New York, and U. M. Shah, V. V. Shah, N. R. Shah, C. Ferlazzo, N. B. Shah and Arnold Berke as individuals and officers of the two respondent corporations, with violation of the Federal Trade Commission Act and of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder, in connection with the importation, sale, offering for sale and transporting in interstate commerce of articles of wearing apparel which articles were so highly flammable as to be dangerous when worn by individuals.

After the issuance of said complaint respondents Virchand Panachand & Co., Inc., Peter Commercial Corporation, U. M. Shah and Arnold Berke entered into an agreement for consent order with counsel in support of complaint, disposing of all the issues in this proceeding, which agreement was duly approved by the Acting Director of the Bureau of Litigation. The non-joinder in said agreement of the respondents V. V. Shah, N. R. Shah, C. Ferlazzo

and N. B. Shah will be hereinafter explained. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the signatory respondents admitted all of 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. By said agreement the parties expressly waived a hearing 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, and all further and other procedure before the hearing examiner and the Commission to which the signatory respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission.

By said agreement the signatory respondents further agreed that the order to cease and desist issued in accordance with said agreement 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 or privilege to challenge or contest the validity of such order.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement; and that the said order may be altered, modified or set aside in the manner provided by the statute for the orders of the Commission.

Accompanying the agreement is an affidavit executed by respondent, Arnold Berke, to the effect that the named respondents V. V. Shah, N. R. Shah, C. Ferlazzo and N. B. Shah are, respectively Vice-President, Vice-President, Secretary and Treasurer of the two corporate respondents but, contrary to the allegations of the complaint, do not formulate, direct and control, and have not formulated, directed nor controlled, the policies and activities of the corporate respondents, which affidavit is confirmed by a clause to like effect contained in the agreement signed by the parties as hereinabove named, and upon consideration of the agreement and affidavit in this behalf the order hereinafter passed will contain a clause of dismissal as to these named respondents.

Said agreement recites that the respondents Virchand Panachand & Co., Inc., and Peter Commercial Corporation are corporations existing and doing business under and by virtue of the Laws of the

680

Decision

State of New York; that the individual respondents U. M. Shah and Arnold Berke are, respectively, President and General Manager of the two named corporate respondents and as such formulate, direct and control the policies, acts and practices of the corporate respondents; that the office and principal place of business of all respondents signatory is located at No. 15 Park Row, New York, New York.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, and in consonance with the terms of said agreement, the hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named herein, and that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That respondents Virchand Panachand & Company, Inc., a corporation, and Peter Commercial Corporation, a corporation, and their officers, and respondents U. M. Shah, and Arnold Berke, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

1. Importing into the United States; or
2. Selling, offering for sale, introducing, delivering for introduction, transporting or causing to be transported in commerce, as "commerce" is defined in the Flammable Fabrics Act; or
3. Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce, any article of wearing apparel, which under the provisions of Section 4 of said Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

Further ordered, That the complaint herein be dismissed as to the named respondents V. V. Shah, N. R. Shah, C. Ferlazzo, and N. B. Shah.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 12th day of January, 1956, become the decision of the Commission; and, accordingly:

Decision

52 F. T. C.

It is ordered, That the respondents Virchand Panachand & Company, Inc., a corporation, and Peter Commercial Corporation, a corporation, and U. M. Shah, and Arnold Berke, individually and as officers of said corporations, 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.

Decision

IN THE MATTER OF
M. RUBIN & SONS, INC., ET AL.

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

Docket 6318. Complaint, Mar. 23, 1955—Decision, Jan. 13, 1956

Consent order requiring sellers in New York City to cease representing through use of the color, pattern, and style of garments issued to members of the United States Armed Forces, and through markings, insignia, labels, and tags substantially the same as those used by the Armed Forces on similar garments, that the jackets and outer coats it sold were manufactured for the Armed Forces and in accordance with Armed Forces specifications; and Order requiring the same sellers to cease representing falsely through use of the word "Manufacturers" on letterheads and invoices and in advertising that it owned a factory where it made the products it sold, when actually all of its rainwear and 60% of its jackets were purchased from other firms and the remaining 40% of the latter were produced according to its specifications, by independent companies.

Mr. Terral A. Jordan, counsel supporting the complaint.

Chambers & Chambers, by *Mr. Gerald H. Chambers*, of New York, N. Y., counsel for respondents.

INITIAL DECISION OF HEARING EXAMINER JOHN LEWIS

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondents on March 23, 1955, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act. Copies of said complaint and notice of hearing were duly served upon respondents. Said complaint charges respondents with two separate illegal practices in the operation of their business: (1) Selling and distributing jackets and outer coats which were made to simulate garments manufactured for the United States Armed Forces, and (2) representing themselves to be the manufacturers of the garments sold by them. Respondents appeared by counsel and filed their joint answer in which they admitted that in that portion of their business in which they acted as distributors and jobbers for merchandise manufactured by others, they had sold garments which in some instances contained labels of the kind and character alleged in the complaint, but that such practice had been discontinued in 1954, and otherwise denied any violation of the Act.

Pursuant to notice, a hearing was thereafter held on May 17, 1955, in New York, New York, before the undersigned hearing examiner, theretofore duly designated to hear this proceeding. At said hearing counsel for the parties advised the hearing examiner that they had reached agreement on a consent order disposing of that portion of the complaint charging respondents with the simulation of Armed Forces jackets, and that a formal document embodying such agreement would be submitted to the examiner in due course. The hearing thereafter continued with respect to the remaining portion of the complaint alleging that respondents had misrepresented their status as a manufacturer. Testimony and other evidence were offered in support of, and in opposition to the allegations of the complaint pertaining to said issue, which testimony and other evidence were duly recorded and filed in the office of the Commission. Both sides were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues. At the close of the evidence in support of and in opposition to the allegations of the complaint, the record was kept open so as to afford counsel supporting the complaint an opportunity to submit rebuttal evidence. Counsel thereafter advised the examiner that he did not desire to offer any rebuttal evidence, and the proceeding was thereupon closed for the submission of evidence by order of the examiner dated June 15, 1955. Proposed findings of fact and conclusions of law were subsequently filed by counsel for both sides, including a supporting memorandum by counsel for respondents. No request for oral argument was made.

On June 21, 1955, there was also submitted to the hearing examiner by counsel supporting the complaint an agreement for consent order covering that portion of the complaint which relates to the simulation of United States Armed Forces style jackets and outer coats. The said agreement, which is dated June 20, 1955, and is signed by counsel supporting the complaint, counsel for respondents and all the respondents and approved by the Director of the Bureau of Litigation of the Commission, contains an admission by respondents of the jurisdictional allegations of the complaint and an agreement that the record may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. The said agreement further withdrawn insofar as it relates to the issue covered by said agreement, and that the parties expressly waive a hearing before the hearing examiner or the Commission with respect to said issue and all further and other procedure to which respondents may be entitled under the Federal Trade Commission Act

685

Findings

or the Rules of Practice of the Commission. Respondents have agreed that the order to cease and desist issued in accordance with said agreement for consent order shall have the same force and effect as if made after a full hearing and that they specifically waive any and all right, power or privilege to challenge or contest the validity of said order. It has been further agreed that said agreement for consent order, together with the complaint, insofar as it relates to the simulation of Armed Forces jackets, shall constitute the entire record herein and 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.

It appearing that the order provided for in said agreement conforms in all respects to the proposed order in the notice portion of the complaint and that said agreement provides for an appropriate disposition of that portion of the complaint which involves the charge of simulation of Armed Forces jackets, and it appearing that with respect to such issue this proceeding is in the public interest, the said agreement is hereby accepted and, in accordance therewith, paragraph 1 is included in the order hereinafter made. With respect to the balance of the proceeding, based on the entire record pertaining thereto and from his observation of the witnesses, the undersigned finds that this proceeding is in the interest of the public and makes the following:

FINDINGS OF FACT

I. The Parties and the Interstate Commerce

Respondent M. Rubin & Sons, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 688 Broadway, New York, New York. Respondents Milton Rubin, Donald Rubin, and Robert Rubin are, respectively, President, Vice President and Treasurer, and Secretary 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 the corporate respondent.

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 retailers 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.

II. The Alleged Illegal Practices

A. *The Issue*

As has been stated above, the only issue which was litigated in this proceeding involves that portion of the complaint in which respondents are charged with having falsely represented themselves to be manufacturers of the garments sold and distributed by them. This charge arises out of the fact that respondents use the word "Manufacturers" on their letterheads and invoices, and also in some of their advertising in trade journals. The complaint alleges that by using the word "manufacturers" respondents have represented that they own, operate or control a factory where they manufacture the merchandise sold by them and that such representation is false. Respondents deny that their use of the term "manufacturer" amounts to a representation that they own, operate or control a plant where their merchandise is manufactured, but nevertheless contend that they are considered to be manufacturers under the generally accepted meaning of the term. The question for decision on this issue, therefore, is whether respondents may properly call themselves manufacturers.

B. *Respondents' Status as a Manufacturer*

There is no basic dispute concerning respondents' method of operation. Respondents are engaged in the sale of outdoor jackets and rainwear, mainly to retail stores.¹ All of the rainwear which they sell is purchased from other firms. Of the outdoor jackets which they sell, approximately 60 percent is purchased, ready-made, from other firms. Their only basis for contending that they are manufacturers is with respect to the balance of their outdoor jackets which are produced, according to respondents' specifications, by independent contractors in the following fashion.

Respondents originate a style for a particular garment and have an independent pattern-maker prepare a pattern to meet respondents' specifications. Respondents purchase from the primary sources, such as mills, the materials which go into the making of the garment. This includes the cloth for the outer shell, material for the inner lining, and trimmings such as zippers, buttons and drawstrings.

¹ While the complaint alleges and the answer admits that respondents also sell their garments to wholesalers, the testimony of the respondent Donald Rubin indicates that respondents' merchandise is sold primarily to retail establishments.

The lining cloth for the heavy jackets is sent out to independent contractors for quilting. Then respondents cut both the outer shell and the lining, in accordance with their pattern. This is usually performed in respondents' own loft where they have a long cutting table and cutting machines, except during the busy season when some cutting is done in the place of business of some of respondents' contractors.² Most of the cutting is done by respondent Donald Rubin, except during the busy season when another cutter is sometimes hired.

After the materials are cut, they are tied in bundles and sent to the factory of independent contractors for sewing. Respondents pay these contractors on a per piece basis for sewing the garments. The contractors have no exclusive arrangement with respondents but work for other firms as well. A representative of respondents regularly visits the plant of the contractor who does the major part of their work in order to see that the garments are properly made. When the garments have been sewn they are returned to respondents' premises where they are tagged, folded and placed in boxes for shipment to customers. No further fabricating operations are performed on the jackets after they are returned from the contractors, except that respondents place several snaps or hooks on certain of the heavy winter garments in order to permit the fastening of a hood which comes with the jacket.

