IN THE MATTER OF

ANNIS FURS, INC.

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

Docket 6880. Complaint, Aug. 30, 1957—Decision, Feb. 7, 1958

Consent order requiring a furrier in New York City to cease violating the Fur Products Labeling Act by failing to comply with the invoicing requirements; and by advertising in newspapers which failed to disclose the names of the animals producing the fur in certain products, the country of origin of imported furs, and that some products were composed of artificially colored fur; which contained the names of other animals than those producing the fur in certain products, misrepresented prices as less than wholesale or less than cost, and failed in other respects to conform to the advertising requirements

Mr. S. F. House, in support of the complaint.
Mr. Everett H. Wells, of Detroit, Mich., for respondent.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding, issued August 30, 1957, charges the respondent above-named with violation of the provisions of the Federal Trade Commission Act, the Fur Products Labeling Act and the rules and regulations promulgated under the last-named act, in connection with the sale, advertising and offering for sale, transportation and distribution, shipping and receiving in commerce, of fur and fur products, as the designations "commerce," "fur," and "fur products" are defined in the Fur Products Labeling Act.

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

By the terms of said agreement, the respondent admitted all the jurisdictional allegations of the complaint, and agreed that the record herein may be taken as though the Commission had made findings of jurisdictional facts in accordance with such allegations. By said agreement the parties expressly waived a hearing before the hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which respondent may be entitled under the Federal Trade Commission Act or the rules of practice of the Commission.

By said agreement, respondent further agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if made after a full hearing, presentation of evidence and findings and conclusions thereon, and specifically waived any and all right, power or privilege to challenge or contest the validity of such order.

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

Said agreement recites that respondent Annis Furs, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 130 W. 30th Street, New, York, N.Y.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropiate disposition of this proceeding, the same is hereby accepted and, without further notice to respondent, is ordered filed upon becoming part of the Commission's decision in accordance with sections 3.21 and 3.25 of the rules of practice, and in consonance with the terms of said agreement, the hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent named herein, and that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That the respondent Annis Furs, Inc., a corporation, and its officers and respondent's representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, offering for sale, transportation, or distribution of fur products in commerce, or in connection with the sale, advertising, offering for sale, transportation or distribution of 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, do forthwith cease and desist from:

A. Falsely or deceptively invoicing fur products by:

1. Setting forth information required under section 5(b)(1) of the Fur Products Labeling Act in abbreviated form, in violation of rule 4 of the rules and regulations promulgated thereunder.

2. Failing to furnish invoices to purchasers of fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed, or otherwise artifically colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(e) The name and adress of the person issuing such invoices;

(f) The name of the country of origin of any imported furs contained in a fur product.

B. 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 which produced the fur or furs contained in the fur product, 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 the fact;

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

2. Sets forth information required under section 5(a) of the Fur Products Labeling Act in abbreviated form, in violation of rule 4 of the rules and regulations.

3. Uses the name or names of an animal or animals other than the name or names specified in the Fur Products Name Guide or prescribed by the rules and regulations.

4. Represents directly or by implication: That fur products are being sold "at less than original wholesale prices" and "at less than original cost" or words of similar import and meaning, when such are not the facts.

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 7th day of February 1958, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

EDWARD MALKIS ET AL. TRADING AS ARCTIC FUR CO.

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

Docket 6786. Complaint, Apr. 30, 1957 [1]*—Decision, Feb. 8, 1958*

Consent order requiring furriers in Cincinnati, Ohio, to cease violating the Fur Products Labeling Act by failing to comply with the advertising, invoicing, and labeling requirements.

Morton Nesmith and *John J. Mathias*, Esqs., for the Commission.

Goodman & Goodman, by *Sol Goodman*, Esq., of Cincinnati, Ohio, for respondents.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The Complaint in this proceeding, issued April 30, 1957, charges the respondents, Edward Malkis and Bess Malkis, individually and as copartners trading as Arctic Fur Co., with violation of the provisions of the Federal Trade Commission Act and of the Fur Products Labeling Act, in connection with the sale, advertising and offering for sale, transportation, and distribution, shipping and receiving in commerce, of fur and fur products, as "commerce," "fur," and "fur products" are defined in the Fur Products Labeling Act.

Subsequent to the issuance and service of the complaint the parties, in February 1957, incorporated the theretofore existing copartnership under the corporate name and style of their former trade name, that is, Arctic Fur Co. The complaint was, on August 20, 1957, amended to substitute Arctic Fur Co., a corporation, and Edward Malkis and Bess Malkis, individually and as officers of said corporation, as parties respondents in lieu of Edward Malkis and Bess Malkis, individually and as copartners trading as Arctic Fur Co. The individual respondents agreed that the answer filed by them on May 28, 1957, may be withdrawn, which agreement is ratified and said answer is hereby ordered withdrawn of record.

Thereafter, on October 14, 1957, respondents entered into an agreement with counsel supporting the complaint for a consent order disposing of all of the issues in this proceeding, which agreement was duly approved by the director and assistant director of the Bureau of Litigation of the Federal Trade Commission. It was expressly

[1] Amended Aug. 20, 1957.

provided in said agreement that the signing thereof is for the purpose of settlement only and does not constitute an admission by the respondents that they have violated the law as alleged in the amended complaint.

By the terms of said agreement, the respondents admitted all of the jurisdictional allegations of the complaint and agreed that the record herein may be taken as though the Commission had made findings of jurisdictional facts in accordance with such allegations. By said agreement the parties expressly waived a hearing before the hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which the respondents may otherwise, but for the execution of said agreement, 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 though 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, as amended, shall constitute the entire record herein; that the complaint herein, as amended, may be used in construing the terms of the order issued pursuant to said agreement; and that the said order may be altered, modified, or set aside in the manner provided by statute for other orders of the Commission.

Said agreement recites that respondents Edward Malkis and Bess Malkis, prior to the issuance of the complaint, were and had been for several years, copartners trading and doing business as Arctic Fur Co. with their office and principal place of business located at No. 407 Race Street, Cincinnati, Ohio; that in February 1957, the copartnership was converted into a corporation of the same name, engaged in the same business, located at the same address, and that the two hereinabove-named respondents are the principal officers of said corporation in which capacities they formulate, direct and control the acts, policies and practices of the newly formed corporation.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provides for an appropriate disposition of this proceeding, the same is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with sections 3.21 and 3.25 of the rules of practice.

Consonant with the express terms and provisions of said agreement, the hearing examiner finds that the complaint herein, as amended, states a valid cause of action; 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 public interest, wherefore he issues the following order:

It is ordered, That respondents Arctic Fur Co., a corporation, and its officers and Edward Malkis and Bess Malkis, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale, transportation or distribution of any fur product in commerce, or in connection with the sale, advertising, offering 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:

A. Falsely or deceptively advertising fur products through the use of any advertisements, 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 that produced the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the said rules and regulations;

(b) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact.

2. Sets forth information required under section 5(a) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder in abbreviated form.

B. Misbranding fur products by:

1. Failing to affix labels to fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the said rules and regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed, or otherwise artifically colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(e) The name, or other identification issued and registered by the Commission, of one or more of the persons who manufactured such fur product for introduction into commerce, sold it in commerce, advertised, or offered it for sale in commerce, or transported or distributed it in commerce;

(f) The name of the country of origin of any imported furs used in the fur product.

2. Setting forth on labels attached to fur products:

(a) Information required under section 4(2) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder mingled with non-required information.

(b) Information required under section 4(2) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder in handwriting.

C. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide and as prescribed under the said rules and regulations.

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(e) The name and address of the person issuing such invoice;

(f) The name of the country of origin of any imported fur contained in a fur product.

2. Setting forth information required under section 5(b)(1) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder in abbreviated form.

3. Failing to set forth an item number or mark assigned to such product.

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 8th day of February 1958, 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

ISIDOR GUTGOLD TRADING AS PEER JEWELRY CO.

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

Docket 6865. Complaint, Aug. 14, 1957—Decision, Feb. 12, 1958

Consent order requiring a manufacturer in New York City to cease selling with the phrase "14 K" appearing thereon, bracelets which were manufactured from gold of substantially less than 14 karat fineness.

Mr. Charles W. O'Connell for the Commission.
Mr. Samuel B. Ohlbaum, of New York, N.Y., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein, charging the above-named respondent Isidor Gutgold, an individual trading and doing business as Peer Jewelry Co., with having violated the Federal Trade Commission Act in certain particulars. The respondent was duly served with process and in due course filed his answer. An initial proceeding was convened at New York, N.Y., on November 14, 1957, pursuant to due notice at which time and place counsel for both parties were present. During a recess of the hearing an "Agreement containing consent order to cease and desist" was executed. The hearing examiner, therefore, recessed the initial hearing pending the submission of said agreement in due course.

On November 18, 1957, there was submitted to the undersigned hearing examiner for his consideration and approval said "Agreement containing consent order to cease and desist" entered into and executed by respondent and his attorney and Charles W. O'Connell, counsel supporting the complaint, which agreement had been thereafter approved by the Bureau of Litigation of the Commission.

On due consideration of said "Agreement containing consent order to cease and desist," the hearing examiner finds that said agreement, both in form and in content, is in accord with section 3.25 of the Commission's rules of practice for adjudicative proceedings and that by said agreement the parties have specifically agreed that:

1. Respondent Isidor Gutgold is an individual trading and doing business as Peer Jewelry Co., with his office and principal place of business located at 125 W. 45th Street, in the city of New York, State of New York.

2. Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on August 14, 1957, issued its complaint in this proceeding against respondent, and a true copy was thereafter duly served on respondent.

3. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties.

5. Respondent waives:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

Upon due consideration of the complaint filed herein, and the said "Agreement containing consent order to cease and desist," the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, unless and until it becomes a part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement containing consent order to cease and desist" that the Commission has jurisdiction of the subject matter of this proceeding and of the person of the respondent signatory to said agreement; that the complaint states a legal cause for complaint under the Federal Trade Commission Act both generally and in each of the particular charges alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the full disposition of all the issues in this proceeding, such order to become final only if and when it becomes the order of the Commission; and that said order, therefore, should be, and hereby is, entered as follows:

ORDER

It is ordered, That Isidor Gutgold, an individual trading and doing business as Peer Jewelry Co., or trading under any other name or names, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of any articles composed in whole or in part of gold or an alloy of gold in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Stamping, branding, engraving, or marking any article with any mark such as "14 K," or otherwise representing, directly or by implication, that the whole or a part of any article is composed of gold or an alloy of gold of a designated fineness, unless the article or part thereof so marked or represented is composed of gold of the designated fineness within the permissible tolerances established by the National Stamping Act (15 U.S. Code, sec. 294 *et seq.*).

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The hearing examiner, on November 22, 1957, having filed his initial decision in this proceeding based on an agreement containing a consent order to cease and desist theretofore executed by the respondent and counsel in support of the complaint; and

The respondent having requested a stay or suspension of the order contained in said decision pending the issuance of similar orders against certain of the respondent's competitors; and

The Commission having considered the matter and being of the opinion that the initial decision is adequate and appropriate to dispose of this proceeding and that a stay or suspension of the order would not be in the public interest:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondent's request for a stay or suspension of the order contained therein be, and it hereby is, denied.

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

IN THE MATTER OF

SALYER REFINING CO., INC., ET AL.

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

Docket 6339. Complaint, May 2, 1955—Decision, Feb. 14, 1958

Order requiring a concern in Oklahoma City, Okla., engaged in selling to dealers for resale to the purchasing public reclaimed lubricating oil obtained from crankcase drainings, to cease advertising for sale or selling such oil without disclosing to the purchaser that it was previously used and without a clear statement to that effect on the containers.

Mr. John W. Brookfield, Jr., for the Commission.
Mr. Leslie L. Conner, of Oklahoma City, Okla., for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondents with violation of the Federal Trade Commission Act through the sale of lubricating oil made from previously used oil, without disclosing such prior use. After the filing of respondents' answer (which was subsequently amended) hearings were held at which a substantial amount of evidence both in support of and in opposition to the complaint was received. Proposed findings and conclusions have been filed by the parties, and respondents Salyer Refining Co., Inc., and B. M. Salyer, Jr. (erroneously referred to in the complaint as Ben M. Salyer, Jr.) have also filed a motion to dismiss the complaint. The case is now before the hearing examiner for final consideration.

2. Respondent Salyer Refining Co., Inc., is a corporation organized and doing business under the laws of the State of Oklahoma, with its office and principal place of business at 2400 Northeast 4th Street, Oklahoma City, Okla. Respondent B. M. Salyer, Jr., is president of the corporation and owner of practically all of its capital stock. He formulates all of its policies and directs and controls all of its activities. While respondents P. A. Salyer and Lester L. Suenram are or have been officers of the corporation, their relationship to it has been nominal only, and neither of them has ever participated actively in the control and management of its affairs. It is therefore concluded that the complaint should be dismissed as to respondents P. A. Salyer and Lester L. Suenram, and the word respondents as used hereinafter will not include these individuals.

3. Respondents are engaged in the sale of lubricating oil made from oil which has previously been used in automobile motors. In

the sale of their product respondents are engaged in interstate commerce, substantial quantities of their oil being regularly sold and shipped by them to purchasers located in various States of the United States other than Oklahoma. They are in competition with other corporations and individuals engaged in the sale of lubricating oil in interstate commerce.

4. Respondents purchase "crankcase drainings," that is, oil which has previously been used in automobile motors, subject the oil to certain refining or re-refining processes, and then sell the finished product to dealers—usually wholesalers. These dealers resell the oil to service stations, who, in turn, retail it to the public. The oil is packaged by respondents in metal containers of the same size and general appearance as those in which oil made from virgin crude oil is sold, and there is nothing on respondents' containers indicating that the oil is made from previously used oil.

Three service station operators, upon examining respondents' containers, testified that in the absence of information to the contrary from other sources they would expect the containers to contain new oil made from virgin crude; and they further testified upon the basis of their experience with the public that in their opinion the public would expect the same thing. That this is the correct view is obvious from an examination of the containers themselves. Unquestionably, members of the public purchasing the oil would be under the impression that the oil was an entirely new product made from virgin crude oil. (Since the issuance of the complaint, respondents have adopted new containers. These will be discussed later.)

5. On the question of public preference, these same witnesses testified that the public prefers lubricating oil made from virgin crude over oil made from previously used oil. And respondent B. M. Salyer, Jr., in his testimony recognized that many members of the public are prejudiced against oil made from previously used oil.

There is testimony on behalf of respondents from three witnesses engaged in the advertising business that the public in purchasing any product is usually interested only in the essential merit of the product; that it is not interested in the source of the product or its ingredients. This testimony, however, is so broad and general in nature as to be of little probative value in determining the issues in the present proceeding. None of the witnesses had had any experience in the oil business nor any substantial contact with the public insofar as lubricating oil is concerned.

While there is testimony on behalf of respondents from two service station operators that the public has no interest in whether lubricating oil is made from virgin crude or from perviously used oil, the weight of the evidence appears clearly to be to the contrary. The finding on this issue therefore is that there is a preference on the part of a substantial portion of the public for lubricating oil made from virgin crude oil over oil made from previously used oil.

6. Respondents urge that what they are selling is not used oil or oil which has merely been reclaimed or reprocessed, but is, in fact, new oil. They insist that oil does not wear out; that all that is necessary to make used oil as good as new is that the contaminating substances be removed; that their refinery is complete and modern in every respect; and that their product when put on the market is as good as or even better than lubricating oils made from virgin crude oil. All of this, however, overlooks the vital consideration that the public is entitled to know what it is getting. It is entitled to be informed as to the true nature of respondents' product in order that it may make its own decision as to whether it will purchase that product or oil made from virgin crude.

7. As indicated above, respondents, since the issuance of the complaint, have adopted new containers for their product and they insist that these containers adequately inform the public as to the nature of the product. These new containers carry in close proximity to the brand name of the oil and in large type the words "Guaranteed Re-Refined". In a panel on the reverse side of the container there appears in much smaller type the following:

STAY—READY

STAYS FULL LONGER
LUBRICATES BETTER

STAY—READY is refinery re-refined exclusively from Motor oil that has stood the test in the crank case. Petroleum is a mineral and the more it is re-refined the purer it becomes.

Oil does not wear out with use in the crank case, but merely becomes contaminated. Each time it is re-refined it is further purified. Among the large users of re-refined oils are the motoring public, the U.S. Air Forces, and the American Railroads. STAY—READY is guaranteed to give complete satisfaction or your money back.

I personally endorse this Product to be one of the finest Motor Oils on the Market today.

B. M. Salyer, Jr.
President

SALYER REFINING COMPANY, INC.

Insofar as the words "Guaranteed Re-Refined" are concerned, these clearly are insufficient to apprise the public as to the true nature of the product, that is, that it is oil made from previously used oil.

As to the other statements, if a prospective purchaser were suspicious enough or cautious enough to examine the container carefully he probably would see the statements and be put on notice as to the source of the oil or at least have his suspicions aroused sufficiently to cause him to make further inquiry. The statements, however, are clearly insufficient to protect the average member of the public. Not only are they lacking in clarity and directness, but they are so inconspicuously placed and in such relatively small type that they would almost certainly escape the attention of the average purchaser. It is therefore concluded that respondents have not, in fact, abandoned or discontinued the practice charged in the complaint.

8. The failure of respondents to disclose that their oil is made from previously used oil has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the belief that such oil is new and unused oil, made from virgin crude oil, and to cause such members of the public to purchase respondents' oil as a result of the erroneous and mistaken belief so engendered. This failure of respondents to reveal the nature of their product also serves to place in the hands of retail dealers a means and instrumentality whereby such dealers may mislead the public with respect to respondents' product. The present proceeding is therefore in the public interest. Respondents' practice is to the prejudice of the public and of respondents' competitors, and constitutes an unfair method of competition and an unfair and deceptive act and practice in commerce in violation of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents, Salyer Refining Co., Inc., a corporation, and its officers, and B. M. Salyer, Jr. (erroneously referred to in the complaint as Ben M. Salyer, Jr.), individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of lubricating oil in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, contrary to the fact, that their lubricating oil is refined or processed from other than previously used oil;

(2) Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising and in sales promotion material, and by a clear and conspicuous statement to that effect on the container.

It is further ordered, That said respondents' motion to dismiss the complaint be, and it hereby is, denied.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents P. A. Salyer and Lester L. Suenram.

OPINION OF THE COMMISSION

By Anderson, Commissioner:

In the initial decision, the hearing examiner found that the respondents there designated were engaging in unfair methods of competition and unfair and deceptive acts and practices by failing to disclose that the motor oil distributed by them is made from previously used oil. The hearing examiner also found that two nominal corporate officers named as respondents in the complaint had not participated in the illegal acts and practices and the initial decision's order provides for their dismissal as parties. No appeal has been filed by counsel supporting the complaint from this ruling, but the respondent, Salyer Refining Co., Inc., and the respondent, B. M. Salyer, Jr., its president and principal stockholder, who are the parties named in the initial decision's order to cease and desist, have appealed from that decision. They, the parties bringing this appeal, are referred to hereinafter as the respondents.

