IN THE MATTER OF

AARON NEWMAN ET AL. DOING BUSINESS AS COLONY FURNITURE CO.

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

Docket 6933. Complaint, Nov. 8, 1957—Decision, Apr. 15, 1958

Consent order requiring manufacturers in Linden, N.J., to cease representing falsely in advertising in trade journals and advertising mats and other material furnished to their dealer customers, that their furniture was advertised in Life and House Beautiful, and that certain of it was made entirely of mahogany, oak, maple, walnut, or fruitwood; furnishing customers with reproduction sheets, catalogs, etc., listing purported regular retail prices which were in fact fictitious and excessive; and furnishing them with "gift certificates" supposedly offering the consumer opportunity to buy furniture at less than the usual price when the prices to which the certificates applied were fictitious and inflated.

Mr. Kent P. Kratz for the Commission.

Mr. Joseph Harrison, of Newark, N.J. 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 through the making of certain representations regarding furniture sold by them. 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 dispositon 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; that the complaint may be used in construing the terms of the order; and that the agreement is for settlement puposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

The proposed order covers all of the representations referred to in the complaint with two exceptions. It appears from the agreement that these two representations were included in the complaint through inadvertence, and the agreement provides for the dismissal of the complaint as to these matters. In the circumstances such action appears appropriate. The agreement and proposed order are therefore accepted, the following jurisdictional findings made, and the following order issued:

1. Respondents Aaron Newman and Dan N. Newman are individuals and copartners, doing business as Colony Furniture Co., with their principal office and place of business located at 1125 West Elizabeth Avenue, Linden, N.J.

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 Aaron Newman and Dan N. Newman, individually and as copartners doing business as Colony Furniture Co., or under any other name, their agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of furniture or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting in any manner, or by any means, directly or indirectly, the kind or nature of the wood or other materials used in the manufacture of their furniture or of any other product, or any part thereof.

2. Representing, directly or indirectly:

(a) That respondents' products, or any of them, have been advertised in any advertising media unless such advertising was recently and regularly run or unless the date thereof is set forth.

(b) That any amounts are the usual or regular retail prices of products which are in excess of the prices at which the products are usually and regularly sold at retail.

3. Furnishing any means or instrumentality to others by and through which the public may be misled as to the usual and regular prices of respondents' products, or the kind or nature of the wood or other materials used in the manufacture of respondents' furniture.

It is further ordered, That the complaint be, and the same hereby is dismissed insofar as it relates to the use of the terms "In Windsor Grey Mahogany Finish" and "fruitwood finish" set out in paragraph 4 thereof.

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 15th day of April 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

ALBERT D. DILL ET AL. TRADING AS RAD-TEL TUBE CO.

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

Docket 6954. Complaint, Nov. 25, 1957—Decision, Apr. 15, 1958

Consent order requiring mail order sellers in Newark, N.J., of radio parts and equipment to radio repair men and dealers, to cease representing "rejects" falsely in advertising as first quality radio tubes; failing to disclose in such advertising and on cartons, invoices, etc., the fact that they were seconds; and failing to disclose such fact adequately on the tubes themselves.

Mr. Charles W. O'Connell for the Commission.

Willkie, Farr, Gallagher, Walton & Fitz Gibbon, by *Mr. Sumner S. Kittelle,* New York, N.Y., for respondents.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on November 25, 1957, issued and subsequently served its complaint in this proceeding against respondents Albert D. Dill and Edward J. McGrath, individuals and copartners trading as Rad-Tel Tube Co., with their office and place of business located at 604 Market Street, Newark, N.J.

On February 12, 1958, there was submitted to the undersigned hearing examiner an agreement between respondents and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, 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. By such agreement, respondents waive any further procedural steps before the hearing examiner and the Commission; waive the making of findings of fact and conclusions of law; and waive all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. Such agreement further provides that it disposes of all of this proceeding as to all parties; that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; 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 following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents, and, when so entered, it shall have the same force and effect as if entered after a full hearing, and may be altered, modified, or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

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

1. Respondents Albert D. Dill and Edward J. McGrath are individuals and copartners trading as Rad-Tel Tube Co., with their office and place of business located at 604 Market Street, Newark, N.J.

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 Albert D. Dill and Edward J. McGrath, as individuals and as copartners trading as Rad-Tel Tube Co., or under any other name, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or the distribution of radio tubes in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication that said radio tubes are first quality tubes, when such is not the fact.

2. Failing to reveal in advertising, invoices and shipping memoranda and on tubes and on the cartons in which the tubes are packed, by the use of the word "seconds" or "rejects" or other words or terms of the same import, that said tubes have been rejected by the manufacturers thereof, when such is the fact.

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 15th day of April 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

HARTLEY FURS, INC., ET AL.

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

Docket 6959. Complaint, Nov. 25, 1957—Decision, Apr. 15, 1958

Order requiring furriers in Minneapolis, Minn., to cease violating the Fur Products Labeling Act by failing to label and invoice fur products as required; and by advertising in newspapers which failed to disclose the country of origin of imported furs, used comparative prices and percentage savings claims and represented that the selling prices were reduced from regular prices without maintaining adequate records upon which the pricing claims were based.

Mr. Harry E. Middleton, Jr., for the Commission.
No appearance for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, the Federal Trade Commission on November 25, 1957, issued and subsequently served its complaint in this proceeding upon the respondents Hartley Furs, Inc., a corporation, and Bernard Oksengorin, Raja Oksengorin, and Mike Engel, individually and as officers of said corporation, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the provisions of said acts. Subsequent thereto, said respondents failed to file their answers in this proceeding or to appear before the hearing examiner on February 10, 1958, the date set for the initial hearing in the complaint, and were declared in default. At said initial hearing counsel in support of the complaint was present and submitted a proposed order for consideration by the hearing examiner. Respondents being in default both as to answering the complaint and as to appearance at the initial hearing, and the hearing examiner having considered the proposed order submitted by counsel in support of the complaint and the record herein and being now duly advised in the premises makes the following findings as to the facts, conclusions drawn therefrom and order pursuant to rule 3.7 of the Commission's rules of practice:

1. Hartley Furs, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of Minnesota. Respondents Bernard Oksengorin, Raja Oksengorin, and Mike Engel are officers of the said corporate respondent and they formulate, direct, and

control the acts, policies, and practices of said corporate respondent. The said corporate respondent and said individual respondents have their office and principal place of business at 1500 West Lake Street, Minneapolis, Minn.

2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been, and are now, engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce of fur products, and have manufactured for sale, sold, advertised, offered for sale, transported, and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act.

3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of section 4(2) of the Fur Products Labeling Act, and in the manner and form prescribed by the rules and regulations promulgated thereunder.

4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the rules and regulations promulgated thereunder in the following respects:

(a) Information required under section 4(2) of the Fur Products Labeling Act and the rules and regulations thereunder was set forth in abbreviated form in violation of rule 4 of the aforesaid rules and regulations.

(b) Information required under section 4(2) of the Fur Products Labeling Act and the rules and regulations thereunder was mingled with nonrequired information in violation of rule 29(a) of the aforesaid rules and regulations.