It is evident that with respect to the rainwear sold by them and the majority of the outer jackets which they purchase ready-made, respondents cannot be considered a manufacturer.³ The only question presented is whether they can be considered as manufacturers with respect to that portion of their garments which are designed and cut by them but which are sewn by independent contractors.

The case of counsel supporting the complaint rests primarily on four retailer-witnesses, operating in the New York City area, who testified with respect to their understanding of the term "manufacturer."⁴ These witnesses testified in substance that it was their understanding that a manufacturer was a person who produced a substantially complete garment in his own plant, with his own employees and machinery, and that they preferred to deal directly with a manufacturer because they believed they would be afforded

² It was estimated that 90 percent of the cutting was done in respondents' own plant.

³ Respondents in their answer admit that with respect to that portion of the business where they buy merchandise from others, "they act as distributors and jobbers."

⁴ Three of such witnesses actually testified and the testimony of the fourth was stipulated.

Findings

52 F. T. C.

a better price and other advantages, such as better quality and selection of merchandise. While some of these witnesses recognized that manufacturers sometimes had contractors make up some of their garments during the busy season, it was their understanding that a manufacturer ordinarily produced most or at least a substantial portion, of the garments in his own plant. Respondents relied mainly on two industry witnesses who testified as to their understanding of the term "manufacturer" in the industry. One of these was a sales representative for two manufacturers, who was himself formerly associated with a manufacturing firm, and the other was a salesman selling quilting services and woolens to firms in the industry. According to the testimony of these witnesses any firm which designs a garment, buys the raw materials and arranges for its manufacture, is considered to be a manufacturer in the industry, even though it performs no fabricating operations whatsoever and has merely an office and showroom.

C. Contentions and Conclusions

Counsel for respondents contends that the testimony of the witnesses called in support of the complaint is of no value since as retailers they are not experts in the industry and were merely expressing their individual opinions. Counsel argues that his own industry witnesses were, on the other hand, more experienced in the manufacturing end of the industry and that their opinions are therefore entitled to greater weight. The examiner cannot agree with this argument.

Counsel's argument overlooks the real issue in this case which is not what the people such as respondents call themselves or understand themselves to be, but rather what the people with whom they deal understand by the term or designation used. Where a firm makes certain representations about itself or its product, the question of whether such statements are misleading is not determined by what the "experts" understand them to mean but by the understanding of those for whose benefit the representations are made, which may include "the ignorant, the unthinking and the credulous."⁵ The fact that a form of misdescription has become so common in an industry that sophisticated members of the industry are not deceived by it and possibly use it themselves, does not prevent it from being

⁵ *Positive Products Co. v. FTC*, 132 F. 2d 165, 167 (C.A. 7, 1942). See also *Gulf Oil Corp. v. FTC*, 150 F. 2d 106, 109 (C.A. 5, 1945); *Chas. of the Ritz Dist. Corp. v. FTC*, 143 F. 2d 676, 679 (C.A. 2, 1944).

misleading and deceptive to those with whom the industry deals, many of whom may not be familiar with the fact that the term is not being used in its ordinarily accepted sense.⁶ The question therefore is what the class of persons with whom respondents deal understand by the term "manufacturer" in the industry. Since respondents sell their merchandise mainly to retailers, the question is what retailers in the industry understand by the designation "manufacturer."

As has already been stated, the retailers who were called in support of the complaint testified it was their understanding of the term "manufacturer" that it referred to someone who had a factory where he employed labor and machinery to produce a substantially completed garment. This testimony is clearly relevant, not simply as an expression of opinion, as counsel for respondents argues, but as evidence of a material fact in issue, viz., the understanding of the class of persons for whom respondents' representation was intended. Such fact may be properly established by the testimony of such persons as to their understanding or impression of the statement used by respondents.⁷

Counsel for respondents argues that the number of retailers who testified in support of the complaint was not significant. However, the testimony of those who did so testify was sufficient to support a finding based on the understanding stated in their testimony, absent substantial countervailing evidence. At the close of the evidence in support of the complaint counsel for respondents stated that he did not propose to call any retailer-witnesses to establish their understanding of the term "manufacturer." However, counsel did subsequently call a retailer who had been subpoenaed by counsel supporting the complaint, but who was excused from testifying by the latter. While some of this witness' testimony does tend to support the understanding of respondents' industry witnesses, his testimony as a whole was characterized by such uncertainty, and was so obviously influenced by the testimony of one of respondents'

⁶ See, in this connection, *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493, where the Supreme Court stated:

"The fact that misrepresentation and misdescription have become so common in the knit underwear trade that most dealers no longer accept labels at their face value does not prevent their use being an unfair method of competition. A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice. Nor does it cease to be unfair because the falsity of the manufacturer's representation has become so well known to the trade that dealers, as distinguished from consumers, are no longer deceived."

⁷ *Stanley Laboratories, Inc. v. FTC*, 138 F. 2d 388 (C.A. 9, 1943); *Koch v. FTC*, 206 F. 2d 311, (C.A. 6, 1953).

industry witnesses who had testified in his presence, that it can be given little weight.⁸

In any event, even accepting the testimony of respondents' single retailer-witness, as indicating that some retailers have an understanding similar to that expressed by respondents' industry witness, there is nevertheless sufficient evidence in the record to establish the existence of a contrary understanding among a significant portion of the class of persons with whom respondents deal. In order to establish a violation of the Act, it is not necessary to show that all persons may be deceived. It is sufficient if there exists a reasonable probability of deception among a significant portion of the public.⁹ It may also be noted, in this connection, that it is not necessary to show actual deception, as counsel for respondents argues; since the tendency or capacity of a representation to mislead or deceive is sufficient to establish a violation of the Act.¹⁰

While counsel supporting the complaint did not call a large number of witnesses, it may be inferred that the understanding of those who did testify fairly reflects the understanding of many other retailers throughout the United States. That such an understanding is widely held may be inferred from the ordinary dictionary meaning of the term used. Under this definition a "manufacturer" is: "One who manufactures, an employer of operatives in manufacturing"; and "manufacture" means: "To make (wares) by hand, by machinery, or by other agency; to produce by labor, esp., now, by division of labor, and usually with machinery."¹¹

The understanding of the witnesses who testified in support of the complaint comports with the finding of the Commission in a number of cases, involving a variety of industries. Under these decisions one who merely arranges for the manufacture of a product but does not perform the basic manufacturing operations is not considered a manufacturer. Thus, the Commission in a number of cases involving the handkerchief industry has held that firms which design the product, purchase the cloth, and package it for shipment but who have the actual manufacturing operations performed by independent contractors are not themselves manufacturers since they

⁸ This witness testified that he had never given much thought to what constituted a manufacturer, but that after listening to one of respondent's witnesses he had become convinced that anyone who could compete with a manufacturer was entitled to be called one (R. 113). Under this concept a wholesaler who could meet a manufacturer's price would be entitled to call himself a manufacturer. However, when asked to define the word manufacturer in his own words, the witness gave the generally accepted definition: "A man who takes a piece of material and makes a garment out of it" (R. 118).

⁹ *Prima Products, Inc. v. FTC*, 209 F. 2d 405, 409 (C.A. 2, 1954).

¹⁰ *Parker Pen Co. v. FTC*, 159 F. 2d 509 (C.A. 7, 1946); *Charles of the Ritz Dist. Co. v. FTC*, 143 F. 2d, 676 (C.A. 2, 1944).

¹¹ Webster's New Collegiate Dictionary.

do not own or operate or control a factory for the production of the products sold by them.¹² The same ruling has been made in other industries and has been sustained, in a number of instances, by the courts. These include knitted wear, textiles, floor coverings, men's clothing and blankets.¹³ The impropriety of calling oneself a manufacturer has been held to exist though the firm making such representation has performed certain incidental operations in the manufacturing process.¹⁴ Finally, the Commission has found that the precise operations which are being performed by respondents do not constitute one a manufacturer. In *Ralph Cohn Underwear*, 31 F. T. C. 1077, respondents represented themselves as manufacturers of ladies' undergarments. They designed and patterned the garments, bought the piece goods and trimming, cut them up with their own employees on their own premises, and sent them out for sewing by independent contractors, after which the garments were returned to respondents for packing and distribution. The Commission held on these facts that this method did not constitute respondents a manufacturer.

Counsel for respondents argues that the evidence here is deficient in that it fails to show "what constitutes control of a factory." It is clear from the record that respondents neither own nor operate a factory. The evidence offered concerning their method of operation also indicates an absence of control over the manufacturing operations of such a nature as to entitle them to use the designation of manufacturer. The Commission has indicated in several cases that a mere incidental relationship to the manufacturing process does not constitute control sufficient to justify use of the designation "manufacturer."¹⁵ While the cases have not spelled out precisely what degree of control it is which entitles one to be called a manufacturer, certain it is that the right to use some term cannot be bottomed on the casual inspection by respondents over the plant of their contractors or their right to reject unsatisfactory garments.

¹² *Berkshire Manufacturing Co.*, 47 F.T.C. 1048; *Julian S. Cohn*, 32 F.T.C. 952; *Universal Handkerchief Mfg. Co., Inc.*, 26 F.T.C. 193; *Standard Handkerchief Manufacturing Co.*, 20 F.T.C. 182.

¹³ *Beacon Knitting Mills, Inc.*, 10 F.T.C. 70; *Bear Mill Mfg. Co.*, 98 F. 2d 67 (C.A. 2, 1938); *Herzfeld v. FTC*, 149 F. 2d 207 (C.A. 2, 1944); *Interstate Clothing Co.*, 20 F.T.C. 412; *Lawrence Blanket Mills*, 24 F.T.C. 615; *Columbia Pants Manufacturing Co.*, 13 F.T.C. 61; *Knit-Firm, Inc.*, 13 F.T.C. 302.

¹⁴ See *FTC v. Royal Milling Co.*, 288 U.S. 212, where respondents blended flour but did not grind it; *Bilt-Rite Box Corp.*, 33 F.T.C. 1487, where respondents bought boxes in knockdown form and assembled them by stitching and stapling them together; *Columbia Pencil Company*, 33 F.T.C. 617, where respondents purchased lead pencils, and then painted them and attached a ferrule and eraser.

¹⁵ See *Progress Tailoring Co. v. FTC*, 153 F. 2d 103 (C.A. 7, 1948), where respondents' clothing was sewn by a subsidiary corporation; *FTC v. Pure Silk Hosiery Mills, Inc.*, 3 F. 2d 105 (C.A. 7, 1925), where respondents' hosiery was made by a mill in which it owned one-sixth of the stock and had one director; *Primfit Textile Co.*, 31 FTC 1423, where respondents had an exclusive contract with the firm which made their product.