The complaint under which this proceeding was instituted alleges that the respondents' oil consists of used oil obtained from drainings from motor crankcases and other sources which is reclaimed or reprocessed by them and thereafter sold in containers bearing no markings to that effect. In the absence of disclosure in that respect, the complaint additionally alleges, it is the understanding and belief on the part of consumers and dealers that the respondents' oil is new oil and that it is purchased as such, that a deceptive instrumentality is placed in the hands of retailers whereby the public may be misled, and that trade is unfairly diverted to respondents from their competitors.

The following record facts are not in dispute. The respondents purchase "crankcase drainings," that is, oil previously used in automobile motors and left or discarded by motorists at filling stations and garages when changing their oil. The respondents subject those waste products to refining or re-refining processes. The oil so processed is sold by them in commerce to jobbers and others who resell it to filling stations and similar outlets for retailing to the public. The metal containers in which the respondents package their oil are of the same size and general appearance as those in which oil refined from crude customarily is sold. The oil itself has the appearance of new oil. At the time this proceeding was instituted, nothing appeared on the respondents' containers stating or in any way suggesting that the oil was made from previously used oil.

In contending that the factual charges of the complaint are not supported by the evidence and that conclusions of legal violation lack sound basis, the respondents argue that the evidence does not establish that there is a preference among the public for oil made from crude and that the public's interest when selecting oil must be regarded instead as limited to price and lubricating qualities. We think, however, that there is conclusive support in the record for the hearing examiner's finding that the public prefers oil made from crude over lubricants processed from previously used oil. The testimony of three filling station operators called by counsel supporting the complaint is clear and convincing on this score and far outweighs the matters cited by the respondents in support of their contentions that such preference does not exist. The testimony of the trade witnesses was to the further effect that they would expect the respondents' containers to contain oil refined from crude rather than from previously used oil and that the public would expect the same.

The appeal emphasizes that the respondents' processing represents a refining or re-refining operation and contends that oil does not wear out from use and that a new oil comparable in quality to oils made from crude accordingly results from their refining methods. Its re-refining notwithstanding, and even assuming the status of respondents' oil as new oil from a chemical or other scientific standpoint, their lubricants are made by processing previously used oil. Hence, they originate as and essentially constitute reclaimed products as distinguished from those long accepted by consumers and dealers which are made by refining crude oil. Substitution is unlawful even though a qualitative equivalence be shown and the consumer is prejudiced if on giving an order for one thing he is supplied with something else. *F.T.C.* v. *Royal Milling Co.*, 288 U.S. 212, 216, 217 (1933); *F.T.C.* v. *Algoma Lumber Co.*, 291 U.S. 67, 77, 78, (1934).

It is clear that the respondents' failure to disclose on the containers for their oil the true facts representing the origin of their products has entailed silence as to a fact highly material and important to users of motor oil. We think that the hearing examiner correctly found that the respondents' practices in that respect had the tendency and capacity to deceive and caused purchases of their oil under mistaken beliefs that it was new oil made from crude rather than a reclaimed product derived from previously used oil.

The respondents further contend that the Commission is not legally empowered to require a revealing statement on containers distinguishing their oil from new or virgin oil. The appeal cites in this connection that the Federal Trade Commission Act is not a labeling law and that no Federal legislation has been enacted making it mandatory for marketers to state whether their oil is made from crude or processed from waste products. The Commission, however, may require affirmative disclosure by sellers where necessary to prevent deception resulting from failure to disclose material facts concerning the merchandise offered. *Haskelite Manufacturing Co.* v. *F.T.C.*, 127 F. 2d 765 (C.A. 7, 1942); *L. Heller & Son, Inc.* v. *F.T.C.*, 191 F. 2d 954 (C.A. 7, 1951).

Also lacking in merit are the exceptions by respondents to the initial decision's findings concerning the container labels adopted several months after this proceeding began. Those labels describe the oil, among other things, as "Guaranteed Re-Refined," and as "refinery re-refined exclusively from Motor oil that has stood the test in the crank case." The lack of clarity, small size of type and other considerations cited by the hearing examiner fully support his conclusions that the statements on the revised labels are a wholly inadequate basis for apprising the public generally that the respondents' products are made from previously used oil.

The appeal additionallly contends that dismissal of this proceeding is warranted in the public interest for the reason, among others, that a requirement that distributors of re-refined oil products differentiate their wares from virgin oil may destroy the re-refining industry. Implicit in this argument is recognition that a considerable degree of prejudice exists against oil made from previously used oil. The use of deceptive acts and practices and unfair methods of competition is adverse to the interests of consumers and to competitors not resorting to such practices, and the arguments advanced under this aspect of the appeal are without merit.

Moreover, 20 of the States have enacted legislation relating to the marking of oil derived from waste lubricants. The oils to which these statutes pertain are designated variously as reclaimed, reprocessed, re-refined, re-run, re-distilled, re-cleaned and reconditioned. Those acts are by no means uniform but a substantial number require such oil be designated as so processed or as previously used products on labels and otherwise. Although Oklahoma, the State in which the respondent company is incorporated, has not so legislated, the respondents market their oil in several states where relevant enactments are in effect. To assert that corrective action against one or more marketers of re-refined oil will adversely affect the industry is to assume without proper warrant that concerns engaged in processing waste oils in States where legislation of this type has been enacted will be disadvantaged if rival re-refiners who distribute their products there from states where such legislation is not effective were similarly required to label them truthfully at processing establishments.

The order contained in the initial decision also has been considered. Its requirement that a disclosure be set forth on the respondents' containers that their oil has been processed in whole or part from previously used oil, when such be the fact, is appropriate and has sound support in the record. Its provision additionally requiring that the facts in that respect also be disclosed in any advertising and promotional material utilized by the respondents in the future conduct of their business reflects due recognition of the fact that the public, in the the absence of disclosure to the contrary, assumes and has the understanding and belief that oil offered to it in regular channels of trade is oil refined from crude instead of oil derived from used oil. Furthermore, this provision looks to protecting purchasers in marketing situations precluding their detailed examination of the respondents' containers at point of sale. The gravamen of the complaint challenges unfair and deceptive practices whereby oil made from previously used oil has been marketed by the respondents under circumstances causing it to be purchased as oil made from crude. To prevent continuance of the practices found above to be deceptive resulting from slight variations by the respondents in past sales methods, we think that the public interest requires inclusion of an additional provision in the order proscribing future resort by the respondents to affirmative claims that their oil is processed from crude.

In the light of the above and in the interest of clarity, the order contained in the initial decision is being modified. The respondents' appeal is denied and the initial decision, modified as noted above, is adopted as the decision of the Commission.

FINAL ORDER

This case having come on for final consideration upon the record, including the appeal of the respondents, Salyer Refining Co., Inc., and B. M. Salyer, Jr., from the initial decision of the hearing examiner; and the Commission having determined, for reasons stated in the accompanying opinion, that said appeal should be denied and that the order contained in the initial decision should be modified:

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

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

It is ordered, That respondents, Salyer Refining Co., Inc., a corporation, and its officers, and B. M. Salyer, Jr. (erroneously referred to in the complaint as Ben M. Salyer, Jr.), individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of lubricating oil in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, contrary to the fact, that their lubricating oil is refined or processed from other than previously used oil;

(2) Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising and in sales promotion material, and by a clear and conspicuous statement to that effect on the container.

It is further ordered, That said respondents' motion to dismiss the complaint be, and it hereby is, denied.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents P. A. Salyer and Lester L. Suenram.

It is further ordered, That the respondents, Salyer Refining Co., Inc., and B. M. Salyer, Jr., shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in said initial decision, as modified.

It is further ordered, That the initial decision of the hearing examiner, as modified hereby, be, and the same hereby is, adopted as the decision of the Commission.

IN THE MATTER OF

FRANK A. KERRAN ET AL. DOING BUSINESS AS DOUBLE EAGLE REFINING CO.

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

Docket 6432. Complaint, Oct. 27, 1955—Decision, Feb. 14, 1958

Order requiring copartners engaged in Oklahoma City, Okla., in re-refining crankcase drainings of lubricating oil which they then sold to dealers for resale to the purchasing public in the same containers used for new oil without indicating its used nature, to cease advertising for sale or selling such reclaimed oil without disclosing to the purchaser that it was previously used and without a clear statement to that effect on the containers.

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

Mr. John B. Ogden and *Mr. Josh Lee*, Oklahoma City, Okla. for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The complaint in this matter charges the respondents with violation of the Federal Trade Commission Act through the sale of lubricating oil made from previously used oil, without disclosing such prior use. After the filing of respondents' answer to the complaint, hearings were held at which evidence in support of the complaint was received. Upon the conclusion of such evidence respondents moved to dismiss the complaint on the ground that a prima facie case in support thereof had not been established. This motion was denied by the hearing examiner, whereupon respondents elected to offer no evidence (other than certain exhibits which had been received during the cross-examination of the Government's witnesses) and rested their case upon the record as then made. Proposed findings and conclusions have been submitted by counsel for both sides. Oral argument has not been requested, probably because the case was argued at length at the time the motion to dismiss was made.

2. The respondents, Frank A. Kerran and Cameron L. Kerran, are copartners trading as Double Eagle Refining Co., with their place of business located at 1900 NE. First Street, Oklahoma City, Okla. Respondents are engaged in the sale of lubricating oil for use in motor vehicles. They purchase "crankcase drainings," that is, oil which has been previously used in automobile motors, and then subject such oil to certain re-refining processes, after which it is sold to dealers for resale to the public. There is no question as to the interstate charac-

ter of their business, sales in substantial quantities being made regularly to purchasers located in a number of states other than Oklahoma. Also undisputed is the fact that respondents are in competition in interstate commerce with other sellers of lubricating oils.

3. Respondents' oil is packaged, displayed and sold to the public in metal containers of the same size and general appearance as those in which lubricating oils refined from virgin crude oil are sold. There is nothing on respondents' containers disclosing or indicating that the oil is other than an entirely new product made from virgin crude oil. After examining the containers, an experienced service station operator testified that unless informed to the contrary he would expect the oil therein to be new and unused oil refined from virgin crude oil, and, further, that from his experience with the public it was his opinion that the public would expect the same thing. That this is the correct view is obvious from an examination of the containers. Unquestionably, in the absence of clear disclosure by respondents as to the nature of their product, members of the public purchasing their oil would expect a new product, not oil made from previously used oil.

4. Respondents urge that their oil is not merely reclaimed or reprocessed oil, but is oil which has actually been re-refined. They insist that their refining plant is modern and complete, and that when the oil leaves their plant it meets all applicable standards and requirements. They further urge that it is an established scientific fact that oil does not wear out but may be used satisfactorily again and again so long as it is subjected to the proper re-refining process, and that their oil is of just as high quality as oil refined from virgin crude oil. While all of this may be true, the fact remains that the public is entitled to know what it is getting. It is entitled to be informed as to the nature of respondents' product so that it may make its own choice.

5. On certain of their containers respondents use the words "Paraffin Base," thus representing that the oil is paraffin base oil. The complaint challenges the correctness of this representation. The only testimony on this issue is that of respondent Cameron L. Kerran. Mr. Kerran is a college graduate, who specialized in academic courses having to do with petroleum. For some ten years he has been in charge of the operation of respondents' refining plant. He testified that the original oil (crankcase drainings) is usually received at the plant in tank truck loads of several thousand gallons each; that certain recognized scientific tests are used to determine whether the oil is at least 50 percent paraffin base; that under industry standards oil which is not less than 50 percent paraffin base may properly be labeled paraffin base; and that only oil meeting this requirement is so

labeled by respondents. In view of this testimony it seems clear that this charge in the complaint has not been sustained.

6. The failure of respondents to disclose that their oil is made from previously used oil has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the belief that such oil is new and unused oil, made from virgin crude oil, and to cause such members of the public to purchase respondents' oil as a result of the erroneous and mistaken belief so engendered. This failure of respondents to reveal the nature of their product also serves to place in the hands of retail dealers a means and instrumentality whereby such dealers may mislead the public with respect to respondents' product. The present proceeding is therefore in the public interest. Respondents' practice is to the prejudice of the public and of respondents' competitors, and constitutes an unfair method of competition and an unfair and deceptive act and practice in commerce in violation of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, Frank A. Kerran and Cameron L. Kerran, individually and as copartners trading as Double Eagle Refining Co., or trading under any other name, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of lubricating oil in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, contrary to the fact, that their lubricating oil is refined or processed from other than previously used oil;

(2) Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising and in sales promotion material, and by a clear and conspicuous statement to that effect on the container.

OPINION OF THE COMMISSION

By Anderson, Commissioner:

Respondents in this proceeding have appealed from the hearing examiner's initial decision holding that they have violated the Federal Trade Commission Act by distributing in commerce lubricating oil without disclosing that it is made from previously used oil. The complaint herein also challenged the correctness of respondents' representation that certain of its products consist of a "paraffin base." The hearing examiner found that, under industry standards, oil which is not less than 50 percent paraffin base properly may be labeled "paraffin base" and that only oil meeting this requirement is so labeled by respondents. The initial decision, therefore, held that the allegations of the complaint in this latter respect were not sustained. No appeal was taken from that ruling. Consequently, the issue before the Commission upon the appeal of respondents is whether respondents' failure to disclose their oil as previously used constitutes a violation of the Federal Trade Commission Act.

The complaint in this connection charges in effect that respondents' oil consists of used oil, obtained from drainings of motor crankcases and from other sources, which is reclaimed or reprocessed by the respondents. It is alleged that the reprocessed oil is sold in containers similar in size and appearance to those used for new oil and that it has the appearance of new and unused oil. The complaint further sets out that these containers bear no markings of any nature disclosing that the product is reclaimed or reprocessed used oil. According to the complaint, in the absence of disclosure on the containers that the oil therein is used, reclaimed or reprocessed, the general understanding and belief on the part of dealers and the purchasing public is that oil sold in containers such as are used by respondents is, in fact, new oil and not used, reclaimed or reprocessed oil.

The hearing examiner in his initial decision found that respondents purchase "crankcase drainings" which is subjected to certain refining processes and then sold to dealers for resale to the public. He further found that respondents' oil, as alleged, is packaged, displayed and sold to the public in metal cans of the same size and general appearance as those in which lubricating oils refined from virgin crude oil are sold, and also that there is nothing on respondents' containers disclosing or indicating that the oil is other than an entirely new product made from virgin crude oil. He concluded that, in the absence of clear disclosure as to the nature of the product, members of the public purchasing respondents' oil would expect a new product, not oil made from previously used oil. This conclusion is drawn in part from the testmony of an experienced service station operator with 25 years in the oil business who stated that from his examination of respondents' containers, he was unable to determine whether they contain new or previously used oil; that in his experience the public had a preference for lubricating oil made from "* * * virgin crude, or original crude oil, or original motor oil that is what I would term a quality motor oil that's first run." This witness also testified that his personal preference also is for a "first run oil" and that unless he sees the word "re-refined" on containers, he expects to find virgin oil therein and that, based on his experience, the public expects the same.

Respondents in their appeal brief have set out "ten important facts" as being established by evidence of record and offers of proof. The evidentiary facts referred to by respondents, and the offers of proof adverted to, with two exceptions, all are relevant only to the subject of the quality of respondents' re-refined oil as compared with lubricants made from virgin crude. We are not concerned in this proceeding with whether or not respondents are offering to the public a "high quality" product "just as good as" competitive products. Such matters are immaterial to the issue before us. That issue relates to whether respondents' failure to disclose that their oil is made from previously used oil has the tendency and capacity to mislead and deceive the purchasing public into the belief that such oil is new and unused oil, made from virgin crude oil. It involves the question of whether the public is led to purchase respondents' oil as a result of the erroneous and mistaken belief so engendered. A subsidiary issue is whether, as further alleged in the complaint, such failure to reveal the nature of the product also serves to place in the hands of unscrupulous or uninformed dealers a means and instrumentality whereby such dealers may mislead the public with respect to respondents' product.

One of two expections in the "important facts" listed by respondent is the statement that "Double Eagle oil is a paraffin base oil." The hearing examiner ruled, as we have seen, that the predominant base of respondents' oil is paraffin and, no appeal having been taken from that ruling, the matter no longer is in issue. The second exception we noted above is respondents' statement that "The Double Eagle Refining Co. has not misbranded or untruthfully labeled any of its products." This statement has implicit in it the entire issues in the case and will be fully discussed hereinafter. It is the only one of the "ten important facts" material to the appeal before us.

In contending that the initial decision should be set aside as erroneous, the appeal argues that failure to disclose on labels the "previous state of the oil" before the refining process has no effect whatever on the finished product. This point as developed by respondents' counsel in the appeal brief and on oral argument, of course, goes again to the matter of the quality of the oil and, in the opinion of the Commission, is not germane to the question before it.

The Commission is of the opinion that the record supports the hearing examiner's finding that in the absence of clear disclosure members of the public purchasing respondents' oil would expect a new product, not oil made from previously used oil. We agree that the public is entitled to know what it is getting and that it should be informed of the nature of respondents' product so that it may make its own choice between lubricants made from virgin crude and lubricants made from used oil. As the Supreme Court said in the *Algoma Lumber Co.* case,[1] in holding that whether the substituted product is as good or better than the original product is immaterial:

> The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 216: *Carlsbad* v. *W. T. Thackeray & Co.*, 57 Fed. 18. In such matters the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance.

Or, as the same court said earlier in the *Royal Milling Co.* case:[2]

> The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might not buy *if correctly informed as to its origin.* We are of the opinion that the purchasing public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial. [Emphasis supplied.]

Respondents recognize the rationale of these decisions and do not dispute their doctrine They argue, however, that in requiring a product to be labeled truthfully as being made from used oil, because of the ignorance of the purchasing public, it "will be misled into believing that it is a low grade product, when actually it is a high grade product" and that it would be unfair to require the use of a label which would "cause the public to under-value a product" and which, "because of the erroneous impression it would give to the public, would *decrease* the sales * * *." Respondents in advancing this contention tacitly admit, in effect, that many members of the public are prejudiced against oil made from previously used oil and that they have a preference for oil made from virgin crude. If consumers have that preference, it cannot be satisfied by imposing upon them a similar article, or one equally as good, but having a different origin. *Federal Trade Commission* v. *Algoma Lumber Co.*, *supra*; *Federal Trade Commission* v. *Royal Milling Co.*, *supra*; and see, *Benton Announcements, Inc.* v. *Federal Trade Commission*, 130 F. 2d 254 (C.A. 2, 1942); *Ohio Leather Co.* v. *Federal Trade Commission*, 45 F. 2d 39 (C.A. 6, 1930).

