IN THE MATTER OF

HARRY KAYE OF HACKENSACK, INC., ET AL.

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

Docket 6320. Complaint Apr. 1, 1955—Decision, July 27, 1955

Consent order requiring a furrier in Hackensack, N. J., to cease violating the Fur Products Labeling Act and the Federal Trade Commission Act through failing to disclose the names of animals producing the fur in certain fur products, the fact that certain furs were artificially colored, and the name of the country of origin of imported furs; through misrepresenting prices as reduced from "regular" prices which were in fact fictitious, the amount of savings possible to purchasers, values of certain products, and products as being the stock of a business in liquidation; and by failing to keep adequate records on which such claims of savings were purportedly based.

Before *Mr. Frank Hier*, hearing examiner.

Mr. John T. Walker for the Commission.

Mr. Robert G. Leff, of Newark, N. J., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Harry Kaye of Hackensack, Inc., a corporation, and Harry Kaplan, 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 under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Harry Kaye of Hackensack, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Respondent Harry Kaplan, an individual, is president of respondent, Harry Kaye of Hackensack, Inc., and in said capacity formulates and controls the policies and practices of said corporate respondent. The said corporate respondent and said individual respondent have their office and principal place of business located at 331 Main Street, Hackensack, New Jersey.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been, and are now, engaged in the introduction into commerce, and in the sale, advertising

and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products, and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as "commerce," "fur," and "fur products" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively advertised, in violation of the Fur Products Labeling Act in that respondents caused the dissemination in commerce, as "commerce" is defined in said Act, of certain advertisements concerning said fur products, by means of newspapers and by various other means, which advertisements were not in accordance with the provisions of Section 5 (a) of the Fur Products Labeling Act, and of the Rules and Regulations promulgated under said Act, and which advertisements were intended to aid and did aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

PAR. 4. Among and including the advertisements as aforesaid, but not limited thereto, were advertisements of respondents which appeared in various issues of the "Bergen Evening Record," a newspaper published in Hackensack, New Jersey, and having wide circulation in said State and in various other States of the United States.

By means of the aforesaid advertisements and through others of the same import and meaning, not specifically referred to herein, respondents falsely and deceptively:

A. Failed to disclose the name or names of the animal or animals that produced the fur contained in the fur products, as set forth in the Fur Products Name Guide, in violation of Section 5 (a) (1) of the Fur Products Labeling Act.

B. Failed to disclose that fur contained in fur products was bleached, dyed or otherwise artificially colored fur, when such was the fact, in violation of Section 5 (a) (3) of the Fur Products Labeling Act.

C. Failed to disclose the name of the country of origin of imported furs contained in fur products, in violation of Section 5 (a) (6) of the Fur Products Labeling Act.

D. Misrepresented prices of fur products as having been reduced from regular or usual prices, where the so-called regular or usual prices were in fact fictitious, in that they were not the prices at which said merchandise was usually sold by respondents, in the recent regular course of their business, in violation of Rule 44 (a) of the aforesaid Rules and Regulations.

E. Misrepresented, by means of comparative prices and percentage savings claims not based on current market values, the amount of

savings to be effectuated by purchasers of said fur products, in violation of Rule 44 (b) of the aforesaid Rules and Regulations.

F. Misrepresented the value of fur products, when such claims and representations were not true in fact, in violation of Rule 44 (d) of the aforesaid Rules and Regulations.

G. Misrepresented said fur products as being the stock of a business in a state of liquidation in violation of Rule 44 (g) of the aforesaid Rules and Regulations.

Respondents, in making the pricing claims and representations referred to in subparagraphs (D), (E) and (F) hereof, failed to maintain full and adequate records disclosing the facts upon which such claims and representations were purportedly based, in violation of Rule 44 (e) of said Rules and Regulations.

PAR. 5. The aforesaid acts and practices of respondents, as herein alleged, were in violation of the Fur Products Labeling Act, and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, the Federal Trade Commission on April 1, 1955, issued and subsequently served its complaint on respondents herein. Harry Kaye of Hackensack, Inc., is a corporation organized under the laws of the State of New Jersey and Harry Kaplan, the other respondent, is president thereof. Both respondents have their office and principal place of business located at 331 Main Street, Hackensack, New Jersey, and are engaged thereat in the introduction into commerce, and in the sale, advertising and offering for sale in commerce, of fur products. Answer to the complaint herein was filed by them on May 9, 1955.

On June 9, 1955, there was submitted to the undersigned hearing examiner an agreement and stipulation between respondents and counsel in support of the complaint providing for entry of a consent order. By the terms thereof respondents admit all the jurisdictional allegations set forth in the complaint; agree that the answer heretofore filed in this matter be withdrawn; stipulate that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with allegations thereof in the complaint; expressly waive 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 or

oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission. Respondents agree that the order hereinafter provided for shall have the same force and effect as if made after a full hearing, presentation of evidence and findings and conclusions thereon and specifically waive any and all right, power or privilege to challenge or contest the validity of the order entered in accordance with such stipulation.

It was further stipulated and agreed that such stipulation, together with the complaint, shall constitute the entire record herein and should be filed with the hearing examiner for his consideration in accordance with Section 3.21 of the Commission's Rules of Practice; that the signing of the stipulation was for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; that the complaint herein may be used in construing the terms of the order hereinafter entered, which order may be altered, modified or set aside in the manner provided by the statute for orders of the Commission; that the stipulation is subject to approval in accordance with Sections 3.21 and 3.25 of the Commission's Rules of Practice and that the order shall have no force and effect until and unless it becomes the order of the Commission.

On the basis of the foregoing, the undersigned hearing examiner concludes that this proceeding is in the public interest; that it is an appropriate disposition of the proceeding and in accordance with the action contemplated and agreed upon, makes the following order:

ORDER

It is ordered, That respondents Harry Kaye of Hackensack, Inc., a corporation, and its officers, and Harry Kaplan, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of fur products, or in connection with the sale, advertising, offer for sale, transportation, or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from falsely or deceptively advertising fur products through the use of any advertisement, representation, public

announcement, or notice which is intended to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of fur products, and which:

1. Fails to disclose:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur products as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations.

(b) That the fur products contain or are composed of bleached, dyed, or otherwise artifically colored fur, when such is a fact.

(c) The name of the country of origin of imported furs contained in fur products.

2. Represents, directly or by implication:

(a) That the regular or usual price of any fur product is any amount which is in excess of the price at which the respondents have usually and customarily sold such products in the recent regular course of their business.

(b) That a sale price enables purchasers of fur products to effectuate any savings in excess of the difference between the said price and the price at which comparable products were sold by respondents during the time specified or, if no time is specified, in excess of the difference between said price and the current price at which comparable products are sold by respondents.

(c) The value of fur products, when such claims and representations were not true in fact.

(d) That any of such products were the stock of a business in a state of liquidation, contrary to fact.

3. Makes pricing claims or representations of the type referred to in Paragraph 2 (a), (b) and (c) above, unless there is maintained by respondents full and adequate records disclosing the facts upon which such claims or representations are based, as required by Rule 44 (e) of the Rules and Regulations.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Sec. 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 27th day of July, 1955, 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.

IN THE MATTER OF

L. H. KELLOGG CHEMICAL COMPANY ET AL.

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

Docket 6287. Complaint, Jan. 17, 1955—Decision, July 28, 1955

Consent order requiring sellers in Minneapolis, Minn., to cease representing falsely in advertising that they were manufacturing analytical chemists, operating laboratories in which they manufactured their embalming fluids, and representing falsely the unique character, bactericidal and germicidal potency, and blood-coagulating properties of their said fluids, and making other unfounded claims.

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

Mr. Ames W. Williams for the Commission.

Sachs, Karlins, Grossman & Karlins, of Minneapolis, Minn., 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 L. H. Kellogg Chemical Company, a corporation, and Leo A. Hodroff, William Hodroff and Ruth Abry, 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 as follows:

PARAGRAPH 1. Respondent L. H. Kellogg Chemical Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office located at 1401 3rd Avenue South, Minneapolis, Minnesota. Respondents Leo A. Hodroff, William Hodroff and Ruth Abry are president and treasurer, vice president and secretary, respectively, of said corporate respondent. These individuals formulate and direct the policies, acts, practices and business affairs of said corporate respondent, including the acts and practices hereinafter set out.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the sale and distribution, among other things, of embalming fluids, a line of which is designated as "Kelco Scientists Series Fuids." Respondents have caused and now cause their said embalming fluids, when sold, to be transported from the place of manufacture thereof in the State of Minnesota to purchasers

in various other States of the United States. Respondents maintain and at all times mentioned herein have maintained a course of trade in said embalming fluids in commerce among and between the various States of the United States.

PAR. 3. In the course and conduct of their aforesaid business respondents are now, and have been, in substantial competition in commerce with other corporations and with firms, individuals and partnerships engaged in the sale and distribution of embalming fluids.

PAR. 4. In the course and conduct of their business, respondents have made numerous statements with respect to their Kelco Scientists Series Fluids and the price thereof; their facilities and other matters in connection with their business in various kinds of advertising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said fluids.

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

The Kelco Laboratories are the finest and most complete maintained by any manufacturer devoted to the profession. Thousands of dollars have been spent to equip and furnish our chemists with the newest and most complete compounding and analytical instruments that are known to science. (In connection with the aforesaid statement there appear pictures of laboratory facilities and men who appear to be chemists at work.)

The FIRST complete line of fluid formulations ever developed and tested as a series to insure perfect integration and true 'living balance' of all ingredients * * *.

The FIRST embalming fluids ever perfected in full cooperation with the nation's foremost primary chemical producers * * *.

The FIRST series of completely new embalming fluids ever planned and produced on the basis of exhaustive modern scientific research methods * * *.

The FIRST series of formulations ever tested in complete sequence and proven superior in repeated case examinations by impartial embalmers and recorded in available case reports.

KB–500—the most powerful bactericide yet developed for embalming use—more than 500 times greater bactericidal effectiveness than phenol (carbolic acid) against all pathogenic organisms * * *.

KB–500 maintains bactericidal potency almost indefinitely * * *.

Contamination or chemical neutralization, which sharply reduces the effectiveness of almost all other germicides, has virtually no effect on KB–500.

Thrombex-Heparin—an amazing new synthesis of medically proven Heparin anti-coagulant and Thrombex clot-dispersant, that instantly stops and prevents all blood coagulation—quickly and safely disperses even the most stubborn clots.

Lanomulsion—the first and only embalming oil-emulsion scientifically tested for real effectiveness * * *.

You are assured of the Finest Quality Ingredients. Even more important than quantity is quality—whenever Kelco buys. Our laboratory specifications

for chemicals are extremely demanding—so strict, in fact, that only two chemical producers in the nation are able to meet our requirements for the exacting quality of formaldehyde used as the basic ingredient in certain Kelco fluids.

Distribution Method No. 1 Manufacturer's salesmen get 40% of your cost. The Kelco Way you get the 40% for yourself.

PAR. 6. Through the use of the statements hereinabove set forth and others similar thereto not specifically set out herein, respondents represent, directly and by implication, that they own and operate the laboratory depicted and that the persons at work therein are chemists employed by them; that their Kelco Scientists Series Fluids are the first line ever developed and tested as a series; that such fluids are the first ever perfected in cooperation with primary chemical producers; that such fluids are the first to be produced as a result of scientific research; that such fluids are the first series of formulations to be tested in sequence by impartial embalmers and recorded in available case reports; that the KB–500 contained in their said fluids has more than 500 times greater bactericidal effectiveness than phenol; that KB–500 maintains its bactericidal and germicidal potency despite contamination and chemical neutralization; that the ingredient Thrombex-Heparin contained in their said fluids stops and prevents all blood coagulation and quickly disperses blood clots and that the ingredient Lanomulsion contained in their fluids is the first and only oil-emulsion of proven value in embalming fluids; that respondents' specifications for formaldehyde are so exacting that only two chemical producers in the nation are able to meet them and that purchasers of respondents' fluids are afforded savings of 40% from the prices charged by their competitors for similar products.

PAR. 7. Respondents on their business stationery and in various advertising media use the expression "Manufacturing Analytical Chemists" and in advertising media the words "Factories, 110 North Fifth Street, 126 East Franklin Avenue." Respondents thereby represent that they manufacture the products sold by them in factories owned by them.

PAR. 8. A substantial portion of those buying embalming fluids prefer to purchase direct from the manufacturer, believing that advantages in price and other respects are thereby obtained.

PAR. 9. The foregoing representations, implications and depictions are false, misleading and deceptive. In truth and in fact, the laboratory facilities depicted are not those of respondents and the scientists are not employed by respondents. Respondents' Kelco Scientists Series Fluids are not the first line to be developed and tested as a series. Such fluids are not the first to be perfected in cooperation with primary

chemical producers. Such fluids are not the first produced as a result of scientific research. The fluids are not the first series of formulations tested in sequence by impartial embalmers and recorded in available case reports. The bactericidal potency of KB–500 in respondents' fluids is substantially less than 500 times that of phenol; its germicidal and bactericidal potency is reduced by contamination and chemical neutralization and will not last indefinitely. The Thrombex-Heparin as contained in respondents' fluids will not stop or prevent blood coagulation nor will it disperse blood clots and Lanomulsion is not the first or only effective embalming oil-emulsion of proven value in embalming fluids.

The respondents are not manufacturing analytical chemists nor do they own or control a factory or factories in which their fluids are manufactured. They employ only one chemist upon a part-time basis. Respondents' specifications for formaldehyde are capable of being met by many producers of such ingredient and purchasers of their fluids are not afforded savings of 40% from the prices charged by their competitors for similar products.

PAR. 10. The use by the respondents of the aforesaid statements, representations and implications in connection with the offering for sale and sale of their embalming fluids in commerce has had and now has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements, representations and implications were and are true, and to induce the public to purchase substantial quantities of respondents' products as a result of such erroneous and mistaken belief.

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

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public and 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 EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding charges the respondents L. H. Kellogg Chemical Company, an Illinois corporation located at 1401 Third Avenue, South, Minneapolis, Minnesota, and Leo A. Hodroff, William Hodroff and Ruth Abry, individually and as officers of said corporation, with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the

provisions of the Federal Trade Commission Act, in connection with the sale and distribution of embalming fluids designated as "Kelco Scientists Series Fluids."

Subsequent to the filing of their answers, the respondents William Hodroff and Ruth Abry filed their separate affidavits to the effect that William Hodroff had resigned as officer, director and employee of said corporation in February 1951 and had assumed employment with Kelco Funeral Supply Company, and that Ruth Abry, although Secretary of said corporate respondent, had not participated in the affairs of the corporation other than calling the annual meetings of shareholders and keeping the minutes thereof and keeping minutes of the meetings of the Board of Directors.

After the issuance of said complaint and the filing of their answers thereto, the respondents L. H. Kellogg Chemical Company and Leo A. Hodroff, individually, entered into a stipulation for a consent order with counsel for complaint disposing of all the issues in this proceeding, which stipulation was duly approved by the Director and Assistant Director of the Bureau of Litigation. It was expressly provided in said stipulation 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 stipulation, the said 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 stipulation, the answers heretofore filed by respondents were 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 stipulation, respondents further agreed that the order to cease and desist, issued in accordance with said stipulation, shall have the same force and effect as if made after a full hearing, 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 stipulation, together with the complaint and the affidavits filed in behalf of Ruth Abry and William Hodroff dated March 24, 1955, shall constitute the entire record herein,

that the complaint herein may be used in construing the terms of the order issued pursuant to said stipulation, and that said order may be altered, modified or set aside in the manner prescribed by the statute for orders of the Commission.

It was further stipulated and agreed between counsel for the respondents and counsel supporting the complaint that in view of the information contained in the affidavits submitted concerning the status of William Hodroff and Ruth Abry, individually cited in the complaint, counsel supporting the complaint by said stipulation recommended dismissal of the charges as to such individuals.

The hearing examiner has considered such stipulation and the order therein contained, and the affidavits filed herein, and it appearing that said stipulation and order provides for appropriate disposition of this proceeding, the same is hereby accepted and made a part of the record and in consonance with the terms of said stipulation, 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 L. H. Kellogg Chemical Company, a corporation, and Leo A. Hodroff, individually, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act of their embalming fluids designated as Kelco Scientists Series Fluids or any other embalming fluids of substantially similar composition or possessing substantially similar properties, whether sold under the same or under any other name, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) Through the use of pictorial representations or otherwise, that they own or control a laboratory or laboratories that they do not actually own or control or that they employ scientists which they do not actually employ.

(b) That their line of embalming fiuids is the first complete line developed and tested as a series.

(c) That such embalming fluids are the first perfected in cooperation with primary chemical producers.

(d) That such fiuids are the first produced as a result of scientific research methods.

(e) That such fluids are the first series of formulations tested in sequence by undertakers and recorded in available case reports.

(f) That the KB–500 contained in their fluids is any number of times more effective than phenol than is actually the fact.

(g) That the KB–500 contained in their fluids maintains its germicidal or bactericidal potency for any period of time that is not in accordance with the facts.

(h) That the Thrombex–Heparin contained in their fluids will stop or prevent coagulation or disperse blood clots.

(i) That Lanomulsion is the first or only oil-emulsion of proven value in embalming fluids.

(j) That their specifications for chemicals are so exacting that only two producers can comply therewith or misrepresent in any manner the quality of the ingredients in their fluids.

(k) That purchasers of their products are afforded savings from the prices charged by their competitors which are not in accordance with the facts.

2. Using the words "Manufacturing Analytical Chemists" or any of them, or the word "Factories," or any other word or words of similar import or meaning, on their business stationery or in advertisements; or representing through any other means or device, or in any manner, that they manufacture the fluids sold by them.

Provided, however, That nothing herein shall preclude the respondents from representing that the fluids which they sell are manufactured under their supervision, from their ingredients and in accordance with their formulas.

It is further ordered, That the complaint be dismissed as to respondents William Hodroff and Ruth Abry.

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 28th day of July, 1955, become the decision of the Commission; and, accordingly:

It is ordered, That the respondents L. H. Kellogg Chemical Company, a corporation, and Leo A. Hodroff, individually, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

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

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (a) OF THE CLAYTON ACT AND OF THE FEDERAL TRADE COMMISSION ACT

Docket 6191. Complaint, Mar. 11, 1954—Decision, July 30, 1955

Consent order requiring the second largest producer of packaged bakery products to cease discriminating in price in violation of sec. 2 (a) of the Robinson-Patman Act, through selling its products to some customers at higher prices than to their competitors by means of a volume discount plan based on the monthly purchases of the particular customer, as charged in Count I of the Commission's complaint.[1]

Before *Mr. John Lewis*, hearing examiner.

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

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

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

COMPLAINT

The Federal Trade Commission, having reason to believe that Sunshine Biscuits, Inc., hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act (U. S. C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, and pursuant also to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Commission, having reason to believe that said Sunshine Biscuits, Inc., Statler Manufacturers Corp., a corporation, Statler Distributors, Inc., a corporation, and hereinafter more particularly designated and described, and Lawrence S. Reiss, individually and as an officer of Statler Manufacturers Corp. and Statler Distributors, Inc., have violated the provisions of Section 5 of the said Act, and it appearing to the Commission that a proceeding by it in respect

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[1] Count II of the complaint was settled on July 20, 1954, 51 F. T. C. 25, by a consent order forbidding exclusive-dealing arrangements under which said baking corporation and sellers of automatic vending machines agreed that the latter would dispense the former's baked goods exclusively through their machines.

thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

COUNT I

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

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

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

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

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

commerce between and among the various States of the United States and in the District of Columbia.

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

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

PAR. 5. The discriminations in price referred to in paragraph 4 hereof have been and now are effected pursuant to the method by which respondent bases the price on which it sells such products to its purchasers. The basic method involves a volume discount plan whereby respondent sells its products at prices based upon the monthly purchases of said products of a particular customer. This volume discount plan is as follows:

Monthly purchases:	*Discount*
$0 to $20.00	None
$20.00 to $149.00	2%
$150.00 to $999.99	2½%
$1,000.00 to $2,499.99	3%
$2,500.00 to $4,999.99	3½%
$5,000.00 to $7,499.99	4%
$7,500.00 and up	4½%

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

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

COMPILER'S NOTE

Count II of the complaint, charging distributors of vending machines with entering into agreements with Sunshine to dispense Sunshine products exclusively through their vending machines, was settled on July 20, 1954, 51 F. T. C. 25, by a consent order terminating the challenged practices.

INITIAL DECISION IN DISPOSITION OF COUNT I OF COMPLAINT BY JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on March 11, 1954, charging respondent Sunshine Biscuits, Inc., in Count I of said complaint, with having violated the provisions of subsection (a) of Section 2 of the Clayton Act (U. S. C., Title 15, Sec. 13), as amended by the Robinson-Patman Act, and charging all of said respondents, in Count II of the complaint, with the use of unfair methods of competition and unfair and deceptive practices in commerce in violation of Section 5 of the Federal Trade Commission Act. After being duly served with said complaint, respondents appeared by counsel and entered into a stipulation for consent order disposing of Count II of the complaint. Said stipulation was thereafter accepted by the undersigned hearing examiner and an initial decision based thereon was filed June 8, 1954, which became the decision of the Commission by its order issued June 30, 1954.

Following submission of the stipulation disposing of Count II of the complaint, respondent Sunshine Biscuits, Inc., filed its answer to Count I of the complaint. Thereafter various interlocutory motions were filed with the undersigned by counsel for said respondent and by counsel supporting the complaint, and appeals were taken to the Commission from the order of the undersigned disposing of said motions. Following the final disposition of said appeals, counsel for respondent Sunshine Biscuits, Inc., and counsel supporting the complaint entered into a stipulation, dated June 9, 1955, providing for the withdrawal of said respondent's answer to Count I of the complaint and for the entry of a consent order disposing of said count. Said stipulation was thereafter submitted to the hearing examiner for his consideration, in accordance with Section 3.25 of the Commission's Rules of Practice For Adjudicative Proceedings.

Respondent Sunshine Biscuits, Inc., pursuant to the aforesaid stipulation, had admitted all the jurisdictional allegations of the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. Said stipulation further provides that all parties expressly waive a hearing before the hearing examiner or the Commission, and all further and other procedure to which said respondent may be entitled under the Clayton Act or the Rules of Practice of the Commission. Respondent has also agreed that the order to cease and desist issued in accordance with said stipulation shall have the same force and effect as if made after a full hearing, and specifically waives any and all right, power, or privilege to chal-

lenge or contest the validity of said order. It has been further stipulated and agreed that the complaint herein may be used in construing the terms of the order provided for in said stipulation, and that the signing of said stipulation is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

The order agreed upon in the aforesaid stipulation accords substantially with the order proposed in the "Notice" portion of the complaint, except for the elimination of a provision covering price discriminations which affect competition in the line of commerce in which respondent Sunshine Biscuits, Inc., is engaged, the so-called primary line. By memorandum dated June 9, 1955, transmitting the stipulation for consent order, the hearing examiner has been advised by counsel supporting the complaint that the reason for the elimination of said provision is that it was not his intention to introduce evidence of possible injury in the primary line and that the principal basis of the complaint is injury to competition in the so-called secondary line of commerce, as to which he believes the order agreed upon makes adequate provision.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid stipulation for consent order, the answer previously filed being hereby deemed withdrawn, and the hearing examiner being satisfied, on the basis of the representations made by counsel supporting the complaint concerning the proof which he proposed to offer had this proceeding gone to hearing, that the aforesaid stipulation provides for an appropriate disposition of this proceeding, the said stipulation is hereby accepted and ordered filed by the hearing examiner, who makes the following findings, for jurisdictional purposes, and order:

1. Respondent Sunshine Biscuits, Inc., is now and has been at all times mentioned in the complaint a corporation organized under and existing by virtue of the laws of the State of New York, with its principal office located at 29–10 Thomson Avenue, Long Island City, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent above named. The complaint states a cause of action against said respondent under the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That respondent Sunshine Biscuits, Inc., a corporation, its officers, agents, representatives, and employees, directly or through any corporate device or in connection with the offering for

sale, sale or distribution of bakery packaged food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating in price, directly or indirectly, between said purchasers of said products by selling such products of like grade and quality to any purchaser at a price different from that granted any other purchaser who in fact competes with the former in the resale or distribution of such products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Sec. 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner in disposition of Count I of the complaint shall, on the 30th day of July, 1955, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Sunshine Biscuits, Inc., 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.