Based on the evidence as a whole and in the light of the precedent above cited, it is concluded and found that respondents are not manufacturers since they do not own, operate or control any factory or manufacturing establishment and since a significant portion of the class of persons with whom they deal understand that a manufacturer is someone who owns, operates or controls a factory where the goods sold by him are manufactured. Moreover, since a substantial portion of the products sold by respondents are purchased by them from others, ready-made, they have no right to call themselves a manufacturer with respect to such products in any event.¹⁶

D. *Preference for Dealing With a Manufacturer*

The basis of the claim of public interest in this case rests on allegation of the complaint that retailers prefer to buy from manufacturers because of their belief that they will obtain better prices and other advantages. This allegation is sustained by the testimony of the witnesses called in support of the complaint previously alluded to. It may be that the expectation of retailers is not always realized, as is indicated by the testimony of the one retailer-witness called by respondents, who testified that he was able to purchase from respondents as cheaply as from a bona fide manufacturer from whom he made most of his purchases. However, this does not gainsay the fact that there exists a general preference among retailers for dealing directly with those whom they consider manufacturers.

The fact that respondents may have, as they contend, largely eliminated the middleman's profit (despite the fact that they pay a contractor for the sewing of their jackets) does not justify ignoring the preference on the part of retailers for dealing with those whom they regard as bona fide manufacturers and as to whom they would ordinarily entertain no doubt concerning the elimination of the middleman's profit. Counsel for respondents urges that there is no likelihood of any damage here since the prices which respondents charge must generally be competitive to that of manufacturers. However, this argument overlooks the fact that retailers have a right to be correctly advised concerning the status of those with whom they deal and to deal with the type of firm for whom they have a preference, even though such preference may sometimes be based on ignorance or caprice.¹⁷ It cannot be denied that the failure to

¹⁶ *Brown Fence & Wire Co. v. FTC*, 64 F. 2d 934 (C.A. 6, 1933). Respondents allege in their answer that the merchandise manufactured by others was sold under a different label from that made up under their supervision. No evidence was offered to support this allegation. Moreover, there is nothing to show that this label indicates respondents are not the manufacturer of such merchandise.

¹⁷ *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 80; *Benton Announcements Inc. v. FTC*, 130 F. 2d 254 (C.A. 2, 1942).

correctly advise retailers concerning the status of a prospective vendor may result in their purchasing from such firm, thereby causing damage to competitors, some of whom may be wholesalers who make no claim to being a manufacturer and some of whom may be bona fide manufacturers. The position which respondents take in this regard is similar to that which was answered by the Court of Appeals in *Bear Mill M'fg. Co. v. FTC*, 98 F. 2d 67, 68, as follows:

“Indeed, the line between manufacturing itself and supervising the finishing of the product as to color, style, and workmanship where, as here, the orders are given to an independent contractor is so tenuous that, upon the record, we regard the damage, if any, to customers or competitors as highly speculative. *Yet accuracy of representations implicit in a trade-name indicating whether a concern is a manufacturer, converter or jobber is in general important and it cannot be denied that a misleading name may lead to injurious misapprehensions on the part of customers, actual or prospective, and damage to competitors.*” [Emphasis supplied.]

It is accordingly concluded and found that there exists a preference on the part of retailers for dealing directly with manufacturers of products rather than with distributors, jobbers and other intermediaries, such preference being due in part to a belief that by dealing with the manufacturer lower prices and other advantages may be obtained.

III. Effect of the Unfair Practices Found

The use by respondents of the word “Manufacturers” on their letterheads, invoices and advertising, as above found, has had and now has the tendency and capacity to mislead dealers into the erroneous and mistaken belief that respondents are the manufacturers of said merchandise and that they own, operate or control a 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.

Respondents in the course and conduct of their business are in direct and substantial competition with other corporations, firms and individuals engaged in the sale in commerce of jackets and outer coats. As a result of the unfair practices found, it may fairly be inferred that substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

Opinion

52 F. T. C.

CONCLUSION OF LAW

The acts and practices of respondents, as hereinabove found, 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.

ORDER

It is ordered, That respondents M. Rubin & Sons, Inc., a corporation, and its officers, and Milton Rubin, Donald Rubin and Robert Rubin, 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:

1. 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.

2. Representing through the use of the word "manufacturers" or any other word or words of similar import or meaning on letterheads or invoices or in any other manner, that they or any of them, manufacture the merchandise sold by them.

OPINION OF THE COMMISSION

By KERN, Commissioner:

The Commission on March 23, 1955, issued its complaint, charging the respondents with having falsely, misleadingly and deceptively represented (1) that jackets and outer coats sold and distributed by them were manufactured for, and according to specifications of, the United States Armed Forces, and (2) that respondents were the manufacturers of the garments sold by them.

With respect to the first charge, respondents and counsel supporting the complaint entered into an agreement for a consent order which was tendered to, and accepted by, the hearing examiner. The initial decision adequately and appropriately disposes of this charge. After hearings at which evidence in support of and in opposition to the remaining charge was received, the hearing examiner issued his initial decision in which he found that the respondents had misrepresented that they were the manufacturers of the garments they sold, and ordered that the practice be discontinued. Respondents

685

Opinion

have appealed from this portion of the hearing examiner's findings and order.

There is no dispute as to the facts surrounding the issue as to whether or not respondents have misrepresented that they are manufacturers of the garments they sell. The hearing examiner's findings as to the respondents' method of operation are adopted by respondents as a "fair factual statement," except for his failure to mention the 2500 square feet of area in respondents' cutting room and the fact that respondents' sales of garments designed and cut by them and sewed by individual contractors have increased steadily each year in proportion to the total volume of their sales. We do not consider the omitted statements as materially changing the factual situation.

Respondents sell rainwear and outdoor jackets, mainly to the retail trade. All of the rainwear and 60% of the outdoor jackets they sell are purchased, ready-made, from other firms. The remaining 40% of the outdoor jackets sold are produced, according to respondents' specifications, by independent contractors, and respondents' relation to the manufacturing process is incidental. Respondents do not own, operate, or control any factory or manufacturing establishment where the garments they sell are manufactured. In our opinion, the hearing examiner's conclusion that the respondents are not manufacturers is correct.

There is substantial testimony in the record to support the finding that respondents' use of the word "Manufacturers" on its letterheads, on invoices, and in some of its advertising in trade journals has the tendency and capacity to mislead dealers into the erroneous belief that respondents own, operate or control a plant or plants where the garments they sell are manufactured, and to induce the purchase of substantial quantities of respondents' merchandise in commerce because of such belief. The Federal Trade Commission Act is violated if there exists a reasonable probability that a substantial portion of the purchasing public may be deceived. The law is well settled that a finding of tendency and capacity to mislead is sufficient and that actual deception need not be shown. *F.T.C. v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934); *Vacu-Matic Carburetor Co. v. F.T.C.*, 152 F. 2d 711, 713 (7th Cir. 1946); *Charles of the Ritz Dist. Corp. v. F.T.C.*, 143 F. 2d 676, 680, and cases there cited (2nd Cir. 1944). We think the hearing examiner properly held that the testimony of the four retailers fairly reflected the understanding of many other retailers throughout the United States, particularly in view of the dictionary definition of the word "manufacturer" and the scant evidence offered by respondents to the con-

Order

52 F. T. C.

trary. The courts have repeatedly affirmed similar Commission orders. *Progress Tailoring Co. v. F.T.C.*, 153 F. 2d 103 (7th Cir. 1946); *Bear Mill Mfg. Co. v. F.T.C.*, 98 F. 2d 67 (2nd Cir. 1938); *F.T.C. v. Royal Milling Co.*, 288 U.S. 212 (1933); *Brown Fence and Wire Co. v. F.T.C.*, 64 F. 2d 934 (6th Cir. 1933); *F.T.C. v. Pure Silk Hosiery Mills, Inc.*, 3 F. 2d 105 (7th Cir. 1924).

The hearing examiner found that the use by the respondents of the word "Manufacturers" on their letterheads, on invoices, and in advertising, not only has the tendency and capacity to, but also does mislead dealers. Since the evidence does not show actual deception, the hearing examiner's findings of fact, first paragraph, Section III, will be modified by eliminating all reference to the existence of actual deception on the part of those dealing with respondents. The capacity and tendency to mislead is sufficient to warrant an order. The findings as modified, conclusions and order of the hearing examiner are adopted as the findings, conclusions, and order of the Commission.

Respondents' appeal is denied, and it is directed that an order issue accordingly.

FINAL ORDER

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

The Commission having determined, for the reasons appearing in the accompanying opinion of the Commission, that the initial decision of the hearing examiner should be modified and thereafter adopted as the Commission's decision, and that respondents' appeal should be denied:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, modified by eliminating the words "and does" from the first paragraph, Section III, of the findings of fact in the initial decision.

It is further ordered, That the findings as modified, conclusions, and order in the initial decision be, and they hereby are, adopted as the findings, conclusions, and order of the Commission.

It is further ordered, That respondents' appeal from the hearing examiner's initial decision be, and it hereby is, denied.

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

Complaint

IN THE MATTER OF

DRUGGISTS' SUPPLY CORPORATION ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2 (c) OF THE CLAYTON ACT*Docket 6420. Complaint, Sept. 22, 1955—Decision, Jan. 17, 1956*

Consent order requiring over 100 wholesale druggists to cease violating Sec. 2 (c) of the Clayton Act, as amended, through receiving brokerage from sellers (1) based upon percentage of sales, (2) in lump sums, and (3) as "functional discounts" on purchases made for them by their own corporate agent.

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

Mr. Rice E. Schrimsher for the Commission.

Appel, Austin & Gay, of New York City, for respondents, generally.

Weaver & Glassie, of Washington, D. C., and *Ballard, Spahr, Andrews & Ingersoll*, of Philadelphia, Pa., for Smith, Kline & French Laboratories and Smith, Kline & French, Inc.

COMPLAINT

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

PARAGRAPH 1. Respondent Druggists' Supply Corporation, hereinafter referred to as respondent D.S.C., is a corporation organized, existing and doing business under the laws of the State of New York, with its principal office and place of business located at 26 West 40th Street, New York, N. Y.

PAR. 2. Respondent Brunswick Drug Company is a corporation organized, existing and doing business under the laws of the State of California, with its principal office and place of business located at 4701 South Santa Fe Avenue, Los Angeles, California. It maintains branch offices in San Francisco, San Jose, San Diego, Sacramento and San Bernardino, California, Phoenix and Tucson, Arizona, and Salt Lake City, Utah.

Respondent Durr Drug Company is a corporation organized, existing and doing business under the laws of the State of Alabama, with

Complaint

52 F. T. C.

its principal office and place of business located at 207-11 Commerce Street, Montgomery, Alabama. It maintains a branch office in Birmingham, Alabama.

Respondent Gilman Brothers, Inc., is a corporation organized, existing and doing business under the laws of the State of Massachusetts, with its principal office and place of business located at 108-12 Shawmut Avenue, Boston, Massachusetts.