In summary, the general appearance of respondents' containers, respondents' failure to reveal thereon the fact that the contents were made from used oil, and the general public preference for new oil, all tend to create and foster in the minds of dealers and the purchasing public the mistaken belief that respondents' oil is new oil and misleads

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[1] *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

[2] *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 217 (1933).

them to purchase such products, thereby unfairly diverting trade from competitors, causing injury to competition and the public. It is clear that in the absence of adequate disclosure to the contrary, the public assumes and has the understanding and belief that oil which is offered to it in regular channels of trade is oil refined from crude instead of oil derived from used oil. Respondents' practices hereinabove discussed constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Respondents next argue that no public good would be served by requiring disclosure of prior use of respondents' oil, that there is no precedent for such disclosure, and that the disclosure, if required, would be misleading and thereby unlawful. In view of what has been said herein, the Commission is of the opinion that these contentions are without merit.

Further, respondents assert that to require such disclosure would destroy the re-refining industry and result in the wasting of millions of barrels of lubricating oil every year and thereby would be adverse to the public interest. We think this argument also is without merit. As the Supreme Court said of a similar contention in the *Algoma Lumber Co.* case, *supra*:

> Finally, the argument is made that the restraining orders are not necessary to protect the public interest (see *Federal Trade Commission* v. *Royal Milling Co., supra*), but to the contrary that the public interest will be promoted by increasing the demand for *pinus ponderosa*, though it be sold with a misleading label, and *thus abating the destruction of the pine forests of the east.*
>
> The conservation of our forests is a good of large importance, but *the end will have to be attained by methods other than a license to* do business unfairly. [Emphasis supplied.]

We also have considered the form of the order which is contained in the initial decision. Its requirement that a disclosure that the respondents' oil has been processed, when such be the fact, in whole or part from previously used oil be set forth on the products' containers is appropriate and has sound support in the record. The provision additionally requiring that the facts in that respect also be disclosed in any advertising and promotional material utilized by the respondents in the future conduct of their business is similarly warranted and looks to protecting purchasers in marketing situations precluding their detailed examination of the respondents' containers at point of sale. The gravamen of the complaint challenges unfair and deceptive practices whereby oil made from previously used oil has been marketed by the respondents under circumstances causing it to be purchased as oil made from crude. To prevent continuance of the practices found above to be deceptive resulting from slight variations by the respondents in past sales methods, we think that the public interest requires inclusion of an additional provision in the order proscribing affirmative claims that their oil is processed from crude.

In the light of the above and in the interest of clarity, the order contained in the initial decision is being modified. The respondents' appeal is denied and the intiial decision, modified as noted above, is adopted as the decision of the Commission.

Commissioner Tait did not participate in the decision herein.

FINAL ORDER

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

The Commission having determined, for the reasons appearing in the accompanying opinion, that respondents' appeal should be denied and that the order contained in the initial decision should be modified:

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

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

It is ordered, That the respondents, Frank A. Kerran and Cameron L. Kerran, individually and as copartners trading as Double Eagle Refining Co., or trading under any other name, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of lubricating oil in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, contrary to the fact, that their lubricating oil is refined or processed from other than previoulsy used oil;

(2) Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising and in sales promotion material, and by a clear and conspicuous statement to that effect on the container.

It is further ordered, That respondents Frank A. Kerran and Cameron L. Kerran shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in said initial decision, as modified.

It is further ordered, That the initial decision of the hearing examiner, as modified hereby, be, and the same hereby is, adopted as the decision of the Commission.

Commissioner Tait not participating.

IN THE MATTER OF

ASHEVILLE TOBACCO BOARD OF TRADE, INC., ET AL.

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

Docket 6490. Complaint, Jan. 11, 1956—Decision, Feb. 14, 1958

Order requiring the Tobacco Board of Trade in Asheville, N.C., and its member-dealers in leaf tobacco, including owners of the 12 auction warehouses operating on the Asheville burley tobacco market and independent tobacco buyers in the area, to cease restricting the establishment of competitive warehousing on the Asheville market by unreasonable limitations on the selling time allotted to new entrants, specifically failing to give reasonable credit for the full size and capacity of new entrants, and limiting the possible gain or loss in selling time allotted to any warehouse for any one selling season to any specific percentage of the selling time allotted for the preceding selling season.

Mr. Rufus E. Wilson and *Mr. R. D. Young, Jr.*, for the Commission.

Williams and Williams, by *Mr. Robert R. Williams* and *Mr. Silas G. Bernard*, of Asheville, N.C., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

On January 11, 1956, the Federal Trade Commission issued its complaint in the above-entitled proceeding, charging the Asheville Tobacco Board of Trade and the individual members thereof with conspiring together to follow, and following, since 1954, a common course of action designed for, and which resulted in, hindering, restricting and preventing, unreasonably, the establishment and operation of market facilities, market opportunities and competition in the purchase and sale of leaf tobacco in the Asheville tobacco market, in violation of § 5 of the Federal Trade Commission Act.

THE ANSWERS

On March 20, 1956, answers were filed by counsel on behalf of all the Respondents except Henry B. Duncan, A. R. Johnson, Jr., Sherrod N. Landon, J. W. Moore, E. G. Anderson, and J. E. Godwin.

Respondent Henry B. Duncan, who is designated in the record as H. B. Duncan, was never served with the complaint, and did not submit an answer thereto nor appear in this proceeding. Accordingly, the complaint herein, as to him, should be dismissed.

Respondent A. R. Johnson, Jr., upon whom, likewise, service of the complaint was unobtainable, is reported to have died in October

1954. Accordingly, the complaint herein, as to him, should be dismissed.

The respondents who submitted answers reserved the right to question the jurisdiction of the Commission, and made various factual admissions, but denied all charges of unlawful acts or practices.

HEARINGS AND PROPOSED FINDINGS

Hearings were held in Asheville, N.C., at which evidence was presented in support of and in opposition to the allegations of the complaint. Thereafter counsel rested their cases and submitted proposed findings as to the facts and proposed conclusions, on which oral argument was heard by the hearing examiner on January 15, 1957, in Washington, D.C.

IDENTITY AND ORGANIZATION OF RESPONDENTS

Respondent Asheville Tobacco Board of Trade, Inc., hereinafter referred to as Respondent Board, is a nonprofit North Carolina corporation with its principal office and place of business located in Asheville, N.C., duly authorized by the North Carolina General Statutes 106–465 " * * * to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse floors" in the tobacco auction market of Asheville, N.C.; but the "making of rules and regulations in restraint of trade" is expressly excepted from this authorization. Membership in Respondent Board is open to those who are engaged in producing, selling, buying, rehandling, or otherwise dealing in leaf tobacco.

There are 12 auction warehouses presently operating as members of Respondent Board on the Asheville burley tobacco market, as follows:

Bernard-Walker Warehouse No. 1,
Bernard-Walker Warehouse No. 2,
Bernard-Walker Warehouse No. 3,
Dixie Warehouse No. 1,
Dixie Warehouse No. 2,
Planters Warehouse No. 1,
Planters Warehouse No. 2,
Carolina Warehouse,
Walker Warehouse,
Liberty Warehouse,
Big Burley Warehouse, and
Day Warehouse.

The operator of each warehouse is entitled to one vote in the deliberations of Respondent Board. Buyer and seller members may hold either participating or nonparticipating memberships, and participating buying, participating selling and participating buying and selling members are also entitled to one vote each. The following named individuals are now, or have been during the time mentioned herein, either officers or members, or both officers and members of the board of directors of Respondent Board:

Max M. Roberts, president;

J. Carlie Adams, vice president;

Fred D. Cockfield, secretary-treasurer;

Jeter P. Ramsey, ex officio assistant to the secretary, supervisor of sales and general director of the Asheville market;

L. G. Hill, director;

James E. Walker, Jr., director; and

James W. Stewart, director.

Respondents James E. Walker, Jr., and John B. Walker are engaged, as part owners and comanagers, in the business of operating tobacco auction warehouses commonly known as Bernard-Walker Warehouses Nos. 1, 2, and 3 and Walker Warehouse, all of which are located in or near the city of Asheville, N.C., where respondents have their principal office and place of business.

Respondents J. Carlie Adams and Luther Hill are copartners trading under the name and style of Adams & Hill Warehouses, and are engaged in the business of operating three tobacco auction warehouses commonly known as Dixie Warehouses Nos. 1 and 2 and Big Burley Warehouse, all of which are located in or near the city of Asheville, N.C., where respondents have their principal office and place of business. Said respondents are members of Respondent Board.

Respondent Farmers Federation Cooperative, Inc. is a North Carolina corporation, and is engaged in the business of operating a tobacco auction warehouse commonly known as the Carolina Warehouse, located in or near the city of Asheville, N.C., having its principal office and place of business at 131 Roberts Street, Asheville, N.C. Said respondent is a member of Respondent Board, and its Carolina Warehouse is operated by Respondent Max M. Roberts as manager.

Respondents Fred D. Cockfield and James W. Stewart are copartners trading as Planters Warehouses, and engaged in the business of operating two tobacco auction warehouses commonly known as Planters Warehouses Nos. 1 and 2, both located in or near the city of Asheville, N.C., where respondents have their principal office and place of business. Respondents Cockfield and Stewart are members of Respondent Board.

Respondents H. B. Duncan, Route 1, Timber Lake, N.C.; Sherrod N. Landon, Rocky Mount, N.C.; J. W. Moore, c/o Banner Tobacco Warehouse, Wendell, N.C.; E. G. Anderson, Robersonville, N.C.; J. E. Godwin, Smithville, N.C.; Beverly G. Connor, Cluster Springs, Va.; and W. G. Maples, Lenoir City, Tenn., are independent tobacco buyers engaged in the buying and selling of burley leaf tobacco at auction on the floors of the various tobacco auction warehouses which comprise the Asheville tobacco market, and are members of Respondent Board.

BURLEY TOBACCO

Burley tobacco, the only tobacco sold on the Asheville tobacco market, is grown in eight States, namely, Tennessee, Kentucky, Ohio, Indiana, Illinois, Missouri, Virginia, and North Carolina. Although burley tobacco is subjected to a curing process by the farmer, it remains a perishable product while in his possession. For that reason, and because its sale is the principal source of cash income for many farmers, quick sales during the marketing season are always desired by such farmers. When the tobacco is ready for sale, it is graded by the farmer, and approximately 95 percent of it is transported to the market in baskets.

MARKETING OF TOBACCO

For many years the prevailing system of selling burley tobacco has been by auction, and there are now three auction markets in North Carolina, including one at Boone, one at West Jefferson, and the largest at Asheville, N.C. The Asheville market has been designated as being engaged in commerce by the United States Secretary of Agriculture, for the purpose of inspecting, grading, and certifying the tobacco therein in accordance with the Tobacco Inspection Act of 1935. The marketing season for burley tobacco generally opens on the last day of November in Asheville, and closes on or about February 1st of the following year.

The auction warehouse in which burley tobacco is sold is generally a large building with ample floor space on a single floor, for conducting the auction in the traditional manner herein described. In Asheville the warehouses vary in size from 9,640 to 125,000 square feet. The farmers deliver their tobacco to these warehouses, where it is weighed and a ticket prepared showing the grower's name, the serial number of the lot, and the number of pounds contained therein. The ticket also has blank spaces for inserting the name of the buyer, his private grade mark, the price paid per pound, and the grade mark to be inserted by the representative of the Secretary of the United States Department of Agriculture. The tobacco is placed in baskets, the contents of which vary in weight from a few to seven hundred pounds. These baskets are arranged in long rows on the warehouse floor, with 20 square feet of space allotted to each basket. At the opening of the tobacco auction season, buyers representing the large tobacco-processing companies come to the market for the purpose of selecting and buying tobacco. Each company generally sends one or more buyers, and a group of buyers composed of one buyer from each prospective purchaser is known as a "set" of buyers. If each prospective purchaser has sent more than one buyer, there are then two or more "sets," and that number of auctions may be simultaneously conducted. The tobacco companies determine the number of buyers which they will send to any given market, so that the number of buyers, and consequently the number of simultaneous auctions that may be conducted, is beyond the control of Respondent Board and of the owners of the various warehouses. For the last several years, two sets of buyers have been assigned to the Asheville market.

After the tobacco has been inspected and graded by a representative of the United States Department of Agriculture and placed in the warehouse as above described, the stage is set for the sale. The sale group is composed of a representative of the warehouse owner; the auctioneer, who is an employee of the warehouse owner; the buyers from the large tobacco-processing companies; clerks to record the purchases; a sale supervisor, who is an employee of Respondent Board, and who is charged with the responsibility of enforcing the numerous rules regulating the conduct of the auctions; possibly a number of independent buyers who purchase tobacco for resale; and a few farmers. The bidding is begun by a representative of the warehouse, who is referred to as the "starter." The bidding is then carried on by the buyers, with the auctioneer chanting the bids as they are made and indicated to him by various signs or gestures. If the representative of the warehouse considers that the highest bid offered for any particular lot of tobacco is unreasonably low, he may bid for and buy the tobacco himself. He will later resell such tobacco, and may or may not make a profit thereon. His primary purpose in so buying tobacco is to keep the goodwill of the farmers by insuring them the best possible price for their tobacco. In the last analysis, however, if the farmer is displeased with the final bid on his tobacco, he may reject it and again offer his tobacco for sale at a subsequent auction or in a competing warehouse. This is, however, very seldom done.

Because of the practical limitations on the time the buyers can spend in any one warehouse, auctions are conducted very rapidly. Selling is done at the rate of 360 baskets or piles per hour, or an average of 6 baskets per minute. At this rate, with 2 auctions proceeding simultaneously, 2,880 baskets may be sold in a 4-hour day. The length of the selling day is set by the Burley Auction Tobacco Association, as hereinafter more fully discussed.

After the tobacco has been purchased by the buyers for the large tobacco companies, it is removed from the warehouse floor and transported to their processing plants in North Carolina and other states of the United States, and the tobacco, after processing, is shipped throughout the United States and the District of Columbia, and to foreign countries. There is a constant current and course of trade in interstate commerce in tobacco from the growers' farms to the tobacco-processing companies, and of tobacco products produced therefrom through their outlets into all the states of the United States and the District of Columbia, and into foreign countries. The sales of tobacco in the tobacco auction warehouses in Asheville, N.C., are an integral part of such course of trade in commerce.

If the tobacco is purchased by an independent speculator or by the warehouseman, it will again be offered for sale at a subsequent auction.

ROTATION OF SELLING TIME

Sales are thus held in the various warehouses of Asheville according to a sales card, which is prepared by the sales committee of Respondent Board and the supervisor of sales each year not later than the first Saturday in April, prior to the opening of the selling season. This sales card indicates the first and second sales position of each warehouse. This sales schedule is then furnished to each member warehouse, and reflects the selling time accorded each warehouse, by Respondent Board. The 3½ hours' selling time per day which was allotted to the Asheville market for the 1954–55 season was divided among the 12 warehouses operating therein during that year. Actually, however, since the 12 warehouses are owned by only 5 individual interests, the selling time has actually been divided into 5 parts instead of 12.

It was also provided by Respondent Board that if one of the warehouses sold all the tobacco on its floor before the expiration of its allotted selling time, the sale would move to the warehouse whose position on the sales card was next in line. This is termed the "squirrel-cage" or "rotation" system, and results in what is known as a "second sale." The surplus selling time thus made available has also been referred to as "free" selling time.

THE IMPORTANCE OF SELLING TIME

A consideration of the strictly-regulated methods of buying and selling tobacco at auction reveals the fact that the amount of selling time available to an auction warehouse is perhaps the most important factor in the success of such a warehouse. Farmers must sell their tobacco promptly when they bring it to the market, because, if there is insufficient selling time available for their tobacco to be sold within a few days, the tobacco deteriorates, so that when it is eventually sold, the farmer may have to accept a lower price than he would have obtained, had the tobacco been sold promptly upon its arrival at the warehouse. Farmers therefore prefer not to patronize any warehouse which does not have enough selling time to insure the prompt sale of their product. If the farmer is compelled to wait, he tends to seek another warehouse or another market where quicker sale is possible. These circumstances naturally give rise to keen competition between tobacco auction warehouse owners for as large a share as possible of the selling time allocated to their market. The length of the selling day on the Asheville tobacco market is determined by the Burley Auction Warehouse Association, a trade association of burley tobacco warehousemen in North Carolina, to which a number of other tobacco markets also belong. Respondent Board has no control over the determination of the length of the selling day in the Asheville tobacco market. It does have the authority, however, under the General Statutes of North Carolina, to allocate or ration the time available in such selling day among the various warehouse owners in the Asheville tobacco market.

MEMBERSHIP IN RESPONDENT BOARD

Not only does Respondent Board thus control the distribution of selling time on the Asheville market, but the statute authorizing its incorporation contains a provision that

> Membership in good standing in a local board of trade shall be deemed a reasonable requirement of such board of trade as a condition to participating in the business of operating a tobacco warehouse or the purchase of tobacco at auction therein.

Accordingly, no one may operate a tobacco auction warehouse or buy tobacco at auction on the Asheville market without first becoming a member of Respondent Board.

There are two types of membership in Respondent Board, namely, participating and nonparticipating. The buyers representing the tobacco-processing companies comprise the nonparticipating members, and the warehousemen and speculators or independent buyers comprise the participating members. Each participating member is entitled to one vote, whereas the nonparticipating members are not so entitled. However, votes are granted to the warehousemen on the basis of one for each tobacco warehouse owned or operated by them on the Asheville tobacco market, so that warehousemen may exercise their voting privilege once for each warehouse they so own and operate. The initiation fee for membership in Respondent Board is $500, and the yearly dues thereafter are $75. In addition, other special assessments may be made from time to time. Farmers are eligible for membership, but no farmer is now or has ever been a member of Respondent Board.

Respondent Board is chiefly controlled by the warehousemen by virtue of their voting strength, and because, under the board's by-laws, only warehousemen or their general managers are eligible for membership in the board of directors, the governing body of Respondent Board.

ADOPTION OF THE PERFORMANCE SYSTEM

In 1954, respondents, as members of Respondent Board, adopted a new set of by-laws which inaugurated a new system for allocating selling time among the tobacco warehouses of Asheville. This new system, known as the "performance system" and sometimes as the "historical system," is described in the by-laws as follows:

> (b) In the event no unanimous agreements of all such warehouses shall be entered into far enough in advance of any selling season for the Asheville Tobacco Board of Trade to put such agreement into effect by allocating selling time in accordance with such agreement, selling time of the warehouses on the Asheville Market shall be allocated according to a schedule prepared and adopted by the board of trade in accordance with the following requirements, to-wit: *selling time shall be allotted to each warehouse on the Asheville market in such proportion as the sales of tobacco of producers thereof in such warehouse were to the total sales of producers on the Asheville market for the year preceding the allocation;* * * *. [Italics supplied.]

The italicized portion of the above quotation comprises, in substance, the entire structure of the performance system itself.