OPINION OF THE COMMISSION

Per Curiam:

This matter is before us upon the interlocutory appeal of respondent Sunshine Biscuits, Inc., from two rulings of the hearing examiner. The appeal raises questions, among others, as to the sufficiency of the complaint and the propriety of the hearing examiner's action with respect to a request of counsel supporting the complaint that this proceeding be certified to the Commission, questions which we believe require a prompt decision in order to prevent unusual expense and delay in the proceedings within the meaning of Rule XX of the Commission's Rules of Practice. Written briefs have been filed by both parties and oral argument was had before the Motions Commissioner.

Count I of the complaint[1] charges respondent Sunshine Biscuits, Inc., with price discriminations in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, in connection with the sale of bakery packaged food products. Following the filing of respondent's answer to Count I of the complaint in which respondent stated, among other things, that the complaint contains no allega-

[1] Count II of the complaint which charged Sunshine Biscuits, Inc. and others with violation of Section 5 of the Federal Trade Commission Act has already been disposed of by the issuance of a consent order.

tion that the customers involved in the alleged discriminations compete with each other, counsel supporting the complaint moved the hearing examiner to certify the proceeding to the Commission and moved the Commission to amend the complaint so as to correct the alleged deficiency. Respondent thereafter moved the hearing examiner to dismiss the complaint for the principal reasons that it is insufficient, vague, indefinite and uncertain; the matter is moot; and it is contrary to the public interest. The lack of an allegation in the complaint as to the existence of competition between the customers involved in the alleged price discriminations constitutes a part of the basis for respondent's contention that the complaint is insufficient.

The hearing examiner did not certify this proceeding to the Commission, as he was requested to do so by counsel supporting the complaint. Instead, after expressing the opinion that the requested amendment merely involved "a clarification of the complaint in a respect which does not change in any material respect the original cause of action" and that, therefore, he could grant the relief requested without certifying the matter to the Commission, he entered an order granting the motion "to the extent that the complaint shall be deemed amended" in the respects requested by counsel supporting the complaint. The Commission interprets this action solely as a clarification of the complaint. No new or additional issue is created by the action and it does not in any way change the cause of action stated in the complaint. It may, however, serve to remove any possibility of doubt or misunderstanding on respondent's part as to the charge it must meet. We believe, therefore, that the hearing examiner's action with respect to the motion of counsel supporting the complaint was proper.

Respondent in its motion to the hearing examiner to dismiss also claimed that the complaint is insufficient because it is not specific as to the results of the alleged price discriminations. In its appeal from the hearing examiner's denial of the motion to dismiss respondent makes the further contention that the complaint is insufficient because it contains no allegation that any of the sales involved in the discriminations were in interstate commerce.

In Paragraph Six of Count I of the complaint it is alleged that the effects of the discriminations "may tend to create a monopoly in the lines of commerce in which respondent Sunshine and its customers are respectively engaged; or to injure, destroy or prevent competition with respondent Sunshine, or with customers thereof who receive the benefits of such discrimination." In Paragraph Three it is alleged, among other things, that respondent Sunshine sells and distributes

bakery food products in interstate commerce. Respondent in its answer admits the allegations of Paragraph Three of the complaint. In Paragraph Four it is alleged that respondent Sunshine "in the course and conduct of its business, as aforesaid, has been and is now discriminating in price * * *." We believe the allegations in the complaint are sufficient to fully apprise the respondent of the charge it must meet and that the absence of further particulars cannot operate to deprive respondent of a full and fair hearing.

Respondent's contentions that this matter is moot and that it is contrary to the public interest to proceed appear to be based largely on the grounds that the discount schedule referred to in the complaint was discontinued on January 1, 1954, prior to the issuance of the complaint, and that for a period of more than thirty years respondent has followed the pricing practices of the dominant member of the industry, namely, National Biscuit Company. It appears from an affidavit of an official of the respondent, submitted with the motion to dismiss, that, prior to April 1944, respondent was using a discount plan under which the maximum discount of 4½% was associated with purchases of $150,000 per month. A similar plan which had been used by the National Biscuit Company was found by the Commission to have resulted in unlawful price discriminations and an order to cease and desist was issued against National Biscuit Company on February 23, 1944 (Docket 5013). Shortly thereafter National Biscuit Company adopted a discount plan whereby the maximum discount of 4½% was associated with monthly purchases of $10,000. Respondent, in April 1944, adopted a discount schedule whereby the maximum discount of 4½% was associated with purchases of $7,500 per month. This discount plan is the subject of the complaint in this proceeding. Respondent's present discount schedule whereby the maximum discount is associated with monthly purchases of $500 was put into effect on January 1, 1954, after respondent learned that a similar discount schedule had been announced by National Biscuit Company.

We agree with the hearing examiner that the facts asserted by the respondent do not establish that this proceeding is moot. Respondent does not assert that its discount schedule was revised as of January 1, 1954, in order to avoid the alleged unlawful price discriminations. It appears instead that the revised discount schedule was adopted in order to follow a similar discount plan which had been announced by National Biscuit Company. Conceding that the respondent has discontinued using the discount schedule which resulted in the price discriminations which the complaint alleges to be unlawful, there is no sufficient basis for either a determination that the discount schedule

which respondent is presently using does not also result in unlawful price discriminations, or a conclusion that there is no likelihood that the alleged unlawful discriminations will be resumed.

As further grounds for dismissal of the complaint, respondent contends that its volume discount plan was established in good faith to meet a similar discount plan previously adopted by the dominant member of the industry and that the effect of the price differences in the secondary line, if any, is *de minimis*. The merits of these contentions cannot be determined on the basis of the present record.

We are of the opinion that the hearing examiner's denial of respondent's motion to dismiss was proper and respondent's appeal therefrom will be denied.

ORDER DENYING APPEAL FROM HEARING EXAMINER'S RULINGS

This matter having come on to be heard by the Commission upon the appeal of respondent Sunshine Biscuits, Inc., from an order of the hearing examiner disposing of a motion by counsel supporting the complaint requesting that this proceeding be certified to the Commission for its consideration of a proposed amendment to the complaint, and denying respondent's motion to dismiss the complaint, and briefs of counsel in support thereof and in opposition thereto; and

The Commission having determined, for the reasons appearing in the accompanying opinion, that the action of the hearing examiner with respect to the said motion of counsel supporting the complaint was proper in all respects, and also that the hearing examiner properly denied respondent's motion to dismiss and that respondent's appeal should be denied.

It is ordered, That the appeal of respondent Sunshine Biscuits, Inc., from rulings of the hearing examiner, be, and it hereby is, denied.

IN THE MATTER OF

RECOTON CORPORATION ET AL.

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

Docket 6322. Complaint, Apr. 1, 1955—Decision, Aug. 2, 1955

Consent order requiring manufacturers in New York City of phonograph needles with points made of synthetic materials to cease representing falsely in catalogues, on packages and containers, and in sales promotional material furnished to dealers, that the needles had points of sapphire or ruby or jewel; and to cease representing that they were the world's largest manufacturer of phonograph needles.

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

Mr. Terral A. Jordan for the Commission.

Cahn, Schwartzreich & Mathias, 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 Recoton Corporation and Herbert H. Borchardt, Jack Karns and Alfred Wish, 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 Recoton 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 located at 147 West 22nd Street, New York, N. Y. Respondents Herbert H. Borchardt, Jack Karns and Alfred Wish are respectively President, Vice-President 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 corporate respondent.

PAR. 2. Respondents are now, and have been for more than two years last past, engaged in the sale and distribution of phonograph needles to wholesalers and dealers in commerce, among and between the various States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have main-

tained, a substantial course of trade in said phonograph needles, in commerce, among and between the various States of the United States.

PAR. 3. In the course and conduct of their business as aforesaid, respondents have made many representations as to the materials used in making their phonograph needles. These representations were made in catalogs, and on counter display cards, packages, containers and other sales promotional material supplied to dealers to be exhibited to the purchasing public. Typical and illustrative of such representations are the following:

Polished Sapphire Tip * * * tipped with a precious sapphire point.
Recoton Ultra Sapphire Tipped Phoneedle.
Ruby Point.
Rubypoint * * * with a sparkling dark red ruby point.
Jewel and Osmium Tipped.
Point Material: Jewel.

PAR. 4. Through the use of the foregoing representations and others of similar import and meaning, respondents have represented directly and by implication that said phonograph needles have points or tips made of sapphire, or ruby or jewel.

PAR. 5. The said representations are false, misleading and deceptive. In truth and in fact the said needles do not have points or tips made of sapphire or ruby or jewel; but said needles have points or tips made of synthetic materials.

PAR. 6. By selling and distributing to wholesalers and dealers said phonograph needles packaged as aforesaid and furnishing to such wholesalers and dealers counter display cards and other sales promotional material as aforesaid, respondents furnish to such wholesalers and dealers the means and instrumentalities through and by which they may mislead and deceive the purchasing public as to the composition of the points or tips of said phonograph needles.

PAR. 7. Through the use of the statement "world's largest manufacturers of phoneedles" on certain of its phonograph needle packages respondents have represented that they are the world's largest manufacturers of phonograph needles and produce more phonograph needles than any other manufacturer in the world. In truth and in fact, there are other manufacturers in the world whose businesses are larger than respondents' and who produce substantially more phonograph needles than the respondents.

PAR. 8. In the course and conduct of their business respondents are in direct and substantial competition with other corporations and firms and individuals engaged in the sale in commerce of phonograph needles.

PAR. 9. The use by the respondents of the false, misleading and deceptive representations herein set forth has had and now has the capacity and tendency to mislead and deceive a substantial number of wholesalers and dealers and members of the purchasing public with respect to the material of which the tips or points of respondents' said needles are made and with respect to the size and capacity of respondents' manufacturing facilities. As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

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

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding charges the respondents Recoton Corporation, a New York corporation located at 52–35 Barnett Avenue, Long Island City, New York, and Herbert H. Borchardt, Jack Karns and Alfred Wish, individually and as officers of said corporation, with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the provisions of the Federal Trade Commission Act, in connection with the sale and distribution of phonograph needles.

After the issuance of said complaint and the filing of their answer thereto, the respondents entered into an agreement for consent order with counsel for complaint disposing of all the issues in this proceeding, which agreement was duly approved by the Director and Assistant 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 said 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 said order may be altered, modified or set aside in the manner prescribed by the statute for 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 appropriate dispositions of this proceeding, the same is hereby accepted and made a part of the record 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 Recoton Corporation, a corporation, and its officers, and Herbert H. Borchardt, Jack Karns and Alfred Wish, 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 phonograph needles in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That the points or tips of phonograph needles made of synthetic sapphires, rubies, jewels or other precious stones are sapphires, rubies, jewels or other precious stones without clearly stating that they are synthetic.

2. Through the use of the statement "world's largest manufacturers of phoneedles" or representations of similar import or meaning that

said corporate respondent is the world's largest manufacturer of phonograph needles.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practices, the initial decision of the hearing examiner shall, on the 2nd day of August, 1955, 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.

IN THE MATTER OF

AMERICAN STAINLESS KITCHEN COMPANY, INC., ET AL.

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

Docket 6294. Complaint, Feb. 18, 1955—Decision, Aug. 3, 1955

Consent order requiring sellers in Milwaukee, Wis., to cease making false claims for the health-inducing properties of their stainless steel cooking utensils and with disparaging competitive aluminum products.

Before *Mr. John Lewis*, hearing examiner.

Mr. Joseph Callaway for the Commission.

Kelley, Drye, Newhall & Maginnes, 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 American Stainless Kitchen Company, Inc., a corporation, and Wesley A. Ryan, Frank W. Ladky and Randall G. Taylor, 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 thereto would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent American Stainless Kitchen Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business located at 161 West Wisconsin Avenue, Milwaukee, Wisconsin. Respondents Wesley A. Ryan, Frank W. Ladky and Randall G. Taylor are the officers of corporate respondent. These individuals formulate and control the policies, activities and practices of the corporate respondent, including the acts and practices hereinafter alleged. The address of respondent Wesley A. Ryan is Room 303, Eighteen West Chelten (Germantown) Philadelphia, Pennsylvania. The address of respondents Frank W. Ladky and Randall G. Taylor is the same as that of the corporate respondent.

PAR. 2. Respondents are now and for more than three years last past have been engaged in the sale and distribution of stainless steel cooking utensils in commerce between and among the various States of the United States. Respondents cause and have caused said products, when sold to be shipped from Sheboygan, Wisconsin, where they are

manufactured for respondents by the Polar Ware Company, to purchasers thereof located in other States of the United States. The volume of business of respondents in said cooking utensils in commerce is now and has been substantial.

PAR. 3. In the course and conduct of their business as aforesaid, respondents are now and have been in substantial competition with other corporations and parties engaged in the business of selling and distributing cooking utensils in commerce between and among the various States of the United States.

PAR. 4. The advertising and selling of respondents' cooking utensils are conducted through the medium of agents, representatives, employees, and distributors of respondents by personal solicitation and contact with the general public. The method chiefly employed by said agents, representatives, employees and distributors is the giving of demonstrations of respondents' products before groups of prospective purchasers, at which time various types of advertising literature, including charts, which have been supplied by respondents are exhibited or distributed, accompanied by sales talks, the material for which is and has been supplied by respondents. Said sales talks have to do with the alleged characteristics and effectiveness of respondents' products in the preparation of food and the alleged disadvantages of the products of their competitors, particularly those made of aluminum. The statements made by said agents, representatives, employees, and distributors have the express or implied approval of respondents and the sales made as a result of said demonstrations inure to the benefit of respondents.

PAR. 5. At the demonstrations hereinabove referred to, respondents, through said agents, representatives, employees, and distributors for the purpose of inducing the purchase of their said products in commerce, have made disparaging statements and representations with respect to utensils sold and distributed in commerce by their competitors. Such disparaging statements and representations and the impressions created by them were and are to the effect that the preparation of, the cooking of, or the keeping of food in aluminum utensils causes the formation of serious and dangerous poisons, and that foods so prepared, cooked or kept are detrimental and hazardous to the health of the user.

PAR. 6. Aluminum has been used in the manufacture of cooking utensils for many years. During that period of time it has been found to be a highly satisfactory material for use in cooking utensils. Poisons are not formed from the preparation of, the cooking of, or the keeping of food in aluminum utensils, and foods prepared, cooked

or kept in such utensils are not detrimental or hazardous to the health of the user.

PAR. 7. Respondents, their agents, representatives, employees and distributors have in the manner aforesaid represented, directly or indirectly, that the use of respondents' cooking utensils will promote and insure better health and is necessary to health.

PAR. 8. The use of respondents' cooking utensils will neither promote nor insure better health, is not necessary to health, and is no more conducive to good health than the use of other modern cooking utensils.

PAR. 9. In the same manner, respondents have made, directly and by implication, other representations shown in the following subparagraphs identified as (A) to (L), inclusive. The said representations are false, deceptive and misleading by reason of the true facts which are set forth in subparagraphs (1) through (12), inclusive.

(A) That there is no loss of vitamins and minerals in fresh vegetables and other food when cooked in respondents' utensils by their recommended method, which is the method known as "waterless cooking" and which involves the use of only a small amount of water; but that such vitamins and minerals are partially or completely destroyed when cooked in vessels made of other material, regardless of the method of cooking.

(1) There is some loss of vitamins and minerals from every known method of cooking. Respondents' recommended method of cooking can be employed, and is employed, with the same results in utensils made of materials other than stainless steel. When such method is so employed, there is no difference in loss of vitamins and minerals as between respondents' utensils and such other utensils.

(B) That potatoes cooked in respondents' vessels and by respondents' method are not fattening.

(2) Potatoes are of high caloric value when cooked by any method. The consumption of a greater number of calories than is required for the maintenance of the body is fattening.

(C) That all the food values are retained in food when cooked in respondents' utensils and therefore no odors are given off; that such odors as emanate from food when it is being cooked means that vitamins and minerals are being cooked out of the food.

(3) The production of odors when food is being cooked does not mean losses in food value. The vitamins and minerals in food do not produce odors.

(D) That calcium, sodium, phosphorus, iodine, manganese, iron, chlorine, silicon, sulphur, magnesium, fluorine, potassium, oxygen, nitrogen, hydrogen, and carbon are essential for perfect health, are

grown into food and should be taken into the body, but that most of them are soluble in water and are partially destroyed when food is boiled.

(4) Silicon, one of the elements listed, is not essential for human nutrition and health. The elements listed are not partially destroyed when food is boiled. Although some of them are soluble in water, there is no loss from this cause unless the water in which the food is cooked is discarded.

(E) That most of our ailments can be traced to the lack of the elements listed in (D) above; that they are in the vegetables when you buy them but never get into the stomach because they are destroyed by the method of cooking.

(5) Most ailments are not due to the lack of any element in the diet. These elements in food are not destroyed by any method of cooking.

(F) That when taken into the human system as a part of the food we eat, calcium protects against tuberculosis; sodium is a protection against gallstones, lowered energy and acidity; phosphorous protects against impaired eyesight, nervous disorders and a dull mind; manganese protects against a confused mind and weak tissues; and iodine is a protection against wrinkled skin.

(6) Calcium does not protect against tuberculosis. Sodium is not a protection against gallstones, lowered energy or acidity. Phosphorous does not protect against impaired eyesight, nervous disorders or a dull mind. Manganese does not protect against a confused mind or weak tissues. Iodine is not a protection against wrinkled skin.

(G) That practically all of the iron in properly cooked green vegetables is assimilated and produces far better results for one suffering from anemia than any tonic.

(7) Green vegetables, no matter how cooked, cannot supply sufficient iron to effectively treat an existing case of anemia.

(H) That when taken into the human system as part of the food we eat, chlorine protects the gums against pyorrhea and the body against blood and liver trouble; that silicon is essential as a preventive for decaying teeth and baldness; that sulphur is a protection against poor digestion, blood and skin disease; that magnesium is a natural laxative—protects against stiff muscles and joints; that many persons suffer from a deficiency of magnesium because of the improper preparation of vegetables; that fluorine protects against tuberculosis, weak eyes and bladder trouble; that nitrogen is a preventive against weak tissues; that potassium wards off constipation; that oxygen protects the body against lowered vitality; that hydro-

gen protects against poor circulation, congestion and inflammation and that carbon protects against poor body heat and lack of energy.

(8) Chlorine does not protect the gums against pyorrhea or the body against blood or liver trouble. As stated above, silicon is not essential for human nutrition and health. It does not prevent decaying teeth or baldness. Sulphur is not a protection against poor digestion, blood or skin diseases. The form in which magnesium exists in plants is not a laxative. Magnesium does not protect against stiff joints or muscles. There is no such thing as a deficiency of magnesium caused by improper preparation of vegetables. Fluorine does not protect against tuberculosis, weak eyes or bladder trouble. Nitrogen is not a preventive against weak tissues. Potassium does not ward off constipation. Oxygen does not protect the body against lowered vitality. Hydrogen does not protect against poor circulation, congestion or inflammation. Carbon does not protect against poor body heat or lack of energy.

(I) That "corrective feeding," meaning eating food cooked in respondents' utensils, will help overcome the following conditions and diseases, to wit; decayed teeth, defective vision, diseased tonsils, enlarged arteries, enlarged anterior cervical glands, goiter, defective hearing, heart defects, underweight, overweight, calluses, boils, catarrh, lumbago, jaundice, sour stomach, influenza, heartburn, bad hearing, carbuncles, eczema, poor eyesight, biliousness, neuralgia, rheumatism, diabetes, kidney trouble, constipation, gallstones, nervousness, rifting, bad teeth, pimples, tired feeling, backaches, indigestion, dizziness, weakness, bald head, colds, ulcers, cancer, laryngitis, bronchitis, arthritis, neuritis, appendicitis, tonsillitis, and all other "itises."

(9) Food cooked in respondents' utensils will not be of value in overcoming the above conditions and diseases.

(J) That 90% of all operations can be prevented by means of diet.

(10) No significant percentage of operations may be prevented by diet.

(K) That less food is required to satisfy the appetite when it is cooked by respondents' method than when cooked by other methods which devitalize the food and cause the loss of its nutrient value.

(11) Less food is not required to satisfy the appetite when cooked by respondents' methods than when cooked by other methods. The amount of food needed to satisfy the appetite does not depend on the nutrient value of the food.

(L) That when coffee is made in respondents' coffee maker no tannic acid or caffeine is extracted.

(12) Water will extract tannic acid and caffeine from coffee regardless of the type of utensil used.

PAR. 10. The use by the respondents and by their agents, representatives, employees and distributors of the above-mentioned false, misleading, deceptive, and disparaging statements and representations, disseminated as aforesaid, has had and has now the tendency and capacity to mislead and deceive a substantial number of the purchasing public into the erroneous and mistaken belief that all of said statements and representations are true and to induce a substantial number of the purchasing public, because of such erroneous and mistaken belief, to purchase substantial quantities of respondents' said products. Furthermore, respondents, by supplying said advertising literature and the material for said sales talks, have furnished to their said agents, representatives, employees and distributors the means and instrumentality for deceiving and misleading the purchasing public. As a result of the said acts and practices of respondents, trade has been unfairly diverted to respondents from their competitors, in consequences of which substantial injury has been and is being done by respondents to their competitors in commerce between and among the various States of the United States.

PAR. 11. The methods, acts and practices of respondents, as hereinabove alleged, are all to the 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 JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on February 18, 1955, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of the provisions of the Federal Trade Commission Act. After being duly served with said complaint, the respondents appeared by counsel and subsequently entered into an agreement with counsel supporting the complaint, dated May 25, 1955, providing for the entry of a consent order disposing of all the issues in this proceeding. Said agreement for consent order, which has been signed by counsel supporting the complaint, by counsel for respondents and by all the respondents except the respondent Frank W. Ladky, and approved by the Director and Assistant Director of the Commission's Bureau of Litigation, has been submitted to the above-named hearing examiner, heretofore duly designated by

the Commission, for his consideration in accordance with Section 3.25 of the Commission's Rules of Practice.

Respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional allegations of the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. Said agreement further provides that all parties expressly waive a hearing before the hearing examiner or the Commission, and all further and other procedure to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission. Respondents have also 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 specifically waive any and all right, power, or privilege to challenge or contest the validity of said order. It has been further agreed that the complaint herein may be used in construing the terms of the order provided for in said agreement, and that the signing of said 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 order which has been agreed upon by the parties differs in two respects from the order which was contained in the notice portion of the complaint, in that (1) the name of the respondent Frank W. Ladky has been eliminated therefrom, and (2) there has been a slight modification in paragraph 6 of said order. In connection with the elimination of the respondent Frank W. Ladky from the order, there has been submitted to the hearing examiner an affidavit sworn to and subscribed on June 1, 1955, by the respondent Wesley A. Ryan, President of the corporate respondent, certifying to the fact that the respondent Frank W. Ladky has not been an officer of the corporate respondent since November 16, 1953, and that during the period when he was an officer of the corporation said respondent had no connection with its sales policy. In a memorandum dated June 8, 1955, transmitting to the hearing examiner the agreement for consent order herein and the above-mentioned affidavit of Wesley A. Ryan, counsel supporting complaint has advised the undersigned that he has no objection to a dismissal of the complaint as to the respondent Frank W. Ladky, based on the statements appearing in said affidavit. Counsel supporting the complaint has further advised the hearing examiner in said transmittal memorandum that the change in paragraph 6 of the order by the insertion of the words "usable by the body" following the word "minerals" was made in order to conform said order to the facts.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid agreement for consent order and accompanying affidavit of Wesley A. Ryan, and the hearing examiner being satisfied, on the basis of the statements made in said affidavit and in the transmittal memorandum of counsel supporting the complaint, that the aforesaid agreement for consent order provides for an appropriate disposition of this proceeding, the said agreement and accompanying affidavit are hereby accepted and ordered filed by the hearing examiner, who makes the following jurisdictional findings and order:

1. Respondent, American Stainless Kitchen Company Inc., is now and has been at all times mentioned in the complaint, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business located at 161 West Wisconsin Avenue, Milwaukee, Wisconsin. Respondents Wesley A. Ryan and Randall G. Taylor are now and have been at all times mentioned in the complaint officers of the corporate respondent. The address of respondent Wesley A. Ryan is Room 303, 18 West Chelten (Germantown), Philadelphia, Pennsylvania, and the address of respondent Randall G. Taylor is the same as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named in paragraph 1 above. The complaint states a cause of action against said respondents under the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That the respondent American Stainless Kitchen Company, Inc., a corporation, and its officers, and respondents Wesley A. Ryan and Randall G. Taylor, individually and as officers of said corporation, and respondents' agents, representatives, employees and distributors, 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 cooking utensils made of stainless steel or any other product of substantially similar composition, design, construction or purpose, do forthwith cease and desist from representing directly or by implication:

1. That the preparation of, the cooking of, or the keeping of food in aluminum utensils causes the formation of poisons;

2. That foods prepared in, cooked in, or kept in aluminum utensils are detrimental or hazardous to the health of the user;

3. That the use of respondents' cooking utensils will promote or insure better health or is necessary to health;

4. That there is no loss of vitamins or minerals in food when cooked in respondents' utensils and by the method recommended by respondents; or that when such method of cooking is employed there is any difference in the loss of vitamins or minerals in food cooked in respondents' utensils as compared with food cooked in vessels made of other material;

5. That potatoes cooked by the method advocated by respondents are not fattening;

6. That the production of odors from food while it is being cooked indicates a loss of vitamins, minerals usable by the body or food values;

7. That silicon is essential for human nutrition or health;

8. That calcium, sodium, phosphorus, iodine, manganese, iron, chlorine, silicon, sulphur, magnesium, fluorine, potassium, oxygen, nitrogen, hydrogen or carbon in food are partially destroyed by boiling or any other method of cooking;

9. That most ailments are due to the lack of some element in the diet;

10. That when taken into the human system as a part of the food we eat:

(a) calcium protects against tuberculosis;

(b) sodium is a protection against gallstones, lowered energy or acidity;

(c) phosphorus protects against impaired eyesight, nervous disorders or a dull mind;

(d) manganese protects against a confused mind or weak tissues;

(e) iodine is a protection against wrinkled skin;

(f) chlorine protects the gums against pyorrhea or the body against blood or liver trouble;

(g) silicon is essential as a preventive for decaying teeth or baldness;

(h) sulphur is a protection against poor digestion, blood or skin diseases;

(i) magnesium in vegetables is a natural laxative, or protects against stiff joints or stiff muscles;

(j) fluorine protects against tuberculosis, weak eyes or bladder trouble;

(k) nitrogen is a preventive against weak tissue;

(l) potassium wards off constipation;

(m) oxygen protects the body against lowered vitality;

(n) hydrogen protects against poor circulation or congestion or inflammation;

(o) carbon protects against poor body heat or lack of energy; or that

(p) any of these elements or any other elements are of greater value to the body than they actually are;

11. That green vegetables, no matter how cooked, can supply sufficient iron to effectively treat an existing case of anemia;

12. That a deficiency of magnesium in the body can be caused by the improper preparation of vegetables;

13. That eating food cooked in respondents' utensils will help overcome decayed teeth, defective vision, diseased tonsils, enlarged arteries, enlarged anterior cervical glands, goiter, defective hearing, heart defects, overweight, underweight, calluses, boils, catarrh, lumbago, jaundice, sour stomach, influenza, heartburn, bad hearing, carbuncles, eczema, poor eyesight, biliousness, neuralgia, rheumatism, diabetes, kidney trouble, constipation, gallstones, nervousness, rifting, bad teeth, pimples, tired feeling, backache, indigestion, dizziness, weakness, baldness, colds, ulcers, cancer, laryngitis, bronchitis, arthritis, neuritis, appendicitis or tonsillitis;

14. That any significant percentage of surgical operations may be prevented by diet;

15. That less food is required to satisfy the appetite when it is cooked by respondents' methods than when cooked by other methods, or that the amount of food needed to satisfy the appetite depends on the nutrient value of the food;

16. That when coffee is made in respondents' coffee maker no tannic acid or caffeine is extracted.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to the respondent Frank W. Ladky.

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 3rd day of August, 1955, become the decision of the Commission; and, accordingly:

It is ordered, That the respondents American Stainless Kitchen Company, Inc., a corporation, and Wesley A. Ryan and Randall G. Taylor, individually and as officers of said corporation, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

AARON WOOL CORPORATION ET AL.

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

Docket 6333. Complaint, Apr. 20, 1955—Decision, Aug. 11, 1955

Consent order requiring manufacturers in Yonkers, N. Y., to cease violating the Wool Products Labeling Act by describing as "All Wool," "100% Wool", etc., on tags or labels and in sales invoices and shipping memoranda, batts or battings which contained substantial quantities of non-woolen materials, and to cease failing to identify the manufacturer on labels as required by the Act.

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

Mr. Roslyn D. Young, Jr. and *Mr. George E. Steinmetz* for the Commission.

Mr. Myron Goldman, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Aaron Wool Corporation, a corporation; and Jack Markowitz, Oscar Fishman, and Murry Lipman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Aaron Wool Corporation, is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business located at 144 Nepperhan Avenue, Yonkers, New York.

The individual respondent, Jack Markowitz, Oscar Fishman and Murry Lipman are President, Treasurer and Secretary respectively, of the corporate respondent, Aaron Wool Corporation. Said individuals formulate, direct and control the acts, policies and practices of said corporate respondent. Said individual respondents have, and maintain, their business offices at the same address as corporate respondent.

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

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

Among such wool products were batts or battings labeled or tagged by respondents as consisting of "100% Wool"; "100% Reprocessed Wool"; and "80% Reprocessed Wool, 20% other Fibers"; whereas in truth and in fact said batts or battings were not composed of 100% wool; 100% reprocessed wool; or 80% reprocessed wool, 20% other fibers, as represented by said respondents.

PAR. 4. Said wool products described as batts or battings were further misbranded by respondents within the intent and meaning of Section 4 (a) (1) of the Wool Products Labeling Act of 1939 and of the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively described and identified in sales invoices and shipping memoranda applicable thereto as "All Wool"; "100% Reprocessed Wool"; and as "80% Reprocessed Wool, 20% Other Fibers"; whereas in truth and in fact said batts or battings were not composed of all wool; 100% reprocessed wool, or 80% reprocessed wool, 20% other fibers, as represented by said respondents.

PAR. 5. Said wool products were further misbranded by respondents in that they were not stamped, tagged or labeled as required under the provisions of Section 4 (a) (2) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder.

Among such wool products were batts or battings misbranded by said respondents in that they were not stamped, tagged or labeled so as to disclose the name or the registered identification number of the manufacturer thereof, or of one or more persons subject to Section 3 of said Act with respect to said wool products.

PAR. 6. The acts and practices of respondents, as set forth in Paragraphs Two, Three, Four and Five hereof, constitute misbranding of wool products and were and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated

thereunder and constituted unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

PAR. 7. In the course and conduct of their business as aforesaid, and and for the purpose of inducing the purchase of said wool products described herein as batts or batting, by the manufacturers of garments and other wool products for resale to retailers and distributors in commerce, respondents have made various statements concerning their products in sales invoices and shipping memoranda applicable thereto. Among and typical, but not all inclusive, of such statements are the following:

ALL WOOL

100% REPROCESSED WOOL

80% REPROCESSED WOOL, 20% OTHER FIBERS

PAR. 8. Through the use of such statements and representations to describe said wool batts and battings, respondents represented, directly and by implication, that said products were composed of all wool: 100% reprocessed wool; and 80% reprocessed wool, 20% other fibers.

PAR. 9. The aforesaid statements and representations are false, misleading, and deceptive, since, in truth and in fact, respondents' products described as batts or battings and represented as "All Wool" were not composed of all wool but contained substantial quantities of non-woolen fibers. The said products represented as "100% Reprocessed Wool" were not composed of 100% reprocessed wool, but contained substantial quantities of non-woolen fibers. The said products represented as "80% Reprocessed Wool, 20% Other Fibers" were composed of substantially less than 80% reprocessed wool and substantially more than 20% other fibers.

PAR. 10. Respondents, in the course and conduct of their business are and were in competition with other corporations and with firms and individuals likewise engaged in the sale of batts or battings, in commerce.

PAR. 11. The use by respondents of statements herein set forth, in the course of selling and offering for sale their products in commerce as above described, has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were and are true, and to induce the purchase of such products on account of such beliefs induced as aforesaid. As a result thereof substantial trade in commerce has been diverted to respondents from their competitors, and substantial injury has thereby been done to competition in commerce.

PAR. 12. The acts and practices of the respondents as set forth in Paragraphs Seven, Eight, Nine, and Ten herein were all to the prejudice and injury of the public and of respondents' competitors and constituted 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 EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding charged the respondents Aaron Wool Corporation, a New York corporation located at 144 Nepperhan Avenue, Yonkers, New York, and Jack Markowitz, Oscar Fishman, and Murry Lipman, individually and as officers of said corporation, with the use of unfair and deceptive acts and practices and unfair methods of competition in interstate commerce in violation of the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939, and the Rules and Regulations made pursuant thereto, by misbranding certain wool products manufactured by them for introduction into commerce.

Subsequent to the filing of their answers, the respondents Oscar Fishman and Murry Lipman filed their separate affidavits supported by an affidavit of respondent Jack Markowitz, President of said corporate respondent, to the effect that respondents Oscar Fishman and Murry Lipman never have been officers or directors of respondent corporation and never did, and do not, direct, formulate or control the acts and practices of the corporate respondent, but instead, respondent Oscar Fishman is, and has been, actively engaged in the Yonkers Fiber Corp., located at 128 Saw Mill Road, Yonkers, New York, and respondent Murry Lipman is, and has been, actively engaged in the Metropolitan Thread Company located at 96 Fifth Avenue, New York, New York.

After the issuance of said complaint and the filing of their answers thereto, the respondents Aaron Wool Corporation and Jack Markowitz individually, entered into an agreement for consent order with counsel in support of the complaint disposing of all the issues in this proceeding, which agreement was duly approved by the Director and Assistant 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 said 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 answers heretofore filed by respondents were 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 said order may be altered, modified or set aside in the manner prescribed by the statute for 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 appropriate disposition of this proceeding, the same is hereby accepted and made a part of the record 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 Aaron Wool Corporation, a corporation, and its officers, and Jack Markowitz, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of batts and battings or other "wool products," as such product are

defined in and subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain, or in any way are represented as containing "wool," "reprocessed wool" or "reused wool," as those terms are defined in said Act, do forthwith cease and desist from misbranding such products by:

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

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

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

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

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

Provided, That the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by paragraphs (a) and (b) of Section 3 of the Wool Products Labeling Act of 1939, and

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

It is further ordered, That Aaron Wool Corporation, a corporation, and its officers, and Jack Markowitz, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of batts or battings or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Misrepresenting the constituent fibers of which their products are composed or the percentages or amounts thereof, in sales invoices, shipping memoranda or in any other manner.

It is further ordered, That the complaint be dismissed as to the respondents Oscar Fishman and Murry Lipman.

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 August, 1955, become the decision of the Commission; and, accordingly:

It is ordered, That the respondents Aaron Wool Corporation, a corporation, and Jack Markowitz, individually and as an 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.

IN THE MATTER OF

SPURGEON PICKERING DOING BUSINESS AS NATIONAL NURSERIES

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

Docket 6343. Complaint, May 5, 1955—Decision, Aug. 11, 1955

Consent order requiring a seller in Biloxi, Miss., to cease misrepresenting in advertising the quality, condition, etc., of azaleas, camellia plants, rose bushes, and other nursery stock, and shipping to purchasers small unrooted dried cuttings which would not grow when planted.

Before *Mr. William L. Pack*, hearing examiner.
Mr. J. W. Brookfield, Jr. 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 Spurgeon Pickering, an individual trading and doing business as National Nurseries, 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 Spurgeon Pickering is an individual trading and doing business as National Nurseries, with his office and principal place of business located at Briarfield Avenue and Railroad in the City of Biloxi, Mississippi.

PAR. 2. Respondent is now, and for more than one year last past has been, engaged in the sale and distribution of nursery stock in commerce between and among the various States of the United States and in the District of Columbia. Respondent causes and has caused said nursery stock, when sold to be shipped and transported from his place of business in the State of Mississippi to purchasers thereof at their respective points of location in the various States of the United States other than Mississippi and in the District of Columbia.

There is now, and has been for more than one year last past, a course of trade by respondent in said nursery stock in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of his said business and for the purpose of inducing the purchase of his said nursery stock, respondent

represented, directly or by implication, in advertisements in newspapers and periodicals having a general circulation in various States of the United States and in circulars and catalogues distributed to persons in various States by means of the United States mails, that of his nursery stock offered for sale: (1) the Camellia plants were rare varieties true to name as listed, and were three years old, heavily rooted branched plants; (2) the Azalea plants were well established blooming size two to three years old, with good root systems; (3) the blueberry plants and blackberry plants were three year old plants which would bear the first year planted and produce up to six gallons of berries from each plant; (4) the Multaflora Rose plants were extra large hardy well rooted plants, one to four feet high pruned to 10 inches and would grow three to four feet the first season; (5) the assortment of 48 roses and shrubs included 10 rose bushes from one to three years old, well rooted, of blooming size, and that they would bloom the season planted; (6) that other rose bushes were well rooted three year old plants.

PAR. 4 The foregoing representations and the implications arising therefrom were false and misleading. In truth and in fact, (1) camellia plants delivered by respondent were in many instances not of the variety named in his advertisements but were other and cheaper and less desirable plants and were not one to three year old plants and were not well rooted branched plants; (2) the Azalea plants delivered by respondent were, in many instances, not well established two to three year blooming size plants with good root systems, but were unrooted dried cuttings; (3) the blackberry and blueberry plants delivered were not well rooted three year old plants and would not bear the first season, nor produce six gallons or any other large amount of berries; (4) the Multaflora Rose hedge plants delivered were not extra large hardy well rooted plants, were not one to four feet high, pruned to 10 inches, and would not grow three to four feet the first season after planting; (5) the rose bushes included in respondent's 48 plant assortment were not one to three year old plants of blooming size nor would they bloom the first season; (6) the other rose bushes delivered were not three year old well rooted plants. In lieu of the plants as represented, respondent in many instances shipped to purchasers, who ordered plants advertised by him, small unrooted dried cuttings which would not grow when planted by the purchaser.

PAR. 5. The use by respondent of the foregoing false, deceptive, and misleading statements and representations and practices in connection with the sale and distribution in commerce of said nursery stock has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasers and prospective purchasers of said nursery stock into the erroneous and mistaken belief that such

statements and representations are true, and into the purchase of substantial quantities of respondent's nursery stock, in commerce, by reason of such erroneous and mistaken belief.

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 WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges respondent with violation of the Federal Trade Commission Act through the making of certain misrepresentations in connection with the sale of his nursery products. An agreement has now been entered into by respondent and counsel supporting the complaint which provides, among other things, that respondent admits all of the jurisdictional allegations in the complaint; that the filing of an answer to the complaint is waived, and that the complaint and agreement shall constitute the entire record in the proceeding; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission to which respondent may be entitled under the 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, presentation of evidence, and findings and conclusions thereon, respondent specifically waiving any and all right, power and privilege to challenge or contest the validity of such order; that the order may be altered, modified or set aside in the manner provided in the Federal Trade Commission Act for other orders of the Commission; and that the signing of the agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an appropriate basis for settlement and disposition of the proceeding, the agreement is hereby accepted and made a part of the record, the following jurisdictional findings made, and the following order issued:

1. Respondent Spurgeon Pickering is an individual trading as National Nurseries, with his office and principal place of business located at Briarfield Avenue and Railroad in the City of Biloxi, Mississippi.

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

ORDER

It is ordered, That respondent Spurgeon Pickering, an individual, trading as National Nurseries, or trading and doing business under any other name or names, his agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of nursery stock in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting the nursery stock offered for sale as to size, variety, age, rate of growth, production, condition or blooming time.

2. Shipping to any purchaser nursery stock different from that advertised by respondent and ordered by the purchaser.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Sec. 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 11th day of August, 1955, 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.

IN THE MATTER OF

JONI GAIL, INC. ET AL.

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

Docket 6323. Complaint, Apr. 4, 1955—Decision, Aug. 12, 1955

Consent order requiring a manufacturer and its corporate selling agent in New York City to cease violating the Wool Products Labeling Act by Labeling as "50% wool, 50% orlon" two-piece ladies' weskit and skirt combinations which contained substantial quantities of reprocessed wool and miscellaneous non-woolen fibers, and by failing to identify the manufacturer on tags and to label the skirts separately, as required by the Act.

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

Mr. George E. Steinmetz and *Mr. Roslyn D. Young, Jr.* for the Commission.

Mr. Robert J. Eliasberg, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Joni Gail, Inc., a corporation, and Ethel Boroff, also known as Ethel Estran, Evelyn Finke and Elvira Torre, individually and as officers of said corporation; Sue Carson, Inc., a corporation, and Herman Boroff, Ben Costa, and Paul Weiner, 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 Wool Products Labeling Act of 1939, 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:

PAR. 1. The corporate respondent, Joni Gail, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York. Respondent Ethel Boroff is President, respondent Evelyn Finke is Vice President and Respondent Elvira Torre is Secretary-Treasurer of said corporate respondent. These individual respondents formulate, direct and control the acts, policies and practices of the corporate respondent. The office and principal place of business of each and all of said corporate and individual respondents is located at 1400 Broadway, New York, New York.

PAR. 2. The corporate respondent, Sue Carson, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York. Respondent Herman Boroff is President, respondent Ben Costa is Vice President, and respondent Paul Weiner is Secretary-Treasurer of said corporate respondent. These individual respondents formulate, direct and control the acts, policies and practices of the corporate respondent. The office and principal place of business of each and all of said corporate and individual respondents is located at 534 Eighth Avenue, New York, New York.

Respondent Joni Gail, Inc., is a wholly owned subsidiary of respondent, Sue Carson, Inc., and acts primarily as a selling agent for respondent, Sue Carson, Inc.

PAR. 3. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since January 1954, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce, as "commerce" is defined in said Act, wool products, as "wool products" are defined therein.

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

Among such misbranded wool products were two piece ladies' weskit and skirt combinations labeled or tagged by respondents as consisting of "50% wool, 50% orlon," whereas, in truth and in fact said ladies' weskit and skirt combinations did not contain 50% wool, 50% orlon, but contained substantial quantities of reprocessed wool and miscellaneous non-woolen fibers in quantities other than those represented by respondents.

PAR. 5. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged or labeled as required under the provisions of Section 4 (a) (2) of the Wool Products Labeling Act of 1939 and of the Rules and Regulations promulgated thereunder.

Among such misbranded wool products were two piece ladies' weskit and skirt combinations misbranded in that they were not stamped, tagged, or labeled as to describe the name or the registered identification number of the manufacturer thereof, or of one or more persons subject to Section 3 of said Act with respect to said wool products.

PAR. 6. Said wool products described as ladies' weskit and skirt combinations were further misbranded by respondents in that the

skirts of said combinations were not separately stamped, tagged, or labeled as required by Rule 12 of the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939.

PAR. 7. The acts and practices of respondents, as set forth herein, were in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted 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 the respondents with the misbranding of certain wool products in violation of the Wool Products Labeling Act of 1939 and the Federal Trade Commission Act. A stipulation has now been entered into by respondents Joni Gail, Inc., a corporation, Sue Carson, Inc., a corporation and Herman Boroff, Ben Costa and Paul Weiner, individuals, and counsel supporting the complaint which provides, among other things, that these respondents admit all the jurisdictional allegations in the complaint; that the filing of answers to the complaint is waived; 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 such 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, presentation of evidence, and findings and conclusions thereon, such respondents specifically waiving any and all right, power and privilege to challenge or contest the validity of such order; that the complaint may be used in construing the terms of the order, which may be altered, modified or set aside in the manner provided by statute for other orders of the Commission; and that the signing of the stipulation is for settlement purposes only and does not constitute an admission by any of such respondents that he or it has violated the law as alleged in the complaint.

While the other respondents in the proceeding, Ethel Boroff, Evelyn Finke and Elvira Torre, were formerly officers of corporate respondent Joni Gail, Inc., it appears from affidavits executed by such respondents and by respondents Herman Boroff, Benn Costa and Paul Weiner, and also a certificate executed by respondent Herman Boroff as Secretary of said corporation, that respondents Ethel Boroff, Evelyn Finke and Elvira Torre are no longer connected with said

corporation, and moreover, that at no time did such individuals participate actively in the management or control of the corporation. It is therefore concluded that the complaint should be dismissed as to these individuals.

It appearing that said stipulation, affidavits and certificate afford an adequate basis for an appropriate settlement and disposition of the proceeding, such instruments are hereby accepted and made a part of the record, the following jurisdictional findings made, and the following order issued:

1. (a) Respondent Joni Gail, Inc., is a corporation organized under the laws of the State of New York, with its office and principal place of business located at 1400 Broadway, New York, New York.

(b) Respondent Sue Carson, Inc., is a corporation organized under the laws of the State of New York, with its office and principal place of business located at 534 Eighth Avenue, New York, New York. Respondents Herman Boroff, Ben Costa and Paul Weiner are officers 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 interest of the public.

ORDER

It is ordered, That respondent Joni Gail, Inc., a corporation and its officers, respondent Sue Carson, Inc., a corporation and its officers, and respondents Herman Boroff, Ben Costa and Paul Weiner, individually and as officers of Sue Carson, Inc., and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of ladies' two piece weskit and skirt combinations or other "wool products" as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain, or in any way are represented as containing "wool," "reprocessed wool" or "reused wool," as those terms are defined in said Act, do forthwith cease and desist from misbranding such products by:

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

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

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

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

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

3. Failing to affix to each unit or piece of any such wool product combinations a stamp, tag, label or other means of identification showing the required information as provided by Rule 12 of the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939.

Provided, That the foregoing provisions concerning misbranding shall not be construed to prohibit acts permitted by paragraphs (a) and (b) of Section 3 of the Wool Products Labeling Act of 1939, and

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

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Ethel Boroff, Evelyn Finke and Elvira Torre.

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 12th day of August, 1955, become the decision of the Commission; and, accordingly:

It is ordered, That the respondents Joni Gail, Inc., a corporation, Sue Carson, Inc., a corporation, and Herman Boroff, Ben Costa and Paul Weiner, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they complied with the order to cease and desist.