(c) Information required under section 4(2) of the Fur Products Labeling Act, and the rules and regulations thereunder was set forth in handwriting on labels in violation of rule 29(b) of the aforesaid rules and regulations.

(d) Required item numbers were not set forth on labels in violation of rule 40 of the aforesaid rules and regulations.

5. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the rules and regulations promulgated thereunder in that:

(a) Information required under section 5(b)(1) of the Fur Products Labeling Act and the rules and regulations thereunder was set forth in abbreviated form in violation of rule 4 of the aforesaid rules and regulations.

(b) Required item numbers or marks were not set forth on invoices in violation of rule 40 of the aforesaid rules and regulations.

6. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that respondents caused the dissemination in commerce, as "commerce" is defined in said act, of certain newspaper advertisements concerning said products which advertisements were not in accordance with the provisions of section 5(a) of the said act and the rules and regulations promulgated thereunder; and which advertisements were intended to aid and did aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

7. Among and included in the said advertisements, but not limited thereto, were advertisements of the respondents published in the Minneapolis Star, a newspaper published in the city of Minneapolis, State of Minnesota, and having a substantial circulation in the said State and various other States of the United States. By means of such advertisements, as well as others of similar import not specifically referred to herein, respondents falsely and deceptively advertised their fur products in that said advertisements failed to disclose the name of the country of origin of any imported furs contained in fur products in violation of section 5(a)(6) of the Fur Products Labeling Act.

8. In advertising and offering the said fur products for sale, as aforesaid, respondents used comparative prices and percentage savings claims and represented that the prices at which said fur products were offered for sale were reduced prices from the regular or usual prices of the said fur products. Respondents in making such pricing claims and representations failed to maintain full and adequate records disclosing the facts upon which these claims and representations were based, in violation of rule 44(e) of the aforesaid rules and regulations.

CONCLUSION

The aforesaid acts and practices of respondents, as herein found are in violation of the Fur Products Labeling Act and the rules and regulations promulgated thereunder and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

ORDER

It is ordered, That respondents, Hartley Furs, Inc., a corporation, and its officers, and Bernard Oksengorin, Raja Oksengorin and Mike Engel, 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 introduction into commerce or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of any fur products, or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation, or distribution of any 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. 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 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, 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;

(g) The item number or mark assigned to a fur product.

2. Setting forth on labels attached to fur products:

(a) Nonrequired information mingled with information that is required under section 4(2) of the act and the rules and regulations thereunder;

(b) Information required under section 4(2) of the act and the rules and regulations thereunder in abbreviated form or in handwriting.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing the item number or mark assigned to a fur product.

2. Setting forth information required under section 5(b)(1) of the act and the rules and regulations 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 fails to disclose the name of the country of origin of any imported furs contained in the fur product.

D. Making use of price reductions, comparative prices and percentage savings claims in advertising unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and 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 15th day of April 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

JORDAN'S INC., ET AL.

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

Docket 6936. Complaint, Nov. 8, 1957—Decision, Apr. 16, 1958

Consent order requiring furriers in Erie, Pa., to cease violating the Fur Products Labeling Act by failing to label and invoice fur products as required.

Mr. Harry E. Middleton, Jr., supporting the complaint.
Mr. Nathan H. Gates, of New York, N.Y., for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on November 8, 1957, charging them with having violated the Fur Products Labeling Act, the rules and regulations issued thereunder, and the Federal Trade Commission Act by misbranding and falsely invoicing their fur products. After being served with the complaint respondents entered into an agreement, dated January 13, 1958, containing a consent order to cease and desist, disposing of all the issues in this proceeding without hearing, which agreement has been duly approved by the assistant director and the director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with section 3.25 of the rules of practice of the Commission.

Respondents, pursuant to the aforesaid agreement, have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been made duly in accordance with such allegations. Said agreement further provides that respondents waive 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 such 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 of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint, 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, 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 order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the agreement is hereby accepted and ordered filed upon this decision and said agreement 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 Jordan's Inc. is a corporation existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at State and 9th Streets, Erie, Pennsylvania.

2. The individual respondents Hyman Carr and Dorothy S. Carr, president and secretary-treasurer, respectively, of the corporate respondent, Jordan's Inc. have their office and principal place of business at 1440 Broadway, New York, N.Y.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the 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 respondents, Jordan's, Inc., a corporation, and its officers, and Hyman Carr and Dorothy S. Carr, 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 in commerce, or the transportation or distribution in commerce of fur products, 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 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 affixed to fur products:

(a) Information required under section 4(2) of the Fur Products Labeling Act and the rules and regulations thereunder which is intermingled 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 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.

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 16th day of April 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

MAINLINE SALES CORP. ET AL.

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

Docket 7017. Complaint, Dec. 31, 1957—Decision, Apr. 16, 1958

Consent order requiring sellers of vending machines in Euclid, Ohio, to cease representing falsely in newspaper advertising and sales material and through their salesmen that they were offering employment to selected individuals, that excessive profits might be expected from their machines, that established routes were available, and that they would assist purchasers in locating machines, give them exclusive territory, make refunds to dissatisfied purchasers, etc.; and that they were manufacturers of their machines.

Mr. William A. Somers supporting the complaint.
Mr. Allan M. Glezerman, of Euclid, Ohio, for respondents.

INITIAL DECISION OF JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on December 31, 1957, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act, by misrepresenting the facts in connection with their sale of vending machines and vending machine supplies, including the profits or earnings to be derived by purchasers, the territories and routes to be assigned, the assistance to be furnished by respondents and other advantages and benefits to be received. After being served with said complaint, respondents appeared by counsel and entered into an agreement dated January 31, 1958, containing a consent order to cease and desist purporting to dispose of all of this proceeding as to all parties. Said agreement, which has been signed by all respondents, by counsel for said respondents, 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.

Respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional facts alleged in 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 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 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 respondents that they have 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 Mainline Sales Corp. is a corporation existing and doing business under and by virtue of the laws of the State of Ohio. Respondent Lois Glezerman is an individual and officer of said corporate respondent and Allan M. Glezerman is an individual and sales director of said corporate respondent. Said corporation and individual respondents have their office and principal place of business located at 27350 Beach Drive, Euclid 32, Ohio.

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

ORDER

It is ordered, That respondents Mainline Sales Corp., a corporation, and its officers, and Lois Glezerman, individually and as an officer of said corporation, and Allan M. Glezerman, individually and as director of sales of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of vending machines, vending machine supplies or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

1. Employment is offered by respondents when, in fact, the real purpose of the offer is to obtain purchasers of respondents' products.

2. Respondents' offer is made only to selected persons who must have special qualifications, references, and a car.

3. Respondents have established routes of their vending machines at the time the offer of sale is made.

4. Respondents, their agents or employees will obtain, or assist in obtaining, satisfactory or profitable locations for the machines purchased from them.

5. The earnings or profits derived from the operation of respondents' machines are any amount in excess of those which have been, in fact, customarily earned by operators of their machines.

6. Respondents allot exclusive territory in which the machines purchased from them may be located.

7. The amount invested in respondents' products is secured either by inventory or otherwise.

8. Respondents, or their representatives, repurchase the machines sold by them in the event the purshaser is dissatisfied.