Substantially the same "performance system" was adopted by the Wilson Tobacco Board of Trade, Inc., of Wilson, N. C., in 1952, and has recently been the subject of extensive litigation before the Federal Trade Commission in the proceeding entitled "In the Matter of *Wilson Tobacco Board of Trade, Inc., a corporation, et al.*," Docket No. 6262. The hearing examiner in that proceeding approved the Wilson performance system, finding as follows:

> 1. That under the exigencies and unchangeable market conditions, generally, and at Wilson, North Carolina, specifically, the performance system of allocating sales time is per se a reasonable regulation and therefore not illegal because,

(a) it promotes rather than hinders competition among warehousemen by putting a premium on additional sales effort—solicitation, advertising, etc, and increases the area of that competition,

(b) puts the competitive emphasis solely on the warehouseman's economic function—service,

(c) penalizes laziness and other inefficiency in that service; * * *.

The Commission, in its decision of August 23, 1956, approved the above finding. The Commission also approved the hearing examiner's finding that the regulation adopted by the Wilson Tobacco Board of Trade, Inc., restricting the allocation of "selling time" to new entrants on the Wilson market to

* * * the same amount of selling time as the last previous entrant (Liberty) had for that year provided the new entrant built as large a warehouse as Liberty's

was "an unreasonable restraint of trade." The Commission further approved the finding that the above-quoted regulation, which was found to be in restraint of trade, and certain other regulations also so characterized, were " * * * not necessarily an integral part of the performance system * * * ", but could be abolished or modified " * * * so as not to be unreasonable * * * ".

Counsel supporting the complaint herein recognizes, of course, the authority of the above-cited precedent, and, in the light thereof, now concedes that the performance system in the instant proceeding, if separated as in the *Wilson* case, *supra*, from unreasonably restrictive and therefore illegal provisos, may be considered a reasonable method of allocating selling time on a tobacco auction market.

THE PROVISOS IN ISSUE

The two provisos which have been appended to the performance system adopted by Respondent Board are not necessarily an integral or inseparable part thereof. Futhermore, the decision of the Commission in the *Wilson* case cannot be interpreted as approving these two provisos. The principal issues here in controversy arise, therefore, from the adoption of such provisos.

The first of these two provisos, which, for convenience, will hereinafter be referred to as the "gain-or-loss proviso," restricts and limits the amount of selling time a warehouse may gain or lose in any particular selling season as a result of the individual degree of success or failure achieved in the preceding season. This proviso is as follows:

* * * provided, however, regular selling time in each warehouse shall not vary more than three and one-half percent from the selling time allocated to a warehouse for the preceding season.

The second proviso, which we will call the "new warehouse proviso," prescribes, for the purpose of allocating selling time to new entrants on the Asheville market, a formula based on the size of the new warehouse in relation to the average size of all warehouses already established, whereby a new warehouse larger than such average size may not receive selling time in excess "of the average of all warehouses." This proviso is as follows:

> Provided that in the event of a new warehouse and/or a warehouse which did not operate on the Asheville tobacco market during the preceding season claiming selling time, then the selling time allotted to such new warehouse or warehouses not operating the preceding season claiming selling time shall be allotted on an average and in proportion with the amount of selling time available to all warehouses operating on the Asheville tobacco market; provided further each such new warehouse and/or warehouses which did not operate the preceding season is smaller in size than the average of all warehouses compromising (sic) the Asheville tobacco market, then the said selling time shall be allocated according to the proportion of its size in relation to all other warehouses; provided further that if said new warehouse or warehouses which did not operate the preceding season is larger in size than the average of all warehouses operating on the Asheville tobacco market, such warehouse or warehouses shall not receive any consideration and be allocated selling time for the size thereof in excess of the average of all warehouses and shall in no event be allocated more than its equal prorata share of selling time as is determined by the number of warehouses operating on the Asheville tobacco market.

Although these two provisos may appear to be separate and distinct provisions and designed to regulate different phases of allocation, actually they intermesh so closely as to have only one effect, that of restricting selling time. While the gain-or-loss proviso imposes certain percentage restrictions upon established warehouses as well as upon new entrants, the weight of both provisos, in actual practice, falls most heavily upon new entrants to the Asheville market, and the restrictions thus imposed are particularly severe against any new entrant who builds a warehouse larger than the average size of the warehouses already established.

MARKET PRIOR TO ADOPTION OF PRESENT PERFORMANCE SYSTEM

Prior to the 1954–55 tobacco-selling season, there were eleven warehouses on the Asheville tobacco market, containing a total floor space of 475,182 square feet. Previously selling time had been allocated among the existing warehouses by what was called the "floor-space system." Under that system, a warehouse was allocated selling time in the ratio its square footage of floor space bore to the total square footage of all the warehouses combined. As a result, selling time was divided among Asheville's 11 warehouses as follows:

Warehouse	Square feet	Percentage allotment of selling time
Carolina	55, 072	11. 58
Bernard-Walker No. 1	91, 941	19. 35
Dixie No. 2	17, 275	3. 64
Planters No. 1	67, 450	14. 20
Walker	46, 124	9. 71
Bernard-Walker No. 2	31, 157	6. 55
Dixie No. 1	33, 484	7. 05
Bernard-Walker No. 3	38, 270	8. 05
Planters No. 2	46, 040	9. 69
Liberty	9, 640	1. 81
Big Burley	39, 729	8. 37
Total	475, 182	100. 00

Although the selling time was allocated on the basis of the square footage of the 11 warehouses, actually, since 4 warehouse owners controlled the 11 warehouses, this resulted in the selling time being apportioned among 4 interests rather than among 11. It will be seen, therefore, that the Asheville tobacco market, prior to the 1954–55 season, was closely controlled by a very small group of individuals, all of whom had been long established in business there.

THREAT OF BUILDING WAR

During 1953 and the early part of 1954, there was much discussion among Respondents and others in Asheville relative to the need to change the method of regulating the Asheville tobacco market, and in particular, the method of allotting selling time, because many of the members believed that there was already more warehouse space available on the Asheville market than was needed to handle the amount of tobacco sold there, and they feared that if selling time continued to be allotted on the basis of warehouse space, a building war would result, for the purpose of obtaining a larger share of the limited selling time available. Such a building war, it was believed, would be very detrimental to the interests of the Asheville market in general and to the warehouse owners in particular. In this connection Mr. Charles T. Day, an experienced, independent tobacco buyer, a former tobacco warehouse operator, and one of the founders of the Respondent Board, is quoted as having said that he intended to gain 25 percent of the selling time if it cost him half a million dollars. Respondent Walker is quoted as having replied that "Every time he (Day) drove a nail, he would drive one too."

NOTICE OF INTENTION TO BUILD

In January 1954, the Mr. Day referred to above notified Respondent Board that he intended to build a new tobacco auction warehouse in Asheville. It was to contain, and when completed did contain, 125,000 square feet of floor space, and, under the system of allotting selling time then in effect, would have entitled Mr. Day to 20.83 percent of the available selling time on the Asheville market.

AGREEMENTS AND RESOLUTIONS

On January 2, 1954, the warehouse members of Respondent Board entered into a written agreement, as follows:

First: That for the 1954 and subsequent tobacco season, the selling time allocated or to be allocated to the Asheville tobacco market, shall be prorated among the various firms as follows:

	Percent
Planters Warehouses	22. 6
Carolina Warehouse	14. 0
Walker Warehouses	43. 0
Hill and Adams	20. 4
	100. 0

Second: We further agree that neither of us, or our heirs or assigns, shall build, rent, purchase, or in any way acquire additional floor space for the purpose of increasing our selling time beyond the figures above agreed to.

Third: Should an outside firm come into the Asheville tobacco market as a new operator, this agreement would be null and void.

* * * * * * *

Fifth: We hereby petition the Asheville Tobacco Board of Trade, in a meeting to be called for this express purpose, to adopt as one of its by-laws, substantially the following resolution:

Resolved: That from and after the ratification of this by-law, any warehouse erected for the sale of leaf tobacco at auction on the Asheville tobacco market, shall be allowed during the first year of its operation fifty percent of its floor space: During the second year, seventy-five percent of its floor space, and during the third and subsequent years, one hundred percent of its floor space.

The above resolution was the first of several definite acts by which the respondent warehousemen agreed together not to expand the Asheville market, not to build new warehouses themselves, and to make the entry of new warehousemen into that market more difficult.

Thereafter, on January 14, 1954, the agreement quoted above was adopted by Respondent Board. A part of the preamble to such adoption reads:

* * * * * * *

And whereas the present method of allocation of selling time by considering floor space as a factor has been justly criticized as being unwise and inequitable in two respects, first, for that it offers a fictitious inducement for the erection of additional warehouses which meet no economic need, but which, judging from the experience of other markets, are likely to be built for the mere purpose of increasing participation by their owners in the allocation of selling time; and, second, for that *the present arrangement deprives experienced operators of the advantage which they would naturally have in holding customers and acquiring new customers* by their past record of efficient and courteous treatment, and thus deprives the operators of any value of the good will which would normally flow from such operations, [Italics supplied.]

* * * * * * *

And whereas it is essential that the warehousemen who are members of the Asheville Tobacco Board of Trade have notice in advance of the approximate amount of selling time they will have during the next season, *to the end that they may take steps to protect their established business if it is threatened by competition, if they so desire, without being taken by surprise,* the undersigned do further petition the Asheville Tobacco Board of Trade to amend the By-Laws to read as follows: [Italics supplied.]

* * * * * * *

It will be observed that this regulation of January 14, 1954, pertains only to the entry of new warehouses on the Asheville market, and, by the declaration of its preamble, was designed "* * * to protect their established business if it is threatened by competition * * *." Under that regulation, new warehouses were to be penalized 50 percent of their floor-space area during the first year of their operation, and 25 percent of their floor-space area during the second year of their operation.

Instead of providing only partial protection of the status quo in Asheville, it would have been much simpler to have provided against any new entries on the Asheville market. Such a regulation of exclusion, however, would have been clearly illegal, and we must assume that the respondents had knowledge of that fact. In the case of *American Federation of Tobacco Growers* v. *Neal*, 183 F. 2d 869, the court ruled that the entrance of new warehouses on a tobacco market cannot be legally precluded; and, in so doing, quoted from the Supreme Court's decision in *Associated Press* v. *United States*, 326 U.S. 1, to the effect that—

The Sherman Act was specifically intended to prohibit independent businesses from becoming associated in a common plan which is bound to reduce their competitors' opportunity to buy or sell the things in which the group competes.

Following the adoption on January 14, 1954, of the resolution above described, Respondents James E. Walker, Jr., Fred D. Cockfield, J. C. Adams, and Max M. Roberts entered into their second agreement for 1954. The most pertinent parts of this agreement are as follows:

1. That the Asheville Tobacco Board of Trade, in preparing the schedules of sales for the years 1954 through 1958 inclusive be, and it is hereby requested to allot the selling time allowed to the market according to the following schedule of percentages of said selling time, and number of baskets for each warehouse, based on the time allowed daily for two sets of buyers, each buying the time allocated by the Burley Warehouse Association:

Firm	*Percentage of selling time*
Bernard-Walker, Walker and Liberty	43. 0
Planters 1 and 2	22. 6
Dixie 1, 2, 3, and Big Burley	20. 4
Carolina	14. 0

* * * * * * *

2. Each of the parties hereto further agrees not to build, rent, purchase, lease, or in any way acquire, directly or indirectly, either as person, firm or corporation, any property for the purpose of securing additional selling time on the Asheville tobacco market, for any of the years 1954, 1955, 1956, 1957, or 1958 tobacco selling season, subject to the conditions set out in paragraph 4 of this agreement.

* * * * * * *

4. In the event any person not a party to this agreement, whether individual or corporate, singly or with others, shall build one or more tobacco sales warehouses during the term of this agreement, with the bona fide purpose of participating in the business of Asheville tobacco market as a warehouseman, and shall apply to the Asheville Tobacco Board of Trade for an allotment of selling time in the manner provided by its regulations and thereby become entitled to an allotment of selling time, the parties hereto shall be thereafter released from all the provisions of this agreement. * * *

EVENTS WHICH PRECEDED THE PERFORMANCE SYSTEM

By August 1954, respondents appear to have become dissatisfied with the agreements and regulations which they had adopted in January. This is revealed in part by a letter written on August 28, 1954, by Respondent James E. Walker, Jr., to Mr. Godfrey Vann, of the tobacco market at Greeneville, Tenn., in which we find the following statement:

> I might add that we are going to adopt the historical system in Asheville for the coming tobacco season. This method certainly protects the values of property of the firms who have all these years spent their time and money in building up a business, and *will tend to discourage further building expansion.* Do hope you will get busy and take action for the preservation of all concerned on the Greeneville tobacco market. [Italics supplied.]

Furthermore, the respondents knew in 1954 that the Asheville market was on the "upswing," and had shown a steady growth for the past 2 years. A second set of buyers had been added the previous season. Some of the warehouses were old. Mr. Day had referred to some of them as chicken-coops, which permitted rain and snow to fall on some of the tobacco. These circumstances seem to have justified substantial improvement, either by the repairing of existing warehouses or by the building of new ones. Mr. Day was in the process of building his new 125,000-square-foot warehouse. Confronted with this situation, respondents met on October 2, 1954, and adopted the performance system, together with the gain-or-loss proviso and the new-warehouse proviso hereinabove quoted and discussed.

PURPOSE AND EFFECT OF THE TWO PROVISOS

The respondents, by their written agreements and their adopted resolutions, have ostensibly professed a desire to remedy the defects of the Asheville system of allocating selling time, and to preserve competition on the Asheville market; but by those same agreements and resolutions, they have shown that their major concern was the preservation of the status quo, and the restriction of selling time allocated to any new competitor. In the resolution of January 14, 1954, we find that they profess to take action "* * * to the end that they may take steps to protect their established business if it is threatened by competition * * * ." They contracted among themselves not to build new tobacco warehouses during the period from 1954 to 1958. Respondent Walker asserted that the new system would protect " * * * the values of property of the firms who have all these years spent their time and money in building up a business, and will tend to discourage further building expansion." We do not question respondents' right to plan for the preservation of their own businesses; but we do question their right to plan and combine together for the purpose of preserving the status quo of business on the market as a whole, and preventing or hindering further expansion thereof. Although the respondents' purpose in adopting the performance system proper may have been worthy, we believe that their purpose in adopting the two provisos in question was predominantly self-serving, and that the provisos were designed unreasonably to hinder and restrict, and, as far as possible, prevent the establishment of competitive warehousing facilities on the Asheville market.

What were the actual effects of these two provisos? Under the floor-space system existing prior to January 1954, a new entrant into the market would have received a prorated share of the selling time, based upon the ratio of the square footage of his warehouse to the total square footage of all warehouses on the Asheville market. Such an allocation of selling time would appear to grant a new entrant to the market his due proportion of the selling time available, and consequently a fair opportunity to compete therein. This system would have allocated to the new warehouse built by Mr. Day, on the basis of its 125,000 square feet of floor space, 20.83 percent of the total selling time available on the Asheville market. By the system which was temporarily put into effect by Respondents on January 14, 1954, Mr. Day's warehouse would have been entitled to over 10 percent of the available selling time.

THE NEW-WAREHOUSE PROVISO

By the new-warehouse proviso of October 2, 1954, Mr. Day was actually granted 8.33 percent of the available selling time, based upon the average square footage of the total of all warehouses on the market or approximately 51,000 square feet. Accordingly, no selling-time credit was granted for the 74,000 square feet of space by which Mr. Day's warehouse exceeded the average size of all warehouses on the Asheville market. Mr. Day testified that he would not have built his new warehouse, had he known that he would be so restricted.

Counsel for respondents points with emphasis to the fact that Mr. Day actually received, during the 1954–55 season, over 20 percent of the available selling time, and still more additional selling time in the 1955–56 season. This contention is factually true; but it fails as a defense of the new-warehouse proviso, because, in advancing this contention, counsel for respondents is attempting to attribute to the new-warehouse proviso a benefit which did not result from its operation, but flowed rather from a fortuitous circumstance which might or might not be repeated. The extra time Mr. Day received was in the form of "second sales" or "free time"—time that was not needed by the other warehouses for the reason that they did not have on their floors enough tobacco, ready for sale, to utilize all the selling time allotted to them. The new warehouse received, in effect, the leavings of selling time after the established warehouses had used all the selling time they could. For any business to be forced by regulation to depend, competitively, upon such a fortuitous circumstance is clearly unfair.

Furthermore, after receiving this extra selling time, the new warehouse still sustained competitive injury, in that it was "blocked"—that is, tobacco was left unsold on its floor at the expiration of its allotted period of selling time—oftener and longer than any other warehouse on the Asheville market. In fair competition, if the total selling time allotted to the Asheville market as a whole were insufficient to sell all the tobacco ready for sale on the floors of all the warehouses, the deficiency should be borne, not principally by one warehouse alone, but in due proportion by all the warehouses on the market. The restriction that placed the greater proportion of this deficiency upon the new warehouse is thus manifestly unfair.

The new-warehouse proviso also resulted in injury to the farmers who desired to sell their tobacco in the new warehouse on the Asheville market. Farmers testified, in fact, that their tobacco was forced to remain on the floor of the new warehouse from 3 days to 3 or 4 weeks before there was sufficient selling time available to sell it. Other farmers testified that because the new warehouse was denied sufficient selling time, they removed their tobacco to other markets, in Tennessee and elsewhere. Thus, not only was the new warehouse deprived of their business, but that business was lost to the Asheville market as a whole. The farmers also suffered injury by reason of the fact that they were compelled to transport their tobacco farther, and, in some instances, to accept a lower price therefor, because of the delay in selling it. Thus the new-warehouse proviso also had a secondary effect detrimental, not only to the market as a whole, but to the farmers, who were not members of Respondent Board, but only members of the general public.

THE OPINION OF THE NORTH CAROLINA COURTS

Counsel for the respondents, in support of his contention that the provisos here in question are lawful, cites the decisions of the superior court and the Supreme Court of North Carolina in the case of *C. T. Day* v. *Asheville Tobacco Board of Trade*, 242 N.C. 136, 87 S.E.2d 18 (1955). In that case, Mr. Day, the owner of the new warehouse here involved, sought an injunction in the North Carolina courts to restrain Respondent Board from adopting the performance system and the two provisos here in issue. The trial court's denial of the requested injunction was sustained on appeal, the appellate court asserting, by way of conclusion, that "the rule by which the allotment was made * * * by the board appears fair and equitable. Indeed, it does not appear that there is any restraint of trade in the rule." In evaluating this opinion, it must be observed that the court, in this instance, was engaged in resolving a private controversy, as distinguished from the broader concept of an impersonal action, such as the instant proceeding, brought solely in the public interest; that it did not have before it the record in the instant proceeding; that the trial court did not consider the facts before it in the light of the Federal law against restraint of trade by unfair methods of competition; and that the appellate court, in approving the denial of injunction by the lower court, was likewise limited because, in reaching its decision, it did not go beyond the record presented to it by the lower court. Its statement that Respondent Board's rule did not appear to be in restraint of trade was therefore merely incidental, and cannot be regarded as a valid precedent in ruling upon the question here in issue.