Respondent Kauffman-Lattimer Company is a corporation organized, existing and doing business under the laws of the State of Ohio, with its principal office and place of business located at 263-83 North Front Street, Columbus, Ohio. It also does business through a wholly-owned subsidiary, Kauffman-Lattimar Company, Inc., Parkersburg, West Virginia.

Respondent Kiefer-Stewart Co. is a corporation organized, existing and doing business under the laws of the State of Indiana, with its principal office and place of business located at 141-55 West Georgia Street, Indianapolis, Indiana. It controls another corporation engaged in the same business, Walding, Kininan & Marvin Company, Toledo, Ohio.

Respondent McPike, Inc. is a corporation organized, existing and doing business under the laws of the State of Missouri, with its principal office and place of business located at 618 Central Street, Kansas City, Missouri.

Respondent Ohio Valley Drug Co. is a corporation organized, existing and doing business under the laws of the State of West Virginia, with its principal office and place of business located at 1305-07 West Main Street, Wheeling, West Virginia.

Respondent Owens, Minor & Bodeker, Inc., is a corporation organized, existing and doing business under the laws of the State of Virginia, with its principal office and place of business located at 1000-08 East Cary Street, Richmond, Virginia.

Respondent Scott Drug Co., Inc., is a corporation organized, existing and doing business under the laws of the State of North Carolina, with its principal office and place of business located at 2923 South Tryon Street, Charlotte, North Carolina.

Respondent Smith, Kline & French Laboratories is a corporation organized, existing and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at 1530 Spring Garden Street, Philadelphia, Pennsylvania.

Respondent Smith, Kline & French, Inc., is a corporation organized, existing and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at 1011 West Butler Street, Philadelphia, Pennsylvania. It is a wholly-owned subsidiary of respondent Smith, Kline & French Laboratories.

It also has a wholly-owned subsidiary, Mercer Wholesale Drug Co., 1880 Princeton Avenue, Trenton, New Jersey.

Respondent Southwestern Drug Corporation is a corporation organized, existing and doing business under the laws of the State of Texas, with its principal office and place of business located at 1108-10 Jackson Street, Dallas, Texas. It maintains branch offices in Dallas, Fort Worth, Waco, Corpus Christi, Midland, Amarillo, Houston, Wichita Falls, and San Antonio, Texas.

Respondent Walsh-Lumpkin Drug Company is a corporation organized, existing and doing business under the laws of the State of Arkansas, with its principal office and place of business located at 217 Hazel Street, Texarkana, Arkansas.

The respondents named in this paragraph are engaged in the wholesale drug business selling primarily to drug retailers numerous products, including drugs, proprietaries and sundries. Each of said respondents is a stockholder member of respondent D.S.C. An official of each of said respondents is also a member of the board of directors of respondent D.S.C.

Respondent D.S.C. has a total of approximately 104 stockholder members engaged in the wholesale drug business. During the period covered by the complaint, the number of such stockholder members has varied from year to year. The stockholder members of respondent D.S.C. constitute a class so numerous as to make it impracticable to specifically name them all as parties respondent herein, and those stockholder members named and designated herein are fairly representative of the whole. The various stockholder members of respondent D.S.C., hereinbefore specifically named in PARAGRAPH TWO hereof, are herewith and hereby made respondents individually, as stockholder members of respondent D.S.C. and as representative of all of the stockholder members of respondent D.S.C., whose principal places of business are located in the continental United States. The stockholder members of respondent D.S.C., as represented by the respondent Stockholder members of D.S.C., hereinbefore specifically named in PARAGRAPH TWO hereof, are hereby made parties respondent as though specifically named herein. All the stockholder members included in this paragraph are sometimes hereinafter referred to as "buyer respondents."

PAR. 3. Respondent D.S.C. was first organized in 1913. Its stock was and is owned by full-line service wholesale druggists who sell primarily to retail druggists such products as drugs, proprietaries and sundries. Currently in 1955 respondent has approximately 104 stockholder members who actually operate approximately 166 wholesale drug concerns, the latter figure including affiliates and subsidiaries in which the members own more than 51% of the stock. Each

Complaint

52 F. T. C.

member, together with all its affiliates or subsidiaries, owns only 10 shares of stock. The policies and management of respondent D.S.C. are controlled by the board of directors, composed of 15 members elected by stockholders. Thus, respondent D.S.C. is a corporation organized, controlled and directed by wholesale druggists who are named as buyer respondents in this proceeding.

PAR. 4. Respondent D.S.C. is now and for more than ten years last past, has been engaged in the business of providing purchasing and other services to the buyer respondents. In its certificate of incorporation, respondent D.S.C. is empowered, among other things, to carry on the business of a broker and commission merchant and to act as a purchasing agent. Purchases made by respondents have resulted in the shipment of products such as drugs, proprietaries and sundries from the State in which the seller is located into and through the various other States of the United States direct to each of said buyer respondents.

PAR. 5. Respondent D.S.C. urges its stockholder members to buy from certain sellers and otherwise promotes the sale of their products to said members. In consideration of the services of respondent D.S.C. in promoting the sale of their products to its members said sellers pay or grant to respondents herein and respondents receive or accept commissions, brokerage, or other compensation, or allowances or discounts in lieu thereof.

PAR. 6. The following methods are illustrative, but not all inclusive, of the manner in which respondents receive or accept commissions, brokerage, or other compensation, or allowances or discounts in lieu thereof:

(1) Respondent D.S.C. receives from various sellers payments of money based upon a percentage of net sales made by the seller to the buyer respondents. Respondent D.S.C. promotes the sale of said seller's products to said buyer respondents. During the 6-year period from 1949 to 1954 respondent D.S.C. received such payments at one time or another from 323 sellers. For any one year the number of sellers ranged from a minimum of 155 in 1951 to a maximum of 199 in 1949, and the payments were based upon percentage of sales ranging from 1% to 10%. During said period, respondent D.S.C. received total payments from said sellers in the following amounts:

1949	-----	\$ 449,149.00
1950	-----	447,585.00
1951	-----	472,182.00
1952	-----	488,874.00
1953	-----	547,651.00
1954	-----	505,597.00
Total	-----	2,911,038.00

699

Complaint

(2) During the same period respondent D.S.C. also received similar payments of money from some seven sellers who sold their products to the buyer respondents, such payments being a lump sum each year agreed upon between respondent D.S.C. and each seller. The total of said payments received by respondent D.S.C. during the period is as follows:

1949	-----	\$ 7,400.00
1950	-----	7,400.00
1951	-----	8,056.50
1952	-----	8,120.00
1953	-----	9,220.00
1954	-----	11,920.00
Total	-----	<u>52,116.50</u>

(3) Respondent D.S.C. has placed orders for goods with certain sellers on behalf of the buyer respondents. For example, in the case of one seller of drug proprietaries, the buyer respondents would submit orders for the seller's goods to respondent D.S.C., which, in turn, forwarded each order upon receipt to the seller. The seller billed respondent D.S.C. at the regular price less "a functional discount" of 20% and at the same time would drop ship the order to the individual buyer respondent. Respondent D.S.C., after paying the seller, billed the buyer respondent direct, allowing a discount of 15%, retaining the differential of 5% for its own work. The regular cash discount was also passed along by respondent D.S.C. to the buyer respondent. Purchases from this seller in this manner amounted to \$316,000.00 in 1952 and \$249,832.00 in 1953.

Respondent D.S.C. receives most of its income from the sellers with which it has the arrangements described above in subparagraphs (1) through (3). Each stockholder member (buyer respondent) is also charged \$150.00 each year as its share of the operating expenses of respondent D.S.C. Once each year, after deducting the expenses of its operations, respondent D.S.C. distributes to its stockholder members a sum of money determined by its directors and the amount paid to each member is in proportion to the member's annual purchases from said sellers. In 1954 for example, said members received individual payments ranging from a minimum of approximately \$100.00 to a maximum of approximately \$8500.00. The total of such payments made during the period 1950 through 1954 is as follows:

1950	-----	\$150,000.00
1951	-----	160,000.00
1952	-----	125,000.00
1953	-----	150,000.00
1954	-----	125,000.00
Total	-----	<u>710,000.00</u>

Decision

52 F. T. C.

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

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On September 22, 1955, the Federal Trade Commission issued its complaint in this proceeding, alleging that the Druggists' Supply Corporation is now and for more than ten years last past has been engaged in the business of providing purchasing and other services to approximately 104 stockholder members engaged in the wholesale drug business, of whom the other respondents named in the caption hereof are representative. The stockholder members of Respondent Druggists' Supply Corporation are alleged to constitute a class so numerous as to make it impractical specifically to name them all as parties respondent herein, and those stockholder members named and designated herein are alleged to be representative of the entire stockholding membership. All stockholder members are, however, made parties respondent as though specifically named herein, and all such stockholder members are hereinafter referred to as Buyer Respondents.

Each of the Buyer Respondents is described as being in the wholesale drug business, selling numerous drug products, including drugs, proprietaries and sundries, primarily to drug retailers.

All of the respondents are charged with engaging in acts and practices violative of the brokerage provisions of subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

On November 9, 1955, all respondents except Respondent Smith, Kline & French Laboratories entered, through their counsel, into an agreement with counsel supporting the complaint, and, pursuant thereto, submitted to the Hearing Examiner an Agreement Containing Consent Order To Cease And Desist, disposing of all the issues involved in this proceeding as to them.

On November 14, 1955, counsel for Respondent Smith, Kline & French Laboratories submitted a motion to dismiss the complaint as to that respondent. This motion was supported by the affidavit of Orlando J. May, Executive Vice President of Smith, Kline & French, Inc., a subsidiary corporation of Respondent Smith, Kline & French Laboratories, both of which are named as Buyer Respondents herein. The affidavit states that the two corporations are independently operated, and that Respondent Smith, Kline & French Laboratories is exclusively engaged in the manufacture of pharmaceuticals and, unlike Respondent Smith, Kline & French, Inc., is not engaged in the wholesale drug business and is not a stockholder-member of

Respondent Druggists' Supply Corporation. Counsel's motion to dismiss is unopposed by counsel supporting the complaint, and it appears, therefore, that the motion should be granted as to Respondent Smith, Kline & French Laboratories. Accordingly, as used hereinafter, the term "Buyer Respondents" will refer only to those respondents who signed the Agreement Containing Consent Order To Cease And Desist. The respondents are identified therein as follows:

Respondent Druggists' Supply Corporation is a corporation 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 24 West 40th Street, New York, New York.

Respondent Brunswig Drug Company is a corporation existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 4701 Santa Fe Avenue, Los Angeles, California.

Respondent Durr Drug Company is a corporation existing and doing business under and by virtue of the laws of the State of Alabama, with its office and principal place of business located at 207-11 Commerce Street, Montgomery, Alabama.

Respondent Gilman Brothers, Inc. is a corporation existing and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located at 100-12 Shawmut Avenue, Boston, Massachusetts.