9. The corporote respondent is the manufacturer of the machines they sell.

10. The products sold by respondents will be delivered within a specified period of time, unless delivery is made within the time specified.

11. Insurance policies are issued on respondents' products without cost to the purchasers.

12. Freight charges are less than they are in fact.

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 16th day of April 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
MICHIGAN BULB CO. ET AL.

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

Docket 6446. Complaint, Nov. 17, 1955—Decision, Apr. 17, 1958

Order requiring mail order sellers of nursery stock in Grand Rapids, Mich., to cease representing falsely in advertising in newspapers and magazines and by radio, the types, quality, and value of the plants, bulbs, shrubs, and trees they sold, and their guarantee of refunds.

Donald K. King, Esq., for the Commission.

Linsey, Shivel, Phelps & VanderWal, by *Leland D. Phelps*, Esq., of Grand Rapids, Mich. and *Henry Junge*, Esq., of Chicago, Ill., for respondents.

Initial Decision by Robert L. Piper, Hearing Examiner

STATEMENT OF THE CASE

On November 17, 1955, the Federal Trade Commission issued its complaint against Michigan Bulb Co., a corporation, and Gerald C. Laug, Forrest Laug, and Louis Laug individually and as officers of said corporation, and with respect to Forrest and Louis Laug, as copartners trading and doing business as Holland Bulb Co. (all hereinafter collectively called respondents) charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of section 5 of the Federal Trade Commission Act (hereinafter called the act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served on respondents.

The complaint alleges in substance that respondents, in connection with the sale and distribution of their products, nursery stock, made certain false representations. Respondents appeared by counsel and filed a joint answer admitting the corporate, partnership, commerce and competition allegations of the complaint and substantially all of the representations set forth therein, but denying any false representations or violations of the act.

Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner duly designated by the Commission to hear this proceeding at various times and places from February 6, 1956, to May 22, 1957. During the course of the hearings, a motion to amend the complaint and a corresponding motion to amend the answer thereto were granted.

All parties were represented by counsel, participated in the hearings and afforded a full opportunity to be heard, to examine and cross examine the witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. All parties filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof, and pursuant to leave granted presented oral argument thereon. All such findings of fact and conclusions of law proposed by parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.[1]

Upon the entire record in the case and from his observations of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The Business of Respondents

The complaint alleged, respondents admitted, and it is found that Michigan Bulb Co. is a Michigan Corporation with its principal place of business located at 845 Ottawa Street, Grand Rapids, Mich. Said corporate respondent does business under its own name and also as Dutch Bulb Importers, Rapid Specialties Co., and Flower of the Month. Its annual sales volume exceeds $1 million. Forrest Laug is president and treasurer, Gerald C. Laug is vice president, and Louis Laug is secretary of said corporate respondent. These individual respondents formulate, direct and control the acts, policies, and practices of said corporate respondent. In addition, Forrest and Louis Laug do business as copartners under the name Holland Bulb Co., operated in conjunction with the corporate respondent, Michigan Bulb Co. Each and all of the aforesaid respondents have cooperated and acted jointly in performing the acts and engaging in the practices hereinafter found.

II. Interstate Commerce and Competition

The complaint alleged, respondents admitted, and it is found that they are now and have been for more than 5 years last past engaged in the sale and distribution of bulbs, roots, plants, shrubs, trees and other related items, hereinafter collectively called nursery stock, in commerce between and among the various states of the United States and the District of Columbia. Respondents cause and have caused said nursery stock when sold to be shipped and transported from their principal place of business in the State of Michi-

[1] 5 U.S.C. § 1007(b).

gan, as well as from other shipping points located in the State of Michigan and other States, to purchasers located in the various States of the United States and the District of Columbia. Respondents maintain and at all times mentioned herein have maintained a substantial course of trade in commerce in said nursery stock In the course and conduct of their businesses, respondents are in direct and substantial competition in commerce with other corporations, firms, and individuals likewise engaged in the sale and distribution of nursery stock.

III. The Unlawful Practices

A. *The Issues Framed*

The principal issues in this case are whether respondents, in connection with certain statements and representations made with respect to various nursery stock offers by means of radio broadcasts, newspaper and magazine advertising, circulars sent through the mail, and other media, which representations are substantially undisputed and admitted in respondents' answer, made certain false representations with respect to their nursery stock offers of 50 perennial plants, 42 rose plants, flowering shrubs and hedge plants, tulip bulbs, gladioli bulbs, an indoor winter flower garden, and evergreen trees.

B. *The False Representations*

There is no dispute in the record, and in fact respondents admitted, that they made the various representations alleged in the complaint and considered hereinafter in connection with the various nursery stock offers set forth above. As stated above respondents denied that any of said representations were false, deceptive or misleading. Since the record establishes beyond dispute that all of the representations alleged in the complaint were made, the primary issues for disposition are whether or not such representations are false and misleading. They are considered *seriatim:*

1. The 50 hardy perennial plant offer.

In connection with the 50 perennial plant offer, respondents disseminated the following advertisement:

50 Magnificent Hardy Perennials Unbelievable—But True!

Our most spectacular garden Offer! Our entire stock of healthy, field-grown Perennial Plants must be sold * * * 50 healthy one year field grown plants in one colorful beautiful display assortment. Will produce hundreds of brilliant blooms year after year without replanting!

$8.00 to $10.00 value just $1.94.

50 Field grown Perennial Plants at an astounding low price, guaranteed flowering size.

By the foregoing advertisements, respondents represented that such plants were (a) all perennials; (b) live, hardy and in good planting condition; (c) 1 year old, (d) of flowering size which would bloom the first season after planting; and (e) an \$8 to \$10 value for \$1.94.

(a) The plants are not all perennials.

Respondents' perennial offer is made up of 5 each of 10 different plants. Included among the 10 are Canterbury Bells, Fox Glove and Sweet William, which counsel supporting the complaint contends are biennials and not perennials. In addition to calling the plants perennials, respondents' advertising states that the plants will produce "hundreds of brilliant blooms year after year without replanting, and a holiday of radiant color throughout spring and summer, year in and year out." The record establishes that Canterbury Bells and Fox Glove are biennials and not perennials. In addition to the evidence received in the record from numerous experts called by both parties, the parties stipulated that the hearing examiner might consult leading authorities in the field of horticulture, such as Bailey's Standard Cyclopedia of Horticulture, copyright 1942, L. H. Bailey, 1953 edition, and Taylor's Encyclopedia of Gardening, copyright 1956, Norman Taylor, 1957 edition, and liberal references to these outstanding authorities have been made by the undersigned. It is of course well established that it is appropriate and indeed frequently essential to consult dictionaries, lexicons and the like to establish the ordinary meaning of common English words.

Webster's New Collegiate Dictionary, copyright 1956, G. & C. Merriam Co., defines perennial as follows: "Bot., continuing to live from year to year; as, a perennial plant." Biennial is defined as "Continuing or lasting for 2 years, as certain plants producing leaves the first year of their life and fruit and seed the second." These definitions accord with the testimony of the experts in the record as to the meaning of the terms perennial and biennial as applied to plants.