IN THE MATTER OF

WM. H. WISE CO., INC.; THE CHARMING WOMAN, INC.; ET AL.

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

Docket 6288. Complaint, Jan. 17, 1955—Decision, Aug. 19, 1955

Consent order requiring sellers in New York City of a correspondence course in beauty culture, to cease use of a misleading "introductory offer" which, following acceptance by a customer, they treated as a contract for the entire course, and to cease continuing to mail lessons and demand additional payment after being advised of the customer's wish to discontinue the lessons.

A third charge of using a fictitious trade name for the purpose of collecting amounts alleged to be delinquent remained for decision in due course.[1]

Before *Mr. Loren H. Laughlin*, hearing examiner.

Mr. William R. Tincher for the Commission.

Mr. Thomas Barrett Scott, 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 Wm. H. Wise Co., Inc., a corporation, The Charming Woman, Inc., a corporation, and John J. Crawley, individually and as an officer of said corporations, hereinafter called 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. Wm. H. Wise Co., Inc., is a corporation duly organized, existing and doing business under the laws of the State of New York, with its principal office and place of business at 50 West 47th Street, in the city and State of New York. The Charming Woman, Inc., is a corporation duly organized, existing and doing business under the laws of the State of New York and a wholly owned subsidiary of said Wm. H. Wise Co., Inc., with its principal office and place of business at 37 West 47th Street, in the city and State of New York. John J. Crawley is an individual and President of said cor-

[1] This charge of representing that respondents' "Publishers Protective Service" was an independent and separate organization employed to collect accounts in arrears, was settled by an order to cease and desist entered Nov. 1, 1956, 53 F. T. C. —.

porations and this individual formulates, controls and manages all of the policies of said corporations. His principal office and place of business is the same as that of Wm. H. Wise Co., Inc.

PAR. 2. For more than two years last past respondent, The Charming Woman, Inc., has been engaged in the sale and distribution of a course of instruction in beauty care which said course was pursued by correspondence through the United States mails. Said respondent, in the conduct of said business, caused said course to be transported from its said place of business in the State of New York to purchasers thereof located in States other than the State of New York. There has been at all times mentioned herein a substantial course of trade in said course of instruction so sold and distributed by said respondent in commerce.

PAR. 3. In connection with the sale of said course respondent, The Charming Woman, Inc., has made use of printed advertising material which was distributed to members of the purchasing public throughout the United States by means of the United States mails, in and by which numerous statements have been made with respect to the terms and conditions of purchase of said course of instruction. Such prospective purchasers received an envelope containing a printed form letter, a circular and a "Charter Enrollment Card." Said card is as follows:

CHARTER ENROLLMENT CARD
MAIL TODAY IN REPLY ENVELOPE THAT NEEDS NO STAMP
MAIL NOW! WITH ONLY 25¢ FOR YOUR FIRST 10 DAILY LESSONS

THE CHARMING WOMAN, Inc.
37 West 47th Street, New York 19, N. Y.

For the enclosed Special Introductory Price of only 25¢, please send me prepaid the first Group of 10 Daily Illustrated Lessons containing the starting foundation for the Course in Beauty, Charm, and Successful Living for Women—and enroll me for 3 months.

You may send me further Groups of 10 Lessons every 10 days, giving me 30 Daily Lessons each month at the rate of only $2 a month, until I give you notice to cancel my enrollment. For convenience in bookkeeping, you may bill me once a month for such lessons as I receive.

FREE: Personal Analysis Guide will be sent me WITHOUT CHARGE. It is understood that I may cancel at any time and pay only for Lesson-Groups actually received.

Miss
Mrs. _____ INSERT 25¢
(Please print in BLOCK LETTERS) UNDER
Address _____ POINTS
City &
Zone _____

NO OBLIGATION TO CONTINUE—STOP WHEN YOU WISH!

Said form letter and circular, in addition to detailed information with respect to the merits of said course, contain various representations regarding the introductory offer of sale. Typical but not all inclusive of such representations are the following:

1. Only 25¢ to start—Cancel Whenever You Like * * * The special Introductory price of *only 25¢* brings you your first 10 day group of fascinating daily lessons! * * *

2. Cancel Any Time Without Further Obligation.

5. Cost Slashed in Half! Every ten days you will receive another group of 10 daily picturized lessons, exciting, interesting, inspiring! * * * for convenience in bookkeeping you will be billed at the old low rate of only $2.00 monthly—Slashing the cost to virtually Half that paid by over 50,000 delighted subscribers!

6. Stop Whenever You Like! Pay only for lesson groups you have received. There's never any obligation to continue.

Only 25¢ to Start—Stop Whenever You Like.

There's really no decision to make now. All you do now is send 25¢ for the wonderful group of 10 Trial Lessons by those famous specialists.

Then you can decide whether or not you want to continue.

Just imagine * * * Only 25¢ for first 10 thrilling daily lessons—Stop Whenever You Like!

If you are more than delighted with your immediate and continuous improvement, you may let the lesson-Groups continue to come to you three times a month, receiving 30 exciting Daily Lessons monthly, and completing the entire course in 3 short months. For convenience in bookkeeping you will be billed at the rate of $2.00 monthly, only for those Lesson Groups you have received.

PAR. 4. By means of the foregoing statements and others similar thereto but not specifically set out herein, respondents have represented and implied that on payment of twenty-five cents, purchasers will receive ten trial lessons of a course in beauty, charm and successful living; that the invitation to mail 25¢ constitutes only a trial offer, the ten lessons being in the nature of a sample, and that the decision to enroll for said course rests entirely with the prospect and that such decision may be made at a later date; that in accepting said 25¢ trial offer, such purchasers incur no other obligations and need not continue with said course unless they specifically indicate a desire to do so; and that additional lessons in groups of ten lessons may be purchased at a monthly rate of two dollars and a total cost of six dollars.

PAR. 5. The foregoing representations and implications are grossly deceptive and misleading. In truth and in fact, persons who sign said Enrollment Card enter into an agreement with respondents to purchase the entire course of instruction for a total price of $6.00 payable in three monthly installments of $2.00 each, unless notice of cancellation is specifically given to said respondent.

Throughout said advertising literature respondents emphasize the fact that 10 sample lessons may be obtained by paying 25¢ and that

the decision of whether or not additional groups of lessons are to be purchased rests entirely with the purchaser.

PAR. 6. As a rule, members of the purchasing public do not read or analyze carefully any printed advertising material which is received by them through the mails; and there has been a substantial number of such members who on receipt of respondents' said advertising material mailed the sum of twenty-five cents to said respondent under the definite impression that said offer of ten lessons for twenty-five cents was in the nature of a sample or trial offer and that they would not be obligated for any further payments unless they expressly advised respondents to that effect. The fact that said agreement to purchase the full course is placed inconspicuously and in fine print on a card containing illustrations, advertising matter and testimonials and that the invitation to mail only 25¢ appears conspicuously and in bold type strengthened the belief in the minds of the purchasing public that said card merely offered an opportunity to buy a set of trial lessons for the nominal price of only 25¢. Said impression and belief are heightened and confirmed by the representations made in said form letter and circular as set forth in Paragraph Three hereof, which are also prominently displayed and reiterated, while the fact that persons sending in 25¢ to said respondent will be subsequently billed at the rate of $2.00 a month for three months is set forth once, in small type and in an inconspicuous place in material containing many illustrations and detailed descriptions of the various phases of said course of instruction.

In some instances, said respondent had continued mailing said lessons after being notified by the person sending in the initial amount of 25¢ to discontinue sending additional lessons; and thereafter has demanded payment in full for said course, in spite of being again advised of such cancellation and contrary to the express representation that purchasers were under no obligation to continue said course.

PAR. 7. In the course and conduct of said business as aforesaid, respondents have adopted and use a fictitious trade name, to wit, Publishers Protective Service, for the purpose of collecting accounts alleged to be delinquent, thereby representing and implying that said Publishers Protective Service is an independent and separate organization employed to collect accounts which are in arrears.

In truth and in fact said fictitious collection agency is operated solely by respondent John J. Crawley and is used by respondents to coerce and intimidate purchasers of said course of instruction, as well as persons who have cancelled orders therefor, and compel them to pay for said course, though purchased as a result of the erroneous

and mistaken belief engendered by respondents' deceptive practices as herein alleged.

PAR. 8. The use by respondents of the statements and representations aforesaid has had and now has the tendency and capacity to and does confuse, mislead and deceive members of the public into the erroneous and mistaken belief that such statements and representations are true and to induce them to purchase said course of instruction in said commerce on account thereof.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (hereinafter referred to as the Commission) on January 17, 1955, issued its complaint herein under the Federal Trade Commission Act against the above-named respondents, charging them in certain particulars with having violated the provisions of said Act. The respondents were duly served with process and thereafter filed their answer.

On June 3, 1955, the respondents, however, stipulated in writing with counsel supporting the complaint for a partial consent settlement only, agreeing therein that a consent order against the respondents be entered herein in terms identical with those contained in the notice issued and served on respondents as a part of the complaint herein except that a provision is inserted at the end of paragraph 2 of the order which takes cognizance of a possible technical violation of the order which respondents desire to avoid, and which does not otherwise affect the obvious intent and meaning of said paragraph. The proposed order further omits paragraph 3 of the order as it appeared in the said notice because the stipulation reserves for decision after initial hearing in adversary proceedings all issues presented by Paragraph Seven of the complaint and the answer to the allegations of said paragraph contained in respondents' formal answer of record herein. Said written stipulation for partial consent settlement was approved in writing by the Director of the Commission's Bureau of Litigation.

By said stipulation for partial consent settlement, among other things, respondents have admitted all the jurisdictional allegations of the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations; that the parties expressly waive a hearing

before the hearing examiner or the Commission only as to the matters agreed to by said partial consent settlement stipulation, and waive all further and other procedure relating thereto to which the respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission; and that the order to cease and desist issued in accordance with said stipulation shall have the same force and effect as if made after a full hearing, the parties having waived specifically therein any and all right, power or privilege to challenge or contest the validity of said order. It was also stipulated and agreed therein that the complaint herein may be used in construing the terms of the order provided for in said stipulation which may be altered, modified or set aside in the manner provided by the statute for the orders of the Commission.

It was specifically stipulated by the parties, however, that said stipulation is for settlement purposes only and does not constitute an admission by respondents that they have engaged in any method, act or practice violative of law.

With reference to Paragraph Seven of the complaint, it was further expressly provided in said stipulation that said paragraph is excluded from consideration in the proposed consent settlement and that the allegations made in said paragraph and the answer to said allegations in respondents' formal answer of record are not included in such stipulation for consent settlement and that the issues joined thereby shall remain for decision in regular course and shall not be affected, modified or altered by such stipulation.

The aforesaid stipulation for consent order for partial settlement as so approved was submitted on June 3, 1955, to the undersigned hearing examiner for his consideration in accordance with Rule V of the Commission's Rules of Practice. Since the drafting of said stipulation for consent order, the Commission's Rules with respect to such matters have been revised and the Commission's present Rule pertaining to consent orders is now Section 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, which became effective on May 21, 1955, and now govern this proceeding. The word "stipulation" as used by the parties thereto and referred to herein means "agreement" as stated in said present Rule and reference made in said stipulation to "the entire record herein" under the present rule is necessarily limited to the meaning of the temporary unofficial record before the hearing examiner, which will not become a part of the official record in this proceeding unless and until the Commission approves said stipulation and this order pursuant to said present rule, said Section 3.25.

And upon due consideration of the allegations of the complaint, other than Paragraph Seven thereof and the answer thereto, and the said stipulation for consent order, which is hereby accepted and ordered filed as part of the record herein, it having been stipulated they shall be the entire record herein on which the hearing examiner may enter this order, the hearing examiner finds that the Commission has jurisdiction of the subject matter of this proceeding and of each of the parties respondent herein; that the allegations of the complaint, other than those contained in Paragraph Seven thereof, state a legal cause for complaint under the Federal Trade Commission Act against the respondents and each of them as to each of the particular matters alleged as violations of law therein but respondents do not admit the same; that this proceeding is in the interest of the public; that the said stipulation and the following order shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission and shall not became a final order until approved by the Commission; and that upon said conditions said order shall be and hereby is entered as follows:

ORDER

It is ordered, That respondents, Wm. H. Wise Co., Inc., a corporation, The Charming Woman, Inc., a corporation, and their officers, and John J. Crawley, individually and as an officer of said corporations, and the 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 a course of instruction in beauty culture, or any similar courses of study and instruction, do forthwith cease and desist from:

1. Failing to disclose clearly and adequately on enrollment cards and in other advertising material that by signing and returning the enrollment card or any similar document, the purchaser or subscriber is, in fact, enrolling for the entire course and that if the purchaser or subscriber desires to discontinue said course he must give notice to respondents to cancel his enrollment.

2. Collecting, or attempting to collect, payment for lessons and other instruction material sent to persons after they have notified respondents to cancel their enrollment; provided, however, that upon a satisfactory showing by respondents that said collection or collection attempt results solely and exclusively from a normal and reasonable delay occasioned by the failure of the person cancelling his enrollment to include in his notice of cancellation the number assigned his account by respondents, this paragraph shall not be applicable.

It is further ordered, That the said stipulation and this order shall not become a part of the official record of this proceeding unless and until said stipulation and this order are approved by and become part of the decision of the Federal Trade Commission; and that the issues raised by Paragraph Seven of the complaint and respondents' answer thereto shall be unaffected by this order and are reserved for decision after initial hearing in adversary proceedings under the Rules of the Commission.

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 19th day of August, 1955, 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.

Commissioner Mason not participating.

IN THE MATTER OF

HAROLD SCHIFF AND MAX SCHIFF DOING BUSINESS AS SUN VACUUM CLEANER COMPANY

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

Docket 6342. Complaint, May 5, 1955—Decision, Aug. 19, 1955

Consent order requiring operators of retail stores in Washington, D. C., and Baltimore, Md., to cease representing falsely in "bait" advertising in newspapers and by telephone calls that they were making bona fide offers to sell new and reconditioned vacuum cleaners at specified low prices, when actually the offers were made only to obtain leads to prospects; and to cease representing falsely that new vacuum cleaners offered for sale were of a well-known make and were unconditionally guaranteed.

Before *Mr. J. Earl Cox*, hearing examiner.
Mr. Michael J. Vitale 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 Harold Schiff and Max Schiff, copartners trading and doing business as the Sun Vacuum Cleaner Company, hereinafter referred to as the respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Harold Schiff and Max Schiff are copartners trading and doing business under the name of Sun Vacuum Cleaner Company. They operate retail stores located at 713 G Street N. W., Washington, D. C., and 1037 Light Street, Baltimore, Maryland. Their post office address is 1037 Light Street, Baltimore, Maryland. Said respondents cooperate and act together in performing the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the sale and distribution of vacuum cleaners among other things. In the course and conduct of their said business

respondents have caused and now cause their vacuum cleaners when sold to be transported from their places of business at the aforesaid addresses to purchasers located in the District of Columbia and in various States of the United States. They maintain, and at all times mentioned herein have maintained a course of trade in said product in commerce in the District of Columbia and between the District of Columbia and various States, and between various States of the United States. Their volume of trade in said commerce has been and is substantial.

PAR. 3. At all times mentioned herein respondents have been, and are now, in direct and substantial competition with corporations, firms and other individuals engaged in the sale and distribution of vacuum cleaners in commerce.

PAR. 4. In the course and conduct of their business, as aforesaid, and for the purpose of inducing the purchase of their vacuum cleaners, the respondents have made various statements in newspapers of general circulation. Among and typical of such statements are the following:

SUN
VACUUM CLEANER CO.

713 G. St., N. W. DI 7-4400

Large Size
Model 12

ELECTROLUX
Reconditioned & Guaranteed by Sun Vacuum

Picture of Electrolux

Complete With
All Attachments

This is the famous large size model 12 Electrolux, not to be confused with smaller models. They have been completely reconditioned by Sun Vacuum and are fully guaranteed.

For Free Home Demonstration
Call DI 7-4400

BUY NOW
AND SAVE!

New Low Price
$12.95
Easy terms
$1 Delivers

SUN
VACUUM CLEANER CO.

713 G St., N.W. DI 7-1058

Lowest Price Ever:
Brand New! (Not Reconditioned)
Famous Cannister Type
VACUUM CLEANER
Complete With All Attachments
Your Fingers Never Touch the Dirt!
It's brand New! It's a well-known make! It'll do a beautiful job of cleaning rugs, drapes, furniture, etc., because you get ALL the attachments at this one Amazing Price! It is fully Guaranteed by The Famous Maker and by Sun Vacuum Cleaner Co.
1 Year Free Service

Picture of Vacuum Cleaner

New Low Price
$16.95 Easy Terms
$1 Delivers

For Free Home Demonstration
Call DI 7-1058

After 8 P. M.
Call DI 7-4400

Respondents, through agents or representatives, have also solicited the sale of their vacuum cleaners by telephone in which the statements in the aforesaid advertisements were made in substance.

PAR. 5. By and through the use of the said statements, and others of similar import but not specifically set out herein, respondents represented directly or by implication:

1. That they were making bona fide offers to sell new and reconditioned vacuum cleaners at the low prices specified in the advertising.

2. That the new vacuum cleaner offered for sale was of a well-known make.

3. Through the use of the words "guaranteed" and "fully guaranteed" that their vacuum cleaners were fully and unconditionally guaranteed.

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

1. The said cleaners would not do a satisfactory job of cleaning, and the said offers were not genuine or bona fide offers in that respondents did not intend to sell the cleaners advertised and offered for sale but were made for the purpose of obtaining leads and information as to persons interested in the purchase of vacuum cleaners. After obtaining such leads through response to said advertisements and telephone solicitations, respondents or their salesmen,

called upon the persons so responding at their homes or waited upon them at respondents' place of business, and demonstrated such cleaners, well knowing that their performance would be unsatisfactory; made little or no effort to sell the advertised cleaners but in many instances attempted to, and frequently did, sell different and more expensive vacuum cleaners to such persons.

2. The vacuum cleaner represented as being of a well-known make in the aforesaid advertisements was not of a well-known make.

3. The guarantee given for the vacuum cleaners, if any, was limited and conditional.

PAR. 7. The use by the respondents of the aforesaid false, deceptive, and misleading statements, representations, and practices 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, because of such statements, representations, and practices, to purchase substantial quantities of respondents' vacuum cleaners, particularly their more expensive vacuum cleaners. As a result thereof, substantial trade in commerce had been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

PAR. 8. The aforesaid acts and practices as herein alleged, were all to the prejudice and injury of the public and of respondents' competitors and constituted 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 J. EARL COX, HEARING EXAMINER

The complaint charges that Harold Schiff and Max Schiff, copartners doing business as Sun Vacuum Cleaner Company, with a retail store and principal place of business at 1037 Light Street, Baltimore, Maryland, and another retail store at 713 G Street NW., Washington, D. C., have been and are now engaged in the sale and distribution in commerce of vacuum cleaners and other merchandise, and that they have violated the Federal Trade Commission Act by making false, deceptive and misleading statements and representations regarding their vacuum cleaners, for the purpose of inducing the purchase thereof by the public. After the issuance of the complaint and prior to the date for filing answer, the respondents entered into a Stipulation For Consent Order with counsel supporting the complaint, which was thereafter approved by the Director, Bureau of Litigation of the Commission and transmitted to the hearing examiner for consideration.

The stipulation provides, among other things, that respondents admit all the jurisdictional allegations set forth in the complaint and that the record herein may be taken as if findings of jurisdictional facts had been made in accordance with such allegations; that the stipulation, together with the complaint, shall constitute the entire record herein; that the complaint may be used in construing the order agreed upon, which may be altered, modified or set aside in the manner provided by statute for orders of the Commission; that the signing of the 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; and that the order provided for in the stipulation and hereinafter included in this decision shall have the same force and effect as if made after a full hearing, presentation of evidence and findings and conclusions thereon.

All parties waive the filing of answer, 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 respondents may be entitled under the Federal Trade Commission Act or the rules of the Commission, including any and all right, power or privilege to challenge or contest the validity of the order entered in accordance with the stipulation.

The order agreed upon conforms to the order contained in the notice accompanying the complaint, and disposes of all the issues raised in the complaint. The Stipulation For Consent Order is therefore accepted, this proceeding is found to be in the public interest, and the following order is issued:

It is ordered, That respondents Harold Schiff and Max Schiff, copartners, trading and doing business as Sun Vacuum Cleaner Company, or trading and doing business under any other name or names, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of vacuum cleaners or 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, that certain merchandise is offered for sale when such offer is not a bona fide offer to sell the merchandise so offered:

2. Representing, directly or by implication, that any merchandise being offered for sale is of a well-known make when such is not the case;

3. Representing, directly or indirectly, that any merchandise is guaranteed to an extent greater than is the fact; or using in advertising or sales literature the word "Guarantee," unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

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 19th day of August, 1955, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Harold Schiff and Max Schiff, copartners trading and doing business as Sun Vacuum Cleaner Company, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

LEO NELSON, INC., ET AL.

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

Docket 6341. Complaint, May 4, 1955—Decision, Aug. 25, 1955

Consent order requiring a furrier in Hackensack, N. J., to cease violating the Fur Products Labeling Act by advertising in newspapers which misrepresented prices, values, and source of its fur products, failed to disclose the names of animals producing the fur in certain products or the fact that it was artificially colored, and otherwise failed to conform to requirements of the Act.

Before *Mr. Frank Hier*, hearing examiner.

Mr. John T. Walker for the Commission.

Brenman & Susser, of Paterson, N. J., for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Leo Nelson, Inc., a corporation, and Leo Nelson, 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 under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Leo Nelson, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Respondent Leo Nelson, an individual, is president of respondent, Leo Nelson, Inc., and in said capacity formulates and controls the policies and practices of said corporate respondent. The said corporate respondent and said individual respondent have their office and principal place of business located at 260 Main Street, Hackensack, New Jersey.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been, and are now, engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products, and have sold, advertised, offered for sale, transported and distributed fur products which have

been made in whole or in part of fur which had been shipped and received in commerce, as "commerce," "fur," and "fur products" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively advertised, in violation of the Fur Products Labeling Act in that respondents caused the dissemination in commerce, as "commerce" is defined in said Act, of certain advertisements concerning said fur products, by means of newspapers and by various other means, which advertisements were not in accordance with the provisions of Section 5 (a) of the Fur Products Labeling Act, and of the Rules and Regulations promulgated under said Act, and which advertisements were intended to aid and did aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

PAR. 4. Among and including the advertisements as aforesaid, but not limited thereto, were advertisements of respondents which appeared in the "Bergen Evening Record," a newspaper published in Hackensack, New Jersey, and having wide circulation in said State and in various other States of the United States.

By means of the aforesaid advertisements and through others of the same import and meaning, not specifically referred to herein, respondents falsely and deceptively:

A. Failed to disclose the name or names of the animal or animals that produced the fur contained in the fur products, as set forth in the Fur Products Name Guide, in violation of Section 5 (a) (1) of the Fur Products Labeling Act.

B. Failed to disclose that fur contained in fur products was bleached, dyed, or otherwise artificially colored fur, when such was the fact, in violation of Section 5 (a) (3) of the Fur Products Labeling Act.

C. Misrepresented, by means of comparative prices and percentage savings claims not based on current market values, the amount of savings to be effectuated by purchasers of said fur products, in violation of Rule 44 (b) of the aforesaid Rules and Regulations.

D. Misrepresented the value of fur products, when such claims and representations were not true in fact, in violation of Rule 44 (d) of the aforesaid Rules and Regulations.