Respondent The Kauffman-Lattimer Company is a corporation existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 263-283 North Front Street, Columbus, Ohio.

Respondent Kiefer-Stewart Company is a corporation existing and doing business under and by virtue of the laws of the State of Indiana, with its office and principal place of business located at 141-55 West Georgia Street, Indianapolis, Indiana.

Respondent McPike, Inc. is a corporation existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 618 Central Street, Kansas City, Missouri.

Respondent Ohio Valley Drug Company is a corporation existing and doing business under and by virtue of the laws of the State of West Virginia, with its office and principal place of business located at 1305-07 West Main Street, Wheeling, West Virginia.

Respondent Owens, Minor & Bodeker, Inc. is a corporation existing and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business located at 1000-08 East Cary Street, Richmond, Virginia.

Decision

52 F. T. C.

Respondent Scott Drug Company is a corporation existing and doing business under and by virtue of the laws of the State of North Carolina, with its office and principal place of business located at 2923 South Tryon Street, Charlotte, North Carolina.

Respondent Smith, Kline & French, Inc. is a corporation existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 1011 West Butler Street, Philadelphia, Pennsylvania.

Respondent Southwestern Drug Corporation is a corporation existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1108-10 Jackson Street, Dallas, Texas.

Respondent Walsh-Lumpkin Drug Company is a corporation existing and doing business under and by virtue of the laws of the State of Arkansas, with its office and principal place of business located at 217 Hazel Street, Texarkana, Arkansas.

Respondents admit all the jurisdictional facts alleged in the complaint, and agree that the record herein may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Each of said respondents waives any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. The agreement further provides that respondents' answer to the complaint shall be considered as having been withdrawn and the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement. The agreement also provides that it is for settlement purposes only and does not constitute an admission by respondents that they or any of them have violated the law as alleged in the complaint; that the order entered in accordance with this agreement shall have the same force and effect as if entered after a full hearing, and may be altered, modified or set aside in the manner provided for other orders; and that the complaint, except as to subparagraph (3) of Paragraph Six thereof, may be used in construing the terms of the order.

Counsel supporting the complaint, in his memorandum transmitting to the hearing examiner the Agreement Containing Order To Cease And Desist, explains that the reason for agreeing to the exclusion of subparagraph (3) of Paragraph Six of the complaint from further consideration is that the discounts received on purchases made for Buyer Respondents by Respondent Druggists' Supply Corporation, described in that paragraph, do not constitute illegal brokerage as therein alleged.

Order

After consideration of the charges set forth in the complaint the facts above agreed to, and the provisions of the proposed order contained in the agreement, it appears that such order will safeguard the public interest to the same extent as could be accomplished by the issuance of an order after full hearing and all other adjudicative proceedings waived by said agreement. Accordingly, in consonance with the terms of the aforesaid agreement, the hearing examiner accepts the Agreement Containing Consent Order To Cease And Desist, and finds that the Commission has jurisdiction over the respondents and all their acts and practices as alleged in the complaint, and that this proceeding is in the public interest. Accordingly,

It is ordered, That Respondent Druggists' Supply Corporation, its officers, directors, agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase of drugs, proprietaries, and sundries, in commerce as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, upon any purchase made by Respondent Druggists' Supply Corporation for resale to its stockholder members, or upon any purchases made by any of said members.

It is further ordered, That Buyer Respondents Brunswick Drug Company, Durr Drug Company, Gilman Brothers, Inc., The Kauffman-Lattimer Company, Kiefer-Stewart Company, McPike, Inc., Ohio Valley Drug Company, Owens, Minor & Bodeker, Inc., Scott Drug Company, Smith Kline & French, Inc., Southwestern Drug Corporation and Walsh-Lumpkin Drug Company, individually and as representative of all stockholder members of Respondent Druggists' Supply Corporation, their respective officers, directors, agents, representatives, and employees, directly or through any corporate or other device, in connection with the purchase of drugs, proprietaries, and sundries, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller or from Respondents Druggists' Supply Corporation, or from any other agent, representative, or other intermediary, acting for or in behalf or subject to the direct or indirect control of said Buyer Respondents, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon any purchase made by said Buyer Respondents or for them by Respondent Druggists' Supply Corporation or by any other such intermediary.

Decision

52 F. T. C.

It is further ordered, That the complaint herein, insofar as it relates to Buyer Respondent Smith, Kline & French Laboratories, be, and the same hereby is, dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 17th day of January, 1956, become the decision of the Commission; and, accordingly:

It is ordered, That Respondent Druggists' Supply Corporation, a corporation, and Buyer Respondents Brunswig Drug Company, Durr Drug Company, Gilman Brothers, Inc., Kauffman-Lattimer Company, Kiefer-Stewart Co., McPike, Inc., Ohio Valley Drug Co., Owens, Minor & Bodeker, Inc., Scott Drug Co., Inc., Smith, Kline & French, Inc., Southwestern Drug Corporation and Walsh-Lumpkin Drug Company, corporations, 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.

Decision

IN THE MATTER OF
THE ORLOFF COMPANY, INC., ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 6184. Complaint, Feb. 24, 1954—Decision, Jan. 27, 1956

Order requiring an assembler and distributor of its "Geneva" brand watches to cease affixing to them tags printed with fictitious and excessive prices, thereby furnishing retailers with means of deceiving members of the purchasing public as to the usual retail prices.

Mr. Frederick McManus for the Commission.

Mr. Sydney C. Orlofsky, of Philadelphia, Pa., for respondents.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

STATEMENT OF THE CASE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 24, 1954, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with use of unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of the provisions of said Act. Said respondents appeared by counsel and filed their joint answer to the complaint. Thereafter, counsel in support of the complaint and counsel for respondents entered into a stipulation as to the facts dated November 12, 1954,¹ in which it was stipulated and agreed that, subject to the approval of the hearing examiner, the statement of facts therein set forth may be made part of the record and may be taken as the facts in this proceeding in lieu of evidence in support of the charges stated in the complaint, or in opposition thereto, and that the hearing examiner may proceed upon said statement of facts to make his initial decision, stating his findings as to the facts, including inferences which he may draw from said stipulation, and his conclusion based thereon, and enter his order disposing of the proceeding without the filing of proposed findings and conclusions or the presentation or oral argument, but reserving to counsel the right to file briefs in support of their respective positions. There-

¹ Prior to the above-mentioned stipulation as to the facts, the parties entered into a stipulation as to the facts dated July 12, 1954. Said stipulation was thereafter rejected by order of the hearing examiner, dated September 22, 1954, for the reason that it was characterized by such ambiguity and lack of clarity as not to afford a proper basis for the issuance of an initial decision based thereon.

Findings

52 F. T. C.

after, this proceeding regularly came on for final consideration by the above-named hearing examiner, theretofore duly designated by the Commission, upon the complaint, the answer and the aforesaid stipulation as to the facts, said stipulation being hereby approved as affording the basis for an appropriate disposition of this proceeding and being hereby ordered filed as part of the record in this proceeding by the hearing examiner who, after considering the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

I. The Business of Respondents

Respondent, The Orloff Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business at 116 South 7th Street, Philadelphia, Pennsylvania. It is now, and for more than two years last past has been, engaged in the assembly, sale and distribution of watches under the brand name "Geneva." Said watches are sold to retailers for resale to the purchasing public. Respondents Michael Orloff, Hyman J. Orloff and Harry Orloff are president, vice president and secretary-treasurer, respectively, of said corporation. These individuals formulate, direct and control the policies, acts and practices of said corporate respondent, including those hereinafter referred to. Their address is the same as that of corporate respondent.

II. Interstate Commerce and Competition

In the course and conduct of their business, respondents now cause, and for some time last past have caused, their watches, when sold, to be transported from their place of business in the State of Pennsylvania to purchasers thereof located in 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 their said watches in commerce between and among the various States of the United States and the District of Columbia.

Respondents at all times mentioned herein have been in substantial competition with other corporations, persons, firms, and partnerships engaged in the sale of watches of like quality as those sold by respondents in commerce between and among the various States of the United States and the District of Columbia.

Findings

III. The Unfair Practices

A. *The charges*

The complaint alleges that respondents affix price tags to their watches with amounts thereon greatly in excess of the prices at which respondents' watches are usually and regularly sold at retail. The gravamen of the violation charged is that respondents, by affixing price tags containing fictitious amounts to their watches, have placed in the hands of retailers a means and instrumentality whereby the retailers may mislead and deceive the purchasing public as to the usual and regular prices of their watches.

B. *The stipulated facts*

The facts with respect to respondents' method of operation in the sale of their watches have been stipulated, and are found, to be as follows:

1. Respondents in the course and conduct of their business and before shipping their watches to customers, affix price tags to the majority of such watches, on which price tags are printed the following prices: \$33.75, \$47.50 and \$71.50.

2. Respondents do not sell their watches to the ultimate consumer.

3. Respondents' watches are, with the knowledge of respondents, displayed and resold by respondents' customers with the price tags described in paragraph 1 above, attached thereto. The prices at which respondents' said customers resell such watches at retail are \$17.95, \$19.95, and \$22.95, which fact is known to the respondents.

4. The amounts set forth on the price tags attached by respondents are greatly in excess of the prices at which said watches are usually and regularly sold at retail.

5. The determination of whether the price tags affixed by respondents shall or shall not be attached to the watches at the time of their resale to the ultimate consumer is made by respondents' purchasers and not by respondents.

6. Respondents' Geneva watches are sold to the public over the counter by jewelry stores, specialty shops, and department stores.

C. *The contentions of respondents*

Counsel for respondents in the brief filed by him has advanced a number of arguments, reasons and contentions as to why no case has been made out against respondents. These fall into two main categories and may be summarized as follows:

Findings

52 F. T. C.

1. Since the instances in which watches are sold at less than the tag prices are "infrequent" and occur only during the course of "isolated sales," there is nothing false or misleading in representing that the prices appearing on the price tags are the normal and regular prices at which such watches are sold at retail.

2. Since respondents do not control the prices at which the retailer sells to the public and have no knowledge at the time of shipping the watches whether the price tags will remain affixed thereto at the time of resale, or as to the prices at which the watches will be resold, they cannot be held accountable for the acts of retailers in selling watches with tags attached at prices below those indicated on the tags.

Respondents' arguments and contentions are based largely on facts and claimed inferences from facts which are either contrary to the facts which have been stipulated, or are not justified by the stipulated facts. Respondents' contentions are considered below in the light of the actual facts stipulated by counsel and the reasonable inferences to be drawn therefrom.

1. In order to establish that respondents' price tags contain false and misleading representations as to price, it is necessary to show that the watches to which such tags are attached are not usually and regularly sold at the tag prices but at substantially lower prices. Apparently addressing himself to this aspect of the case, counsel for respondents contends that it is a fair inference from the stipulated facts that "the only time the Respondents' watches are ever sold at a price less than the prices appearing on the price tags is in the course and conduct of isolated sales." These instances, counsel states, "are special occasions and not the normal or usual practice." Counsel further contends that it is a fair inference from the facts that "in the normal course when price tags are attached, such watches are sold at the prices appearing on the tags."