Counsel in support of the complaint called 21 experts to testify in this proceeding, all of whom were qualified as experts in the field and many of whom had outstanding qualifications as experts and specialists in the field of horticulture. Their qualifications are set forth in the record but it would unduly lengthen this decision to reiterate them here.[2]

Messrs. Boyer, Burgess and Johns, experts called in support of the complaint, as well as Mr. Van Engen, an expert called by respond-

[2] For the purpose of reference, their qualifications are summarized in schedule A attached to the proposed findings submitted by counsel in support of the complaint.

ents, all testified that Canterbury Bells and Fox Glove are biennials and not perennials. There is some disagreement in the record among the expert witnesses as to whether Sweet William is a biennial or perennial. Both Bailey and Taylor state that Sweet William (Dianthus barbatus) is a perennial, but indicate that it is probably better known or treated as a biennial.[3] The evidence in the record is not substantial enough to warrant a finding that Sweet William is a biennial. Both Bailey and Taylor, as well as the U.S. Department of Agriculture, list Canterbury Bells (Campanula medium) and Fox Glove (digitalis purpurea) as biennials.[4]

Respondents offered proof that certain other nurseries advertised Canterbury Bells and Fox Glove as perennials, but no proof that they in fact are. The misrepresentations of others cannot justify respondents' conduct. The record establishes and accordingly it is found that all of the 50 plants included in respondents' perennial offer do not bloom year after year or year in and year out without replanting, and are not in fact perennials.

(b) The plants shipped are not always alive, hardy and in good planting condition.

Two consumer witnesses called in support of the complaint testified that they purchased and received through the mail from respondents the 50 perennial offer. Mrs. George Williams of Ft. Wayne, Ind., testified that when she received shipment, although the outside of the package was in perfect condition, the plants were deteriorated and none of them grew. Respondents contended that this might have been because the shipment had been delayed in transit, although there is no evidence in the record on this point. Mrs. Walter Kocher testified that when she received the 50 perennial plants some of them were dying but nevertheless she planted them the same day. She said that none of them bloomed except the Sweet William and the rest of them looked like weeds. Mr. James Johns, a nurseryman called in support of the complaint, testified that the 50 perennials which he examined were alive but were late fall seedlings less than 1 year old. This group of plants had been furnished to a Commission investigator by respondents.

Respondents are engaged primarily in the mail-order business and do not grow the nursery stock included in their various offers. They purchased the plants making up the perennial offer from Mr. Van Engen of Kalamazoo, Mich. He testified that all of the perennials he sold to respondents during the spring of 1956 were alive and healthy.

[3] *Taylor's Encyclopedia*, p. 289; *Bailey's Cyclopedia*, p. 997.
[4] *Bailey's Cyclopedia*, p. 1010; *Taylor's Encyclopedia*, p. 376.

Although he had furnished the perennials sold by respondents for a number of years, no mention was made of those furnished prior to 1956. Both of the consumers' orders discussed above were received in 1954. The record establishes and accordingly it is found that respondents do not always furnish live and healthy plants in good planting condition as represented.

(c) The plants shipped are not all 1 year old.

A Commission investigator obtained two samples of the 50 perennial plants, one selected at random from respondents' shipping line in Grand Rapids, and the other from Mr. Van Engen who supplied the perennials to respondents. These samples were examined by three experts, two experienced nurserymen and Mr. Boyer, chief of the Bureau of Plant Industry of the Michigan Department of Agriculture. The record establishes that in the industry a 1-year-old plant is one which has grown in the field for a full growing season, i.e., planted in the spring and grown through a full growing season. It does not have to be a full calendar year old to be classified as a 1-year-old plant, but must have grown through one full growing season. It is then sold the following spring prior to the second growing season as a 1-year-old plant. All three of the experts stated that the perennials inspected by them were either late summer or fall planted seedlings, or propagated stock which had not had a full growing season, and hence were not 1-year-old plants. The record establishes, and it is found, that the perennial plants shipped by respondents are not 1-year-old plants as represented.

(d) The perennials are not all flowering size which will bloom the first season after planting.

Counsel in support of the complaint concedes that the record does not substantiate this allegation of the complaint, and accordingly no such finding is made.

(e) The perennial plants furnished are not an $8 to $10 value.

The same three experts who examined the plants all testified that they were not an $8 to $10 value. Mr. Johns said that in his opinion they were worth not more than 2 cents apiece, based on their size. It will be recalled that the plants inspected were furnished by respondents and their supplier. The only testimony in contradiction of this was given by Mr. Van Engen, respondents' supplier of the plants in question, who said that in his opinion they were a $15 value. A preponderance of the substantial evidence in the record establishes, and accordingly it is found, that the 50 perennial plants were not an $8 to $10 value as represented.

2. The 42 rose plant, flowering shrub and hedge plant offer.

Respondents ran a large full-page illustrated advertisement in many newspapers concerning the 42 rose plant offer, and there were received in evidence such advertisements for the years 1954, 1955, and 1956. All of them were in color except the 1954 advertisement. In most respects, the three advertisements are substantially the same, although certain changes were made in them over the years, particularly in 1956 after the issuance of the complaint herein. The largest and most predominant portion of these advertisements was the legend "42 Gorgeous Rose Plants" and the price, "$2.98." Each advertisement contained relatively large illustrations of the various plants offered. In fact more than half of the full-page advertisement was occupied by such illustrations. In the 1954 advertisement the number "42" was 2 inches high and more than a quarter of an inch wide, the words "gorgeous rose plants" were in large capitals approximately ⅝ of an inch high, twice as high and as wide as the following words, "flowering shrubs and hedge plants." The same relative size print and illustrations appear in the 1955 and 1956 advertisements, which in addition have the plants illustrated in bright colors.

The excerpts from the 1954 advertisement, disseminated by respondents throughout the United States, set forth in the complaint read as follows:

42 GORGEOUS ROSE PLANTS, FLOWERING SHRUBS AND HEDGE PLANTS.

ALL A $26.77 CATALOG VALUE, SPECIAL $2.98.

YES: this is the biggest Flower Bargain in America Today!

STURDY AND FIELD GROWN * * * EACH PLANT IS AT LEAST 1 FT. HIGH. MANY HAVE ALREADY BLOOMED.

If you love the startling beauty that only roses can bring your garden * * * if you thrill to the splendor of flowering shrubs and have always dreamed of a handsome hedge to set off your yard or garden but thought all this far beyond your means, just read this amazing bargain offer! Here is your opportunity to get a total of 42 healthy plants for only $2.98! Many have already bloomed in the nursery field this past season and matured to the point where they bear large showy blooms. In this Giant Assortment, which includes some specially collected varieties, you get (1) two Rock Roses that bear a profusion of large delicately textured rose-like blossoms and beautify any garden (2) two Rose of Sharon, the 6 to 8 foot tall bush producing those gorgeous large double blooms (3) four Spirea Roses, so popular for borders and groups with their beautiful clustered rose-colored flowers (4) four Spirea Crimson, the favorite of all dwarf shrubs, blossoming out with great masses of lovely rose-crimson flowers. You get 7 flowering shrubs! 2 Hydrangea, a sunburst of immense, pure white rounded flowers; 2 Red Snowberrys with gay pink blossoms followed by clusters of bright red berries; 2 Coralberrys; 1 White Dogwood Tree; 2 Tulip Trees; 2 fragrant Honeysuckle Vines; 2 Trumpet Vines; 2 Red Norway Maple Trees and 30 feet of Amur Privet Hedge. These plants are all field-grown, well-branched, sturdy and well-rooted. They are not cuttings. They are all 1 foot tall or taller. A $26.77 CATALOG VALUE!