E. Misrepresented said fur products as being the stock of a business in a state of liquidation in violation of Rule 44 (g) of the aforesaid Rules and Regulations.

Respondents, in making the pricing claims and representations referred to in subparagraphs (C) and (D) hereof, failed to maintain full and adequate records disclosing the facts upon which such claims

and representations were purportedly based, in violation of Rule 44 (e) of said Rules and Regulations.

PAR. 5. The aforesaid acts and practices of respondents, as herein alleged, were in violation of the Fur Products Labeling Act, and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, the Federal Trade Commission on May 4, 1955, issued and subsequently served its complaint on respondents herein.

Although corporate respondent herein is named and designated in the complaint as Leo Nelson, Inc., it is agreed that its correct name is Nelson Furs, Inc. The said Nelson Furs, Inc., hereby acknowledges service of process upon it and consents that this proceeding shall be treated as though Nelson Furs, Inc., were properly named as party respondent in the complaint.

Respondent, Nelson Furs, Inc., is a corporation organized under the laws of the State of New Jersey and respondent, Leo Nelson, an individual, is president thereof and in said capacity formulates and controls the policies and practices of said corporate respondent. Both respondents have their office and principal place of business located at 260 Main Street, Hackensack, New Jersey, and are engaged thereat in the introduction into commerce, and in the sale, advertising and offering for sale in commerce, of fur products.

On June 24, 1955, there was submitted to the undersigned hearing examiner an agreement between respondents and counsel in support of the complaint providing for entry of a consent order. By the terms thereof respondents admit all the jurisdictional allegations set forth in the complaint; agree that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with allegations thereof in the complaint; expressly waive the filing of answer, 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 or oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission. Respondents agree that the order hereinafter provided for shall have the same force and effect as if made after a full

hearing, presentation of evidence and findings and conclusions thereon, and specifically waive any and all right, power or privilege to challenge or contest the validity of the order entered in accordance with such agreement.

It was further agreed that such agreement, together with the complaint, shall constitute the entire record herein and shall be filed with the hearing examiner for his consideration in accordance with Section 3.21 of the Commission's Rules of Practice; that the signing of the agreement was for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; that the complaint herein may be used in construing the terms of the order hereinafter entered, which order may be altered, modified or set aside in the manner provided by the statute for the orders of the Commission; that the agreement is subject to approval in accordance with Sections 3.21 and 3.25 of the Commission's Rules of Practice and that the order shall have no force and effect until and unless it becomes the order of the Commission.

On the basis of the foregoing, the undersigned hearing examiner concludes that this proceeding is in the public interest; that such agreement is an appropriate disposition of the proceeding and in accordance with the action contemplated and agreed upon, makes the following order:

ORDER

It is ordered, That respondent Nelson Furs, Inc., a corporation (erroneously referred to in the complaint as Leo Nelson, Inc., and which by the agreement for a consent order is to be substituted for Leo Nelson, Inc., and is to be treated as though Nelson Furs, Inc., was named as a party respondent in the complaint), and its officers, and Leo Nelson, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of fur products, or in connection with the sale, advertising, offer for sale, transportation, or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur," and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement, or notice which is intended to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of fur products, and which:

1. Fails to disclose:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur products as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(b) That the fur products contain or are composed of bleached, dyed, or otherwise artificially colored fur, when such is a fact.

2. Represents, directly or by implication:

(a) That the regular or usual price of any fur product is any amount which is in excess of the price at which the respondents have usually and customarily sold such products in the recent regular course of their business;

(b) The value of fur products, when such claims and representations are not true in fact;

(c) That any such products are the stock of a business in a state of liquidation, contrary to fact.

3. Makes pricing claims or representations of the type referred to in Paragraph 2 (a) and (b) above, unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims or representations are based, as required by Rule 44 (e) of the Rules and Regulations promulgated pursuant to the Fur Products Labeling Act effective August 9, 1952.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Sec. 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 25th day of August, 1955, 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.

IN THE MATTER OF

DOUBLEDAY AND COMPANY, INC.

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND OF SEC. 2 (a) OF THE CLAYTON ACT

Docket 5897. Complaint, June 29, 1951—Decision, Aug. 31, 1955

Order requiring a publishing house in Garden City, N. Y., to cease discriminating in price by requiring that retailers, but not book clubs, sell at fixed minimum resale prices books which it sublicensed the clubs to publish, and by selling publishers' editions to some wholesalers or jobbers at lower prices than to their competitors.

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

Satterlee, Warfield & Stephens, of New York City, for respondent.

Wolfson, Caton & Moguel, of New York City, for Book-of-the-Month Club, Inc., *amicus curiae.*

Newman & Katz, of New York City, and *Davies, Richberg, Tydings, Beebe & Landa*, of Washington, D. C., for American Booksellers Association, Inc., *amicus curiae.*

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

The Proceedings

This proceeding began on June 29, 1951, with the issuance by the Commission of a four count complaint against the respondent. Simultaneously there was issued complaints against five other large and prominent book publishers substantially the same as the first two counts in this proceeding.[1] Since the four counts in this proceeding are in reality four different actions, clarity will be served if their particular charges are set out separately hereinafter when each individual count is separately discussed. Suffice it to say here that the first three counts in this proceeding charge a violation of the Federal Trade Commission Act through the use by respondent of unfair methods of competition by reason of unreasonable restraints of trade imposed by it upon its distributive outlets and that the fourth count charges respondent with price discrimination in the sale of its publications in violation of Section 2 (a) of the Clayton Act [U. S. C. Title

[1] A third count in each of these five cases charging price discrimination was subsequently dismissed by the Commission.

15, Sec. 13]. After answer, 48 hearings were held, resulting in the accumulation of 4693 pages of testimonial evidence and 369 exhibits, all duly filed in the Office of the Commission. When the case was rested by counsel in support of the complaint on October 21, 1952, counsel for respondent moved to dismiss, which motions were ruled upon by the hearing examiner on March 2, 1953, and promptly appealed to and argued before the Commission, decision thereon being entered September 23, 1953. Thereafter, respondent's defensive evidence was received and a short rebuttal followed, the case then being closed for further proof-taking on June 10, 1954. The proceeding now comes on for final consideration by the hearing examiner, heretofore duly designated by the Commission, on the complaint, answer thereto, testimony and other evidence, proposed findings, conclusions and briefs submitted by counsel and brief submitted by counsel for the Book of the Month Club, Inc. (by leave) from which the hearing examiner finds that this proceeding is in the interest of the public and makes findings of facts, conclusions drawn therefrom and order as will hereinafter appear.

Count I. Pleadings, History and Issues

The complaint in this count charges that respondent as copyright licensee from an author to print, publish and sell the author's work, sublicenses the Book of the Month Club, Literary Guild of America and other "book clubs," to print, publish and distribute to their members exclusively the same work, as a "book club edition"; that it refuses to similarly sublicense anyone else; that it contracts in these sublicensing agreements to fix and maintain the retail price of the books which it, the respondent, sells to jobbers and retail bookstores; and further contracts and agrees therein not to release for sale such books until the book clubs distribute their own editions to their subscribers, and that such contractual provisos are in restraint of trade and are unfair methods of competition.

Upon motion to dismiss filed by respondent at the close of the evidence offered by counsel in support of the complaint, the hearing examiner, acting on the principal that a copyrightee or his licensee may legally agree to or do anything which accomplishes no more than to preserve or exploit the monopoly given him, but he may not by restrictions or restraints add to that monopoly, extend it or increase its effective orbit of operation, ruled that the exclusivity and simultaneous publication provisions were legal but that the price maintenance provision was not because it extended restraint below and beyond the orbit of the licensee's own field. On appeal, the Commission affirmed the ruling on the exclusivity provision, reversed on the simultaneous

release provision and did not rule on the price maintenance provision because respondent had not appealed that particular ruling. In its reversal the Commission ruled the simultaneous release provision to be a restraint beyond the scope of the copyright protection but said the question then was whether or not the restraint was reasonable and remanded the matter to the hearing examiner for determination of that issue, listing as relevant factors in that determination the following:

1. The simultaneous publication by trade publishers and licensed book clubs.

2. The character and location of book club readers as compared to those who buy from retail bookstores.

3. The character of the competition involved—potential versus actual competition.

4. The fact that the largest sale of a popular book takes place shortly after its publication and gradually dwindles thereafter.

5. The policy of operation of books clubs, such as the purchase of books by subscribers which they might not voluntarily purchase at a bookstore, etc.

On the partial record then before him and at the insistence of counsel, the hearing examiner was of the opinion that the restraint was unreasonable. Since then evidence of the reasonableness and necessity of the restraint has been taken, and a rather full picture of the book club operation has been portrayed, as well as some rebuttal evidence. The picture now is markedly different.

The questions for decision on this Count are:

1. Whether the simultaneous publication or release agreement is a reasonable or unreasonable restraint of trade.

2. Whether the agreement by the respondent with a book club that the former will "fair trade" the copyrighted trade books which it sells to retailers or jobbers, and exempt the book club from such resale price maintenance is an unfair method of competition.

Upon these issues and the record the following findings of fact are made:[2]

1. Respondent, Doubleday and Company, Inc., is a corporation under the laws of the State of New York with its principal office and place of business located at 501 Franklin Avenue, Garden City, Long Island, New York. It is, and has been since prior to 1900, under one corporate name or another, engaged in the publication, sale, and distribution of popular fiction and nonfiction books, commonly known

[2] Specific fact-findings are numbered seriatim through all four counts to aid counsel in referring thereto on the inevitable appeal. Background or explanatory paragraphs are unnumbered.

as trade books, which it sells to (1) wholesalers or jobbers for resale to libraries and retail bookstores, (2) to retail bookstores, and (3) to libraries and directly to the reading public through retail bookstores owned and operated by it. In 1952 it ranked second among domestic publishers in number (300) of titles published. Its volume in trade books is $7,000,000 a year. It directly owns and operates a large printing plant at Hanover, Pennsylvania. It also owns all the outstanding stock of the Country Life Press Corporation, which latter owns and operates a large printing plant located at Garden City, Long Island, New York.

2. In the conduct of such business respondent has been, and is now, engaged in commerce, as that term is defined and understood in the Federal Trade Commission and Clayton Acts, under which this proceeding is brought, in that respondent ships or causes to be shipped its publisher's editions of trade books from the States in which are located its several places of production and business to purchasers thereof located in other States and the District of Columbia and in that there has been as continuous a current of trade and commerce as respondent could achieve in said books between and among the various States of the United States and the District of Columbia.

3. Respondent has been, and is now, in competition with other publishers of trade books and with many of its customers, both wholesale and retail. Jobber customers of respondent have been and are in many instances in competition with each other and, to a lesser degree, with respondent for the business of libraries and retail booksellers. Retail booksellers, customers of respondent, have been and are, at times and in many localities, in competition with each other for the consumer market, and in many instances in those States wherein are located respondent's retail bookstores, in competition with those stores, for the consumer market.

4. To procure manuscripts for publication, respondent, for stipulated lump payments and royalties, procures from an author the latter's license as copyrightee to print, publish and sell exclusively the author's work, which license includes the right to sublicense a book club (an organization which independently produces or publishes books for direct mail order distribution to its subscribers) to print, publish and sell a "book club" edition of the same work, provided that the author receives one-half, or some other percentage, of the publisher's receipts from such sublicense. In the case of well known or "established authors" and in the case of "best sellers," all of these sums are very substantial.

5. Thereafter, respondent makes such manuscript available to a first edition book club, such as the Book of the Month or Literary Guild,

for perusal and possible selection. If these book clubs deem the manuscript a good selection for their subscribers, think it will sell well and profitably, they sublicense from respondent the exclusive right to print, publish and sell a book club edition of the work, to lease the publisher's printing plates for that purpose, or make their own therefrom, paying for the lease and sublicense a substantial sum of money and in addition agreeing to pay a stipulated royalty for each copy of the book sold to their subscribers. These sublicenses contain also the two provisions under attack here, a provision that the respondent's publication date will not precede the book club's, and in the case of the Literary Guild, but not in the case of the Book of the Month Club, a provision that the respondent will "fair trade" the resale price of its edition and exempt such club from any such resale price maintenance. In the case of the Book of the Month Club (hereinafter designated as B. O. M. C.) the agreement was that respondent would not enter into any fair trade contract except on terms which would exclude B. O. M. C. from such contract.

6. Book club editions are sold in direct competition in commerce with the publisher's edition of the same work, and with publisher's editions of other works, directly to the public by the book clubs. These book club editions are practically the same in design, format, quality and size and appearance as the publisher's editions of the same work and carry the respondent's name as publisher thereon because the original publisher is the author's representative in respect to that book. Many of these book club editions have the same dust packets as are on the publisher's editions of the same title, although there is plainly printed thereon that it is a book club edition or selection. There is some evidence that the similarity was so great that book club editions have been returned for credit to retail book stores selling only the publisher's edition.

7. B. O. M. C. is an independent corporation having no relationships, corporate, stockholding, directorial, blood or otherwise, with respondent. Literary Guild on the other hand is a wholly-owned subsidiary of respondent whose first vice-president is also president of Literary Guild. Respondent's president, director and chairman of the board is vice-president and director of Literary Guild and the latter's book club editions are printed at respondent's Hanover, Pennsylvania, plant.

8. In reselling the publisher's edition, the retail bookseller is under a definite price disadvantage, vis-a-vis the book club. As was said before in this case, it is obvious that the retail bookseller, paying respondent $2.10 for a book which he must resell for $3.50, cannot sell

it at that price to potential purchasers who may obtain the same book for anywhere from nothing, in case it is a premium or gift or bonus, up to $2.00 or so by subscribing to a book club for a year and buying eleven or other number of books at prices individually low also, by comparison. There is substantial evidence in the record from retail booksellers that they have been unable to sell, or have lost sales by reason of cancellations and returns, against this competition. There is testimony also of a general decline in retail book business, principally in basic stock, which titles, however, book clubs rarely, if ever, publish; the closing of bookstores—although the secretary of the American Bookseller's Association, to which 90% of them belong, testified that its membership has remained about the same, withdrawals being about offset by new members; that some booksellers order less when a book has been selected by a book club than when it has not; that with some booksellers, their sales of the publisher's editions which are also book club selections, are less than if the book had not been selected; that book club selections are the fast selling cream of the crop and the slow moving books are left to the bookseller to sell; and that book club selections, because of their lower price, have created a consumer belief that the bookseller is overcharging with consequent bad public relations. Against this there was substantial testimony of publishers, backed by specific examples of cases, where the selection by a book club of a particular book greatly enhanced the sale of that book in the retail bookshop—testimony which in two instances was corroborated by two very large retailers. Although this has happened with specific books, by and large the retail bookseller is under a competitive disadvantage, vis-a-viz, the book club with the majority of the latter's selections, not as severe as claimed but nevertheless definite. It is this price disadvantage which has been the focal point of the prosecution.

9. Instead of starting with an illegal practice, or one which might or might not be, dependent on its effect, illegal, here the start has been with an existing condition, and an inquiry backward, not only to ascertain the cause but on a priori assumption that that cause must, of necessity, be illegal. Until it was decided that the exclusivity provision was legal, the main attack was upon it. Since then, the artillery has been concentrated upon the left flank—the simultaneous publication provision, which until the prosecution evidence was half completed, had not appeared specifically in the case at all, and was not on counsel's "index expurgatorious" as the villain of the bookseller's plight. Instead of the effect being an element of illegality or a measure thereof, in this case, it has been used as the lodestar to which practice or agreement has been merely background or illumi-

nation. The record clearly reveals that the primary, if not the sole, cause of the bookseller's handicap vis-a-vis the book club is the price disparity between the same books offered by both—simultaneous release is not the sole nor the primary cause—at most, it is a contributing cause. The contention that it is, is a mid-trial afterthought of counsel.

10. But the Commission has flatly rejected this approach, as has the hearing examiner. Effective competition is necessarily bruising—the fact that a fighter is knocked out or badly mauled does not necessarily import a "fixed" or foul fight. As the Commission has expressed it:

"Competitive disadvantage, in and of itself, does not necessarily create illegality. The fact that the retail bookseller has lost sales to book club or cannot successfully compete with a book club for the patronage of certain types of readers is of no legal consequence unless this result springs from some improper and unfair act on the part of respondent." [3]

11. There is evidence in the record that booksellers have sent out circulars, advertised and selected, and as a result have procured substantial prepublication orders for a forthcoming publisher's edition by a popular author, only to have the publisher postpone the publication date after a book club had selected the work with the result of having many of those prepublication orders cancelled because the customer had read the book, it was a book club selection and could be obtained there at less money.

12. The Commission's opinion further held that, on the partial record before it, this simultaneous release provision was a restraint, that, in consonance with prevailing legal precedent, it was not illegal per se, the inquiry being whether such restraint was reasonable or unreasonable, this in turn to be determined by all the circumstances of the operation, with special emphasis on the "special needs of the licensee [the book clubs] for the competitive advantage afforded by the license." [4]

13. Respondent has presented considerable substantial evidence on this point. One of these "special needs" is the public demand for "newness." B. O. M. C. was organized in 1926, Literary Guild in 1927, and until 1931 or thereabouts purchased "selections" from publishers at discount and resold them to their subscribers at the same price as retail booksellers. When book costs advanced, however, the book clubs started leasing plates and doing their own publishing. The testimony of their organizers and directing heads down to the present, as well as their releases, establishes that the idea for both was

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[3] Opinion on appeal from Hearing Examiner's rulings on respondent's motion to dismiss, September 23, 1953.

[4] *U. S. v. Paramount Pictures Inc., et al.*, 334 U. S. 131, 145.

the selection of a new and current book each month by a board of judges or selectors, and the furnishing of that book to the subscriber upon publication. The pristine character of these popular books—fiction and current non-fiction—was stressed for many years. While it is true that in many instances the advertisements of these book clubs over the past few years has stressed price lowness, premiums, alternate selections, bonus books, etc., and now newness, nevertheless the newness theme has also been stressed in some of them. Moreover, after many years of emphasis on newness, and selection for current interest by a board of authors and literary people, public acceptance on that basis has become ingrained, as the testimony of one book club member clearly indicated, without reiterated insistence on that theme. The Hearing Examiner is fully convinced on this record that "newness" is as important an appeal to the potential subscriber as is price and a "must" to the current subscriber. There is no doubt that most of the books selected are "new."

14. An exhibit showing the respondent's sales of such book published in 1952 (all kinds and types) indicates conclusively that the greatest sale is in the first month, slightly less in the second month after publication and then sales rapidly decrease until by the fourth month and thereafter, returns for credit are greater than sales. This demand for "newness" is also evidenced by constant complaints from book club subscribers, if their books are delivered later than the same book appears in a retail bookseller's—a number of letters of which are in evidence. There is also substantial evidence of subscribers threatening to quit as such, if they receive books later than they are purchasable in book stores, and some, that they would not have joined if this time element were missing.

15. The record also shows that postponement of an announced publication date by the publisher is frequently caused by other factors, such as bringing a book out in a different or more favorable season, printing or other production breakdown or delays; that the announcement of a publication date is not regarded in the industry as binding on the publisher; that it also happens that an announcement that a book, scheduled for publication, has been selected by a book club, increases prepublication orders; that retail booksellers circularize their customers as much as six months in advance of publication, whereas book clubs have but a month in which to do so; and there is testimony also that one bookseller increases his orders when he learns that a forthcoming publication has been selected by a book club.

16. On this question of timeliness, the record also shows that in a five month period, the publication dates of 9 out of 18 selections by

Literary Guild were postponed by the publishers to correspond with the Literary Guild's publication dates and that other instances, with specific books, have occurred where retail booksellers are solicited for and give prepublication orders for the publisher's editions months before publication; that this occurs before any book club announcement to its members of the selection of the same work as a book club edition; that publication date for the publisher's edition is usually fixed before the manuscript is delivered to the book club for decision on selection; that retail booksellers frequently circularize their customers months in advance of the publisher's announced publication date to secure prepublication orders; and that postponement thereof, coupled with announcement of the work's selection by a book club does cause cancellation of these prepublication orders given to the bookseller, in one instance as high as 50%.

17. Book club officials testified that their ability to publish simultaneously with the trade edition was vital to their business; that it was a cornerstone thereof; and that 90% of the membership take and will insist on a newly published edition rather than an old or previously published alternate. Granting personal motive in the testimony of those presently interested, this evidence is strikingly confirmed in great detail by the founder of the Literary Guild, who in 1934 sold that organization to respondent and who is now a publisher having no connection with a book club. All of them stressed the fact that except in the case of alternates or bonus books, their business is publishing new books, not reprints or previously published books.[5]

18. This public demand for "newness" or "timeliness" is also evident from the fact, not in the record, but a matter of common knowledge, that people will pay money to a rental library to get to read a book just out, or one being discussed, although they can get the same privilege for nothing by waiting on the list at the public library.

19. Another evidence of the importance of timeliness to the consumer is the tremendous publicity and advertising build-up which precedes publication. Publishers and booksellers spend fortunes "to achieve maximum publication impact" for the trade edition. Reviews, trade announcements, special offers, plus violent advertising inevitably arouse interest in a forthcoming book and stimulate buyer interest. Upon publication it disappears. The same book appearing later is inevitably as dated in the public mind as yesterday's newspaper.

20. B. O. M. C. spends 2 million and Literary Guild $1,600,000 annually for advertising and circularizing. Literary Guild's annual

[5] Alternates are not new books and these are selected in place of new books by 20% or more of Literary Guild's membership each month.

investment and other costs for 1953 was between 6 and 7 million, its credit losses alone amounting to $325,000 and its cost for free books to new members $1,300,000 a year. It cost Literary Guild $5.00 to obtain a new member with a 50% annual turnover in membership. B. O. M. C. has the same turnover. It costs Literary Guild 82.2 cents to sell each of its members.

21. Without competitive equality in reaching the book reader, the book club would go out of business, at least out of the new book business, and become merely a reprint house. This would affect at the moment 1,270,000 subscribers who would then be compelled to depend on libraries, rental or public, to read, or the retail bookseller, to buy, newly published works.

22. Equally important, financially at least, is the provision under attack, to the publisher, who receives such a substantial amount of income from its sublicense to the book club, with this proviso in it, that it frequently represents the difference between profit and loss in its total operation. The testimony is that without the proviso under attack, the book club would deal directly with the author, leaving the publisher out in the cold. Whether the author would realize more from such a change than he does under the present system, the record does not show.

23. Last we come to the public, the book buyer. These book clubs do a nationwide business. While it is true that anyone accessible to and serviced by the U. S. mail can buy books from a retail bookseller if he wishes, it is not true that it is as easy as subscribing to a book club. In the former case, he must first know of the forthcoming books. Then he must separately order and pay for each. There are hundreds of communities in the United States where bookstores are not reasonably accessible. A survey by Literary Guild shows that of 20,180 communities in which it has 245,225 members, only 1,473 of these towns with 148,980 members, have bookstores, whereas 18,707 towns have no bookstores although the Literary Guild in these communities has 96,245 members.[6] Thus, 40% of its members live without benefit of local bookstores. Obviously, too, from these figures there must be many to whom bookstores are accessible but who prefer to send in one yearly order for new books rather than go to a bookstore for each purchase. This may be a plus coverage or substitute coverage. With a few exceptions, there are no satisfactory statistics in the record as to the extent which bookstores, by mail order, satisfy the remote consumer market. These exceptions cannot be regarded

[6] Approximately 300,000 of Literary Guild's members receive their selections through department store book departments.

as typical of the 1500 others. As to B. O. M. C. 32% of its members live in communities of 10,000 population or less, another 32% in communities whose population ranges from 10,000 to 100,000.