THE GAIN-OR-LOSS PROVISO

After placing an arbitrary limitation upon the competition which might develop from a new entrant upon the Asheville market during the first year of his operation, respondents adopted the gain-or-loss proviso, by which they assured themselves, not only that the established warehouses could not lose more than 3½ percent of their selling time in any one season by reason of business vicissitudes encountered during the preceding year, but that neither the new entrant nor any of the established warehouses could gain more than that amount in any one season. Again, in the *Wilson* case, *supra*, the hearing examiner approved the performance system because he found that it possessed "three requisites of competition: opportunities for competitors to grow; opportunities for competitors to appeal for patronage by improving or changing services; no restraint upon the farmer's freedom of election to patronize the competitor of his choice." The gain-or-loss proviso obviously violates all these requisites of fair competition. In conjunction with the new-warehouse proviso, this limitation would have compelled the new entrant to wait between 3 and 4 years, under optimum conditions, before receiving the just proportion of the available selling time which, in a freely competitive system, would have been accorded to him promptly upon his entry into the market. This seems too heavy a competitive handicap for any business to be required to carry.

We must conclude, therefore, that the new-warehouse proviso and the gain-or-loss proviso, both separately and operating in conjunction with each other, are unreasonable and unfair, and constitute an undue hindrance to and restriction upon fair competition in the Asheville tobacco market.

The Commission held, in the *Wilson* case, *supra*, that it was basically unfair and arbitrary to restrict a new entrant's allotment of selling time to the amount of selling time granted the last entrant upon the market because, as Hearing Examiner Hier stated, "* * * it determines a new entrant's competitive opportunity by the energy and efficiency of another."

By the same reasoning, it is basically unfair and arbitrary to limit the competitive opportunity of a new entrant in any market to the average competitive ability of all his established competitors. The very idea of such arbitrary limitation of opportunity is alien to the whole concept of the free-enterprise system.

CONCLUSION

Based upon consideration of the entire record, and in consonance with the applicable principles of law and precedent, we conclude:

1. That the Federal Trade Commission has jurisdiction over the respondents and over their acts and practices alleged in the complaint herein to be unlawful;

2. That this proceeding is in the interest of the public and that public interest herein is substantial; and

3. That the acts and practices of respondents, as hereinabove found, have had and now have a tendency and capacity to, and do, unreasonably and unduly restrain trade in the Asheville tobacco market in the purchase, sale and distribution of tobacco in commerce, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of §5 of the Federal Trade Commission Act.

Accordingly,

It is ordered, That Respondents Asheville Tobacco Board of Trade, Inc., a corporation, and Max M. Roberts, president and director, J. Carlie Adams, vice president and director, Fred D. Cockfield, secretary-treasurer and director, Jeter P. Ramsey, ex officio assistant to the secretary, supervisor of sales and general director of the Asheville market, L. G. Hill, director, James W. Stewart, director, and James E. Walker, Jr., director, all individually and as officers and directors of Asheville Tobacco Board of Trade, Inc., and James E. Walker, Jr., and John B. Walker, part owners, comanagers and operators of Bernard-Walker Warehouses; J. Carlie Adams and Luther Hill, copartners trading under the name and style of Adams & Hill Warehouses; Farmers Federation Cooperative, Inc., a corporation, leasing and operating Carolina Warehouse; Fred D. Cockfield, and James W. Stewart, copartners trading under the name and style of Planters Warehouses; Sherrod N. Landon, J. W. Moore, E. G. Anderson, J. E. Godwin, Beverly G. Connor, W. G. Maples, members of Asheville Tobacco Board of Trade, Inc., individually and as officers, directly or through any corporate or other device, in connection with procuring, purchasing, offering to purchase, selling or offering for sale leaf tobacco, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from devising, adopting, using, adhering to, maintaining or cooperating in the carrying out of any plan, system, method, policy, or practice which:

1. Allots selling time to new entrant warehouses on the Asheville tobacco market on any basis or in any manner which fails to take

into account and give reasonable credit for the full size and capacity of a new entrant;

2. Limits the possible gain or loss in selling time allotted to any warehouse, under the performance system or any other system, for any one selling season to 3½ percent, or any other specific percentage, of the selling time so allotted to such warehouse for the preceding selling season; or

3. Has the purpose or effect of foreclosing or preventing any new entrant warehouse on the Asheville tobacco market, or any other warehouse doing business on that market, from competing therein on a fair and equal basis.

It is further ordered, That the complaint herein, insofar as it relates to Respondents Henry B. Duncan, designated in the record as H. B. Duncan, and A. R. Johnson, Jr., deceased, be, and the same hereby is, dismissed.

ON APPEAL FROM INITIAL DECISION

By Secrest, Commissioner:

Complaint herein issued January 11, 1956, charging respondents with having conspired and combined together in pursuance of a planned common course of action to restrict, hinder, suppress and prevent the establishment and operation of new tobacco auction warehouse market facilities and market opportunities and competition in the purchase and sale of leaf tobacco in the Asheville, N.C., market, in violation of the Federal Trade Commission Act. Hearings were held in due course before a hearing examiner, who filed his initial decision on March 29, 1957.

Respondents are the Asheville Tobacco Board of Trade, Inc., its directors, officers, and certain of its members. Membership in the board is open to those engaged in producing, buying, selling, rehandling, or otherwise dealing in leaf tobacco. Twelve member auction warehouses in the market each are entitled to one vote on the board. Buyer and seller members hold either participating or nonparticipating memberships. Participating members are entitled to one vote. Only warehousemen or their general managers are eligible for membership on the board of directors, the governing body of respondent board of trade. Thus, respondent board chiefly is governed by the warehousemen by reason of their voting strength.

All of the respondents appealed from the hearing examiner's initial decision. Oral argument was had before the Commission on this appeal and briefs in support of and in opposition to the appeal were filed. Also, a "Brief of State of North Carolina Amicus Curiae" was submitted.

The initial decision prohibits respondents from restricting the allotment of selling time to any *new entrant* on the Asheville tobacco auction market to an amount which is based (a) upon an average of the size in square feet of all established warehouses, (b) upon an average of the amount of selling time allotted during the preceding selling season to established warehouses, or (c) upon a formula which divides the total selling time available to the market as a whole by the total number of warehouses operating therein. The initial decision further inhibits respondents from limiting possible gain or loss of selling time for any one selling season to 3½ percent, or any other specific percentage, of the selling time allotted to a given warehouse for the preceding season.

Respondents in their appeal assert that the issues presented are both substantive and jurisdictional. The two substantive issues are stated by respondents as being first, whether it is reasonable and lawful to grant selling time to a new warehouse equal to the average selling time of all warehouses on the market, and second, whether it is reasonable and lawful to limit gain or loss of selling time of 3½ percent to or from the selling time allocated to a warehouse for the previous selling season. We will consider these substantive issues at the outset and thereafter state and dispose of the jurisdictional questions.

Prior to the 1954–55 selling season, the Asheville market operated under a "floor space" system, whereby a warehouse was given an amount of selling time on a daily basis proportionalized between its total square footage of floor space and the total square footage of all warehouses on the market. Beginning with the 1954–55 selling season, the Asheville board abandoned the "floor space" system and adopted what is designated as the "performance" system with respect to the allocation of selling time to existing warehouses and promulgated a regulation setting up a "unit" system with respect to the allocation of selling time upon the entry of a new warehouse. Under the performance system selling time is allotted to each warehouse on the Asheville market in such proportion as the sales of tobacco of producers thereof in such warehouse were to the total sales of producers on the Asheville market for the year preceding the allocation.

The "unit" system, or "new warehouse proviso" generally would allot a *new* warehouse selling time on the basis of the average of the selling time available to all warehouses.[1]

The board also adopted a regulation which provided that regular selling time in each warehouse shall not vary more than 3½ percent from the selling time allocated to a warehouse for the preceding season. This is known as the "gain or loss proviso."

There is no dispute here as to the legality and reasonableness of the "performance" method of allocating selling time on the Asheville tobacco market. In fact, the Commission has sustained the intrinsic legality of such a method in a recent proceeding involving another North Carolina tobacco auction market. *In the Matter of Wilson Tobacco Board of Trade*, F.T.C. Docket No. 6262 (decided August 23, 1956). And the courts likewise have upheld the adoption of the "performance" method of allocating selling time.[2]

A problem is presented, however, under the performance system adopted by respondents October 2, 1954, where they added to it the "new warehouse proviso" and the "gain or loss proviso" hereinbefore mentioned.

A careful reading of the respondents' "new warehouse proviso" (*supra*, n. 1) discloses that it establishes an allocation of selling time to a new entrant into the market based upon the average and in proportion with the amount of selling time available to all warehouses operating on the Asheville tobacco market, and, further, that it expressly provides that no time be allocated to any new warehouse "*for the size thereof in excess of the average of all warehouses.*" This provision that a new warehouse claiming selling time is not to be given credit for any of its floor space in excess of the average floor space on the market in actual operation was disclosed on the record to have had the effect of restraining trade unreasonably.

In this connection the hearing examiner found that in January 1954, the respondent Board was notified of plans for a new tobacco

[1] This proviso in full is as follows:

"Provided that in the event of a new warehouse and/or a warehouse which did not operate on the Asheville tobacco market during the preceding season claiming selling time, then the selling time allotted to such new warehouse or warehouses not operating the preceding season claiming selling time *shall be allotted on an average and in proportion with the amount of selling time available to all warehouses operating on the Asheville tobacco market;* provided further each such new warehouse and/or warehouses which did not operate the preceding season is smaller in size than the average of all warehouses compromising (sic.) the Asheville tobacco market, then the said selling time shall be allocated according to the proportion of its size in relation to all other warehouses; *provided further that if said new warehouse or warehouses which did not operate the preceding season is larger in size than the average* of all warehouses operating on the Asheville tobacco market, *such warehouse or warehouses shall not receive any consideration and be allocated selling time for the size thereof in excess of the average* of all warehouses and shall in no event be allocated more than its equal prorata share of selling time as is determined by the number of warehouses operating on the Asheville tobacco market." [Emphasis supplied.]

[2] *Day* v. *Asheville Board of Trade*, 242 N.C. 136, 87 S.E. 2d (1955); *Rogers* v. *Douglas Tobacco Board of Trade*, 244 F. 2d 471 (C.A. 5, 1957).

auction warehouse containing 125,000 square feet of floor space which would entitle it to 20.83 percent of the available selling time on the market under the allotment system then prevailing. When completed, this new warehouse was actually granted 8.33 percent of available selling time under the "new warehouse proviso" adopted on October 2, 1954. This was on the basis of 51,000 square feet (the average size of all warehouses theretofore operating in the market) *with no selling-time credit being granted for the 74,000 square feet of floor space in excess of the average.* It is true, as contended by respondents, that in the 1954–55 season this new warehouse actually received about 20 percent of available selling time. But, as the initial decision points out, this extra time resulted from "second sales" or "free time"—that not needed by other warehouses because they did not have enough tobacco on their floors to utilize their allotted time. As the hearing examiner correctly concluded, the net result was that the new warehouse ended up with the leavings of selling time after established warehouses had used all they could. Thus, said the hearing examiner, "[f]or any business to be forced by regulation to depend competitively upon such a fortuitous circumstance is clearly unfair." He found further competitive injury, and in this is clearly sustained by the record, in that the new warehouse was "blocked" (tobacco left unsold on its floor at expiration of its allotted period of selling time) oftener and longer than any other warehouse.

The record also establishes that the effect of the "new warehouse proviso" on farmers and on the Asheville market as a whole was deleterious. There is testimony that farmers' tobacco had to remain on the floor of the new warehouse for periods from three days up until four weeks before selling time became available; that because of this situation farmers removed their tobacco to other markets, in Tennessee and elsewhere, incurring additional transportation costs and in some cases being forced to accept lower prices because of the delay in selling. Thus, the new warehouse not only was deprived of business, which also was lost to the Asheville market as a whole, but the farmers were injured by operation of the proviso.

As to the "gain or loss proviso," the record demonstrates that, through its operation, established warehouses could not lose more than 3½ percent of their selling time in any given season by reason of marketing difficulties encountered during the preceding season and, also by reason of the proviso, that neither a new entrant nor any established warehouse could gain more than 3½ percent in any one season. Clearly, under this proviso, existing warehouses gained an unreasonable and unfair competitive advantage, since if a new entry, notwithstanding the fact that its allocated time was limited under the "new warehouse proviso," still managed to compete by improving or changing service, the established warehouses remained secure in the knowledge that any newcomer would be limited arbitrarily to an increase in selling time each year to 3½ percent. As illustrative of this result, it appears that the new warehouse previously mentioned as having been granted 8.33 percent of available selling time in 1954 would have to wait about 28 years to be allocated the approximately 21 percent of selling time which it would have obtained under regulations in effect when it was constructed.[3] We have found that the "performance system" in and of itself is not illegal; but tied up as it is here with this "gain or loss proviso" and the "new warehouse proviso," we are confronted with an entirely different situation. We are of the opinion, in the light of the whole record herein, that the hearing examiner correctly concluded that the new warehouse proviso and the gain or loss proviso, both separately and operating in conjunction with each other, are unreasonable and unfair and constitute an undue hindrance to and restriction upon fair competition in the Asheville tobacco market. Both substantive issues raised by respondents on appeal should be, and hereby are, decided adversely to respondents' contentions in support thereof, except as noted in the concluding two paragraphs of this opinion.

We turn now to the jurisdictional issues raised by respondents. They urge first that respondent Asheville Board of Trade, Inc., is not a "corporation" within the meaning of section 4 of the Federal Trade Commission Act and that it is not a "person, partnership or corporation" within the meaning of section 5 of the act. As a corollary respondents argue that the board is not engaged in interstate commerce and that the acts and practices alleged are not "in" commerce so as to confer jurisdiction upon the Commission over such acts and practices. Similar contentions were advanced in the matter of *Wilson Tobacco Board of Trade*, *supra*, recently decided by us, and we ruled that they were without merit. On the basis of the reasons stated in our decision in the *Wilson* case, we reject respondents' contentions here that the Commission is without jurisdiction.

Respondents contend in effect also that, even if jurisdiction exists in the Commission, the proceeding should be dismissed for lack of

[3] In *Rogers v. Douglas Tobacco Board of Trade* (supra, n. 2), the United States Court of Appeals, Fifth Circuit, in remanding that case for further proceedings, stated in regard to a similar "gain or loss proviso" that:

"The 3½ percent limitation, we think, practically froze the seven warehouses in their 1954 competitive positions, eliminated in major part the hope of gain and the risk of failure inherent in a true performance system * * *."

public interest because it is purely a private controversy completely devoid of public interest; because the public interest has in no way been affected by the regulations in question; and because the regulation of the business of tobacco warehousing by the Federal Government is unwarranted in view of the adequacy of the regulatory program established by the State of North Carolina and the United States Department of Agriculture.

The gravamen of the complaint is that respondents in concert attempted to hinder, interfere with and prevent such further warehouse competition in the Asheville tobacco auction market as would upset the status quo of the established warehouse members of respondent Board in that market. The record clearly demonstrates the effectiveness of respondents' efforts in this respect. Moreover, as we have seen above, all tobacco producers in the area—the farmers—were affected adversely by respondents' practices. Their tobacco remained on the floor of the new warehouse for periods of up to four weeks before selling time became available by reason of the adoption and placing into effect by respondents of the by-laws, rules, and regulations herein discussed. Farmers, because of the situation obtaining, removed their tobacco to other distant markets, incurring concomitant additional transportation costs and in many cases were forced to accept lower prices. Not only was the new warehouse deprived of business, that business was lost to the Asheville market as a whole as well. The hearing examiner made his subsidiary findings as to the facts and concluded "[T]hat this proceeding is in the interest of the public and that public interest herein is substantial * * *." From our review of the whole record, we think there is substantial proof of a substantial public interest in this matter. Respondents' contentions to the contrary are rejected.

As to respondents' argument that regulation of tobacco warehousing by the Federal Government is unwarranted because of the adequacy of regulatory programs established by the State of North Carolina and the United States Department of Agriculture, we fail to see any merit therein. The United States Department of Agriculture does not govern or regulate tobacco markets. It only provides informational, inspection and grading services as well as a price support program.

It is true that the State of North Carolina has by statute authorized the establishment of boards of trade pursuant to which the latter are:

* * * authorized to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse

floors in the several towns and cities in North Carolina in which an auction market is situated.[4]

And in *Cooperative Warehouse* v. *Lumberton Tobacco Board of Trade*,[5] that authority correctly and logically was held to include "authority to make reasonable rules and regulations in respect to allotment of sales time."

However, the record evidence in this case proves unequivocally, as the examiner found, that the respondents' purpose in adopting the rules and regulations here involved essentially was self-serving and that "the provisos were designed unreasonably to hinder and restrict, and, as far as possible prevent the establishment of competitive warehousing on the Asheville market." In such circumstances, the Commission has the statutory duty and authority to take corrective action. In the opinion of the Commission the principle enunciated by the United States Court of Appeals, Eighth Circuit, in the landmark case of *Chamber of Commerce of Minneapolis, et al.* v. *Federal Trade Commission*[6] is controlling here. One of the arguments in that case was that rules and regulations prescribed by the Chamber affected interstate commerce only indirectly and they, therefore, were subject only to state action. In rejecting that contention the court ruled that:

> This may be true as a broad general statement (*Hill* v. *Wallace*, 259 U.S. 44, 68, and citations in that opinion). But Congress, in the Federal Trade Commission Act, has assumed to legislate concerning "unfair methods of competition" affecting interstate commerce and if any action by or any rule or regulation of the chamber has that effect it is certainly subject to that act, no matter what the state has or has not authorized or permitted in that respect. Any action by the State legislature or any decision of the State courts falls blunted if it strikes at this power which Congress vested and had constitutional authority to vest in the Commission (*Northern Pac. Ry.* v. *Washington*, 222 U.S. 370, 378).

We conclude, therefore, that respondents' argument that Commission action is unwarranted because respondents are regulated by the State of North Carolina is without merit and it is rejected.

Respondents, before the hearing examiner, cited the decision of the Supreme Court of North Carolina in *Day* v. *Asheville Tobacco Board of Trade*, *supra*, n. 2, as being determinative of the issues in the instant proceeding. In that case the plaintiff Day, owner of the new warehouse hereinbefore mentioned as having entered the Asheville tobacco auction market in 1954, sought unsuccessfully

[4] North Carolina Gen. Stat., §106-465, P.L. 1933, ch. 268. It sholud be noted that the statute also provides that:

"Nothing in this act shall authorize the organization of any association having for its purpose the control of prices or the making of rules and regulations in restraint of trade."

[5] 242 N.C. 123, 87 S.E. 2d 25.

[6] 13 F. 2d 673, 684 (C.A. 8, 1926).

to enjoin operation of the "new warehouse proviso." The hearing examiner held, however, that the decision in that case resolved a private controversy and was arrived at upon a limited record wholly different from that made in this proceeding, involving, as it does, broad considerations of public interest and principles of Federal law against restraint of trade by unfair methods of competition. He concluded, therefore, that the *Day* case "cannot be regarded as a valid precedent in ruling upon the question here in issue." The Commission is of the opinion that the hearing examiner's conclusion in that respect was fully justified.