The hearing examiner can find nothing in the stipulated facts which even remotely supports the inferences which counsel has sought to draw therefrom. The stipulated facts are (a) that the "majority" of respondents' watches are sold to retailers with the price tags attached; (b) that "[r]espondents' watches are, with the knowledge of respondents, displayed and resold by respondents' customers with the price tags * * * attached thereto"; (c) that "such watches" are resold at retail at specified prices substantially below those listed on the tags; and (d) that the amounts appearing on the tags "are greatly in excess of the prices at which said watches are usually and regularly sold at retail." It has also been stipulated that counsel supporting the complaint could produce "reputable and

credible witnesses who would testify that they at all times sell respondents' watches with the price tags attached" and at specified prices substantially below the tag-indicated prices.

In the light of these facts there is not the slightest basis for any finding that the only time watches with tags attached are sold at below-tag prices is on "infrequent occasions" and in the course of "special sale events." In fact, there is nothing in the stipulated facts to justify a finding that any of respondents' watches has ever been sold at the prices indicated on the tags. On the contrary, the only reasonable inference which can be drawn from the stipulated facts is that with respect to the watches sold by respondents with price tags attached, they are generally resold by the retailer with the price tags attached and at prices substantially below those indicated on the tags.

Counsel for respondents refers to the fact that a large number of watches "which comprise only one less than the majority" are sold by respondents without any price tags attached. Aside from the fact that the record does not establish whether any considerable number of watches are sold by respondents without retail price tags, this fact has no material significance. This proceeding is not concerned with those watches which are sold by respondents without price tags. It is only with respect to those sold by respondents with price tags, which under the stipulated facts involve at least the majority of their watches, that it is claimed respondents have fathered an instrumentality for deception.

2. Counsel's second argument is based on respondents' alleged lack of knowledge and control as to their customers' use of the tags and the prices charged by them. Counsel contends in this connection that (a) respondents have no "apperceptive" knowledge at the time of shipping the watches that they will be resold with the tags attached, or that they will be resold at prices below those appearing on the price tags, and that (b) in any event, they have no control over the use made by their customers of the price tags or as to the prices charged by them.

Counsel's version of the facts is not supported by the record and is based on a misapplication of the facts and the law. By lack of "apperceptive" knowledge, the examiner assumes counsel means that respondents do not have any actual knowledge in advance that any given shipment of watches will in fact be resold with the price tags affixed and at prices below those indicated on the tags. Aside from the facts that there is nothing in the record to support any such finding, respondents' lack of "apperceptive" knowledge is of no significance in view of the stipulated facts that (a) respondents'

Findings

52 F. T. C.

watches which have been sold with price tags are, "with the knowledge of respondents," resold to the ultimate consumer with the price tags attached and (b) that the prices at which they are resold are certain specified prices substantially below those listed on the tags, "which fact is known to the respondents." Counsel concedes in his brief that respondents do know, "but only retrospectively," that a "large number" of their watches will be resold at below-tag prices. Whether or not respondents have actual knowledge in advance that each and every watch sold by them with price tags will be resold with the tags attached and at below-tag prices is not controlling, since it is clear from the stipulated facts, and is so found, that respondents know or have reason to believe that in the normal course of events their watches will be resold with the price tags attached and at prices substantially below those listed on the tags. The fact that a customer could conceivably, if he chose, remove a price tag before resale or possibly resell the watch at the tag-indicated price, does not gainsay the fact that respondents are chargeable with knowledge of the ordinary business "facts of life" concerning what happens to their product.

In addition to his argument based on respondents' alleged lack of "apperceptive" knowledge as to what their customers do with the tags, counsel also relies upon respondents' lack of control over their customers both with respect to their use of the tags and as to the prices at which the watches will be resold. However, counsel chooses to overlook the fact that respondents are aware that, generally speaking, the watches which they sell with tags attached will be resold to the public with the tags remaining thereon and at prices substantially below the tag-indicated prices. Respondents cannot therefore insulate themselves from responsibility for the natural consequences of their acts on the specious theory that their customers are "free agents." It is elementary that one who puts into the hands of another a means or instrumentality by which that other may mislead the public, is himself the public, is himself guilty of deception.²

Counsel for respondents seeks to distinguish the instant situation from that involved in the cases where the above principle has been applied, on the ground that in those cases the respondent was the "author" of an instrumentality which was inherently deceptive, whereas here—

"the Respondents do not furnish a product specifically designed for the purpose of furthering a practice which is illegal. The mere fact

² *F.T.C. v. Winsted Hosiery Co.*, 258 U.S. 483; *Irwin v. F.T.C.*, 143 F. 2d 316 (C.A. 8, 1944).

that some (and from the facts, very few) retailers misuse the tickets should not be sufficient to hold the Respondents subject to a vicarious liability for their actions."

The distinction which counsel seeks to make is based upon a state of facts not supported by the record and is, moreover, an immaterial one. It has not been established that "very few retailers misuse the tickets." On the contrary, as has already been found, the watches sold by respondents with tags are generally resold with the tags attached and at prices below those indicated on the tags, and respondents know, or have reason to believe, that their watches are being so merchandised. There is, in fact, no evidence that such watches have ever been sold at the tag prices. Since the normal use to which the tags are being put is one which, to respondents' knowledge, is a deceptive one, it is of no consequence that the tags are not inherently deceptive in the sense that they could conceivably be put to a non-deceptive use by respondents' customers.

In support of his position, counsel for respondents cites a number of cases dealing with the sale of gambling devices which he interprets as holding that in a "means and instrumentality" case the illegal use of the device must be the "only" use which can be made of the device, and that the mere fact the device "may be" used for illegal purposes is not enough. While it is true that the mere fact a device "may be" misused by third persons is not itself sufficient to charge its author with responsibility therefor, it does not follow that he cannot be held accountable unless the device can "only" be used for illegal purposes. It is sufficient, in the opinion of the examiner, to hold the originator of the means or instrumentality if the device which he distributes is generally used by his distributors for deceptive purposes, and the originator is aware that his distributors are making such use of the device furnished by him.

It is absurd to suppose that respondents would continue to engage in the empty and financially wasteful practice of supplying retail price tags to their customers if such tags were not being used by the customers to advantage in the sale of respondents' watches.³ Since they are aware that the watches to which such tags are attached are usually and regularly sold at substantially lower prices, respondents must also obviously be aware that the device which they have furnished is being used for deceptive purposes. Respondents cannot therefore deny their authorship of, or escape responsibility for, a device which to their knowledge is being widely used for deceptive purposes.

³ See *Seymour Sales Co.*, Docket No. 6060, Dec. 1, 1953, affirmed sub nom., *Seymour Sales Co. v. F.T.C.*, App. D. C., Nov. 4, 1954; *Benmar Sales Co.*, Docket No. 6128, Dec. 17, 1954.

D. Concluding findings

Based on the stipulation entered into by counsel and the reasonable inferences to be drawn therefrom, it is found (1) that a majority of respondents' watches are sold by respondents to jewelry stores, specialty shops, department stores, and other retail outlets with price tags attached thereto; (2) that such watches are generally displayed and resold by respondents' retail customers to the general public with such price tags attached thereto and at prices substantially below those listed on the price tags; (3) that respondents sell and deliver said watches to their retail customers with knowledge that such watches are generally resold with the price tags attached and at prices substantially below those listed on such price tags; (4) that by means of the tags attached to such watches, respondents have represented that the amounts thereon indicated are the usual and regular retail prices for said watches; (5) that such representation is false, misleading and deceptive in that in truth and in fact such amounts are fictitious and greatly in excess of the prices at which said watches are usually and regularly sold at retail; and (6) that respondents, by the practices aforesaid, have knowingly placed in the hands of retailers a means and instrumentality whereby such retailers may mislead and deceive members of the purchasing public as to the usual and regular retail prices of its watches.

E. The effect of the unfair practices

The acts and practices of respondents, as hereinabove found, have had and now have the tendency and capacity to mislead and deceive members of the purchasing public as to the usual and regular retail selling price of said watches and to induce the purchase of substantial quantities thereof because of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been and is being unfairly diverted to respondents from their competitors and substantial injury has been, and is being, done to competition in commerce.

CONCLUSION OF LAW

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

709

Opinion

ORDER

It is ordered, That respondents, The Orloff Company, Inc., a corporation, and its officers, Michael Orloff, Hyman J. Orloff and Harry Orloff, individually and as officers of said corporation and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of watches in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing in any manner that certain amounts are the regular and usual retail prices of merchandise when such amounts are in excess of the prices at which such merchandise is usually and regularly sold at retail by the class of retailers selling such merchandise.

(2) Putting any plan into operation whereby retailers or others may misrepresent the regular and usual retail prices of merchandise.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

This is an appeal by the respondents from an initial decision by the hearing examiner holding that the respondents have misrepresented the prices at which their watches are generally sold to consumers and have knowingly placed into the hands of retailers a means and instrumentality whereby members of the purchasing public may be misled and deceived as to the usual and regular selling prices of respondents' watches, in violation of Section 5 of the Federal Trade Commission Act, as amended [52 Stat. 111; 15 U.S.C.A., Sec. 45].

All of the facts in this matter were stipulated. Accordingly, there has been a narrowing of the issues. The facts pertinent to this appeal are these: Respondents sell watches to retailers. They do not sell to ultimate consumers. On a majority of the watches sold, respondents affix to price tag containing prices greatly in excess of those at which the watches are usually and regularly sold by retailers to consumers. The prices on the tags affixed by respondents are either \$33.75, \$47.50 or \$71.50. The prices at which respondents' customers resell the watches at retail are \$17.95, \$19.95 and \$22.95, which fact is known to the respondents. The determination as to whether the price tags affixed by the respondents shall or shall not be attached to the watches at the time of their resale to the ultimate consumer is made by respondents' purchasers and not by respondents. However, at least some dealers resell the watches with

the price tags attached at \$17.95, \$19.95 and \$22.95, and never at any other price. By means of the prices appearing on the price tags affixed by respondents, it is represented that the amounts thereon are the usual and regular retail prices for the watches.

Reasonable inferences drawn from facts which are based on substantial evidence are adequate to support findings. *Federal Trade Commission v. Pacific States Paper Trade Association*. When there is a choice of reasonable inferences which may be drawn from the facts of record, the Commission may make the choice which in its best judgment should be made. *Excelsior Laboratory, Inc., v. Federal Trade Commission*, 171 F. 2d 484; *Phelps Dodge Refining Corporation v. Federal Trade Commission*, 139 F. 2d 393, 395.