24. The mass mail order servicing of these hundreds of thousands of subscribers is an expensive, laborious and time-consuming job and that "time" is of the essence. After the editorial board of a club has selected a title it takes three to five months to produce a book and another 28 days, at a minimum, for distribution. These book clubs must edit, produce and distribute monthly club magazines to announce each month's selection. The requisite details of this are tremendous. This is necessary because the book club must know prior to distribution whether the member will take that month's selection or some alternate, and rejection slips mailed with the magazine are frequently returned at the last moment. Then follows a mad scramble of packaging, addressing and mailing each member's selection. The whole process requires the services of 1,000 employees for B. O. M. C. and 1,400 for the Literary Guild. Five months is, apparently, the absolute minimum between selection and delivery.

25. Another aspect of "special needs" is that a book club cannot operate on isolated sales as can a bookstore. The latter may return for credit stale or non-moving merchandise—the book club cannot—its investment has already been made. The normal loss of one-half of its membership annually points this up. The club risks its entire success on twelve books a year—a bookstore does not. The tremendous sums it has spent on advertising are not recoverable if the book is unpopular—the book club must obtain most of its members solely through this means. It has in addition advanced and gambled very substantial sums in acquiring the sublicense—all of it nonrecoverable, an expense unknown to the bookseller.

26. If, as contended for, and proved, by counsel in support of the complaint, newness, or timeliness, is an economic need of the retail bookseller, it cannot be any less a need to the book club, because both compete for the same bookbuyer on many of the same books. Respondent's evidence outlined, but not detailed above, clearly establishes that this need of the book club is indeed a special need.

27. These then are the "special needs" of the licensee—the book club. Do they make the restriction reasonable? The Paramount case,[7] apparently regarded by the Commission as controlling, is a far weaker plea for the reasonableness there found than is presented here. In that case the Court was asked to and did sanction a refusal by the licensor to license suburban theaters to show first-run (new) motion

[7] 334 U. S. 131, 145.

pictures for a time long enough to permit competitive downtown theaters to exhibit this same film at far higher consumer exactions, which were shown to be not only possible of exaction but necessitous to the favored theaters by reason of higher operating costs. The latter seemed to justify allowing the favored theaters to skim the financial cream off the milk, leaving the suburban theaters to the remains. Hence, there was in that case an approval of chronologically competitive inequality—of permitting some to reach the market first and reap the consequent profits—newness being there, as here, of prime appeal. Here, on the other hand, the proviso attacked does no more than provide for competitive equality in reaching the market. The Hearing Examiner and those who sit above him are here asked to destroy that equality and to prevent the book club from reaching the market until after the retail bookseller has exploited it alone.[8]

28. The Commission, in its prior opinion in this case, said of the exclusivity provision:

"We are not unmindful of the public interest. Disadvantage to retail booksellers may be perpetrated by the decision we have been compelled to make. On the other hand, a contrary decision would have an adverse effect on authors, publishers, book clubs and a large section of the public. On balance, the overriding public interest (as well as the law) seems to lie with the views of the Hearing Examiner."

29. Adopting this as a ratio decidendi of the instant question, we have on the one hand some 1,550 retail bookseller's each with a minimum stock of 300–400 titles and a minimum investment in books of $3,600.00,[9] located roughly in ratio to population density, under competitive price disadvantage with the book clubs, competing at such disadvantage directly with book club selections in popular fiction and non-fiction, taking on sidelines of stationery, greeting cards and gifts to supplement a profit margin not exceeding 2% on books alone, with some mortality but, according to their spokesman, the secretary

[8] It has been obvious to the Hearing Examiner since early in this proceeding that the real drive here was in some way and by some means to increase the book club's costs so that it would have to sell at the same or very similar price of the bookseller. There could have been no other purpose in the offer of testimony at Cleveland, Ohio, of a publisher, also a book club owner, as to comparative costs of publication. Beyond the doubtful power to order, even indirectly, a book club to increase to "parity" its prices, the enforcement of such an order, as a practical matter would be ridiculous to attempt. The leverage in this drive was first supplied by the attack on the exclusivity of the grant, when that failed, the objective seemed to be that if prices could not be equalized then some presently enjoyed right or benefit be taken away or destroyed—hence, the heavy fire on the "time equality" or "chance at the market equality" provision. Change of front and shift of position has also characterized respondent's position, but these are explained to some extent by the failure to attach a proposed order to the complaint when issued, by the vagueness of the complaint and by the shifting of the attack.

[9] These are mostly basic stock, rarely if ever in competition with book club selections.

of their association, not appreciably significant in total operating units. About one-half of these do a gross business of $25,000 a year, the others, more. All of them need a discount margin of from 38 to 40% to operate, and up to 80% of their book trade is in current "timely" books.

30. On the other hand, we have the publishers, whose income from these book club sublicenses means the difference ofttimes between profit and loss, and the fact, that if the attacked provision is forbidden, this income would disappear either through the book club dealing directly with the author, or going into the reprint business only. In the latter event, the author, too, would lose substantially. As to the public, the record fairly reveals that over their nearly thirty years of operation, the book clubs have expanded the market of bookbuyers, reaching thousands to whom bookstores are not easily accessible, and in densely populated areas, where such stores are accessible, nevertheless reaching other thousands on plus sales—buying books they would not buy from the bookstore, buying more books than they would, were it not for the book club operation, buying books because of the lower price from book clubs instead of from the bookstore—books, nevertheless, which they might not buy from the bookstore in any event. Particularly is this true of those who spend only a fixed total sum on books per year.

31. Another most significant factor as to public interest here is that the relief sought will not reduce book prices. Bookseller witnesses were unanimous in their desire for price maintenance, and the secretary of the American Bookseller's Association said his membership was practically unanimous against any change therein. That they were equally unanimous against the provision attacked here is, of course, to restate the obvious. The Hearing Examiner does not see on this record how the consuming public will be benefited pricewise, servicewise, qualitywise or any other wise by the corrective action sought. Only that segment of the public comprised of retail booksellers can benefit by giving them a monopoly of the most profitable sale period.

32. Still another aspect is presented by the fact that many retail booksellers take subscriptions in their own bookstores for the book clubs for a fee of 30% of the subscription price—thus, in effect, nourishing in their very bosom the economic viper they claim to be killing them. In fact, the record shows that 300,000 of Literary Guild's 770,000 members subscribed through department store book departments. The record does not show how many bookstores do this, nor how many such subscriptions are taken by each nor by all, nor what

their fees for doing so amount to individually, or the average, or in the aggregate, so that fiscal comparisons with their average or actual investment, income or sale volumes are impossible, but certain it must be that their claimed economic injury must be bruising rather than lethal or they would not thus feed the mouth which bites them. The glib excuse given by some that "if you can't beat 'em, jine 'em" is wholly inconsistent with any claim that the injury is mortal.

33. On balance then (to use an expression used by the Commission previously in this case in another connection) the overriding public interest clearly seems to the Hearing Examiner in favor of sustaining the attacked provision and the practice which it expresses as a reasonable restraint of trade under all the circumstances of this case. The finding therefore is that the agreement between respondent and any book club, or the practice without an agreement between them, to release for public purchase the publisher's edition and the book club edition of the same literary work, simultaneously, is a reasonable and therefore legal restraint of trade.

34. Respondent has been sublicensing the book club rights since the early 1930's. Up until 1938 or shortly thereafter there were obviously no provisions relating to "fair trade" in these licenses but since then respondent has agreed therein that it does or will "fair trade" its publisher's edition through its distributive outlets and would in effect exempt the book club therefrom. These provisos have not been all uniform, but the fact is that respondent does maintain prices under the Federal Fair Trade Laws in fifteen States on all its publications. Recently these provisions have been omitted from the sublicenses, but it is immaterial here that they were not included up until 1938 or thereabouts or have been recently dropped out. It is likewise immaterial that the book clubs were formed long before the enactment of Fair Trade Laws, that they then undersold as they do now or that they were not formed to accomplish that end. The fact remains that respondent's bookselling retailers have been and are now legally bound to resell in fifteen States only at prices fixed by respondent. Of course, this charge can only apply to that area and to those books which the book club selects and which are likewise sold by respondent's customer retailer.

35. The competitive effect on the retail bookseller is obvious to the Hearing Examiner. Nothing which has been added to this record since his ruling on respondent's motion to dismiss has changed the factual picture in this respect. As was said before, the provisions and the act effectively insulate the book club from price competition on its own distributional activities, and restricts pricewise one avenue of distribution while holding a price umbrella over another and com-

petitive avenue. Respondent's retail bookseller is in a price strait jacket, the book club is free to sell the same book at any price it will. Below the level set by respondent, price competition has been eliminated between the two.

36. The exemption of B. O. M. C. from price maintenance by respondent is a waste of paper. B. O. M. C. is entirely independent of respondent and deals with it at arm's length. It is not, and cannot be, under its sublicense from respondent the "vendee" spoken of in Section 5 (a) (2) of the McGuire Act. It is the sole producer of its branded product—the book club edition. Respondent cannot legally fix the resale price of the branded product of another—there is no resale price of respondent to fix and it does not own the brand. B. O. M. C. is thus exempt by operation of law—not by any contract which can add nothing to the law.

37. In the four States—New York, Pennsylvania, Massachusetts and Louisiana—where respondent maintains wholly owned retail bookstores, respondent, through them, is in competition with both B. O. M. C. and with its customer retail booksellers in endeavoring to sell to the reading public the same literary work. These retail outlets of respondent are located in New York City and Rochester, New York; Philadelphia and Hanover, Pennsylvania; Boston, Massachusetts and New Orleans, Louisiana. The number of retail booksellers who buy from respondent and resell its trade books located in the same cities are respectively 891, 26, 124, 1, 70 and 21 and respondent's total sales volumes to these outlets in these cities was, in 1952, $1,757,-542.66, whereas respondent's sales to respondent's own outlets for the same period totaled $194,878.09.

38. Outside this area, however, respondent is not in competition with B. O. M. C. nor with its retail bookselling customers. The latter are in competition with each other but not with respondent. The complaint in this count charges only unfair methods of competition—it does not charge unfair acts or practices. There cannot be an unfair method of competition unless there is competition between the one charged and the alleged victim.

39. The finding, therefore, is that as to B. O. M. C., any contract, agreement or understanding between it and respondent, providing that respondent will "fair trade" its publisher's editions to its retailer customers in New York, Pennsylvania, Massachusetts and Louisiana of any book which is, or may be, selected by B. O. M. C. for book club production, is an unfair method of competition as to such retailer customers with whom both respondent and B. O. M. C. compete in the area described.

40. As to the Literary Guild, this is a wholly owned subsidiary of respondent with interlocking officers. For practical purposes, on this record, Literary Guild is a part or division of respondent. In this situation, respondent is, through Literary Guild, in direct price competition with its retail bookseller customers for the consumer market on those books selected by Literary Guild, sublicensed from respondent, and sold in the 15 States noted. In this situation, respondent, with its right hand compels its retailer customers to sell at a fixed price, and with its left hand, undercuts its own customers in the same market on substantially the same product at lower prices. Since Literary Guild competes nationwide with all retail booksellers, including all or practically all of the respondent's retailer customers, there is in this situation no area limitation, except the 15 States where respondent presently "fair trades" its books. The finding is, and any prohibition must necessarily be, limited of course to just those books published by respondent which are also selected by Literary Guild.

41. The fact that Literary Guild has thus undercut pricewise the retail bookseller since the early 1930's, long before "Fair Trade Laws" were enacted; that it sells not only the books of respondent but those of other publishers; that it was not organized for that specific purpose, is, it seems to the Hearing Examiner, beside the point. It is not motive, but the effect upon it, in which the public is interested.

42. The fact that retail booksellers have for many years favored and voluntarily observed suggested resale retail prices is immaterial. If they do so voluntarily and suffer competitive injury, that is their affair and no concern of the law. But here they are not free to do so.

43. It is likewise immaterial at whose instance or for whose benefit this resale price maintenance was agreed upon, or whether the book club coerced the publisher or vice versa into such an agreement. The fact still remains that the respondent has prevented its retail bookseller customers from competing pricewise with it, respondent, below a level fixed by respondent, while respondent, through its own agency, the Literary Guild, undercuts that price. It likewise freezes them, well aware that B. O. M. C. is unrestricted.

44. In the Hearing Examiner's opinion this is clearly an unfair method of competition on the part of respondent, and it is a directly contributing cause to the demonstrated price plight of the retail bookseller.

45. While the above findings are necessarily limited geographically by present practices, there is nothing to prevent respondent from "fair trading" in many more than the present fifteen States, and nothing to prevent it from opening wholly owned retail outlets in additional "fair traded" States, thereby widening the orbit of its compe-

tition, and increasing the impact of the unfair method of competition found. Hence the order, hereinafter set out, is not, and should not be, limited as are the findings of fact.

Count II

The charge here is vertical price fixation, or, in lay language, "fair trading" respondent's copyrighted books. There is no dispute that respondent does so. This, of course, is illegal, absent an exempting statute. Respondent defends on that basis—the Miller-Tydings and subsequently the McGuire Act, which expressly permit this as to a branded commodity "which is in free and open competition with commodities of the same general class produced or distributed by others."

To this, counsel in support of the complaint assert that copyrighted trade books are not and cannot be, by reason of the copyright monopoly, in free and open competition, one with the other, and further contend that the competition meant by the statute means only such effective competition that if the price of one commodity is set too high, the price of some other commodity will cause loss of sales of the first commodity and force a lowering of its price—in other words—price competition.[10]

The Hearing Examiner, however, is of the opinion that this decision is too narrow to be applied to all industries, and on this record, to the publishing industry. The Eastman case involved colored versus black and white photographic film, part of the former, the roll of which would fit only cameras made by the film producer. The record here shows that as to some purchasers at some times books compete on price, subject matter, author, style, authenticity and treatment. Price competition is not the only form of competition, nor the only form recognized by the antitrust laws.

The issue under this count, then, is whether or not respondent's copyrighted trade books are in free and open competition in price or otherwise with those of other publishers and thereon, in addition to the findings of fact heretofore made under Count I, supra, the facts are further found as follows:

46. There is substantial evidence in the record from several booksellers, offered by counsel for proponent, that 75-80% of their customers ask for a particular title when coming in to buy and that any effort by the bookseller to persuade such customers to buy instead a different book, on the same or different subject matter, or at a lower price was abortive, that as to this 75 or 80%, even though the price was thought to be too high, the customer would postpone purchase of that particular

[10] Eastman Kodak Co. v. F. T. C., 158 F. 2d 592.

book until a later date, rather than purchase a cheaper substitute of the same type. With the remaining 20%, substitution was presumably possible and achieved, or else these customers were browsers or shoppers. Several of these witnesses were book dealers, and two others were managers of book departments in large department stores in Washington and Cleveland. One of the latter, proponent's chief and most informative witness, admitted that children's books—juveniles—did compete pricewise and otherwise, that these constituted 25–30% of her volume [11]; that 20% of them were copyrighted and that mystery stories also competed to some extent.

47. This evidence is in line with the contention of proponent counsel that the retail bookshop being the market place, that it is therefore the sole place for determining whether competition exists between copyrighted trade books. It would be hard to imagine any product where this generalized sophistry, nostalgically reminiscent of Adam Smith, would be less applicable than in the sale of books. Modern advertising and display are thereby ignored as well as the distinctive, if not unique, character of books as compared to dishtowels or rutabagas. New books, particularly fiction and non-fictional commentaries on present day problems and recent history, and memoirs are reviewed in detail by most newspapers of large circulation. The best known examples are, of course, the book review sections of the New York Times, the New York Herald and the Chicago Tribune. Reprints of these are frequently sent out by booksellers. In addition to this, the latter, and department stores with book departments, customarily send out descriptive circulars, inserts and stuffers with monthly bills. On top of this is the widespread advertising of publishers describing forthcoming books. All of this material shows the author, the publisher and the price. The record shows that this material is widely, even avidly, read and that the competitive forces determining selection are then present in the home, the office and the discussion group. Small wonder it is that such a high percentage of book buyers come into the book shop for adult reading with their selection determined.

48. Against this evidence of booksellers, respondent offered the testimony of the Chief Librarian of the Brooklyn Public Library, which has 57 branches with 700,000 registered borrowers and which spends $600,000 a year buying new books. In these purchases, price is the most important factor, general appeal is next. Out of the 10,000 to 11,000 titles published each year, 7,000 to 8,000 are read for selection

[11] Tr. 2423.

by his staff and about 5,000 are purchased. Books compete for his purchase on price.

He further testified that except for those doing research work or school assignments, most patrons come into the library looking for a book on some subject. This is particularly true of fiction and of the "how to raise bees" or "build a garage" type. The library also puts out selected lists of a number of books in a given category and conducts discussion groups of various books in the same general class. His experience is that it is easier to substitute one novel for another in the same general area than in any other book category. Witness had no experience selling books—only in buying them, and no distinction is made by him between copyrighted and non-copyrighted books.

49. The President of McGraw Hill Publishing Company also testified that his company published 300 books in 1953, the result of going over some 5,000 submitted manuscripts, 65 of which were in the trade book field, 100 in the college textbook field, 15 in the school book field, 40 in the industrial and business field, and 40 in the technical field. He stated that his company "fair trades" its books, that the price at which a book can be sold frequently determines whether he will publish it or not, that in determining the retail price of an offering he must and does consider the price at which a book on the same subject matter published by his competitors is being sold. He has had to lower the price on his trade books because of the price of a book published by another publisher. He wants his books to compete on price and authority with those of other publishers and selects manuscripts, produces and prices on that basis. Consequently, he was firmly of the opinion that trade books—not technical books—do compete pricewise and otherwise with other copyrighted trade books.

50. To the same general effect was the testimony of responsible officials of Houghton Mifflin Company, Harper & Brothers, Simon and Schuster, Inc., Little, Brown and Company, Inc., Random House, Inc. and Viking Press, Inc., all of which are publishing houses of substantial size, publishing a wide variety of books in the same classes as respondent. All of them do a gross volume in excess of two million dollars a year and publish from 65–125 new copyrighted trade books each year. From ¼ to ⅓ of this volume is in juveniles with most of them, and "westerns" and mystery stories account for another substantial segment. All of these witnesses testified that they fix their retail prices for their books with a keen eye to the offerings of others—both as to subject matter and price; that rarely can they obtain, with

any profitable volume, more than $3.00 to $4.50 for fiction or $2.50 for a mystery story; that to charge more than what other publishers charge for the same class of book would ruin sales; that they have lowered a previously fixed retail price on one of their books when another publisher did on a comparable book; and that they have had to likewise lower a previously fixed retail price when their salesmen reported that individual book buyers were complaining to retail booksellers about the price.

51. They further testified, with one exception, that they spend in excess of 10% of their sales volume in extensive consumer advertising of their new trade books and furnish free, tens of thousands of a new book to reviewers and critics. All of them were of the opinion that copyrighted trade books do compete with other copyrighted trade books in price as well as subject matter and that this competition was most dominant and noticeable in juveniles, "westerns" and mystery stories, in all of which classes, two of them testified substitution of one book for another could be and was made to the customer.

52. Five of these seven publishers are respondents in the five companion proceedings to this one and with the same charge involved, therefore, these witnesses cannot be said to be disinterested. However, the other two publishers, whose officials testified, are completely disinterested and their testimony corroborates a substantial part of that of the five. Additional corroboration is to be found elsewhere in the record, the detailing of each bit of which would unduly extend this decision. In addition to that, the vice president in charge of respondent's sales testified in detail to the same effect.

53. The buyer for all the Brentano stores testified that the purchase volume there is about 3 million a year, and comprises the books of all publishers, copyrighted and non-copyrighted. These books are widely advertised by Brentano's by circulars (mailing list 70,000), periodical advertising and discussion groups so that the trade book of one publisher is contrasted with the trade books of other publishers and competes for the eye, ear and the mind of the advertising target. She testified on the basis of 20 years of bookselling and supervision of that selling that many people are browsers and shoppers; that the trade books of one publisher definitely competes in price with those of another publisher; that as little as 50¢ will switch a customer's choice from one fiction book to another; and that she has seen much "impulse buying" engendered by attractive and eye-catching displays, where a previous idea of purchasing a particular book was switched to the purchase of another. This price competition applies to all categories but not in every case or every time. Her estimate was that 50% of

the people who come into Brentano's stores come in with a specific book in mind to buy, that the other 50% come into shop and browse, but that in the case of a book department in a department store the percentages were 25% and 75% respectively. The witness had many years of experience selling books in a large department store. She also testified that price resistance was a basis for purchase substitution of one trade book over another in all fields of current books. She testified that substitution takes place in one-half of the instances where the customer has asked for a specific book upon entering. In her purchases for the Brentano chain, she is always price conscious. Fifteen to twenty percent of these purchases are in juveniles. Most of this testimony was illustrated by specific examples. She further testified that there is no one reason why people buy books, the reasons are innumerable.

54. Another bookseller, doing $45,000 with an inventory of $15,000, and making 40 book sales a day employing 3 clerks in Larchmont, suburban New York City, for 7 years, testified that book jackets, type, displays (not on shelves but on tables where accessible, and particularly in the front window) all influenced the customer's selection. Changing from wall shelves to tables markedly increased his business. Ninety percent of his customers are regular customers personally known to him or his clerks. About 50% of the 40 books which he sells per day are asked for specifically by the customers when they come in but these customers, nevertheless, always examine the books before buying, and frequently compare them with others. When he makes a suggestion for a substitute, he suggests a variety rather than a single book. Fifty percent of his customers to whom he makes sales come in with no specific book in mind but shop around for a selection. His store traffic is approximately 200 people a day. He further testified that when the book specifically requested by a customer is out of stock he is able to substitute another and based on his experience, he is of the opinion that books do compete with one another in price, subject matter, and physical appearance. Substantially the same testimony was given by respondents' vice president in charge of its 30 retail stores, who had several decades of experience in the retail sale of books.

55. Another bookseller, located on East 57th Street in New York City, testified that ⅔ of his store traffic are regular customers; that he specializes in books of the Catholic religion and that ⅔ of his trade is in that type of book and that he has 3 employees and an inventory of $20,000. Approximately 50% of his customers come in with a specific title in mind and usually mention that they have seen a book

review or an advertisement about that particular book or that someone has told them about it; that they all want to examine the book before they buy it and that sometimes they reject it and they ask what the price is if they do not already know from the book review or the advertisement. He further testified that he is frequently able to substitute one book for another and that he frequently hears the argument that a book is too expensive, in which case he offers another book on the same subject matter and that sometimes the customer buys it, sometimes not. He also was of the opinion that open and accessible display was most important in selling books and that when he makes a suggestion for a substitution he names several substitute books. In approximately ⅓ of the cases where such suggestions are made, the substitute is bought. He further testified that price is a most important factor in sales potential and that copyrighted trade books in his store compete one with the other. Two-thirds of his customers have charge accounts, many order over the phone but even then very often they ask for a clerk to discuss the book to buy. He further testified that he wished he could say that it was the book's intrinsic or its literary merit that sold it but that he thought that often it was a colorful jacket—that bad jackets or bad print could kill the sale of a book of good quality.

56. Finally respondent produced 5 book purchasers whose testimony as to their book buying habits was so variant as to warrant its rehearsal in some detail. The first witness was, at the time of testifying, a literary agent and had been a writer—in fact, had spent a great portion of her adult life with authors, book publishers and the literary world. She spent an average of $75 a month on books and had hundreds in her personal library. She had definitely developed literary tastes and knew what was coming out long in advance of publication. She orders a substantial number of her books before publication and only reads book reviews after publication. The only influence they have on her is that if they are bad she takes the books back. It was evident that she not only had definite and fixed ideas in the purchase of books but in a great many other things as well. She testified that she was highly selective in her purchases; that she was not a browser; that she knows very definitely when she goes into a bookstore just what she wants; that she is not influenced by the price of the book except where a price difference exceeds $25.00; that she frequently does not know the price of a book when she buys it as price makes no difference to her and that no one could substitute one book for another.