In oral argument before the Commission counsel for respondents cited in support of their appeal *Rogers* v. *Douglas Tobacco Board of Trade, supra*, n. 2, a case also involving the allocation of selling time in a tobacco auction market. That decision of the United States Court of Appeals, Fifth Circuit, dated May 9, 1957, subsequent to entry of the initial decision here under review, involved an action for treble damages for alleged violations of the Sherman Antitrust Act and was before the court on appeal from a district court ruling sustaining motions of defendants to dismiss and for judgement on the pleadings. The basic question was whether defendants were entitled to a judgment as a matter of law. All responsible parties were not before the court and the appellate court specifically recognized that the issues were not so framed as to be the basis for review of the performance system of allocating selling time there involved. The case was remanded for further proceedings with no final judgment on the merits. It is not controlling of our decision here.

As previously noted, the State of North Carolina, through its Attorney General, filed a brief *amicus curiae* in support of respondents' appeal. In arriving at its decision herein, denying in part respondents' appeal, the Commission has carefully considered that brief, together with the whole record before it.

In conclusion, the Commission is of the opinion that insofar as respondents object to paragraph 1 of the order to cease and desist contained in the initial decision, there is considerable merit in their position. As written, this paragraph would prohibit respondents under any and all circumstances from allocating selling time to new warehouses on the basis of an average of the size, previous selling time, or number of warehouses already operating on the Asheville market. As we have noted, however, the vice of respondents' system of allocating selling time to new warehouses lies not so much in relating their selling time to an average of the established warehouses, but rather to the arbitrary refusal to take into account and give credit to the size and capacity of the new entrant over and above the average of the sizes and capacities of the warehouses already in operation. In view of this, we think paragraph 1 of the order should be revised so as not to prohibit the allocation of selling time to a new entrant on the Asheville market on the basis of some average of the established warehouses, but to require that, under whatever system is employed, reasonable selling time credit be given for the full size and capacity of the new entrant.

In view of the foregoing considerations, respondents' appeal is denied in part and granted in part to the extent indicated in this opinion, and the hearing examiner's initial decision, modified as indicated in the last succeeding paragraph, is adopted as the decision of the Commission.

FINAL ORDER

Respondents having filed an appeal from the hearing examiner's initial decision and the matter having come on to be heard upon the whole record, including briefs and oral argument, and the Commission having rendered its decision denying respondents' appeal in part and granting the appeal in part and adopting as its own decision the initial decision, as modified by the Commission's opinion:

It is ordered, That paragraph 1 of the cease and desist order contained in the initial decision be modified to read as follows:

1. Allots selling time to new entrant warehouses on the Asheville tobacco market on any basis or in any manner which fails to take into account and give reasonable credit for the full size and capacity of a new entrant.

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

IN THE MATTER OF

MOHAWK REFINING CORP. ET AL.

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

Docket 6588. Complaint, July 17, 1956—Decision, Feb. 14, 1958

Order requiring a concern in Newark, N.J., engaged in reclaiming used motor oil obtained from drainings of motor crankcases which they sold, some of it blended with new oil, to dealers for resale to the purchasing public, to cease advertising for sale or selling such oil without disclosing to the purchaser that it was previously used and without a clear statement to that effect on containers.

Mr. John W. Brookfield, Jr. for the Commissiom.

Mr. Seymour Friedman and *Mr. Joseph H. Freehill*, of Washington, D.C., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

Respondents are charged with having engaged in unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the Federal Trade Commission Act, by the sale of lubricating oil which has been reprocessed by them in whole or in part from used motor oil procured from gasoline stations and other sources, without showing on the containers in which said oil is sold, or otherwise disclosing, the fact that such oil is reclaimed and reprocessed. By answer respondents deny that they have in any way violated the Federal Trade Commission Act, and aver that the Federal Trade Commission is without jurisdiction in the matter, that the proceeding is not in the public interest, and that the complaint fails to state a cause of action.

Hearings have been held, evidence in support of and in opposition to the allegations of the complaint has been received, duly recorded and filed with the Commission, proposed findings of fact and conclusions have been submitted by counsel and oral argument thereon heard by the hearing examiner. Based upon consideration of the entire record, the following findings of fact are made and conclusions reached:

1. Respondent Mohawk Refining Corp. is a corporation organized and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 472 Frelinghuysen Avenue, in the city of Newark, N.J. Respondents John E. C. Stroud, C. Kenneth Johnes, and William L. Ashby are

individuals and officers of said corporation. These individual respondents dominate and direct the affairs and practices of said corporate respondent.

2. Respondents are now, and for more than 2 years last past have been, engaged in the business of producing motor lubricating oil by collecting, reprocessing and re-refining used motor oil obtained from automobile crankcase drainings and other sources. Respondents' refining operation consists of a series of processes, including filtration, dehydration, heat, acid, and clay treatments. The finished motor oil is sold straight, or with additives. Sometimes, in order to meet varying viscosity requirements, it is blended with motor oils refined from "crude" oil. Respondents' product is sold to blenders and other industrial users, to jobbers and to retailers for resale to the public. It is sold either in bulk or in quart and 2-gallon cans under various brand names, including "Mohawk Oil," "Mohawk Chieftain Oil," "Tomahawk High Speed Motor Oil," "Solar Power Oil" and other names specified by customers. The trade names are used interchangeably for re-refined used oil, refined crude oil, or a blend of the two.

3. During each of the years 1954 and 1955, respondents sold approximately 2 million gallons of oil, for which they realized about $500,000. Of this total, between 75 and 90 percent represented oil produced by respondents, and from one-quarter to one-third of all sales were in interstate commerce, involving transportation from respondents' place of business in New Jersey to purchasers located in various other States, mostly States near New Jersey. Although respondents' business is small compared to total oil sales in the United States, it is still substantial.

4. Respondents trade also as "Metropolitan Lubricating Terminal," a registered trade name of Mohawk Refining Corp., which also has an affiliate "Oil Collection Corporation" through which collections are made of the used oils which become the raw material in respondents' reprocessing and re-refining operations. Respondents are in competition with other individuals, firms, and corporations engaged in the production and sale of lubricating oil made from used oil, and with others who sell lubricating oil made from crude oil.

5. Most of respondents' bulk sales are on customer specification or to meet customer requirements. The containers used for the oil sold for the retail trade indicate the S.A.E. viscosity rating of the oil con-

tent in accord with standards established by the Society of Automotive Engineers, but these containers bear no statement as to the nature or origin of the raw material from which the oil is derived. In the absence of such statements, the record indicates, many retail dealers and many members of the purchasing public believe that the oil sold in such containers is in fact refined from crude oil for which they, the purchasing public have a preference as opposed to oil which has been reprocessed and re-refined from oil that has been previously used. There is substantial evidence that the public buys motor oil largely on the basis of price, in the belief that the higher-priced oils will give them better service. For this reason most of the oil sold for use in automobiles is of the higher- or medium-priced oils.

6. The quality of the lubricating oil sold by the respondents is not in question in this proceeding. There is no charge or implication that respondents' oil is lacking in lubricating qualities, in efficiency, or in adaptability to the uses for which it is sold; nor is it claimed that it is inferior to lubricating oil which has been refined from crude oil. Therefore no finding is required in this respect. For this reason, respondents' offer of evidence that no difference in characteristics or qualities of lubricating oils arises out of the fact that some may have been refined from crude oil while others were re-refined from used oil, and that the origin or source of the raw material is not decisive as to the quality of the lubricating oil which is derived therefrom, was rejected.

7. Respondents assert that there is much variation in the potentialities of crude oils obtained from various fields, that the paraffin-base Pennsylvania crude oil is of much higher quality than the asphaltic, naphthenic, or mixed-base oils that come from the coastal and midcontinent areas. They assert that the lubricating oil which they produce will not be affected by the characteristics of the used oil which they utilize as basic raw material any more than the lubricating oil of other refiners will be affected by the various sources of crude oil supply; from this they conclude that the public interest does not require that they disclose the origin or source of their oil unless it is required that the sources of all other oils also be disclosed. This argument is rejected. This proceeding is specific and must be decided by the hearing examiner upon its own merits. Respondents' argument relates to an issue of general policy which is strictly within the discretion of the Commission.

CONCLUSIONS [1]

1. The Commission clearly has jurisdiction in this matter.

2. By respondents' failure to disclose the fact that their oil is reprocessed and re-refined from used oil, many purchasers have been deceived and misled into buying such oil, thinking it to be oil refined from crude oil, when such is not the fact. "[T]he public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance" (*F.T.C.* v. *Algoma Lumber Co.*, et al., 291 U.S. 67, 78). The failure of respondents to inform their customers who resell to the public as to the facts concerning the source or origin of their oil places in the hands of these customers a means and instrumentality whereby they too may mislead the public with respect to the nature of respondents' oil.

3. The aforesaid acts and practices of respondents, and their failure to disclose that their oil is composed in whole or in part of oil which has been processed and re-refined from used oil have had and now have the tendency and capacity to mislead and deceive a substantial number of dealers and members of the purchasing public into the erroneous and mistaken belief that said oil is refined from crude oil, and to induce the purchasing public to purchase substantial quantities of the respondents' products because of such erroneous and mistaken belief.

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

5. This proceeding is in the public interest, and the aforesaid acts and practices are in violation of the Federal Trade Commission Act. Therefore,

It is ordered, That respondents, Mohawk Refining Corp., a corporation, and John E. C. Stroud, C. Kenneth Johnes, and William L. Ashby, individually and as officers of Mohawk Refining Corp., and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of lubricating oil in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, contrary to the fact, that their lubricating oil is refined or processed from other than previously used oil;

[1] For related cases supporting the conclusions, see the Commission's decisions in the matters of: *Westville Refinery, Inc.*, docket 4370, 36 FTC 402; *Penn-Lub Oil Products Co.*, docket 4524, 34 FTC 1049; *Dabrol Products Corp., et al.*, docket 5656, 47 FTC 791; *Pennsylvania Oil Terminal, Inc., et al.*, docket 5868, 48 FTC 356; and *High Penn Oil Co., Inc.*, docket 6492, not yet published.

(2) Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising and in sales promotion material, and by a clear and conspicuous statement to that effect on the container.

OPINION OF THE COMMISSION

By Anderson, Commissioner:

The initial decision filed by the hearing examiner ruled that the respondents have violated the Federal Trade Commission Act by failing to disclose that the motor lubricants which they sell are oils processed from previously used oil and the respondents' appeal challenges that holding and decision as erroneous.

The respondents purchase drainings left by motorists at filling stations and garages when changing their oil and subject these and other waste oils to refining or re-refining processes at their place of business in Newark, N.J. That oil, alone or blended with new oil, is packed in containers and resold in commerce by the respondents to jobbers and dealers. No text appears on the containers in which the products are distributed stating or suggesting in any manner that the oil has been processed in whole or in part from previously used oil. The containers are of the same size and general appearance as those in which oil refined from crude customarily is sold to the public; and the appearance of respondents' oil is identical with that of virgin oil.

The foregoing matters are not in dispute. The complaint issued by the Commission includes a charge that, in the absence of disclosure by the respondents that their oil is reclaimed oil, dealers and the consuming public have the understanding and belief that the oil is new oil and purchase it as such with the result that the public is deceived and trade unfairly diverted to respondents from their competitors. The hearing examiner found, in effect, that the charges of the complaint were sustained by the evidence. The respondents vigorously except to the initial decision's findings, among others, that the public has a preference for oil refined from crude over that processed or re-refined from previously used oil and that many dealers and members of the public purchase respondents' oil under beliefs that it consists of oil refined from crude.

The appeal argues in such connections that the public buys oil solely on the basis of price, brand name, and dealer reliability, and that preference as to source of the raw materials in oil plays no role in consumer choice. The matters relied upon by the respondents in support of these contentions are greatly outweighed, however, by other testimony received into the record from trade and consumer witnesses. Rather than representing mere theoretical expressions of consumer preferences as argued by the respondents, we think that those witnesses' testimony supports informed determinations that a marked preference exists among consumers and dealers for motor oil refined from crude over oils processed from waste oil. Furthermore, there is sound record basis for additional conclusions that, in the absence of disclosure to the contrary, the public assumes and has the understanding and belief that oil which is offered to it in regular channels of trade is oil refined from crude instead of oil derived from used oil.

The respondents further contend that their re-refined oil and the oils refined from crude are one and the same and that substitution in no sense results when respondents' products are purchased by persons unaware of their origin. This, the appeal contends, precludes findings that the respondents' failure to disclose processing facts represents a withholding of material facts from purchasers or that such practice constitutes unfair and deceptive acts and practices or unfair methods within the purview of the act. Their chemical identity and equivalence in lubricating qualities notwithstanding, the record clearly shows that members of the public do not regard these two categories of oil as equally acceptable for use in their cars. Inasmuch as the respondents' oil is made by processing waste oils, their lubricants originate as, and essentially constitute, reclaimed products as distinguished from those long accepted by consumers and dealers which are made by refining crude oil.

Not only does the appeal's argument on this aspect ignore the right of consumers to purchase according to their preferences and prejudices but it disregards the fact that trade is diverted unfairly from both marketers of reclaimed oil so labeled and vendors of oil refined from crude when the respondents' oil is purchased under mistaken beliefs that it is virgin oil. The consumer is prejudiced if on giving an order for one thing he is supplied with something else. *F.T.C.* v. *Royal Milling Co.*, 288 U.S. 212, 216, 217 (1933); *F.T.C.* v. *Algoma Lumber Co.*, 291 U.S. 67, 77, 78 (1934).

It is clear, therefore, that the respondents' failure to disclose that their product is made in whole or in part from previously used oil entails silence as to a fact highly material and consequential to users and dealers in motor oil. We think that the hearing examiner correctly found that such practice has had the tendency and capacity to deceive and caused purchases of respondents' oil under mistaken beliefs that it was oil made from crude rather than a product derived from previously used oil.

The appeal also contends that no power is conferred under the act to require revealing statements in cases of nondisclosure unless the challenged practice also is accompanied by false statements or affirmative misrepresentation pertaining to the articles offered. This legal concept is erroneous. The Commission has plenary power to require affirmative disclosure of material facts in situations where seller silence results in deception of purchasers. *Haskelite Manufacturing Co.* v. *F.T.C.*, 127 F. 2d 765 (C.A. 7, 1942); *L. Heller & Son, Inc.* v. *F.T.C.*, 191 F. 2d 954 (C.A. 7, 1951).

The complaint alleges that the public purchases the respondents' oil under mistaken beliefs that it is "new oil." The hearing examiner found that the erroneous beliefs engendered among purchasers were that the products were oil "refined from crude oil." The appeal states that the term "new oil" is not used by the trade to identify oil derived from crude and that no dictionary defines "new oil" as such. Respondents argue that the hearing examiner's finding represents a substantial variation from the charge and that the complaint should be dismissed for failure of proof to sustain its essential allegations. That "new oil" in the complaint refers to other than reclaimed oils and can refer only to the remaining category of oil and hence means oil derived from crude, is beyond doubt. Therefore, the deception which the hearing examiner correctly found to be proved fully conformed to the pleading and the appeal's arguments to the contrary are erroneous.

The respondents also except to rulings of the hearing examiner excluding certain testimony and documentary evidence from the record. The rejected matters included evidence relied on to show that the oil industry does not disclose the source of its oils, that source is not regarded in the trade as relevant to the oils' quality or value, and that virgin and re-refined oil cannot be differentiated from a laboratory or specifications' standpoint. We think that the excluded evidence in essence related to the quality of the respondents' motor oil. Quality and identity of performance are not material, however, to the issues of this proceeding which are: whether the public distinguishes or has marked preference between virgin oil and oil processed from used oil and whether rights of the public to receive the product which it chooses are prejudiced. This aspect of the appeal is also being denied.

We also have considered the form of the order which is contained in the initial decision. Its requirement that a disclosure that the respondents' oil has been processed, when such be the fact, in whole or part from previously used oil be set forth on the products' containers is appropriate and has sound support in the record. The provision additionally requiring that the facts in that respect also be disclosed in any advertising and promotional material utilized by the respondents in the future conduct of their business is similarly warranted and looks to protecting purchasers in marketing situations precluding their detailed examination of the respondents' containers at point of sale. Another provision of the hearing examiner's order further forbids the respondents to use affirmative statements similarly calculated to engender beliefs that they refine their oil from crude oil. The gravamen of the complaint challenges unfair and deceptive acts and practices whereby oil made from previously used oil has been marketed by the respondents under circumstances causing it to be purchased as oil made from crude. This additional provision of the order is likewise appropriate inasmuch as it is designed to prevent recurrence of the past practices which are the targets of the complaint should they be resumed under an expansion or variation in their original theme.

While approving it in substance, we are modifying the form of the initial decision's order, however, to conform it to those adopted in our decisions in the matters of *Salyer Refining Co., Inc., et al.*, Docket No. 6339, and *Frank A. Kerran, et al.*, Docket No. 6432, which also are issuing this day.

The respondents' appeal is denied and the the initial decision, modified as noted above, is adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the respondents' appeal from the initial decision of the hearing examiner; and the Commission having determined, for reasons stated in the accompanying opinion, that said appeal should be denied and that the order contained in the initial decision should be modified:

It is ordered, That the appeal of the respondents be, and it hereby is, denied.

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

It is ordered, That respondents, Mohawk Refining Corp., a corporation, and John E. C. Stroud, C. Kenneth Johnes, and William L. Ashby, individually and as officers of Mohawk Refining Corp., and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of lubricating oil in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, contrary to the fact, that their lubricating oil is refined or processed from other than previously used oil;

(2) Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser in advertising and in sales promotion material, and by a clear and conspicuous statement to that effect on the container.

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

It is further ordered, That the initial decision of the hearing examiner, as modified hereby, be, and the same hereby is, adopted as the decision of the Commission.

IN THE MATTER OF

LINCOLN OIL CO. ET AL.

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

Docket 6669. Complaint, Oct. 30, 1956—Decision, Feb. 14, 1958

Consent order requiring sellers in Boston, Mass., to dealers for resale to the purchasing public of oil consisting in whole or in substantial part of reclaimed oil obtained from drainings of motor crankcases, to cease advertising and selling such oil without disclosing to the purchaser that it was previously used, and without a clear statement to that effect on the containers.

Mr. William R. MaHanna for the Commission.

Mintz, Levin & Cohn, by *Mr. William H. Wolf,* of Boston, Mass., for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with violation of the Federal Trade Commission Act in connection with the sale of their reclaimed or reprocessed lubricating oil. An agreement has now been entered into by respondents and counsel supporting the complaint which provides, among other things, that respondents admit all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; 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 entered after a full hearing, respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other orders of the Commission; and that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

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

1. Respondent Lincoln Oil Co. is a corporation existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 214 Harvard Avenue, Boston, Mass. Respondents Louis I. Rosenfield, Arthur P. Katzenberg, Floyd F. Hennessy, and Richard Mintz are individuals and were officers of said corporation on the date of the complaint; but said individuals are no longer officers of said corporation, having resigned effective November 13, 1956. Respondents Floyd F. Hennessy and Arthur P. Katzenberg are the persons respectively described in the complaint as Lloyd F. Hennessy and Arthur D. Katzenberg.