We share the hearing examiner's view that the stipulated facts and reasonable inferences drawn therefrom present a clear case of fictitious pricing, a practice which the Commission and the courts have repeatedly held to be unfair and in violation of the Federal Trade Commission Act. *Miss Youth Form Creations, et al.*, Docket 6351 (1955); *Excel Automatic Products, Inc., et al.*, Docket 6063 (1954); *Melvin Marcus, et al.*, Docket 6083 (1954); *Ray R. Goldie and David Bachman*, Docket 6064 (1954); *Thomas v. F.T.C.*, 116 F. 2d 347 (C.A. 10, 1940); *Brown Fence & Wire Co. v. F.T.C.*, 64 F. 2d 934 (C.A. 6, 1933).

Respondents contend that they were in no way responsible for any misrepresentation which might have been made as to the usual and regular selling prices of their watches. They contend that when they attached a price tag to a particular watch, they had no knowledge as to the price at which the retailer would sell the watch, or whether or not the tag would be attached to the watch at the time of the sale by the retailer, and that, therefore, the respondents could not be held responsible for a misrepresentation as to the usual retail price of the watch by an unscrupulous dealer.

The hearing examiner was not persuaded by these and similar arguments advanced by the respondents, and neither are we. The law is well settled, as the hearing examiner points out, that one who puts into the hands of others a means or instrumentality by which they may mislead the public, is himself guilty of deception. *F.T.C. v. Winsted Hosiery Co.*, 258 U.S. 483 (1922); *Chicago Silk Co. v. F.T.C.*, 90 F. 2d 689 (C.A. 7, 1937); *Marietta Manufacturing Co. v. F.T.C.*, 50 F. 2d 641 (C.A. 7, 1931); *Irwin v. F.T.C.*, 143 F. 2d 316 (C.A. 8, 1944). Respondents argue that this principle is not applicable to the facts in this case because "The elements of design, of purpose and intent to supply a means of deception, of inducing the deception, is lacking in the instant case." We think the hearing examiner correctly disposed of this contention when he said:

"* * * While it is true that the mere fact a device 'may be' misused by third persons is not itself sufficient to charge its author with responsibility therefor, it does not follow that he cannot be held accountable unless the device can 'only' be used for illegal purposes. It is sufficient, in the opinion of the examiner, to hold the originator of the means or instrumentality if the device which he distributes is generally used by his distributors for deceptive purposes, and the originator is aware that his distributors are making such use of the device furnished by him.

"It is absurd to suppose that respondents would continue to engage in the empty and financially wasteful practice of supplying retail price tags to their customers if such tags were not being used by the customers to advantage in the sale of respondents' watches. Since they are aware that the watches to which such tags are attached are usually and regularly sold at substantially lower prices, respondents must also obviously be aware that the device which they have furnished is being used for deceptive purposes. Respondents cannot therefore deny their authorship of, or escape responsibility for, a device which to their knowledge is being widely used for deceptive purposes."

Respondents' objection to the hearing examiner's action of rejecting a stipulation between counsel requires brief comment. It appears that counsel, on July 12, 1954, entered into a written stipulation in which it was stipulated and agreed that, "subject to the approval of the hearing examiner," the facts set forth therein may be taken as the facts in this proceeding. The hearing examiner rejected the stipulation for the reason that it was "characterized by such ambiguity and lack of clarity as not to afford a proper basis for the issuance of an initial decision based thereon." Subsequently, counsel entered into another stipulation as to the facts which was accepted by the hearing examiner. Respondents claim that the rejected stipulation "should have been determined * * * or, in the alternative, that the facts therein agreed to, not inconsistent with those in the subsequent stipulation, should be considered by the hearing examiner." In rejecting the original stipulation, the hearing examiner was clearly acting within the scope of his authority and no rights of the parties were in any way prejudiced by that action. Respondents were under no compulsion to enter into the subsequent stipulation. Under the circumstances it would not have been proper for the hearing examiner to decide this case on the basis of the facts stipulated in the rejected stipulation, whether or not those facts were inconsistent with the facts in the subsequent stipulation.

Order

52 F. T. C.

We have considered respondents' exceptions to the hearing examiner's initial decision in the light of the stipulated facts and the applicable law and, in our view, these exceptions are without merit. We think the hearing examiner's findings as to the facts are in accord with the facts stipulated and reasonable inferences drawn therefrom, and that his conclusions and order are fully supported by the findings. Accordingly, respondents' appeal is denied and the initial decision of the hearing examiner is affirmed. Appropriate order will be entered.

Commissioner Kern did not participate in this decision.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and briefs and oral argument of counsel in support thereof and in opposition thereto; and

The Commission having rendered its decision denying respondents' appeal and affirming the initial decision:

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.

Commissioner Kern not participating.

Decision

IN THE MATTER OF
RAY S. KALWAJTYS ET AL.
DOING BUSINESS AS GENERAL PRODUCTS

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

Docket 6211. Complaint, Sept. 17, 1954¹—Decision, Jan. 27, 1956

Consent order requiring a Chicago firm to cease inducing and attempting to induce purchasers of photograph albums to breach their contracts with competitors and to purchase respondents' albums;

Order requiring the same sellers of photograph albums, engaged in selling certificates for photographs to be taken at various associated studios, to cease representing falsely in advertising, on certificates issued to customers, and through statements made by their sales representatives that they sold only to selected persons, their albums were given free, the prices at which they regularly sold were promotional or reduced prices, and the photographs provided by their certificates were of natural gold-tone finish; and representing falsely through their salesmen that the salesmen were those of competitors.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On September 17, 1954, the Federal Trade Commission issued its amended and supplemental complaint in this proceeding, charging the Respondents with false, deceptive and misleading statements and representations and unfair methods of competition, in violation of the Federal Trade Commission Act, in connection with the sale and distribution of photographic albums and certificates for photographs to be taken at independent studios in various States of the United States.

On October 25, 1955, Respondents submitted an amended answer denying the principal charges of the complaint, which was thereafter modified by a further amendment on the record during the course of the hearing. Subsequently, a Stipulation For Consent Order as to the allegations of Paragraph Seven of the amended and supplemental complaint, relevant to Respondents' alleged practice of inducing persons to breach their contracts of purchase with Respondents' competitors, was entered into by Respondents and counsel supporting the complaint, which removed these allegations from controversy.

Evidence relative to the issues raised by the other allegations of the complaint was duly received in the record, and forms the basis

¹ Amended and supplemental complaint.

for the factual findings and conclusions relative thereto which are herein made.

1. Respondents Ray S. Kalwajtys, Walter J. Kalwajtys, Bernice Kalwajtys and Weronika Kalwajtys, are individuals and copartners doing business as General Products, with their office and principal place of business located at 4234 North Lincoln Avenue, Chicago, Illinois.

2. As admitted by Respondents in their answer, and as shown by the evidence of record, Respondents are now, and for more than two years last past have been, engaged in the sale and distribution of photograph albums, together with certificates for photographs to be taken at independent "associate" studios. In the course and conduct of their said business, Respondents have caused their photograph albums, when sold, together with the certificates, to be transported from their place of business in the State of Illinois to purchasers thereof located in various other States. They maintain, and at all times mentioned in the complaint 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. Respondents also admit their further engagement in commerce, in that they transmit various instruments of a commercial nature to their customers located in States other than the State of Illinois and receive like instruments from said customers.

3. At the present time, and during the period of time covered by the allegations of the complaint, Respondents are and have been in direct and substantial competition with other corporations, firms and individuals engaged in the sale and distribution of photograph albums, together with certificates, for photographs to be taken at independent studios.

4. In connection with, and as a part of, their business, Respondents have entered into agreements or understandings with a large number of photographic studios, located in all or most of the States of the United States, whereby said studios have agreed to honor certificates for photographs issued to purchasers of Respondents' albums, the designation of which is BUILD-A-BOOK. These certificates provide that the holders thereof are entitled to receive ten 8 x 10 portraits, one of which may be a family group, the portraits to be made at the rate of two a year at intervals of not less than ninety days. Under the terms of the agreement or understanding, the studio may make a charge of \$1.00 for each sitting, if the certificate-holder does not order additional photographs. The price which Respondents receive for their album-certificate combination is

\$39.95. The album is designed to hold as many as 100 photographs. In the course and conduct of their business, Respondents employ a large number of salesmen who obtain orders by door-to-door solicitation. Purchasers of Respondents' Build-A-Book generally are young parents with one or more children.

5. In the course and conduct of their business, as aforesaid, Respondents, through statements made in various advertising media, on certificates issued to customers, and by means of oral statements made by their sales representatives, have made, directly or by implication, representations which are found to be misleading and deceptive, as follows:

(1) At times when prospective purchasers have been approached by Respondents' representative, they have been told that they were to receive a gift of an album, which was being presented only to selected families with a baby or young child, and that only a few of such albums would be given in their area. In truth and in fact, Respondents' prospective purchasers were selected merely on the basis of their belonging to a class of families who, because they had young children, were naturally interested in purchasing pictures of their children and an album to contain them. The names of such prospects were in fact secured from public birth records. The idea of special selection was made more deceptive by the assertion that only a few of the albums were to be placed in an area. The number of albums "placed" in any given area was in fact limited only by the number of possible purchasers and the ability of the salesmen to sell the albums.

(2) Respondents' representatives told prospective purchasers that the album was to be free, and that a charge was to be made for photographs to be taken thereafter. In actuality the albums were not given free, because the purchasers thereof were required to pay \$39.95 to Respondents for the combination of album and certificates entitling them to purchase photographs, for which they were later charged, by the studio taking the pictures, at the price of \$1.00 each, unless they ordered more than one photograph, in which event they were to receive one photograph without charge on paying the studio's regular price for the remaining photographs ordered. Therefore, Respondents' charge of \$39.95 was in large part the price of the album, which, accordingly, was not in fact free.

(3) Respondents' prospective purchasers were also told that a price of \$39.95 was being charged for the album-certificate combination, which was a promotional and reduced price, the album-certificate combination being represented as having the value of \$114.50. Inasmuch as the evidence shows that the album-certificate

combination was usually and customarily sold for the price of \$39.95, such price was not promotional or reduced.

On the other hand, the latter part of the above representation, to the effect that the album-certificate combination is of a value of approximately \$114.50, is hypothetically possible. Respondents' evidence shows that the album has been offered for sale by Marshall Field of Chicago for a price of \$34.50, and that photographs comparable to those offered through Respondents' album-certificate combination are being sold in many areas of the United States for a price of \$8.00 each, making a total price for 10 photographs, involving 10 separate sittings, of \$80.00. This amount, added to the \$34.50 for the album, equals Respondents' claimed value of \$114.50.

Because of the natural tendency of parents, when purchasing photographs of their children, to buy more than one print of each sitting, the hypothetical value of \$114.50 will seldom be received by purchasers of Respondents' album-certificate combination. That value, however, may actually be realized by the purchaser if he is willing to comply strictly with Respondents' terms of sale: that is, to purchase only one print of each sitting, and to allow the pictures to be taken at the rate of two sittings per year for a period of five years.