57. Another young man testified that he spent $200–$300 a year on books and had been buying them for his personal use for 18 years.

His method of buying was to go to a bookstore and if he had a definite book in mind, ask for it, look it over and if it did not appeal to him after looking it over, he would then put it down and browse for something else. Book reviews, dust jackets, displays and price all influenced his purchase. He testified that 75% of the time that he entered a bookstore, that he did so to browse. The other 25% of the time he went in to buy a definite book but did not always buy that book because if it did not appeal to him upon examination, he might leave without buying anything or come out with some other book. He was of the opinion that books were a commodity of the same general class and that they were in price competition for his dollar. However, he did not permit substitution on gift purchases. In many instances price switched his choice from one book to another.

58. The third witness, a housewife, testified that she bought from 30–40 books a year; visited bookstores about 3 times a month; spent from 2 to 3 hours at a visit; that 70% of the time she went into the bookstore with some idea of the type of book she wanted and then shopped around among all the books of that type, narrowing her choice from several to a maximum of 10 and that the other 30% of the time she went in to buy a particular book. She testified further that her purchases were influenced by the manner of displays, by the dust jackets, paper, number of lines to the page, price, book reviews, discussions with her friends and by book advertisements. She testified further that she always takes prices into consideration and compares books and that, so far as she is concerned, books are in competition one with another. She testified that at times she asks the bookstore clerk's opinion, particularly if she has gotten acquainted with the clerk and that if a book she wants is out of stock sometimes she takes another, sometimes not, depending upon the type of book. When she buys books for gifts she does take substitutes.

59. The fourth witness bought from 15–20 books a year, visiting bookstores 2 to 3 times a month for that purpose and only 10% of the time does she have a specific book in mind. She is a browser and compares books as to subject matter, authority, literary style and price. She spends from 2 to 3 hours at a bookstore when she goes in and if she has a definite category in mind, will look at 10 books and will examine from 4 to 5 thoroughly. She further testified that book reviews, advertisements, dust jackets, displays and word of mouth discussions all influenced her purchases and that she frequently purchases substitutes. Lastly, she said that 25¢ or 50¢ difference in price would not cause her to buy one book over another but that $1.00–$2.00 did and that books definitely compete for her purchasing favor.

60. The last witness of these consumer witnesses maintained a personal book library of 5,000 to 7,000 volumes and reads from 15 to 25 books a month, was a bookstore browser and bought specific books about 50% of the time. He further testified that he was definitely price conscious except where he wanted a specific title; that no one thing ever determines his book purchases; that the displays, reviews, advertisements, jackets and price all play a part and that price plays a greater part in non-fiction than in fiction.

61. The testimony of these book consumers shows in more variant detail what is apparent on the face of the record as a whole and that is that there is no such thing as a typical book buyer; that there is no pattern in consumer book buying; that the attraction, and therefore the competition, varies from book to book, authority to authority, style to style, subject matter to subject matter, reader to reader and furthermore varies from time to time with any one given reader, or, stated otherwise, that books compete for the consumer's purchase on subject matter, authority, treatment, authenticity, documentation, literary worth, format, printing, illustration and price. It is also apparent that these competitive forces are not constant but are constantly varying—that while price may be the paramount consideration at one time with a customer, at another time it plays no part whatsoever. The picture is not all black as counsel in support of the complaint would paint it, nor all white as counsel for the respondent sees it.

62. The record does abundantly show that books in certain rough categories do compete pricewise most of the time, namely, juveniles, mysteries and westerns and the record further shows that these account for about 16% of respondent's sales.

63. On the other hand, textbooks, research books, authoritative books and reference books very seldom, if at all, compete on a price basis because if a surgeon or other scientist wants a particular work, he must have it, and price is of no concern. Likewise, a student or researcher must own and consequently use a specific book, as a carpenter uses his tools. These, however, account for only .06% of respondent's sales.

64. Fiction competes in price with some people all of the time and with others at some times. At other times it does not. Non-fiction is in the same category, depending upon the book buyer's literary taste, the fields of his reading interest, his need or desire for a particular type of memoir, autobiography or commentary on current events. These two categories comprise 84% of respondent's business.

65. There is a direct conflict in the evidence of booksellers as to whether most people buy specific books without regard to other books, pricewise or otherwise, and whether one book can be substituted for the sale of another. But the testimony of the publishers, giving specific

examples, uncontradicted on this record, that they must and do lower prices because of the prices of other books on the same subject matter; the testimony of book buyers as to their purchasing habits, that they shop and browse, and compare; and that price differences determine and change ultimate selections for purchase, makes a clear preponderance of evidence that the great majority of books are in free and open competition with each other even on the narrow theory of the Eastman Kodak case [12] insisted upon by counsel in support of the complaint. On the broader theory that in the book publishing industry competition must mean competition in subject matter, author, treatment, etc., as well as competition in price, the evidence is overwhelming that copyrighted trade books are commodities of the same general class and are in free and open competition with each other for the consumer's dollar.

66. In addition to all this, the evidence affirmatively shows that 700,000 members of the Literary Guild and 500,000 members of the Book of the Month Club purchase up to 12 or more books a year, solely on the basis of price, sight unseen, contents unknown, and with all other factors entering into book appeal likewise unknown and wholly dependent upon the selection made by the Club. Much of the evidence offered by counsel in support of the complaint is to the effect that these book club members purchase because they obtain the same books for less money than they can purchase them in bookstores. With all other factors, except price, unknown and selection entirely dependent upon a Club Board, it cannot be argued that these books which cover the entire range of subjects and categories published by respondent, except the .06% of medical and scientific books sold by them, do not price compete and, from the Book Club standpoint effectively compete on price, one with other.

67. Counsel in support of the complaint most insistently urge that respondent's copyrighted trade books are nonfungible commodities and since sold under legal monopoly they cannot as a matter of law be in full and open competition with the similarly copyrighted by differently authored books of other publishers. Without discussing the rather novel idea of whether two products which, from the evidence, are in full and open competition as a matter of fact that they nevertheless may not be as a matter of law, it is sufficient to note that the Supreme Court has held that the news dispatches of different writers [13] and the dress designs of different originators [14] not only can be, but are, in competition one with the other, that although the latter were not copyrightable, the former were, and to observe further each was the "crea-

[12] 158 F. 2d 592.
[13] Associated Press v. U. S., 326 U. S. 1.
[14] Fashion Originators Guild et al. v. F. T. C., 312 U. S. 457.

tive product of the intellect" of a given mind just as is the work of an author. And 37 state legislatures by expressly including the word "publisher" in their state fair trade laws are obviously of the considered opinion that copyright does not prevent competition.

68. The finding therefore is that respondent's copyrighted trade books effectively compete on price in substantially all instances with the copyrighted trade books of other publishers, and that they always compete in subject matter, treatment, style, literary merit, format, type, documentation and author with the copyrighted trade books of other publishers, and are accordingly within the immunity of the McGuire Fair Trade Act, so far as the question of competitors is concerned. It follows that Count II should be dismissed.

Count III

The charge here is that respondent through its ownership and operation of retail stores is a retailer and as such competes for consumer purchases with its purchasing consumer outlets and that the McGuire Act [15] expressly exempts from its immunity of vertical price fixation price maintenance "contracts or agreements * * * between persons, firms, or corporations in competition with each other."

69. The facts are simple and largely undisputed. Respondent price maintains its dictated list price on its books in fifteen States under the provisions of the McGuire Act. In four of these States—New York, Pennsylvania, Massachusetts and Louisiana—it owns, controls and operates 16 retail stores. The relief sought is accordingly confined to this area and to copyrighted trade books published and sold by respondent.

70. In the area described, respondent sells to independent retail bookstores as follows: New York City, 891; Rochester, 26; Philadelphia, 124; Hanover, Pennsylvania, 1; Boston, 20 and New Orleans, 21. Sales of respondent's books to these stores by respondent for the fiscal year ended April 3, 1953 and sales by respondent to its own retail outlets for the same period were as follows:

	Independent book retailers	*Respondent's own stores*
New York City	$1,285,923.75	$164,490.10
Rochester	25,908.14	2,484.84
Philadelphia	175,275.05	6,009.70
Hanover	13.89	1,721.15
Boston	238,269.60	16,092.29
New Orleans	32,152.23	4,080.01
	1,757,542.66	194,878.09

[15] Sec. 5 (a) (5) of the Federal Trade Commission Act (15 USC 45).

These figures do not include sales to stores located in the suburban or contiguous areas of the above-named localities, but they do show that respondent's own retail stores sell less than 10% of respondent's total sales volume in the six cities listed and from other statistics in the record 8.22% of respondent's total sales in the four state area.

71. The Commission has already found and the record shows that respondent's own retail outlets and its independent retail bookseller purchasers do compete with each other for consumer custom. Since both resell to consumers at respondent's fixed list price, the former by executive direction and policy, the latter by force of "fair trade" contracts, there is no price competition between them in such resale of respondent's books.

72. There is no suggestion in the record that a bona fide relationship of seller and buyer did not exist between respondent and its retail bookselling customers, or that respondent, as a retailer, connived or agreed with such customers to maintain prices.

73. For the purpose of this decision, it is assumed that all nonsigner bookstore customers were bound by any contract or agreement signed with respondent by any one of them in any of the four States. It is immaterial whether respondent's retail business has increased or decreased over the years, or whether its competition through its retail stores has injured or affected its bookstore customers.

74. The issue on these facts is thus: Are respondent's "fair trade" contracts and resultant retail price rigidity or fixation legal under the McGuire Act, or do they make out the exemption quoted above and therefore are illegal?

75. These facts are indistinguishable, except in area coverage or number of outlets, from those in Docket No. 6040, in the matter of Eastman Kodak Company decided by the Commission January 6, 1955. In that case it was held that by the proviso partially quoted above Congress did not intend to withhold the immunity conferred by the McGuire Act from partially integrated producers and hence the fact that such a producer also sells at retail in competition with its customer, legally bound to resell at the same price, is not illegal. The Hearing Examiner is bound by this decision and bound to follow it. Further discussion is academic and unnecessary and it follows that Count III should be dismissed.

Count IV

The charge here is that respondent has sold the same books at different prices to different purchasers competing with each other in the resale thereof, resulting in actual or probable substantial injury

to competition in both the selling and reselling lines of commerce and in a tendency toward monopoly in the selling line, all in violation of Section 2 (a) of the Clayton Act (U. S. C. Title 15, Sec. 13). To this charge five defenses are interposed by respondent: (1) that its discount, and resultant price differentials are cost justified; (2) that such price differentials were adopted by respondent in response to changing conditions affecting the market for and the marketability of the books sold by respondent; (3) that such price differentials were made by respondent in good faith to meet the equally low prices, discounts, services and facilities furnished by respondent's competitors; (4) that such price differences are not price differences at all but are compensation by respondent to its customers for services and facilities rendered by the latter, varying in degrees and amounts in accordance with the amount of such compensation and that respondent has made such compensation available on proportionally equal terms to all of its customers; and (5) that some of its discounts to those of its customers performing the dual function of both retailer and wholesaler are in fact an average between respondent's wholesaler and retailer discounts based on the percentage of duality.

On the issues thus drawn, findings of fact, in addition to those heretofore made on the three preceding charges or counts in this complaint, are made as follows:

76. On each publication, respondent establishes a retail or consumer price, and the price at which such publication may be purchased by reselling distributive outlets is arrived at by granting a discount from this list price. Thus retailers bought from respondent at 40% off this list, wholesalers at 46% off list and those doing a dual business at 43% off list. There were at times different discount gradations between these figures, but these were most common and typical.

77. Only three of respondent's many customers purchased from it at a discount of 46% off list. These were the American News Company, the largest wholesaler or jobber of books in the United States, reselling nationwide, 80% of its volume being from the resale of magazines, 20% being in the resale of books, stationery and toys. In 1947, 30% of its sales of trade books were to libraries, 70% to retail bookstores and in 1953 these percentages were 55% and 45% respectively. Through a wholly owned subsidiary, the Union News Company, it resells books and magazines at retail, including books purchased from respondent at the latter's lowest price of 46% off list.

78. The second price favored customer is A. C. McClurg Company of Chicago which wholesales not only books but stationery, office

supplies, school supplies, toys, gifts, housewares, sporting goods and dinnerware—less than 40% of its business being in books, which are resold to retail book dealers and libraries. It also operates two retail stores at which it resells books purchased from respondent at 46% off list, directly to consumers at list.

79. The third 46% discount purchaser is Baker and Taylor, wholesaling to retail book dealers and libraries, the latter accounting for 40% of its sales and consisting of 5,000 to 6,000 accounts.

80. All of these three accounts have enjoyed their 46% discount for more than 20 years, all of them are in competition with each other in reselling to retail book dealers and libraries, and all of them are in competition with one or more of respondent's customers who buy at less than 46% discount from list, usually 43%, and who resell as jobbers to retail book dealers and particularly to jobbers.

81. The officials or owners of eight or nine of these latter testified to their business details, their purchases from respondent and their attempts to resell particularly to libraries. All of them in such activity were in active competition with one or more of the three customers of respondent described above, and with one or more of each other. No useful purpose could be served by rehearsing here the details of their individual operations. Suffice it to say, they were all established for a number of years, all were substantial in inventory and sales volume, with one possible exception, all had found that libraries buy on bids, for the most part and since libraries operate on strict budgets, that price is the primary and, in most instances, the sole consideration. All testified that they had repeatedly lost bids to American News Company, Baker and Taylor or A. C. McClurg because of the slightly lower prices quoted by the latter, that even when they bid prices which left them no profit, they were still underbid by one of these three who of course had a 1% to 3% greater margin on which to bid. The testimony is that ¼ to ½ of 1% off list will switch library business. This, and the loss of bids was corroborated by the testimony of two public librarians. With one of the latter, price was the only consideration in buying, with the other, if two bids were equal in price, the contract would go to the bidder offering the fastest and best service but price was the first and primary consideration.

82. The record shows that competition between wholesalers, jobbers and "subjobbers" for the trade book business of libraries is active and keen, that over a period of years this business has increased, while the resale of trade books by these distributors to retail book dealers has decreased; and that the proportion of sales to libraries of two

of the three "Big Three" wholesalers (as they seem to be called in the industry) has increased in recent years over their respective sales of trade books to retail book dealers.

83. It is obvious that in a market where sales are sensitive to, and even determined by, as little as ¼ or ½ of 1%, that the 3% differential with which respondent favors these "Big Three" puts at their disposal an ability to quote and resell at a profit, lower than any of their competitors, so unfavored by respondent; that the discount differential here involved is substantial and that its effect may be substantially to lessen competition and have a tendency toward monopoly in this reselling line of commerce.[16] The record here goes further, however, and shows repeated instances of loss of business directly traceable to this discount differential and a slow but steady growth over a period of years in the library business of the favored.[17]

84. There is no substantial evidence, however, that these price differences have substantially lessened competition with respondent or tended to create a monopoly in it, nor that there is a reasonable probability that they may do so. For aught in the record, respondent's competitors may grant the same, similar or even greater discounts to the same purchasers, the price disparities may be even greater, their sales may have increased or diminished—there are simply no facts in this record from which seller-line injury or monopoly may be inferred.

85. For first defense to this showing, respondent alleges but has not proved that its price differences, to different competitor purchasers, make only "due allowance for differences on the cost of manufacture, sale and delivery resulting from the differing methods and qualities" in which books are sold by respondent. No accounting analysis of these operations was presented. Respondent's responsible official admitted that respondent has never made a detailed cost study or survey to justify its discount differentials, either before or since June 19, 1936; that because of its widespread and varied operations and the complexities involved, it was impossible or impractical to do so; and that it has never made any analysis of its cost of sales or distribution of its trade books to any purchaser, nor has it ever made any detailed investigation to determine the nature of the services which may have been performed or offered by the unfavored jobbers in competition with the "Big Three." Accordingly, the finding is that this defense is not sustained.

86. Next respondent defends on the ground that the discount and price differentials referred to were adopted by respondent in response to changing market conditions. There is nothing in the record to

[16] F. T. C. v. Morton Salt Company, 334 U. S. 37.

[17] The sufficiency of proof to make out a prima facie case has in effect been determined. Motion to dismiss was denied and not appealed to the Commission.

show any changing market conditions, nor to show that respondent fixed its discount differentials in reference to any particular market conditions. In fact, the "Big Three" have enjoyed their maximum differentials since prior to 1925 and respondent's discount schedules have remained unchanged from prior to 1925 to 1953, when this proceeding was well along in trial. This defense is wholly unsustained even in bold outline, let alone in detail.

87. Respondent next contends in its answer, at least, that its discount differentials were made by it in good faith to meet the equally low price, discount, service and facilities furnished by competitors of respondent to the purchasers concerned.[18] It is, of course, implicitly mandatory from the law itself that to meet the equally low price of a competitor that the price so met must be shown. The record here does not show at what prices competitors of respondent sold or offered to sell to respondent's customers. The only evidence on this point is the testimony of respondent's vice president in charge of sales, the respondent's competitors did have a subjobber price classification, but at what price, what competitor, to whom or when is unknown. He also said that he "assumed" Harper & Bros. was selling full jobbers as full jobbers but that he did not know what other publishers were selling at. An official of A. C. McClurg Company, one of the "Big Three" testified that his firm did not receive the same discount from the other 300 publishers from whom it bought as it did from respondent; that from some the discount was greater than that extended by respondent, from others it was lower, although he did say it was lower from the MacMillan Company than from respondent. Here again one is left in the dark as to just what prices respondent claims to have met, whether they were equally low, to whom they were extended, when and under what conditions. Respondent has failed to show a meeting, as required by the sanctioning statute, let alone whether the price met was equally low, or whether it was in good faith. Needless to say the further requirements of F. T. C. vs. Staley Mfg. Co., 324 U. S. 746 and Standard Oil Company vs. F. T. C., 340 U. S. 231, that the discriminatory price claimed to have been made to meet the equally low price of a competitor in good faith must be temporary, localized, individualized, defensive rather than aggressive and not part of a pricing system, and that the price so met must be a lawful price, or believed to be such, have likewise not been shown. There is no evidence in the record on these points.

88. The fourth defense of respondent and the one on which the only substantial evidence was offered is that respondent's price and

[18] Section 2 (b) of the Clayton Act, Title 15, Sec. 13 USC.

discount differentials are not actually what they are called, but are really payments by respondent to its customers as compensation for services and facilities of value to respondent furnished and made available by such customers, and not furnished or made available by purchasers who do not receive such differentials, which compensation is available on proportionally equal terms to each of respondent's customers.

89. At first blush, this appears to be a pleader's retrospective attempt to convert a charge of price discrimination under Section 2 (a) of the Act, to one of discrimination in payments made to customers for services rendered by them in violation of Section 2 (d) of the same Act. The record abundantly shows, however, that respondent did not operate that way. Since 1920 respondent has granted varying discounts from retail list on its sales, has carried such transactions on its books as price differences, has published and maintained price discount schedules as such, and so far as the record shows has never advanced the idea of payments to a customer instead of prices charged a customer, until the answer filed in this case. Respondent at no time formulated or made known a list of "services" for which it would pay stipulated sums over given periods graduating "proportionally" the sums to the services either quantitatively or qualitatively, although the Act commands that such be made "available." Available certainly connotes advice by respondent, and knowledge by all of its customers.

90. Nor from this record did respondent ever ascertain what "services or facilities" its unfavored customers (those purchasing at 40% or 43% or some other figure less than 46% off list) could furnish, or their character, quality or amount, although there is substantial evidence in this record that some of them did furnish some of these services in lesser degree. Nor did it ever formulate or disseminate any base or standard, either optimum or minimum, to which other "services" or "facilities" qualitatively or quantitatively could be "proportionalized." This is fatal.

91. As was said in Elizabeth Arden Sales Corporation v. Gus Blass Company, 150 F. 2d 988 (CCA 8):

> There is another fallacy in appellant's argument which is inescapably conclusive of the situation. On the findings of the trial court and the evidence, appellant's furnishing of clerk's services, or payment of clerk's salaries to appellee and Cohn Co., cannot be claimed to have ever had any established or determinable basis or standard whatever. The allowance had been fixed in both instances at the time the purchase of goods began and there it simply remained. The amount was arrived at by personal negotiation and individual agreement, nor was it based on any other guiding factor, such as a difference in the character of the stores and the type of facilities afforded for handling appellant's products, if that could have been made to constitute a valid legal distinction.

We think it must be held that a seller engaged in commerce who furnished clerk's services or pays clerk's salaries in unequal amounts to customers competing in the distribution of its products, which amounts have no other bases or standard than the seller's discretion or favor, and as to which there is no competitive way for such customers to qualify for proportional or equal levels, is to the extent of any differences in such amounts guilty of discrimination.

* * * * * * *

That which was discriminatory when done, because wholly unrelated to any proportionalized bases or standard, cannot subsequently * * * be artificially tailored into proportionally equal terms by fixing it to some imaginary basis or standard that has in fact never existed.

The Court here also quotes with approval the holding of the Federal Trade Commission in the matter of Elizabeth Arden, et al., Docket No. 3133, 39 FTC 288, subsequently appealed to the Second Circuit and affirmed there in 156 F. 2d 132. The claim by respondent, therefore, that it was operating on a compensation rather than a discount basis, or stated otherwise, that it can defend as if the charge was under Section 2 (d) instead of Section 2 (a) of the Act, must be and is rejected.

92. This defense must be regarded, was treated during trial and is here treated as claiming that price differences charged competing customers are justified on the basis of services performed and facilities furnished by the price favored customers on their merchandise in the resale therefor. Much evidence was tendered by respondent on this point. In general, it consisted of testimony by officials of the price favored "Big Three" of their multimillion dollar sales volumes, that they stock the books of all publishers, maintain huge and variegated inventories, both dollarwise and unitwise, maintain branch sales rooms and warehouses throughout the nation or substantial portions thereof, travel a substantial number of salesmen, maintain huge numbers of employees in their warehouses to fill orders, large and small and to process them, service thousands of retail book dealers in delivery and credit, issue thousands of expensive catalogues periodically, all of which costs a great deal of money (merchandising cost, 10% of sales), which costs would have to be borne by respondent and other publishers if they did not perform these functions.

93. This proffered testimony was to the effect, also, that the retail bookseller, customarily gives his first order in quantity, usually directly to the publisher; that reorders in units of as little as one, go to the jobber; that that is the type of order that is more expensive to process than an original order; that their service saves the retail book dealer and library much expense because the latter can in one order

procure from them one or more copies of the books of many publishers instead of having to make out a separate order for each different publisher. This is corroborated by the testimony of one book dealer and one librarian also. Furthermore, delivery from these wholesalers is far quicker than from any publisher. Respondent's vice president in charge of sales added that if the "Big Three" did not perform these services, respondent's distributive costs would skyrocket because it would have to greatly expand its order department, employ more salesmen, issue more catalogues and that some of these services were not feasible for respondent to perform.

94. All of this evidence is in the record on tender only, the Hearing Examiner having rejected all of it for the reason that prices cannot under the present law be varyingly fixed on the basis of what a customer does with his own merchandise in an effort to resell it. Pricing by customer service inevitably means pricing by customer, the very result the law was obviously intended to prevent. In Southgate Brokerage Co., Inc. v. F. T. C., 150 F. 2d 607 at 610–611, the Court held:

> The crucial fact is that all of the services upon which it relies are services rendered in connection with its own purchases, ownership or resale of the goods; and these services it renders, not to those from whom the goods are purchased, but to itself.
>
> * * * * * * *
>
> For sellers to pay purchasers for purchasing warehousing or reselling the goods purchased is to pay them for doing their own work, and is a mere gratuity.