We took the catalogs of 6 other nursery organizations and computed the average price for these same varieties. That average price was $26.77 for the quantities listed above yet you pay only $2.98 if you take advantage of this amazing bargain offer NOW! We were not able to compare the stock but we guarantee this offer to produce as well as any similar varieties bought from any other mail order firm or your entire order will be replaced FREE!

Michigan Bulb Co., Dept. NS-256, Grand Rapids 2, Mich.[5]

As previously indicated, some slight changes in respondents' advertising of the 42 rose plant offer were made in 1955 and 1956, although basically the advertisement remained the same. Some of the changes consisted of substituting a few different plants for those included in the 1954 offer. The only difference in the plants between 1954 and 1955 was that in 1954 the offer included red Norway maple trees while in 1955 it included red maple trees. Both the 1954 and 1955 offers included a magnolia tree, free of extra charges, making the total actually 43 instead of 42 plants. In 1956 the Red Snowberry, Coralberry, and Spirea Crimson plants were dropped, and in their place were substituted rose acacia, euonymus americana, and multiflora rose bush plants. In 1954 the offer was described as a $26.77 catalogue value, in 1955 as a $26.51 catalogue value, and in 1956 as a $22.05 value, if ordered separately at respondents' individual prices. The 1955 and 1956 advertisements contained a certification by The American Research and Testing Laboratories that all of the plants had been tested and were certified as alive, healthy, and hardy. This certification was not included in the 1954 advertisement. The 1956 offer actually included 44 plants, as it added a red bud tree if the order was mailed before a certain date.

By the foregoing advertisements, respondents represented that purchasers would receive: (a) True rose plants or bushes; (b) all field-grown plants; (c) plants which are all at least 1 foot high; (d) well-branched, well rooted, live healthy plants in good planting condition; (e) many plants which have bloomed in the nursery fields and which will produce large showy blooms the season after planting; (f) a $27.66 or a $26.51 catalogue value for $2.98, or a regular $22.05 value at respondents' individual prices; (g) two red Norway maples; (h) a white flowering dogwood tree; (i) two hydrangea bushes; (j) two different kinds of plants known as coralberry and red snowberry; (k) plants which are hardy and will grow in all areas where respondents' advertising is disseminated; (l) shipment during the planting season for such nursery stock; (m) plants tested for condition by a

[5] *Commission Exhibits* 7 and 34.

nursery expert; and (n) A magnolia bearing a pink bloom, a hydrangea bearing a blue bloom, a trumpet vine bearing an orange bloom, and a multiflora rose having the shape and petal of a tea rose.

(a) The 42-shrub offer did not include any true rose plants, as the term is understood by the public.

As previously found, the most dominant part of respondents' advertisements of the 42 plants were the words "gorgeous rose plants." In addition thereto, the largest single plant illustrated in the top center of the advertisement appears to be a beautiful pink rose. Also, as will be considered hereinafter under subsection (n), the 1956 advertisement included 4 beautiful pink roses labeled multiflora rose but illustrated as having the appearance, shape and petal structure of either hybrid tea or hybrid climber roses. The descriptive literature of the 1954 advertisement following the bold print heading began as follows: "If you love the startling beauty that only roses can bring your garden * * *." In the lower center portion of each advertisement appears a list of the plants included in the offer under the heading, "Here Is What You Get." In each of the advertisements the first group of plants listed include the word "rose" or something similar thereto. The overall impression obviously conveyed is that the offer includes a substantial portion of rose plants among the 42 plants.

The fact that the words "rose plants" are twice as large as the words "shrub and hedge plants" would convey the impression that the offer is predominantly roses. The first sentence of the descriptive material quoted above further enhances such impression. The fact that the first three groups of plants listed in the 1954 and 1955 advertisements and the first four listed in the 1956 advertisement include the word "rose" or something similar further solidifies the impression that the offer includes a substantial number of rose plants. Actually, the record establishes that none of the plants included in the offer are true roses as the term is understood by the public and used in the industry. Even a conservative or cautious purchaser would be led to conclude that the offer must include about one-third rose plants, inasmuch as three plant categories are set forth in large print; namely, rose plants, flowering shrubs and hedge plants, even ignoring the emphasis upon the rose plants. One-third of 42 would be 14. This impression is enhanced by the fact that the first 12 plants listed in the 1954 and 1955 advertisements either contain the word rose or might be concluded to be roses, and 12 of the plants listed in the 1956 advertisement including the first 10 contain the word rose or something similar thereto.

The first four plants listed in all of the advertisements are rock roses and rose of sharon. The record establishes and respondents now concede that neither are roses, either in the botanical sense or in the public understanding. All of the experts who testified agreed that neither of the foregoing are members of the rose family, and the use of the word rose in their name has no bearing upon their true horticultural classification. In the 1954 and 1955 offers both spirea rosea and spirea crimson plants were included, while in the 1956 offer rose acacia plants replaced spirea crimson. The record established and respondents conceded that rose acacia is not a member of the rose family but is a subdivision of the locust family. The illustration of rose acacia included in the 1956 advertisement appears to be small pink climbing roses, and is not at all similar to the illustration of rose acacia appearing on page 2968 of Bailey's Cyclopedia.

Respondents contend that spirea rosea and spirea crimson are rose plants because they are members of the rosaceae family, sometimes loosely referred to as the rose family. Spirea is a member of the rosaceae family, in fact one of its main subdivisions, but is not a rose, which is a member of the rosa genus, one of the many genera making up the rosaceae family. As pointed out in Bailey's Cyclopedia at page 40, the rosaceae family contains about 90 genera and 50 species, ranging all the way from fruit trees such as peaches, plums, apples, pears, and cherries, to strawberries, raspberries, blackberries and the like. One of the principal subdivisions of the family is the genus rosa, while another principal subdivision is the genus spirea. All true roses are found under the genus rosa. Obviously nobody normally would think of a peach tree or a strawberry plant as a rose.

Taylor's Encylopedia at page 951 defines rosa, comprising all of the true roses, as a genus of the rosaceae family. On page 954 he lists some of the different genera of the rosaceae family and includes among them rosa and spirea. At page 954, *et seq.*, Taylor further states that true roses may be classified into eight groups: tea roses, hybrid tea roses, polyantha including floribunda, hybrid perpetual roses, moss, bourbon and bengal roses, hardy climbing roses, shrub roses and hybrid rugosa roses. At page 959, he refers to spireae as a rose relative, not as showy as the rose itself, and as pointed out, it is a different genus of the rosaceae family.