(4) Some of such prospective purchasers were informed that they would receive a natural gold tone finish portrait. The record shows that Respondents' photographs were not and are not natural gold tone finish, but instead are ordinary sepia finish prints.

6. The use by Respondents of the false, deceptive and misleading statements and representations and unfair methods of competition, as herein found, had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations were true, and to induce the purchasing public to purchase substantial quantities of Respondents' album-certificate combinations as a result thereof. Consequently, substantial trade in commerce has been unfairly diverted to Respondents from their competitors, and substantial injury has thereby been done to competition in commerce.

The aforesaid acts and practices of Respondents, as herein found, 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.

7. As previously stated, Respondents, on March 11, 1955, entered, with counsel supporting the complaint, into a "Stipulation For Con-

721.

Decision

sent Order As To Paragraph Seven Of The Amended And Supplemental Complaint," in which Respondents identify themselves as above shown. They also admit therein 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 therewith.

All parties agree that the answers filed by Respondents on September 10 and October 25, 1954, insofar as they relate to Paragraph Seven of the amended and supplemental complaint, be withdrawn, and for all legal purposes said answers, insofar as they so relate to Paragraph Seven of the amended and supplemental complaint, will hereafter be regarded as withdrawn. As to the allegations contained in said Paragraph Seven of the complaint, all parties expressly waive any further hearings before a hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which the Respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission. Respondents agree that the order contained in the Stipulation For Consent Order shall have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon, and specifically waive any and all right, power or privilege to challenge or contest the validity of the provisions of the order entered in accordance with this stipulation.

It is also agreed that this stipulation, together with the complaint, shall constitute the entire record in this proceeding, upon which the initial decision, insofar as it relates to the allegations contained in Paragraph 7 of the amended and supplemental complaint, shall be based. The stipulation sets forth that the complaint herein may be used in construing the terms of the aforesaid order, which may be altered, modified, or set aside in the manner provided by statute for orders of the Commission.

The stipulation further provides that the signing of the "Stipulation For Consent Order As To Paragraph Seven Of The Amended And Supplemental Complaint" is for settlement purposes only, and does not constitute an admission by Respondents that they have violated the law as alleged in said paragraph of the complaint.

8. In view of the Stipulation For Consent Order as outlined above, and the fact that the order embodied therein is identical with the provisions of the order accompanying the amended and supplemental complaint which relate to the allegations contained in Paragraph

Order

52 F. T. C.

Seven of such complaint, it appears that such order will, with respect to such allegations, safeguard the public interest to the same extent as could be accomplished by the issuance of an order after full hearing and all other adjudicative procedure waived in said stipulation. Accordingly, in consonance with the terms of the aforesaid stipulation, as to the allegations of Paragraph Seven of the amended and supplemental complaint, and after consideration of the entire record herein as to the remaining allegations of such complaint, the hearing examiner accepts the "Stipulation For Consent Order As To Paragraph Seven Of The Amended And Supplemental Complaint," submitted herein; finds that this proceeding is in the public interest; and issues the following order:

It is ordered, That the Respondents, Ray S. Kalwajtys, Walter J. Kalwajtys, Bernice Kalwajtys, and Weronika Kalwajtys, individually and as copartners doing business as General Products, or under any other name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of photograph albums or certificates for photographs, do forthwith cease and desist from:

1. Representing, directly or by implication:
 - (a) That they sell only to selected persons;
 - (b) That their albums are given free or without cost;
 - (c) That the prices at which they regularly or customarily sell their products are promotional or reduced prices;
 - (d) That the photographs provided by Respondents' certificates are of natural gold tone finish;
2. Inducing or attempting to induce purchasers of photograph albums of competitors to breach their contracts with such competitors and to purchase Respondents' photograph albums;
3. Inducing or attempting to induce prospective purchasers to breach their contracts for the purchase of competitive photograph albums and to purchase Respondents' photograph albums by:
 - (a) Offering to allow as part payment of the purchase price of their own photograph albums any sum paid on the purchase price of the photograph albums of their competitors;
 - (b) Offering to indemnify such persons against loss which might accrue to them by reason of such breach;
 - (c) Offering to furnish the services of attorneys to such persons to defend suits brought by Respondents' competitors for the purchase price of their photograph albums;

4. Representing, directly or by implication through their salesmen or employees, or otherwise, that their salesmen or employees are the salesmen or employees of their competitors.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The amended and supplemental complaint charges false, deceptive and misleading statements and representations and unfair methods of competition, in violation of the Federal Trade Commission Act, in connection with the sale and distribution of photograph albums and certificates for photographs to be taken at independent studios in various localities.

Subsequently, a stipulation for consent order as to certain charges was entered into and trial was had on the remaining allegations. The charges settled by the stipulation are covered in Paragraphs 2, 3 and 4 of the order in the initial decision. As to the remaining charges, the hearing examiner found against the respondents and issued an order accordingly.

The challenged portion of the order to cease and desist would prohibit respondents from:

1. Representing, directly or by implication:
 - (a) That they sell only to selected persons;
 - (b) That their albums are given free or without cost;
 - (c) That the prices at which they regularly or customarily sell their products are promotional or reduced prices.

Respondents manufacture and sell (among other things) photograph albums, known as Built-A-Book, which is the product involved here. The method of distribution is by salesmen who obtain orders through personal solicitation. As part of the transaction, the salesmen turn over to purchasers, certificates which are to be presented to a designated local studio, with whom respondents have made previous arrangements. These certificates provide that the holders thereof are entitled to receive ten 8 x 10 portraits, one of which may be a family group, the portraits to be made at the rate of two a year at intervals of not less than ninety days. Under the terms of the agreement or understanding, the studio may make a charge of \$1.00 for each sitting, if the certificate-holder does not order additional photographs. The price which respondents receive for their album-certificate combination is \$39.95, all of which is collected and retained by respondents.

It is not disputed that respondents secured the names of prospective customers by the "birth lead method." That is, the names were secured from public birth records.

The written instructions furnished the salesmen by respondents (See Comm. Ex. 6) contained the following directions as to the sales talk to be employed after the salesman had gained admittance to the home:

"I am looking for the John Jones family * * * Mrs. Jones, I am from General Products. We have, in reality, a gift for selected families with (a baby) or (a young child). The reason we check so close is because the gifts are quite expensive and they have been promised to a selected number of families and, of course, we want to be sure we have the right families".

Respondents' evidence is to the effect that the circulation of Ex. 6 was abandoned in 1953. Nevertheless, it was stipulated "that if the hearing was held, now scheduled in Appleton, Wisconsin, the witnesses called there would testify in substance as follows:

"(1) That at the time they were approached by a representative from General Products, they were told that they were receiving in reality a gift for selected families with a baby or young child and that there would only be a few of these books placed in the respective areas.

"(2) That they understood the album to be free and that the charge was made for the photographs.

"(3) That the price of \$39.95 for the album-certificate combination, was a promotional and reduced price.

"(4) That the album-certificate combination was of the value of \$114.50.

"(5) That representations were made to some of the witnesses that they would receive a natural gold tone finish portrait, when such was not always the case."

Respondents call attention to 57 Corpus Juris 106 where the word "select" is defined as follows:

"Select. A word which, whether we look to its derivation or to its universal use, means to choose, and take from a number; to cull; to pick out or take from among a number, to take by preference from among others, to take some particular part or number from a greater."

The real question, however, is what impression did respondents' representations make on the prospective purchaser. It seems clear that the impression sought to be created was that the particular person had been specially chosen and that only a few were chosen. The truth, of course, was that each person was called on, simply because he belonged to a certain class, thought to be good prospects, to wit, the parents of a baby or a child. It is true this class would be smaller than the entire group of the population. Nevertheless,

Opinion

the sales appeal was not made on the basis that all in that class were in fact being called on and no other. Such a selling proposition could easily and clearly have been made had respondents desired to do so. The natural impression made by the sales approach used was that for some reason the prospective purchaser was being specially and individually chosen, rather than that he was only one member of a certain group who, because of the circumstances, would be likely to buy. The representations had the capacity and tendency to deceive and the hearing examiner clearly found them to be misleading and deceptive.

Each person accepting respondents' offer was required to pay \$39.95. For that, he received one Build-A-Book and certificate which entitled him to have not to exceed 10 pictures taken by a specified photographer, for which the photographer could charge \$1.00 each. All the \$39.95 went to the respondents.

It is respondents' claim that the album was given free and that the \$39.95 was for the making of the pictures. The written instructions to the salesmen refer to the album as "in reality, a gift" and the testimony of the witnesses was that they were told they were receiving the album free. It also appears that respondents manufactured and sold the album and were not financially interested in the picture making business, except that they owned and operated one studio.

The hearing examiner decided that, in actuality, the albums were not given free, that respondents' charge was in large part the price of the album, which, accordingly was not in fact free.

With this conclusion, we agree. Obviously, respondents' interest was in the sale of the Build-A-Book. It does not appear that they had any other reason to help the photographers except as it contributed to the sale of their products. They collected and kept all the money. If the purchaser, for any reason, did not avail himself of the right to have any picture taken, respondents, nevertheless, were entitled to keep the money. The transaction did not involve a gift of the album as that term is commonly understood. Instead, it was a sale for \$39.95 of one album, plus certain contract rights set out in the certificate.

The final question has to do with alleged misrepresentations that \$39.95 was a promotional and reduced price.

As found by the hearing examiner:

"Respondents' evidence shows that the album has been offered for sale by Marshall Field of Chicago for a price of \$34.50, and that photographs comparable to those offered through respondents' album-certificate combination are being sold in many areas of the United

Order

52 F. T. C.

States for a price of \$8.00 each, making a total price for 10 photographs, involving 10 separate sittings, of \$80.00. This amount added to the \$34.50 for the album, equals respondents' claimed value of \$114.50."

About all this proves is that an individual purchaser, by following a certain course, might realize a value of \$114.50 from his \$39.95 purchase. Nevertheless, it appears that the album-certificate combination, with its various possibilities so far as the individual purchaser was concerned, usually and customarily sold for \$39.95.

We think the hearing examiner decided the issues correctly. His findings, conclusions and order are approved and adopted as the findings, conclusions and order of the Commission.

Respondents' appeal is denied. It is directed that an order issue in accordance with this opinion.

FINAL ORDER

This matter having come before the Commission upon respondents' appeal from the hearing examiner's initial decision, and the matter having been heard on the whole record, including briefs in support of the appeal and in opposition thereto [oral argument not having been requested]; and the Commission having rendered its decision denying the appeal and affirming the initial decision:

It is ordered, That respondents Ray S. Kalwajtys, Walter J. Kalwajtys, Bernice Kalwajtys, and Weronika Kalwajtys, individually and as copartners doing business as General Products, 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 contained in said initial decision.