The individual respondent Joseph Kaplan named in the complaint is now deceased and therefore he is not included in the term "respondents" as used herein.

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

ORDER

It is ordered, That respondents Lincoln Oil Co., a corporation, and its officers, and Louis I. Rosenfield, Arthur P. Katzenberg (erroneously referred to in the complaint as Arthur D. Katzenberg), Floyd F. Hennessy (erroneously referred to in the complaint as Lloyd F. Hennessy), and Richard Mintz, individually and as officers of Lincoln Oil Co., and their 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 lubricating oil composed in whole or in part of oil which has been previously used and reclaimed, do forthwith cease and desist from:

1. Representing, directly or by implication, that their oil is new or unused oil, or refined from virgin crude oil.

2. Advertising, offering for sale, or selling any lubricating oil previously used for lubricating purposes without disclosing such prior use to the purchaser or potential purchaser in advertising, in sales promotion matter and by a clear and conspicuous statement to that effect on the container.

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

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The Commission having considered the initial decision of the hearing examiner, based on an agreement executed by counsel for a consent order to cease and desist, has concluded that the said initial decision is adequate and appropriate in all respects to dispose of this proceeding:

Accordingly, it is ordered, That the aforesaid initial decision be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents Lincoln Oil Co., a corporation, and Louis I. Rosenfield, Arthur P. Katzenberg, Floyd F. Hennessy, and Richard Mintz, shall within sixty (60) days after service upon them of this order file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the aforesaid initial decision.

IN THE MATTER OF

FRED A. BLUST TRADING AS REED PRODUCTS CO.

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

Docket 6922. Complaint, Oct. 24, 1957—Decision, Feb. 18, 1958

Consent order requiring a seller in St. Louis, Mo., to cease representing falsely, in advertising mats and other advertising material furnished to dealers purchasing for resale, the therapeutic properties, effectiveness, etc., of his "AR-PAN-EX" drug product in the treatment of all kinds of arthritis, rheumatism, and allied ailments.

Mr. Michael J. Vitale supporting the complaint.
Respondent, pro se.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on October 24, 1957, charging him with violation of the Federal Trade Commission Act as set forth in said complaint. After issuance and service of the complaint, respondent and counsel supporting the complaint, on December 11, 1957, entered into an agreement containing consent order to cease and desist from the practices complained of, which agreement disposes of all the issues in this proceeding without hearing. This agreement has been duly approved by the assistant director and director of the Bureau of Litigation and has been submitted to the undersigned, heretofore designated to act as hearing examiner herein, for his consideration in accordance with rule 3.25 of the rules of practice of the Commission.

Respondent Fred A. Blust, an individual, trading and doing business as Reed Products Co., in the aforesaid agreement has admitted all the jurisdictional facts alleged in the complaint and has agreed that the record may be taken as if findings of the jurisdictional facts had been duly made in accordance with such allegations. Said agreement provides further that respondent waives all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision

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of the Commission, that said 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, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified or set aside in the manner provided for other orders of the Commission, and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order, and it appearing that the agreement and order cover all the allegations of the complaint and provide for appropriate disposition of this proceeding, the order and agreement are hereby accepted and ordered filed upon becoming part of the Commission's decision pursuant to sections 3.21 and 3.25 of the rules of practice; and the hearing examiner accordingly makes the following findings for jurisdictional purposes and order:

1. Respondent, Fred A. Blust, is an individual trading and doing business as Reed Products Co., with his office and principal place of business located at 4438 N. 20th Street, St. Louis, Mo.

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

ORDER

It is ordered, That respondent, Fred A. Blust, an individual trading and doing business as Reed Products Co. or trading and doing business under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the product designated "AR-PAN-EX," or any other product of substantially the same composition or possessing substantially similar properties, whether sold under the same name or under any other name or names, do forthwith cease and desist from:

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

(a) Is an adequate, effective or reliable treatment for any kind of arthritis, rheumatism, sciatica, lumbago, neuralgia, or neuritis;

(b) Will arrest the progress of, or correct the underlying causes of, or cure, any of the aforesaid ailments or conditions;

(c) Will afford complete or permanent relief from the aches, pains, stiff muscles, stiff joints or other discomforts of any kind of arthritis, rheumatism, sciatica, lumbago, neuritis, or neuralgia, or have any therapeutic effect upon any of the symptoms or manifestations of any such conditions or disorders in excess of affording temporary relief of the minor aches or pains thereof;

(d) Is a new scientific discovery, or that it contains seven or any number of ingredients which are an adequate, effective or reliable treatment for any kind of arthritis, rheumatism, sciatica, lumbago, neuralgia, or neuritis.

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

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner did, on the 18th day of February 1958, 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

SPECIALTY LEATHER GOODS CO., INC., ET AL.

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

Docket 6842. Complaint, July 15, 1957—Decision, Feb. 19, 1958

Consent order requiring manufacturers in New York City to cease marking or stamping the words "genuine leather" or "genuine calf" on wallets and billfolds which were not made entirely of leather or calf; and to cease attaching to such products price tickets carrying fictitious and exaggerated prices.

Mr. Harry E. Middleton, Jr., for the Commission.

Guggenheimer & Untermyer, by *Mr. Louis Newman*, of New York, N.Y., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents with the use of false, misleading, and deceptive representations with respect to the quality and price of the wallets and billfolds which they manufacture, sell and distribute in commerce to wholesalers and retailers, alleging that such representations constitute unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of the Federal Trade Commission Act.

Subsequent to the issuance of the complaint, respondents, their counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the director and the assistant director, Bureau of Litigation of the Commission, and thereafter transmitted to the hearing examiner for consideration.

The agreement identifies respondent Specialty Leather Goods Co., Inc., as a New York corporation, with its office and principal place of business located at 440 Lafayette Street, New York, N.Y., and the individual respondents Arnold White, Leo White, and Dorian White as officers of the corporate respondent, and having the same address as the corporate respondent.

All parties agree that, in view of the affidavit of Oscar D. White and Arnold White, attached to the agreement, establishing the fact that respondent Oscar White was not an officer of the corporate respondent and had nothing to do with formulating, directing or controlling its policies, acts and practices during the period when the acts and practices complained of were engaged in by said corporate respondent, the complaint herein should be dismissed as to respondent Oscar D. White.

The agreement provides, among other things, that the respondents signatory thereto admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordnace with such allegations; that the record on which the intitial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint herein may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondents waive any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The order agreed upon fully disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein as being in violation of the Federal Trade Commission Act. Accordingly, the hearing examiner finds this proceeding to be in the public interest and accepts the agreement containing consent order to cease and desist as part of the record upon which this decision is based. Therefore,

It is ordered, That the respondent Specialty Leather Goods Co., Inc., a corporation, and its officers, and respondents Arnold White, Leo White, and Dorian White, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of wallets and billfolds, or other articles of merchandise, do forthwith cease and desist from:

1. Representing, directly or by implication, that billfolds and wallets, or other articles, made in whole or in part of substance other than leather, are made of leather;

2. Supplying purchasers of billfolds, wallets, or other merchandise with price tags having prices or amounts which are in excess of the usual or regular retail selling prices of said billfolds, wallets, or other merchandise, or otherwise representing that the usual or regular retail price of merchandise is any amount greater than the price at which such merchandise is usually and regularly sold;

3. Putting into operation any plan whereby retailers or others may misrepresent the regular and usual retail price of their products.

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

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 February 1958, become the decision of the Commission; and accordingly:

It is ordered, That respondents Specialty Leather Goods Co., Inc., a corporation, and Arnold White, Leo White, and Dorian White, 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

BELL, MERCHANDISING-AUTOMATICALLY, INC., ET AL.

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

Docket 6849. Complaint, July 24, 1957—Decision, Feb. 22, 1958

Consent order requiring a seller in St. Louis, Mo., of razor blade and ball point pen vending machines and the merchandise dispensed therein, to cease representing falsely in advertising in newspapers and periodicals and through its salesmen, that it was affiliated with the Gillette Co.; that purchasers of its machines would realize large returns on their investment and had their future secured; and that it would supervise operation of the machines, extend financial assistance to purchasers, locate machines for them, etc.

Mr. Terral A. Jordan for the Commission.
Mr. Morris A. Shenker, of St. Louis, Mo., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on July 24, 1957, charging respondents with the dissemination of false, misleading and deceptive representations in connection with the distribution in commerce of vending machines and articles of merchandise, including razor blades and ball point pens, in violation of the Federal Trade Commission Act.

On October 22, 1957, respondents, their counsel, and counsel supporting the complaint herein entered into an agreement containing consent order to cease and desist, which was approved by the director and the assistant director of the Commission's Bureau of Litigation, and thereafter submitted to the hearing examiner for consideration.

The agreement identifies Respondent Bell, Merchandising-Automatically, Inc. as a Missouri corporation, and Respondents Donald J. Garrison and Clovis Ooley as individuals and as president and vice president, respectively, of the corporate respondent, all respondents having their office and principal place of business at 7307 Olive Street Road, St. Louis, Mo.

Respondents admit all the jurisdictional facts alleged in the complaint, and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

Respondents waive any further procedure before the hearing examiner and the Commission; the making of findings of fact and conclusions of law; and all the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement. All parties agree that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement; that the order to cease and desist, as contained in the agreement, shall have the same force and effect as if entered after a full hearing, and may be altered, modified or set aside in the manner provided for other orders; that the complaint herein may be used in construing the terms of said order; and that the agreement is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint.

After consideration of the allegations of the complaint and the provisions of the agreement and the proposed order, the hearing examiner is of the opinion that such order constitutes a satisfactory disposition of this proceeding. Accordingly, in consonance with the terms of the aforesaid agreement, the hearing examiner accepts the agreement containing consent order to cease and desist; finds that the Commission has jurisdiction over the respondents and over their acts and practices as alleged in the complaint; and finds that this proceeding is in the public interest. Therefore,

It is ordered, That Respondents Bell, Merchandising-Automatically, Inc., a corporation and its officers, and Donald J. Garrison and Clovis Ooley individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of vending machines or articles of merchandise, including razor blades and ball point pens, dispensed in said vending machines, or other similar merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly:

1. That respondents are affiliated with, approved by or are agents or representatives of the Gillette Co., Gillette Park, Boston, Mass., or of any other person, firm, or corporation when such is not the fact;

2. That large returns upon the amount invested by a purchaser will accrue from the operation of said vending machines, or that said returns will be in excess of those usually and ordinarily realized;

3. That the sale of merchandise by vending machines is unaffected by economic depressions;

4. That the income from the sale of said merchandise by said vending machines is adequate to secure a purchaser's future;

5. That respondents will provide supervision or assume the control and direction of the vending machine businesses established by purchasers of their said vending machines and articles of merchandise or will extend financial assistance to such purchasers;

6. That respondents will establish a vending machine business for purchasers of said vending machines and articles of merchandise or will locate said vending machines in profitable locations;

7. That purchasers of respondents' said vending machines and merchandise are not required to sell or solicit in connection with the establishment and operation of the business of selling articles of merchandise by vending machines.

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 22d day of February 1958, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Bell, Merchandising-Automatically, Inc., a corporation, and Donald J. Garrison, and Clovis Ooley, 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

COCA COLA BOTTLING CO. OF NEW YORK, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT

Docket 6594. Complaint, July 19, 1956—Decision, Feb. 26, 1958

Order dismissing without prejudice for "lack of potential proof" complaint charging a bottling company in New York City with granting unlawful promotional allowances to favored customers indirectly through payments of money to major radio broadcasting networks for the benefit of certain chain store customers for their own advertising purposes, in compensation for services furnished in connection with the sale of respondent's products.

Mr. J. Wallace Adair, *Mr. William R. Tincher* and *Mr. Eugene Kaplan* for the Commission.

Appell, Austin & Gay, by *Mr. Cyrus Austin*, and *Mr. Harry Malter*, of New York, N.Y., for Respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

The complaint in this proceeding charges the respondent with having paid money to three of the major broadcasting companies for the benefit of certain chain-store customers, thereby providing broadcasting time through such broadcasting companies to respondent's favored customers for their own advertising purposes. The payments thus made by respondent are alleged to have been made as compensation or in consideration for services or facilities furnished it by these favored customers in connection with the offering for sale and sale of respondent's products. It is further alleged that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the provision of subsection (d) of § 2 of the Clayton Act, as amended.

The complaint then describes in some detail the sales promotion plans through which respondent is alleged to have favored certain of its customers.

THE ANSWER

Respondent in its answer admits that it is a corporation organized and doing business under the laws of the State of Delaware, with its principal office and place of business located at 425 E. 34th Street, New York, N.Y.

Respondent also admits that it is now and for a number of years has been engaged in the business of selling and distributing carbonated beverages, and that said beverages are sold by it to independent groceries and grocery chains, some of whom compete with each other. Respondent further admits entering into contracts with the American Broadcasting Co., Columbia Broadcasting System, Inc., and with the National Broadcasting Co., Inc., for the purchase of broadcasting time for the advertising of its beverages. It also admits that each of the broadcasting companies named furnished to the Respondent, at no cost to itself, promotional displays of its advertised products in the stores of certain grocery chains.

Respondent denies, however, the allegations of paragraph 2 of the complaint, that it is now and for a number of years has been engaged in selling its products in commerce, as "commerce" is defined in the Clayton Act as amended; and also denies the allegation that it has violated § 2(d) of that act.

MOTION TO DISMISS THE COMPLAINT

On October 28, 1957, counsel supporting the complaint submitted a motion to dismiss the complaint herein. In that motion they state that this proceeding is one of nine cases in which complaints have been issued against respondents because of their use of certain discriminatory merchandising plans alleged to be in violation of § 2(d) of the Robinson-Patman Act. Counsel aver that the cases above referred to were presented to the hearing examiner for determination on the basis of agreed stipulations of facts common to all. They further assert that, in contrast to the eight companion proceedings, the instant proceeding involves a question of commerce. Counsel supporting the complaint set forth the following:

> Information made available to the Commission by the respondent in this matter shows that the respondent, in the New York City metropolitan area, is engaged in commerce only in a limited and temporary manner. According to this information, prior to March 1956 respondent did not sell and distribute bottled Coca Cola in the New York City metropolitan area in commerce as alleged in the complaint. From March 1956 to the present respondent has made some interstate shipments of its "family size" bottles of Coca Cola into Connecticut from respondent's Manhattan plant. Respondent intends to install machinery and equipment for bottling the "family size" bottles at its Connecticut plant in the near future and to discontinue hauling said bottles from Manhattan when this machinery is installed. Once this machinery has been installed at the Bridgeport, Conn., plant respondent will no longer be engaged in the interstate shipment of its products. On the basis of these facts it is expected that the Commission's jurisdiction over the respondent as alleged in the complaint would end prior to the issuance of any order in the instant matter. There is no contrary evidence presently available to counsel supporting the complaint.

They conclude that

Since the legality of the adoption and use of these merchandising plans is already being tested in the above referred to cases, counsel supporting the complaint consider the separate and continued prosecution of this matter an unnecessary expenditure in determining the legality of the alleged practice and in the protection of the public interest.

Counsel then ask that the complaint herein be dismissed "without prejudice to the right of the Commission to undertake such further investigation or to institute such further proceedings as facts and circumstances may warrant."

RESPONDENT'S REPLY TO MOTION

Counsel for the respondent has stated, in a letter to the Secretary of the Commission, that no formal answer will be filed to the motion to dismiss. He further states, however, that "the respondent consents to the granting of the relief asked for * * * upon the grounds therein stated."

THE ISSUE RESOLVED

Although we cannot subscribe to all the reasons presented by counsel for the dismissal of this proceeding, counsels' motion does contain one good and valid reason why the complaint herein should be dismissed. They state therein that prior to 1956 the respondent did not sell and distribute bottled Coca Cola in the New York City metropolitan area in commerce, as alleged in the complaint. They further state that although, since March 1956, respondent has engaged in some interstate shipments of its family-size bottles of Coca Cola from the New York area into Connecticut, respondent intends to eliminate such shipments in the near future by the construction of a Connecticut bottling plant; and that, once this plant has been established, respondent will not in any wise be engaged in interstate shipment of its products. The admission by counsel that they have no evidence to disprove those facts is tantamount to a declaration that they cannot prove that the respondent was engaged in selling its products in commerce during the period of time when the acts and practices complained of allegedly occurred. This being so, the further prosecution of this proceeding is unwarranted, and counsels' motion to dismiss the complaint herein should be granted. Since, however, the requested dismissal is being granted on the basis of a confessed lack of potential proof rather than a failure of proof upon trial of the issues, the dismissal should be without prejudice to the public interest. Accordingly, *It is ordered*, That the complaint herein be, and the same hereby is, dismissed without prejudice to the right of the Commission to take such further action against the respondent herein as facts and circumstances may warrant.

FINAL ORDER

This matter having come on for review of the hearing examiner's initial decision dismissing the complaint without prejudice, and the Commission having concluded that the initial decision constitutes an appropriate and adequate disposition of the proceeding:

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

IN THE MATTER OF

OLD YORK DISTRIBUTORS, INC., ET AL.

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

Docket 6790. Complaint, May 3, 1957—Decision, Feb. 27, 1958

Order issued in default requiring the president of an incorporated business in Philadelphia, Pa., to cease using in advertising in newspapers and otherwise purported offers of employment to sell candy vending machines and misrepresenting profits customers would make operating them; and falsely representing orally and through salesmen that he represented the Hershey Chocolate Corp. and that vending machine purchasers would also be Hershey representatives—among a variety of false and misleading claims, all made for the purpose of inducing purchase of his products.

As to the corporation and its secretary-treasurer, also named as respondents, the matter was settled by their consenting to an identical order on September 18, 1957, p. 349 herein.

Mr. Floyd O. Collins and *Mr. William M. King* for the Commission.
No appearance on behalf of respondent Kolman Freedman.

INITIAL DECISION AS TO RESPONDENT KOLMAN FREEDMAN BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves alleged violations of the Federal Trade Commission Act as amended, it being charged in the complaint, in substance, that the respondents have committed unfair and deceptive acts and practices and unfair methods of competition in commerce by misrepresenting through printed advertisements and oral statements of respondents' salesmen certain claims concerning respondents' vending machines and candies. On August 6, 1957, the hearing examiner herein issued an initial decision based upon an "agreement containing consent order to cease and desist," which had been entered into by and between respondents other than Kolman Freedman and Floyd O. Collins, counsel supporting the complaint, under date of July 15, 1957, which had been approved by the Bureau of Litigation. This initial decision, on September 18, 1957, was approved by the Commission, which issued on that date its "decision and order to file report of compliance." This initial decision now rendered is against only the respondent Kolman Freedman upon his default.