In this connection, although not alleged in the complaint, it is interesting to note that in the 1954 and 1955 advertising, respondents listed as separate plants spirea rosea and spirea crimson. They referred to the former as producing rose-colored flowers and the latter rose-crimson flowers. The record establishes that the two plants are in fact the same, and the names used by respondents are not recognized as the correct names for the plants in question. As noted above, respondents contend that spirea is a rose plant, and the manner of the listing of the two in the advertisement confirmed this impression. Neither Bailey, page 3207, nor Taylor, page 1043, recognize either rosea or crimson as one of the many species of spirea. As will be seen hereinafter under subsection (f) hereof, respondents themselves, in ordering spirea from other nurseries in an attempt to establish their catalogue value, ordered species under recognized names different than rosea and crimson. Actually, the record establishes that the two terms are merely adjectives used to describe the color of the spirea and not to distinguish species. According to Taylor, page 959, rosea means nothing more than rose colored.

Mr. Smith, the Tennessee nurseryman from whom respondents purchased all of the plants used in their 42 plant offers, testified that what he shipped was pink spirea. In respondents' 1956 advertisement spirea crimson was dropped and spirea rosea became rosea spirea. In the 1956 advertisement, respondents for the first time included after each plant its correct botanical name. Rosea spirea is listed as japonica fortunei, one of the well-known pink varieties recognized by both Bailey and Taylor as well as the industry generally. Of course, the use of the word rosea with the word spirea enhances the general impression that the plants in the offer included true rose plants, especially to the uninitiated.

In the 1956 offer, after the issuance of the complaint, for the first time are included two multiflora rose bushes. As previously found, the color illustration of the multiflora was that of a true rose, either a hybrid tea or a climber. Technically, multiflora bushes are a member of the genus rosa, but in no sense constitute a rose as the public normally thinks of a rose. The multiflora bush is a native, wild rose plant with small white flowers about the size of strawberry blossoms, is primarily used as a hedge plant or fence, and does not produce flowers anything like what are normally thought of as roses. All of the many catalogues received in evidence, as well as the expert witnesses who testified concerning it, establish that it is offered for sale by the industry as a living hedge, or fence, and not as a rose plant. Commission's exhibit 65, a picture of a multiflora rose bush in full bloom, as well as an illustration of the multiflora rose at page 2985 of Bailey's Encyclopedia, clearly portrays that there is no resemblance between its flowers and real roses. Over the years it has been crossbred with other varieties which have produced true climbing roses, such as the seven sisters and crimson climbers, which probably are the roses illustrated in respondents' 1956 advertisement. In addition to the experts called in support of the complaint, Mr. Smith, respondents' supplier, himself characterized the plant as "Multiflora rose hedge."

There can be no question but that respondents' advertising in all 3 years falsely conveyed the impression that a substantial number of true rose plants were included in the offer. That multiflora rose hedges are not thought of as true roses is further evidenced by respondents, own evaluation of them in its 1956 advertisement, where they listed them as having a value of two for 25 cents, substantially less than any other plant listed thereon. As will be evidenced hereinafter in subsection (f) hereof concerning value, respondents were anything but conservative in stating the alleged value of their various plants. The inclusion of two plants used primarily as hedges or fences for the enclosure of livestock and similar purposes, having an admitted value of no more than 25 cents among a claimed $22 worth of plants, hardly can be said to justify the representation that the offer consisted of 42 rose plants, flowering shrubs, and hedge plants.

Mr. Whiting, editor and publisher of "Flower Grower," the most widely circulated garden magazine, who was qualified as an expert with 20 years of experience in public reaction to advertising of nursery products, stated that in his opinion persons reading respondents' advertising would definitely think that they would receive true roses. Perhaps the statement found at 2982 of Bailey's Cyclopedia best illustrates the misrepresentation resulting from respondents' 42 plant advertisements. He says there: "There is probably no flower more popular and better known than the rose. From time immemorial poets have sung its praise, and the love of it can be traced through the most ancient documents in the literature of the Aryan race. * * * It is probably the first flower known and cultivated in a double state, and *it is the double-flowered garden form whose image the word 'rose' almost invariably brings to the mind*, while to the wild single-flowered rose much less attention has been given." [Emphasis added.]

As previously noted, the largest single illustration of a flower in the advertisement is a beautiful pink rose, which in appearance is substantially similar to the colored portrait of a true rose, bridesmaid, appearing at page 3000 of Bailey's Cyclopedia. Apparently the illustration in the advertisement is supposed to be that of a rose of sharon, inasmuch as every other plant is illustrated and identified by name, this is the only illustration not named, and the rose of sharon is the only name not found under any illustration. Some of the experts testified that it might be an illustration of a double form of rose of sharon known as Althea. However, respondents listed their rose of sharon as hibiscus syriacus, the ordinary rose of sharon. The illustration thereof on page 1487 of Bailey's Cyclopedia is nothing like that of the large pink rose portrayed in the advertisement.

Although not alleged in the complaint, it is interesting to note that respondents do not even ship rock roses. All of their advertisements listed their rock roses as hypericum. As pointed out in Taylor's Encyclopedia, page 971, and Bailey's Cyclopedia, page 1629, hypericum is called St. John's Wart, whereas rock roses are known horticulturally as cistus.[6] Incidentally, hypericum has yellow flowers whereas cistus or real rock roses normally have pink flowers, but the colored illustration of the rock rose in respondents' advertising is pink.

A preponderance of the reliable evidence in the record establishes and accordingly it is found that respondents' 42 plant offer does not include any plants which are thought of as true roses by either the public or the industry.

(b) All of the plants shipped are not field grown.

In respondents' 1954 and 1955 advertisements the collection offered is described in bold print as "sturdy and field grown." In 1956 this language was changed to read "field grown and native collected." In 1954 the fine print of the advertisement contained the following statement: "In this giant assortment, which includes some specially collected varieties, you get two rock roses that bear a profusion of large delicately-textured rose-like blossoms and beautify any garden, two rose of sharon, the 6-to 8-foot tall bush producing those gorgeous large double blossoms, four spirea roses, so popular for borders and groups with their beautiful clustered rose-colored flowers, * * * These plants are all field-grown, well branched, sturdy and well-rooted." In 1955 this was changed and in the fine print was added the phrase "some are native collected." The record establishes beyond dispute that at least 25 percent, if not most of the 42 plant collection, is native collected from the wilds in Tennessee by employees of Mr. Smith. Patently, the bold print representations in the 1954 and 1955 advertisements are false and misleading. The term "field grown" is used in the industry to designate stock grown in the fields by nurserymen as distinguished from stock grown in greenhouses. It is also used to distinguish stock grown and cultivated by nurserymen in their fields from that which is native collected from the wilds. Respondents' own witness, Mr. Van Engen, testified that field grown is the opposite of native collected and means stock which is planted and grown by a nurseryman. Another of respondents' witnesses, Mr.

[6] *Taylor's*, page 205 and *Bailey's*, page 776.

Perry, now employed by respondents as a nursery expert, testified that field grown is an expression used to distinguish stock from that which is grown in hothouses.

Respondents' change in its 1956 advertising is further evidence that field grown means something other than or different from native collected. Mr. Bruer, of the Tennessee Department of Agriculture in charge of the certification of all nursery stock grown in Tennessee, testified that 10 of the 15 different kinds of plants included in the offer were all collected from the wilds, and some of the other 5 kinds were also native collected. Accordingly it is found that respondents did not ship all field grown plants as represented.