Although that case was under a different section of the law,[19] the principle is the same and is reinforced by the fact that that section expressly included an escape hatch of "except for services rendered" not provided for in the section here involved.

95. This view is further reinforced by the fact here that the officials of the price-favored "Big Three" did not furnish these services on the basis of discounts or the amount thereof which they received from respondent or other publishers. They furnish the same services in reselling their purchases of books from all publishers alike, even though the discounts they received from other publishers, vary in amount among themselves and vary from those of respondent. It is thus impossible to say on this record that there was any relation between services, qualitatively or quantitatively, and discounts or price differences. Furthermore, it is only the seller's costs, not the buyer's, which may be shown defensively under the law itself.

96. The fifth and last defense of respondent is that because some of its price disfavored customers are dual function resellers, it was

[19] Section 2 (c) of the Clayton Act, 15 USC 13.

unable to determine what proportion of resales were as jobbers to libraries and retailers and what proportion were as retailers to consumers, and therefore respondent simply averaged between extreme (46%) and minimum (40%) discounts as a rough approximation of these resale proportions. There is no evidence that such a determination was impossible. There is no evidence that respondent made any intelligent or reasonable effort to determine this. It is common knowledge that in a number of industries, manufacturers who sell to dual-function resellers, grant their jobbing discount only on periodical proof from the customer of the amount of merchandise resold as a jobber. There appears in this record no effort to do this, and no reason why it could not be done.

97. Furthermore, one of the "Big Three" operates two retail stores of its own, and another, American News Company, through its wholly owned subsidiary, Union News Company, does an extensive retail business, although both received what is here contended to be, solely, a jobber's discount without any averaging.

98. The holding is that this defense is not a valid defense, and, even if valid, is not sustained by the record.

99. It follows that the showing made of price discrimination has not been rebutted, and the finding therefor is that respondent has discriminated in price between its customers competing in the resale of books purchased from respondent, with both actual and potential substantial lessening of competition and tending to create a monopoly in such buyer or customer line of commerce and that such price discrimination has injured and prevented resale competition by those paying the higher prices with those paying the lower prices.

ORDER

It is ordered, That the respondent, Doubleday and Company, Inc., a corporation, its officers, agents, representatives and employees,[20] directly or through any corporate or other device, in connection with the publication, sale or distribution of trade books, in commerce, as "commerce" is defined, construed and understood in the Federal Trade Commission Act [15 U. S. C. A. Sec. 45] and the Clayton Act [15 U. S. C. A. Sec. 13] do forthwith cease and desist from:

1. Entering into, maintaining, or continuing any contract, agreement or understanding of any nature with any book club or similar organization whereby respondent, while exempting said book club or organization from any responsibility for resale price maintenance,

[20] Since the factual picture, due to interlocking officers and directorates, and the manifold subsidiary and affiliated enterprises, owned, partly owned or controlled by respondent, is so different than that presented in R. J. Reynolds Tobacco Co. v. F. T. C., 192 F. 2d 535, 540–4, this phrase is here included.

undertakes to fix, establish or maintain the resale price, terms or conditions of sale of any literary work which it publishes and sells and which it also sublicenses such book club or organization to publish and sell, in any area wherein said book club or organization and retail book sellers purchasing from respondent compete with one another in the sale of such work.

2. Discriminating, directly or indirectly, in the price of trade books published by it by selling to any purchaser at net prices higher than the net prices charged any other purchaser, competing in fact in the resale and distribution of said books.

It is further ordered, That the motions of counsel for respondent to dismiss the entire complaint, and so much of Count I thereof as is covered by Par. 1 of this order, supra, and to dismiss Count IV of the complaint be, and the same hereby are, denied.

It is further ordered, That the motions of counsel for respondent to dismiss that part of Count I of the complaint not covered by Par. 1 of this order, supra, and to dismiss Counts II and III of the complaint are hereby granted, and the described portions of the complaint are herewith dismissed.

Chairman HOWREY delivered the opinion of the Commission.

The complaint in this case, in four counts, charged respondent Doubleday and Company, Inc., with engaging in unfair methods of competition in violation of the Federal Trade Commission Act and with discriminating in price between certain of its customers in violation of Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act.

Count I challenged three aspects of respondent's agreements with book clubs[1] whereby the clubs were sublicensed to publish and distribute separate editions of books selected from literary works also published by respondent, namely, (1) the granting of publishing rights to book clubs while refusing to grant similar rights to competing book sellers;[2] (2) the "simultaneous release" provision whereby it was agreed that publication of publisher's editions would not precede the publication of book club editions of the same book; and (3) the fixing of resale prices under "fair trade" laws on publisher's editions while exempting the book clubs from any form of resale price maintenance with respect to their editions.[3]

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[1] **Notably Book-of-the-Month Club and respondent's subsidiary The Literary Guild of America.**

[2] This issue was decided in favor of respondent in an earlier interlocutory appeal.

[3] Respondent's agreements with Literary Guild refer to specified resale price maintenance for publisher's editions of books sold through retail book sellers which also appear in book club editions, whereas its agreements with Book-of-the-Month Club exempt the latter from any resale price maintenance contracts that may be negotiated by respondent for the resale of its own editions.

The gist of the second count was that respondent's efforts to fair trade its publisher's edition of copyrighted books through retail book sellers was unlawful because such books were not in "free and open competition" with copyrighted books of other publishers and were therefore not within the resale price maintenance exemption of the Miller-Tydings and McGuire Acts.

Count III, no longer in issue, dealt with respondent's efforts to "fair trade" its books in a situation where it occupied a dual role as a publisher and a retailer operating some 25 stores in four different States. The theory of the charge here was that establishment of resale prices through retail book sellers would, so long as respondent operated retail stores, amount to a "horizontal" price fixing arrangement beyond the immunity of the Miller-Tydings Amendment or the McGuire Act.

Finally, Count IV charged respondent with violating Section 2 (a) of the amended Clayton Act by discriminating in favor of certain jobbers or wholesalers to the injury of others competing with them and to the injury of respondent's competitors.

The case is before the Commission for the second time. The Commission previously heard an interlocutory appeal from the ruling of the hearing examiner which dismissed Count III, and held that the first and second aspects of the book club agreements attacked in Count I were legal and protected by copywright. With respect to the latter we upheld the examiner's ruling as to the exclusive grant of publishing rights to the book clubs but remanded as to the second aspect holding that the simultaneous release provision was beyond the protection of the Copyright Act. The lawfulness of such provision, we said, should be determined, after reviewing all the evidence in the light of appropriate standards, according to whether the prior publication prohibition was reasonable or unreasonable.

All of the Commissioners voting on the previous appeal favored remand as to Count III but for different reasons. However, since the remand, the Commission has rendered a decision In the Matter of *Eastman Kodak Company*, Docket 6040, involving the same issue. The examiner has now dismissed Count III upon the authority of this decision and counsel in support of the complaint have not appealed that ruling.

The hearing examiner found that the simultaneous release provision was reasonable and therefore lawful. He held the agreements with book clubs agreeing to impose resale price maintenance on publisher's editions, under conditions which favored book clubs, were illegal. And he found respondent's price discriminations in the form

of discounts to the so-called "Big Three" jobbers, The American News Company, A. C. McClurg Company, and Baker Taylor Company resulted in competitive injury in violation of the amended Clayton Act.

Counsel in support of the complaint have appealed the examiner's dismissal of Count II and his findings with respect to the simultaneous release provision. Both counsel in support of the complaint and respondent have appealed the examiner's holding with respect to the resale price maintenance phase of Count I. In addition, respondent challenges the examiner's finding that the price discrimination charge has been sustained.

With two exceptions, namely, the scope of the order under Count I and a ruling on the relevancy of certain evidence under Count IV, we believe the examiner's disposition of this case to be correct. His initial decision is well documented and contains a thorough analysis of all the facts and issues involved. Our comment, therefore, will be limited to the two exceptions.

We are of the opinion that the examiner's view of the resale price maintenance phase of Count I and his proposed order thereunder are unduly limited. The effect upon competition is clear from the record. As the examiner said, "(T)he provisions . . . effectively insulate the book club from price competition on its own distributional activities, and restricts price-wise one avenue of distribution while holding a price umbrella over another and competitive avenue. Respondent's retail book seller is in a price strait-jacket. The book club is free to sell the same book at any price it will."

The unfair competitive advantage then, is the gravamen of the charge and respondent's operation of retail stores in New York, Pennsylvania, Massachusetts and Louisiana does not spell the legality or illegality of the disparate price treatment. We hold, therefore, the examiner's finding of illegality as being limited to the four States where respondent operates retail stores to be too narrow.[4]

If paragraph 38 of the initial decision holds that the finding on this phase must be restricted because of the complaint's failure to charge "unfair acts or practices," we disagree.

Neither do we agree with the distinction, based on respondent's ownership of Literary Guild, made by the examiner in ruling on this issue, between the agreements with Book-of-the-Month Club and Literary Guild. As we have indicated, the illegality of respondent's practices in this phase of the case arises from the unfair competitive

[4] The examiner's ruling on this point, in singling out the areas where respondent sells its own editions at fair trade prices, along with other retail stores, would seem to have the effect of saying to respondent that it should not treat the competing book clubs more favorably than it does itself.

position imposed on retail book sellers who must compete with favored book clubs selling free of any resale price restraint. Respondent's ownership of Literary Guild affords no more basis for predicating a finding of illegality than respondent's operation of retail outlets, and the distinction made between the Literary Guild and Book-of-the-Month Club agreements we think ill-founded.

Accordingly, we would modify and enlarge the order to prohibit respondent from agreeing with any book club, exempted from any resale price restraint, to impose resale price maintenance, with respect to books selected by such book clubs, upon retail book sellers in areas where the book club and retail book sellers compete with one another.

In connection with Count IV, the price discrimination charge, respondent attempted to show that the discounts allowed the so-called "Big Three" jobbers were in reality functional discounts by which respondent compensated integrated jobbers for services rendered. The evidence on this issue is in the record on tender only, the hearing examiner having ruled that the asserted defense was unavailable on the ground that the law does not permit price differentials on the basis of what a customer does to resell his own merchandise; in other words that the character of the selling of the purchaser and not the buying determines functional classification.

This principle is not without limitation or qualification.

Inasmuch as the functional discount, as applied to our present dynamic economy and constantly changing methods of marketing, presents a difficult and perplexing problem, a brief historical discussion is in order.

Functional discounts long have been a traditional pricing technique by which sellers compensated buyers for expenses incurred by the latter in assuming certain distributive functions. The typical functional discount system provided for graduated discounts to customers classified in accordance with their place in the distribution chain, namely, wholesaler, retailer and consumer in diminishing amounts. They were intended to reflect, at least from an economic viewpoint, the seller's estimates of the value of the marketing functions performed by the various classes of customers.

Inasmuch as traditional discounts of this type, as any other price differentials, remained lawful under the Robinson-Patman Act unless engendering adverse effects on competition, the ordinary discounts to wholesalers and retailers were considered entirely legal. The single function middleman presented no problem of classification, for he bought as well as sold in one distributive role, that is, strictly as a wholesaler or strictly as a retailer. A discount granted to such wholesalers did not injure retailers who received no equivalent price reduc-

tion, since they did not compete for the consumer's business. By virtue of the "injury" prerequisite in Section 2 (a) of the act, therefore, functional discounts to single-function distributors were considered above legal reproach. The controversy, rather, centered on the more complex types of distributors that were beginning to dominate our market structure—distributors whose functions ranged from only partial performance of the wholesale function to those who were almost wholly integrated, that is, who were both wholesalers and retailers and often consumers as well.

Under these conditions classification of buyers became unprecise and shifting in meaning. Wholesalers and retailers no longer comprised clear-cut separate links between the producer and the ultimate consumer, each responsible for a clearly defined set of duties. Marketing functions became scrambled, with many permutations and combinations. Many jobbers and brokers contributed genuine and important services, though assuming only a part of the traditional full-time wholesaler's job. More often there was the contrary trend toward integration of distributive functions. Manufacturers created their own outlets. Retailers integrated into wholesaling, and wholesaling into retailing, either by outright ownership of by cooperative arrangements. The number of patterns was legion and diverse.

This proliferation of modern marketing methods defies definition, neat nomenclature or descriptive labels.

No useful purpose would be served, therefore, by reviewing past proceedings in this area of multiple-function distributors, involving for the most part agricultural supplies, where the Commission turned the discount on the selling functions of the purchaser and not his buying functions.[5] It is enough to say that functional discounts to dual distributors under present marketing methods remain in a suspended state of confusion. The stormy and still undetermined *Standard Oil* decision, which has been characterized by some critics as holding not only that the purchaser's resale activities determine his eligibility for a functional discount but also that the supplier must police resale prices, has, insofar as this issue is concerned, settled nothing.[6]

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[5] See *Agricultural Laboratories, Inc.*, 26 F. T. C. 296 (1938); *Hansen Inoculator Co.*, 26 F. T. C. 303 (1938); *Albert L. Whiting*, 26 F. T. C. 312 (1938); *Nitragin Co.*, 26 F. T. C. 320 (1938); *Sherwin-Williams Co.*, 36 F. T. C. 25, 40–41 (1943)—this element was subsequently dismissed without prejudice.

[6] *Standard Oil Co.*, Docket No. 4389, 41 F. T. C. 263 (1945); modified, 43 F. T. C. 56 (1946); modified and affirmed, 173 F. 2d 210 (C. A. 7, 1949); reversed and remanded, 340 U. S. 231 (1951); modified by Commission, January 16, 1953; certified to 7th Cir., March 26, 1953; remanded to Federal Trade Commission, January 18, 1954; reconsideration denied by Commission, January 7, 1955; now pending again before 7th Cir.

In our view, to relate functional discounts solely to the purchaser's method of resale without recognition of his buying function thwarts competition and efficiency in marketing, and inevitably leads to higher consumer prices. It is possible, for example, for a seller to shift to customers a number of distributional functions which the seller himself ordinarily performs. Such functions should, in our opinion, be recognized and reimbursed. Where a businessman performs various wholesale functions, such as providing storage, traveling salesmen and distribution of catalogues, the law should not forbid his supplier from compensating him for such services. Such a legal disqualification might compel him to render these functions free of charge. The value of the service would then be pocketed by the seller who did not earn it. Such a rule, incorrectly, we think, proclaims as a matter of law that the integrated wholesaler cannot possibly perform the wholesaling function; it forbids the matter to be put to proof.

On the other hand, the Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer. It should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it.

We believe, therefore, that the evidence offered by respondent on this point was relevant and should have been admitted.

However, respondent was not prejudiced by the examiner's ruling in this instance. We have treated all the evidence tendered on this point as being in the record and find it insufficient. It failed to establish any reasonable relation between the amount of discounts allowed and the value of services or facilities furnished by the Big Three.[7] Furthermore, the preferential discounts allowed the Big Three were enjoyed by them for as long as twenty-five years without any effort on respondent's part to determine what services were in fact rendered or how the benefit or savings, if any, inured to the respondent. From the record it appears that the Big Three as well as respondent treated the higher discounts as price reductions and not payments or allowances for services rendered.

To the extent indicated the appeal of counsel in support of the complaint is allowed. In all other respects, both appeals are denied, and the examiner's decision, as modified, is affirmed.

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[7] In view of our ruling we do not consider, as did the examiner, the *Southgate Brokerage* case, 150 F. 2d 607, which arose under the brokerage section of the Robinson-Patman Act, as controlling. Further, we do not agree with the examiner's statement in finding No. 95 to the effect that only the seller's costs may be shown "defensively" under the law.

Commissioner Gwynne concurs in the result. Commissioners Mead and Secrest concur in the result with separate opinions. Commissioner Mason dissents as to the cease and desist order in Count I.

Commissioner Secrest concurring in the result:

I think the decision of the majority is proper. However, I believe that the hearing examiner's ruling with reference to respondent's fourth defense under Count IV is correct.

Count IV charged that respondent had sold the same books at different prices to different purchasers competing with each other in the resale thereof, resulting in actual or probable substantial injury to competition in violation of Section 2 (a) of the Clayton Act (U. S. C. Title 15, Sec. 13). To this charge respondent interposed five defenses, the fourth of which was that its differentials in price were not actually what they were called but were in reality payments by respondent to its customers as compensation for services and facilities furnished. Respondent argued that these services and facilities were available only through its favored customers and were not furnished or made available by purchasers who did not receive its differentials, and that its differentials were made available on proportionally equal terms to each of its customers.

During the course of the hearings respondent presented a number of witnesses to testify that its "Big Three" customers, to whom respondent allowed preferential discounts of 46% as compared to 40% to 43% allowed to unfavored customers, rendered services or facilities which were of benefit to the respondent and that the additional differential was a means of compensating these customers therefor. The hearing examiner ruled that such testimony was improper as a defense to a Section 2 (a) case and excluded the testimony but permitted its incorporation physically into the record as offers of proof. The opinion of the majority states that this evidence offered by respondent was relevant and should have been admitted. I disagree. As found by the hearing examiner,

"* * * prices can not under the present law be varyingly fixed on the basis of what a customer does with his own merchandise in an effort to resell it. Pricing by customer service inevitably means pricing by customer, the very result the law was obviously intended to prevent. In *Southgate Brokerage Co., Inc.* v. *F. T. C.*, 150 F. 2d 607 at 610–611, the Court held:

" 'The crucial fact is that all of the services upon which it relies are services rendered in connection with its own purchases, ownership or resale of the goods; and these services it renders, not to those from whom the goods are purchased, but to itself.'

* * * * * * *

" 'For sellers to pay purchasers for purchasing warehousing or reselling the goods purchased is to pay them for doing their own work, and is a mere gratuity.' "

A service where the benefits inure exclusively to the seller is one thing. It is quite another where the service helps the buyer, even though such service may benefit the seller by resulting in larger purchases from him. Enforcement of the law would be extremely difficult if not impossible, if, in each 2 (a) case, the Commission were required to divide a common service which may benefit both the buyer and the seller. Each case would require an operation as delicate and difficult as the separation of Siamese twins.

Functional classification of customers for discount purposes should be conditioned on their character as sellers, not on the performance of any services to their supplier. To hold otherwise would lead to pricing by individual customers which would undoubtedly give the larger buyer a price advantage in the resale of the seller's goods. For example, in the instant case, the majority held that the record did not establish that the "Big Three" did render the additional services and facilities claimed by the respondent. However, if they had held to the contrary, respondent would have been able to justify discriminations in price by which its "Big Three" customers could have undersold their smaller counterparts at the same functional level. I believe that the evidence tendered by respondent on this point was properly excluded by the hearing examiner as irrelevant to the issue, and concur in his conclusion that only the seller's cost, not the buyer's, may be shown defensively under the law. Otherwise, I concur in the opinion of the majority.

Commissioner MEAD, concurring in the result:

I disagree only with reference to the position of the Majority respecting the evidence received in the form of an offer of proof in defense of the price discrimination charge under Count IV of the complaint.

Under the view expressed by the Majority, a seller charged with discriminatory pricing practices may successfully defend against such charges by showing the rendition by the favored buyer of services in connection with its own purchases, ownership or resale of the goods purchased. Whether or not this is good economics, I am not prepared to say. I agree with the hearing examiner, however, in that it is not the law as expressed in the Robinson-Patman Act. Under that Act, a price discrimination, as described, unless justified in the manner therein set forth, is unlawful if the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly

or to injure, destroy or prevent competition. This, of course, applies to discriminatory discounts based on distributional functions performed by the buyer as well as to any and all other price differentials. To hold otherwise is to not only read into the law a provision which is not there, but is to also completely disregard express provisions which are there. It also paves the way for the ultimate annihilation of small retail dealers who are unable, by reason of their inability to perform the same marketing functions as their larger dual-functioning competitors, to successfully compete with them.

OPINION DISSENTING AS TO THE CEASE AND DESIST ORDER IN COUNT I

MASON, Commissioner:

My non-concurrence on one facet of the majority's views on Count I must not be taken as disapproval of the exposition of the law and facts on the other counts. I concur entirely with the majority expressions in the instant case except for those on the resale price maintenance phase of Count I.

The temptation to assume an omniscience that can smooth out all the market inequalities of a "fair trade" controversy leads the Commission into difficulties. I believe the practical effect of this part of the order would be either a wholesale nullification of fair trade in the book field or a violation of the Sherman Act.

The cease and desist order here appears to prohibit the publisher from selling books at a "fair trade" price when licensing another company to manufacture and sell the same articles at prices to suit its own fancy. The Commission in trying to protect small business apparently wants the big book club companies to toe the fair trade line also.

It might be suggested that the respondent could comply with this order by agreeing with the second manufacturer that it, too, should fair trade the same books.

If the respondent were to comply with the Commission's cease and desist order as above suggested, it would find itself under indictment for violating the Sherman Antitrust Law by the Department of Justice for agreeing with other manufacturers (the book clubs) to fix prices.[1]

[1] At least with respect to its agreement with the Book-of-the-Month Club and probably as to the agreement with the Literary Guild, too, if we are to pay our respects to the Kiefer-Stewart decision, 340 U. S. 211, that contract would be illegal also.

Does this leave only one alternative for the respondent here—that is, to refuse to fair trade its product at all? If so, this is a plight the retailers will not stomach with gratitude.

Heretofore, the Commission has consistently taken the position that it is not within its province to exercise control over resale price agreements. The Commission has regarded the McGuire Act as barring any antitrust authorities from concerning themselves with the rights and obligations brought into existence by State laws. Enforcement has been left exclusively to State courts.[2]

The charge of the complaint limits the cease and desist order to banning an agreement. An agreement is a contract between two or more parties. In my opinion, there is nothing in the order preventing respondent from unilaterally determining that it will fair trade the books it publishes and in the same manner determine that it will say nothing about prices to other manufacturers that it licenses. Thus, they still will be free to price their own products as they see fit. Whether this violates the concepts of those State statutes which were enacted in accordance with the permission of the McGuire Act or Miller-Tydings Amendment is the individual concern of each State.

I doubt if the majority opinion gives the opponents or the advocates of fair trade any reason to regard the Federal Trade Commission as a new forum to settle grievances on this State problem. In effect it really says:

"A plague on both your houses."

FINAL ORDER

Counsel in support of the complaint and respondent Doubleday and Company, Inc., having respectively filed an appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard on briefs and oral arguments of counsel, and the Commission having rendered its decision granting in part and denying in part the appeal of counsel in support of the complaint and denying the appeal of respondent and affirming the intitial decision as modified:

It is ordered, That the paragraph numbered 1 of the order contained in the intial decision be, and it hereby is, modified to read as follows:

"Entering into, maintaining, or continuing any contract, agreement or understanding of any nature with any book club or similar organization whereby respondent, while exempting said book club

[2] Paraphrased from the press release of February 21, 1955, re an application of retail jewelers to get the Federal Trade Commission to proceed against jewelry manufacturers who had forced some merchants to sell at fair trade and by their acts allowed others not to.

or organization from any responsibility for resale price maintenance, undertakes to fix, establish or maintain the resale price, terms or conditions of sale of any literary work which it publishes and sells and which it also sublicenses such book club or organization to publish and sell, in any area wherein said book club or organization and retail book sellers purchasing from respondent compete with one another in the sale of such work."

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

Commissioner GWYNNE concurring in the result, Commissioners MEAD and SECREST concurring in the result with separate opinions, and Commissioner MASON dissenting as to the cease and desist order in Count I.