From the record it appears that said respondent Kolman Freedman was duly served with a copy of the complaint herein on June 7, 1957; that he never filed an answer or other pleading and has long been in default of answer or any other appearance, either in person or by counsel; that due service was made upon him pursuant to the Commission's rules of practice for adjudicative proceedings of the orders setting this proceeding for November 8, 1957, at 9:30 a.m., in room 362, Federal Trade Commission Building, Sixth and Pennsylvania Avenue NW., Washington, D.C., for the purpose of hearing the evidence to be presented by counsel supporting the complaint to find whether or not the facts as against said respondent Kolman Freedman are as alleged in the complaint, to make proper findings on the evidence presented, and to determine the form of order to be issued against said respondent under said complaint and evidence in the initial decision to be rendered herein as to said respondent.

On November 8, 1957, at the time and place designated therefor, the hearing examiner conducted such a hearing; counsel supporting the complaint appeared, but no appearance was made at or prior to such hearing by said respondent Kolman Freedman, either in person or by counsel, and on motion of counsel for the Commission his default was taken and entered of record by the hearing examiner. Hearing then proceeded upon the presentation made by the attorney for the Commission who requested that findings be made against said respondent in accordance with the allegations of the complaint and that order be issued against said respondent in the same language as was the order entered against the other respondents in the initial decision issued August 6, 1957, and filed August 7, 1957. The proceeding was then taken under advisement.

Upon due consideration of the whole record herein and the hearing examiner being fully advised in the premises, it is found as follows:

1. Respondent Old York Distributors, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, with its home office and principal place of business located at 5940 Old York Road, Philadelphia 41, Pa.

Respondent Kolman Freedman is an individual and president and coowner of the respondent corporation. Respondent's business address is 5940 Old York Road, Philadelphia 41, Pa.

Respondent Henry Perkins is an individual and secretary-treasurer and coowner of the respondent corporation. Respondent's business address is 5940 Old York Road, Philadelphia 41, Pa.

The individual respondents Kolman Freedman and Henry Perkins direct and control the acts, practices, and policies of respondent corporation.

Respondents are now and have been for several years last past engaged in the sale and distribution of vending machines and candies in interstate commerce. Said machines are sold in lots of 15 at a price of $690 per lot. When sales are made, respondents ship or cause said products to be shipped and transported from their place of business in Philadelphia, Pa., across State lines to the purchasers thereof, many of whom are located in States of the United States other than the State of Pennsylvania. Respondents have during all the time herein mentioned carried on a constant and recurring course of trade in said products in commerce among and between the various States of the United States and in the District of Columbia.

In the course and conduct of their said business, respondents are now and have been at all times herein mentioned in substantial competition in commerce with other corporations and with firms and individuals engaged in the sale and distribution of like products.

In the course and conduct of their business as herein described, to induce the purchase of their products, respondents, by the use of newspapers and other means of advertising, have made certain representations with reference to their vending machines and candies, of which the following is typical:

HERSHEY CANDY ROUTES

Excellent opportunity to become associated with the finest name in the candy industry refilling and collecting from our 5¢ candy machines. Established routes—no selling. This can be done in your spare time with the possibility of taking over full time. To qualify for work you must have car, references, $690 cash—secured by inventory. Devoting 6 hours a week to business. Your end on percentage collections will net up to

$300 MONTHLY SPARE TIME

By and through the use of the statements in the aforesaid advertisement, and others of the same import not specifically set out herein, respondents represented, directly or by implication:

1. That the offer is an offer of employment;

2. That the route the prospective purchaser would be servicing was an established Hershey Chocolate Corp. route;

3. That to qualify for the offer the prospect must have a car and furnish references;

4. That the investment of $690 in respondents' products will result in monthly earnings of up to $300;

5. That the $690 invested is secured by inventory.

The individual respondents, and salesmen employed by them and the corporate respondent, in the course of the solicitation for the sale of said machines have orally made additional statements to prospective purchasers of which the following are typical but not all inclusive, that:

1. Respondents' salesmen represent the Hershey Chocolate Corp.;

2. Purchasers will be representatives of the Hershey Chocolate Corp.;

3. Machines sold will be located in choice locations;

4. The respondents are represented by a number of qualified placement men;

5. Purchasers will be allowed to order additional candy and machines on credit;

6. Salesmen or placement men will return in a few weeks after the machines are placed to be sure that everything is satisfactory and that the machines are properly located;

7. Freight or express charges on the initial shipment are paid by the respondents;

8. The candy dispensed by respondents' machines cannot be bought in local stores at retail;

9. Respondents pay all taxes and licenses on the machines sold by them;

10. Respondent Old York Distributors, Inc., has had 43 years of experience in the vending machine business;

11. Purchasers are under company jurisdiction for one year and have to operate up to the company's standards or lose his or her license;

12. In the event purchasers ever desire to sell their machines, the respondents will assist them in finding a buyer;

13. Purchasers can obtain a refund of the $690 at any time he or she so desires;

14. Purchasers are given exclusive franchises for his or her area;

15. The amount of $690 is in the nature of a surety bond which amount will be refunded in case purchasers cease doing business with respondents.

The aforesaid statements made in the advertising matter and orally by the individual respondents and their salesmen were false, misleading and deceptive. In truth and in fact:

1. The offer was not an offer of employment but was made for the purpose of obtaining purchasers for respondents' products;

2. The routes to be serviced were not Hershey Chocolate Corp. routes;

3. It was not necessary for a prospect to have a car or to furnish references in order to qualify for the offer. The only necessary qualification was the purchase price of said products;

4. Earnings of $300 per month were and are greatly in excess of the earnings that will result from an investment of $690 in respondents' products;

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5. While purchasers have the products purchased as evidence of such purchase, they are, by no means, security for the amount invested.

6. Neither the respondents nor their salesmen have ever represented the Hershey Chocolate Corp., nor do the purchasers of their products represent said corporation;

7. The respondents do not place the machines sold by them in choice locations from the standpoint of producing revenue to the purchasers but are placed wherever the owners of businesses will permit;

8. The men employed by respondents to place machines purchased are not qualified or experienced candy route men;

9. Purchasers are not allowed to order additional candy and machines on credit;

10. Neither respondents' salesmen nor their placement men render assistance of any kind to purchasers after the machines are located;

11. Respondents do not pay freight or express charges on the products sold;

12. The candy dispensed by respondents' machines can be bought locally;

13. Respondents do not pay any taxes or licenses on machines sold by them;

14. Respondent, Old York Distributors, Inc., was organized in 1956 and is not the successor of any organization that had been engaged in the vending machine business;

15. The purchaser of respondents' machines is not under company jurisdiction for any time;

16. Respondents do not assist a purchaser to dispose of his machines in the event he desires to sell;

17. Respondents do not refund the purchase price of machines, in any event;

18. Purchasers are not given exclusive franchises in his or her area;

19. The amount of $690 is the purchase price of respondents' machines and is not refunded under any circumstances.

The use of said false and misleading statements, as set out hereinbefore, has had and now has the tendency and capacity to mislead and deceive the purchasing public into the erroneous and mistaken belief that such statements were and are true and to cause substantial numbers of the purchasing public to purchase substantial quantities of respondents' products. As a result thereof, trade has been and is now being unfairly diverted to respondents from their competitors and injury has been and is now being done to competition in commerce.

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

CONCLUSIONS OF LAW

There being jurisdiction over the person of respondent Kolman Freedman, upon the findings hereinbefore made, the allegations of the complaint, and the presentation of counsel supporting the complaint, the hearing examiner upon the whole record makes the following conclusions of law:

1. The Federal Trade Commission has jurisdiction over all of the respondents' acts and practices hereinbefore found to be unlawful.
2. The public interest in this proceeding is clear, specific, and substantial.
3. The aforesaid acts and practices of respondent Kolman Freedman, as hereinbefore found, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the meaning and intent of the Federal Trade Commission Act, as amended.

Upon the foregoing findings of fact and conclusions of law, the following order is hereby entered:

ORDER

It is ordered, That respondent Kolman Freedman, individually and as an officer of said corporation, and his agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of vending machines or candies, or both, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly, that:

1. Employment is offered when, in fact, the purpose of the offer is to obtain purchases of respondent's products.
2. The route the prospective purchaser would serve is in any way connected with or under the supervision or control of the Hershey Chocolate Corp., or that said route had been established prior to the time of the purchase of respondent's machines.
3. It is necessary for a purchaser to own a car or furnish references in order to qualify for respondent's offer, or misrepresenting in any manner the necessary qualifications.

4. The earnings or profits derived from the operation of respondent's machines are any amounts that are in excess of those which have been, in fact, customarily earned by operators of said machines.

5. The amounts invested in respondent's products are secured by inventory or otherwise.

6. Respondent's salesmen or the purchasers of his products represent the Hershey Chocolate Corp.

7. Respondent will place the machines sold by him in choice locations from a revenue producing standpoint.

8. Purchasers of respondent's machines and supplies are allowed to purchase additional machines and supplies on credit.

9. Salesmen or placement men render services to purchasers after the machines purchased are located.

10. Freight, express or other delivery charges on the initial shipment are paid by respondent.

11. Candy dispensed by respondent's machines cannot be bought in local stores at retail.

12. Respondent pays any or all taxes or licenses on machines sold by him.

13. Respondent corporation has had 43 years of experience in the vending machine business or for any period of time that is not in accordance with the facts.

14. Purchasers of respondent's machines are under his jurisdiction for any period of time or are required to operate in accordance with his standards.

15. In the event purchasers of the machines desire to sell the machines, respondent will assist them in finding buyers, unless such is a fact.

16. Respondent will refund the purchase price of machines.

17. Purchasers are given exclusive territorial franchises.

18. The amount paid for respondent's machines is a surety bond or anything other than the purchase price.

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 27th day of February 1958, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Kolman Freedman 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

L. M. CLOTHING CO., INC., ET AL.

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

Docket 6899. Complaint, Sept. 27, 1957—Decision, Feb. 27, 1958

Consent order requiring New York City manufacturers to cease violating the Wool Products Labeling Act by falsely labeling as "All Wool" and "All Wool Exclusive of Ornamentation" men's sport coats which contained a substantial percentage of nonwoolen fibers; by failing to set forth separately on stamps, etc., the character and amount of constituent fibers contained in the interlinings; and by failing in other respects to conform to the requirements of the act.

Michael J. Vitale and *Alvin D. Edelson*, Esqs., for the Commission.

Green & Ettinger, by *Joseph Ettinger*, Esq., of New York, N.Y., for respondents.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding, issued September 27, 1957, charges the respondents L. M. Clothing Co., Inc., a corporation, and Louis Motzkin and Bertha Motzkin, individually and as officers of the corporate respondent, and Donald Motzkin, individually, with violation of the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and of the rules and regulations promulgated under authority of the said Wool Products Labeling Act, in connection with the introduction or manufacture for the introduction into commerce, or offering for sale, sale, transportation or distribution of men's sport coats in commerce, as "commerce" is defined in said acts.

After the issuance of said complaint respondents, on December 6, 1957, entered into an agreement for a consent order with counsel in support of the complaint, disposing of all of the issues in this proceeding, which agreement was duly approved by the director and assistant director of the Bureau of Litigation of the Federal Trade Commission. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the respondents admitted all of the jurisdictional allegations of the complaint and agreed that the record herein may be taken as though the Commission had made findings of jurisdictional facts in accordance with such allegations.

By said agreement the parties expressly waived a hearing before the hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which the respondents may otherwise 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 though made after a full hearing, presentation of evidence and findings and conclusions thereon, and specifically waived any and all right, power or privilege to challenge or contest the validity of such order.

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

Said agreement recites that respondent L. M. Clothing Co., Inc., is a corporation existing under and by virtue of the laws of the State of New York, with its office and principal place of business located at 85 Fifth Avenue, New York, N. Y.; that respondents Louis Motzkin and Bertha Motzkin are individuals and president-treasurer and vice-president-secretary of the corporate respondent; that respondent Donald Motzkin is an individual and general manager of the corporate respondent; that as such they formulate, direct and control the policies, acts and practices of the corporate respondent.

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

ORDER

It is ordered, That the respondent, L. M. Clothing Co., Inc., a corporation, and its officers, Louis Motzkin and Bertha Motzkin, individually and as officers of said corporation, and Donald Motzkin, individually, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction, into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, and the Wool Products Labeling Act of 1939, of men's sports coats or other "wool products," as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products 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 contained therein;

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

(a) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding 5 per centum 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 products, 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. Using abbreviated words or terms descriptive of fiber content on stamps, tags, labels or other means of identification attached to said wool products;

4. Failing to separately set forth on the required stamp, tag, label or other means of identification, the character and amount of the constituent fibers contained in the interlinings of said wool products.

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 27th day of

February 1958, 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

WASTE FIBRES CORP. ET AL.

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

Docket 6903. Complaint, Oct. 3, 1957—Decision, Feb. 27, 1958

Consent order requiring a manufacturer in Brooklyn, N.Y., to cease violating the Wool Products Labeling Act by failing to label the woolen fibrous stock it made and sold to yarn manufacturers and woolen mills, and by describing it as "100% wool," etc., on sales invoices and shipping memoranda when it contained substantial quantities of reused or reprocessed wool and other non-woolen fibers.

Michael J. Vitale and *Thomas A. Ziebarth*, Esqs., for the Commission.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding, issued October 3, 1957, charges the respondents Waste Fibres Corp., a corporation, and George M. Goldman and Ernest Zahler, individually and as officers of the corporate respondent, with violation of the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and of the rules and regulations promulgated under authority of the said Wool Products Labeling Act, in connection with the introduction or manufacture for the introduction into commerce, or offering for sale, sale, transportation or distribution of woolen fibrous stock or other wool products, in commerce, as "commerce" is defined in said acts.

After the issuance of said complaint respondents, on December 3, 1957, entered into an agreement for a consent order with counsel in support of the complaint, disposing of all of the issues in this proceeding, which agreement was duly approved by the director and assistant director of the Bureau of Litigation of the Federal Trade Commission. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the respondents admitted all of the jurisdictional allegations of the complaint and agreed that the record herein may be taken as though the Commission had made findings of jurisdictional facts in accordance with such allegations. By said agreement the parties expressly waived a hearing before the hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which the respondents may otherwise 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 though made after a full hearing, presentation of evidence and findings and conclusions thereon, and specifically waived any and all right, power or privilege to challenge or contest the validity of such order.

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

Said agreement recites that respondent Waste Fibres Corp., is a corporation existing under and by virtue of the laws of the State of New York, with its office and principal place of business located at No. 300 Butler Street, Brooklyn, N.Y.; that respondents George M. Goldman and Ernest Zahler are individuals and president and vice president of the corporate respondent; that as such they formulate, direct and control the policies, acts and practices of the corporate respondent.

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

ORDER

It is ordered, That respondents Waste Fibres Corp., a corporation and its officers, and George M. Goldman and Ernest Zahler, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for the 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 woolen fibrous stock 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:

A. Misbranding such products by 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 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where the percentage by weight of such fiber is 5 per centum 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 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.

It is further ordered, That Waste Fibres Corp., a corporation, and its officers and George M. Goldman and Ernest Zahler, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate of other device, in connection with the offering for sale, sale or distribution of woolen fibrous stock or any other products or materials in commerce, as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from directly or indirectly:

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.

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 27th day of

February 1958, 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

LYTTON'S, HENRY C. LYTTON & CO.

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

Docket 6909. Complaint, Oct. 7, 1957—Decision, Feb. 27, 1958

Consent order requiring a furrier in Chicago to cease violating the Fur Products Labeling Act by failing to conform to the labeling and invoicing requirements; by advertising in newspapers which failed to disclose the names of animals producing the fur in certain products, described fur products by names connoting false geographical origin, represented prices as reduced from regular prices which were in fact fictitious, and used comparative prices not based on current market value; and by failing to keep adequate records as a basis for such purported price reductions.

Mr. William A. Somers supporting the complaint;
Ettelson & O'Hagan, of Chicago, Ill., for respondent.

INITIAL DECISION OF JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on October 7, 1957, charging it with having violated the Fur Products Labeling Act and the rules and regulations issued thereunder, and the Federal Trade Commission Act, through the misbranding of certain fur products and the false and deceptive invoicing and advertising thereof. After being served with said complaint, respondent appeared by counsel and subsequently entered into an agreement, dated December 18, 1957, containing a consent order to cease and desist purporting to dispose of all this proceeding as to all parties. Said agreement, which has been signed by respondent, by counsel for said respondent, and by counsel supporting the complaint, and approved by the Director and Assistant Director of the Commission's Bureau of Litigation, has been submitted to the above-named hearing examiner for his consideration, in accordance with section 3.25 of the Commission's rules of practice for adjudicative proceedings.

Respondent, pursuant to the aforesaid agreement, has admitted all the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondent waives any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law and all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has been agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing and that the complaint may be used in construing the terms of said order. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, and that said agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing consent order, and it appearing that the order provided for in said agreement covers all the allegations of the complaint and provides for an appropriate disposition of this proceeding as to all parties, said agreement is hereby accepted and is ordered filed upon this decision's becoming the decision of the Commission pursuant to sections 3.21 and 3.25 of the Commission's rules of practice for adjudicative proceedings, and the hearing examiner, accordingly, makes the following jurisdictional findings and order:

1. Respondent Lytton's, Henry C. Lytton & Co. is a corporation existing and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of doing business located at 235 South State Street, Chicago, Ill.

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

ORDER

It is ordered, That the respondent Lytton's, Henry C. Lytton & Co., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, offering for sale, transportation or distribution of fur products in commerce, or in connection with the sale, advertising, offering 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:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing:

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

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(e) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce;

(f) The name of the country of origin of any imported furs used in the fur product.

2. Setting forth on labels attached to fur products information required under section 4(2) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder mingled with nonrequired information.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of the paws, tails, bellies, or waste fur, when such is the fact;

(e) The name and address of the person issuing such invoice;

(f) The name of the country of origin of any imported furs contained in a fur product.

2. Setting forth information required under section 5(b)(1) of the Fur Products Labeling Act and the rules and regulations promulgated thereunder in abbreviated form.

C. 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 the name or names of the animal or animals that produced the fur or furs contained in the fur product, as set forth

in the Fur Products Name Guide and as prescribed under the rules and regulations.

2. Describes fur products by animal names which connote a false geographic origin of the animal producing the fur.

3. Represents, directly or by implication, that the regular or usual price of any fur product is any amount which is in excess of the price at which the respondent has usually and customarily sold such product in the recent regular course of its business.

4. Makes use of comparative prices and percentage savings claims in advertisements unless such compared prices or claims are based upon the current market value of the fur product or upon a bona fide compared price at a designated time.

5. Makes price claims or representations referred to in 3 and 4 above unless there are maintained by respondents full and adequate records disclosing the facts on which such claims or representations are based.

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 27th day of February 1958, become the decision of the Commission; and, accordingly:

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