(c) The plants are not all at least one foot high.

All of respondents' advertisements represented that each plant is at least 1 foot tall, or taller. Several samples of the 42 plant offer, which were ordered and received through the mail from respondents by various witnesses, were received in evidence. A number of these plants were substantially less than 1 foot tall. One of the samples ordered by mail was produced at the hearing unopened and was then opened for the first time. It contained a number of plants less than a foot tall. Respondents urge that because the American Standards for Nursery Stock, issued by the American Standards Association, Inc., and sponsored by the American Association of Nurseries, Inc., which will be considered hereinafter in more detail, recommends a tolerance of 10 percent under grade for seedling trees and shrubs, respondents' representation should not be found to be false. Many of the plants received in evidence were substantially more than 10 percent shorter than 1 foot. Respondents' contention might carry more weight if they had represented the plants to be 1 foot tall. In such a case a slight variation could probably be overlooked. However, respondents represented that all of the plants were *at least* 1 foot tall or taller. Another contention advanced by respondents was the fact that their contract with Mr. Smith, the supplier of the plants, required that all of the plants in the offer should be at least 18 inches tall. Respondents are, of course, responsible for the acts of their duly authorized agents. It is concluded and found that the plants shipped are not all at least 1 foot tall as represented.

(d) The offer does not consist of well-branched, well-rooted, live healthy plants in good planting condition.

Respondents' advertising described the 42 plants as sturdy, well-branched and well-rooted, and certified them to be alive, healthy, and hardy. The record establishes the opposite.

Dr. Rogers, curator of the New York Botanical Gardens, testified that 17 of the plants in the collection he ordered and received in the spring of 1956 were dead. Dr. Chadwick of Ohio State University testified that in the collection inspected by him, six of the plants were dead and some of the others were nearly dead. Dr. Creech of the U.S. Department of Agriculture, who inspected the collection opened for the first time in the hearing room in 1956, testified that the 13 privet plants would not live under average garden conditions, and that the multiflora rose seedlings were not well branched. Nurseryman Bauge testified that the collection ordered and received by him was improperly packed, the plants were poorly rooted, were not well-branched, a number of them were dead, and they were inferior in grade to those which meet the standards of the American Standards for Nursery Stock. He classified the plants as culls, not saleable by nursery standards.

Nurseryman Holmes testified that in the collection ordered by his company, six of the plants were dead, two were half dead, five had no roots, and some of the rest were not fit for "lining out," an expression used to designate immature or seedling stock set out by nurserymen for further growth before being saleable to the public. Nurseryman Burgess stated that in his opinion the native collected plants in the offer could not be home grown. While not an expert in this field, it is the opinion of the undersigned based upon his observation of the exhibits received in evidence that many of them were not sturdy, well-branched, or well-rooted. Respondents offered no expert evidence to contradict that in support of the complaint. Mr. Smith, admittedly an interested witness as the sole supplier of the offer for respondents, testified that "most" of the plants he furnished were well-rooted.

The record establishes and it is found that many of the plants making up the 42 plant offer were not well-branched, well-rooted, alive, healthy, and hardy as represented.

(e) Many of the plants have not bloomed in the nursery fields and will not produce showy blooms the first season after planting.

All of the respondents' advertisements contain those representations except that in 1955 and 1956 the word "nursery" was dropped. Apparently this change was in line with the addition in 1956 of the term "native collected" previously considered. The 1954 representation that many of the plants had already bloomed in the nursery field obviously could not have been true concerning the many plants native collected. Even ignoring this fact, inasmuch as the word nursery was eliminated from the 1955 and 1956 advertisements, the record establishes that very few if any of the plants contained in the offer had previously bloomed or would produce large choice blooms the first season after planting.

Dr. Creech testified that many of the plants he examined could not have bloomed previously and would not bloom the next season after planting because of their size. Dr. Rogers testified that none of the plants he examined had bloomed the preceding year and only a few of them would bloom the next season. Mr. Boyer testified that a rose of sharon, 1 foot high, normally would not have bloomed the previous season nor would it the next, and that privet plants which were 4 inches high could not possibly bloom the summer after planting. Mr. Louis Laug, one of the respondents herein, testified that in the spring of 1956 during the pendency of these proceedings he selected one of the 42 plant offers at random from respondents' warehouse and planted it as an experiment. Even though this proceeding was well along and this particular issue well defined, he was unable to state that any particular plant bloomed and testified only that some of the plants flowered.

The only evidence that respondents offered in contradiction of the foregoing was the submission at the hearing in August of certain plants handpicked by Mr. Smith. He testified that these plants had bloomed during 1956. This, of course, constituted no proof that they had bloomed in 1955 as represented in the advertising. The offers sold in the spring of 1956, of which these were supposed to be samples, were represented to have previously bloomed in the fields, namely, in 1955. Smith's testimony was to the effect that they bloomed after they were planted in 1956. In addition to this, it is significant to note that Smith testified that he personally selected the plants produced at the hearing from his fields. He admitted that all of his plants did not bloom and that he had to pick the ones that bloomed. Mr. Laug's testimony concerning the plants he selected at random in May of 1956 from the 42 plant offer then being sold by respondents is equally infirm inasmuch as the exhibits received in evidence from Mr. Laug showed that included among the 42 plants were spirea crimson, red snowberries, and red Norway maple trees, yet according to respondents' 1956 advertisement, none of these plants were included in the 1956 offer.

The record establishes and it is found that many of the plants had not bloomed in the nursery fields and would not produce blooms the first season after planting as represented.

(f) The 42 plant offer is not a \$26.77 or \$26.51 catalogue value, or a \$22.05 value at respondents' regular individual prices.

In the 1954 and 1955 advertisements, respondents represented that the 42 plant offer had an average mail order catalogue value of \$26.77 and \$26.51, respectively, based upon a comparison with nursery stock from the catalogues of other nurseries. After the complaint was issued alleging this representation to be false, the 1956 advertisement was changed to claim that the plants were worth $22.05 based upon individual prices charged by respondents in selling many thousands of the same plants individually. A number of the expert witnesses called in support of the complaint, including Messrs. Boyer, Burgess, Bauge and Jones, testified that the 42 plants were not a $26.77 or a $26.51 catalogue value nor anything close to it.

In view of the facts already found: that the offer contains no true rose plants, many of the items are native collected, many are extremely small and immature, many are dead, partly dead, not well-branched or well-rooted, and unlikely to survive in the average garden, many have not bloomed previously and are not sufficiently mature to produce blooms the season after planting, and the facts hereinafter considered, that with respect to many of the items listed in the offer the purchaser does not receive the plants described but a different plant of inferior quality and value, and further that many of the plants are not hardy in large parts of the areas where they are sold, it seems obvious that the offer is not anywhere near in value any of the three figures referred to above. As pointed out by counsel in support of the complaint, the value of plants like any other merchandise is dependent upon the quality. Obviously a plant which is well-branched, well-rooted, larger, older, and more mature is worth more than one which is not. A plant which is dead or so weak that it cannot survive, or is not hardy in an area where it is sold, is not worth anything, let alone the amounts represented by respondents.

Respondents contended that they ordered the items making up the 42 plant offer from various nurseries throughout the country, and arrived at the prices listed in their 1954 and 1955 advertising by this method. The catalogues from which such items were ordered by respondents for comparison were received in evidence. Aside from the fact that many of the respondents' plants were either dead or so weak they could not survive, the record establishes that the plants ordered by respondents from other nurseries were of a much better quality, size, age, and maturity, and in many instances a different species of considerably more value commercially than that furnished by respondents. In this connection, counsel supporting the complaint offered and there was received in evidence the American Standards for Nursery Stock adopted by the American Standards Association and sponsored by the American Association of Nurseries, referred to hereinabove. Respondents objected to its receipt at the time but as noted above, now rely upon it in connection with their contention concerning grade or size tolerance.

These standards establish an appropriate criteria for plant grades, and the record shows that they are generally followed by all reputable nurserymen in the sale of nursery stock. The record also establishes the manner in which they were adopted and promulgated under impartial conditions, and that they have been accepted for use by the Federal and State Governments including the State of Michigan. As a matter of fact they are recognized by and referred to in the Commission's trade practice rules recently adopted for the nursery industry.[7] Under rule 4 thereof dealing with size and grade designations appears the following: "Note: It is the consensus of the industry that the grade and size standard set forth in American Standard for Nursery Stock, as revised April 15, 1951, and in the addendum thereto entitled 'Bulbs, Corms and Tubers' (now incorporated in American Standard for Nursery Stock as revised April 15, 1956) is generally recognized in the industry, and that use of the size and grade designations therein set forth, in accordance with the requirements of the standard for the designations, in the marketing of industry products to which such standard relates, will prevent deception and confusion of purchasers and prospective purchasers of such products."

The record herein establishes that the grade of plants included in the 42 plant offer does not meet these standards. This in itself tends to establish that the plants included in the offer are not of a comparative value to those purchased by respondents from other nurseries which recognize and follow the standards established in the American Standard for Nursery Stock. In addition, an analysis of the testimony of Mr. Forrest Laug concerning the various plants he ordered from different nurseries to establish the list of prices used in the 1954 and 1955 advertisements, together with the catalogues received in evidence describing the plants ordered by Mr. Laug, establishes that they were of far better quality and size than the plants contained in respondents' offer. Mr. Laug said that respondents purchased two rock roses from the Akerman catalogue, respondents' exhibit 60(g). (As previously noted this plant was hypericum, or St. John's Wart, not a rock rose.) The plants purchased by respondent were two years old, field grown by the nursery, and a species described as golden St. John's Wart. As previously found herein, respondents' hypericum was younger, had not previously bloomed and was collected from the wilds. Patently it was of far less value than the plants ordered by respondents. This is so even assuming that the plants were received by the customer alive and well-rooted, which frequently was not the case as found above.

[7] Title 16, Part 34, C.F.R. (1957).

Mr. Laug purchased two rose of sharon plants from the Stark Nursery for $3.30, and an examination of its catalogue reveals that the plants were 1½ to 2 feet tall and not native collected. The record reveals that substantially all of respondents' plants were not as tall or mature as these plants. In one of the catalogues used by respondents to purchase these comparison plants, the Tennessee Nursery lists rose of sharon 1½ to 2 feet tall at 70 cents each or $1.40 for two. Again this is a taller, more mature plant than that offered by respondents. Apparently they selected the more expensive plant from the Stark catalogue in making up their list of values even though the item listed in the Tennessee catalogue was larger than their plants. Mr. Laug said respondents purchased four spirea rosea for $3, two coralberries for $1, and two honey suckle vines for $1.20 from the Tennessee Nursery. The spirea purchased were 2 to 3 feet tall, more than two to three times larger than those offered by respondents, and in addition were the billiardi species whereas those sold by respondents were japonica fortunei. The coralberries were 1½ to 2 feet tall, and the honey suckle were 2-year-old No. 1 plants.

Mr. Laug further said respondents purchased four spirea crimson for $3 and two trumpet vines for $1.50 from Allison Nursery. As previously found, there was no difference between the spirea rosea and spirea crimson plants offered by respondents. Again a different species was purchased, this being spirea froebeli instead of spirea japonica fortunei. The plants purchased were 1½ to 2 feet tall. The prices quoted were three for $2, and consequently four could not have been more than $2.75, instead of $3. The Allison catalogue does not state the age or size of the trumpet vines, but the record establishes that those included in respondents' offer were collected from the wild. Respondents purchased two hydrangea for $1.80 from Whitten's Nursery. These plants were strong 1½ to 2 feet bushes, whereas respondents were native collected. Respondents purchased 2 red snowberries for $1.70 and 15 amurense privet hedge for $3.22. The red snowberries were 1½ to 2 feet tall and the same size red snowberry could have been purchased from the Tennessee Nursery for $1. The 15 privet hedge were a different and more valuable variety than that sold by respondents. Respondents furnished ligustrum sinense, a privet hedge not hardy in the north, whereas the privet they purchased was ligustrum amurense, the hardy northern variety. In addition the plants purchased were 2 years old and much larger than those of respondents received in evidence. The Tennessee Nursery catalogue used by respondent to make other purchases listed ligustrum sinense plants 1 to 1½ feet tall 15 for $1.50. Respondents did not explain why they ordered a different species much hardier and worth more than twice as much as the kind they sold, even assuming the size and condition to be comparable.

Mr. Laug testified respondents purchased one white dogwood tree for $1.39 from Richards Nursery. Aside from the fact that the record shows that respondents usually did not furnish a white dogwood tree but instead a red ozier dogwood bush of far less value, Whittens' catalogue lists a 2- to 3-foot 2-year-old, white dogwood tree for 90 cents, and the Tennessee catalogue a 2- to 3-foot tree for $1. Mr. Laug said they could find no catalogue listing for tulip and red maple trees comparable in size to respondents', so they listed their own catalogue price of two for $2 for each. However, the Tennessee catalogue lists tulip trees of the same botanical name 4 to 5 feet tall at $1.25, and 5 to 6 feet tall at $1.40. In the Stahling catalogue, tulip trees 3 to 4 feet tall are 2 for $1.70. In view of the comparative sizes, respondents' claimed valuation is far too high. In the Tennessee catalogue the same red maple trees offered by respondents are listed at $2, 5 to 6 feet tall. Obviously respondents' plants, being very much smaller, would be proportionately less valuable, even assuming they were well-branched, well-rooted, and healthy. In respondents' 1954 advertisements two red Norway maple trees were listed with a claimed value of $2.80. In the catalogues which respondents used, red Norway maple trees as distinguished from native red maple trees are far more expensive. As will be noted in the following subsection (g), respondents did not ship a red Norway maple but used the native red or swamp maple.

The foregoing findings establish respondents' misrepresentations concerning their valuation of the offer in 1954 and 1955. With respect to their 1956 advertisement, respondents represented that the plants were worth a total of $22.05, based upon claimed individual sales of many thousands of the same plants at the prices listed in the advertisement. In support of this claim, Mr. Laug testified that during the 1956 season respondents sold over a million of the same plants individually at such prices. The documentary evidence as well as other testimony from Mr. Laug and Mr. Smith, respondents' supplier of the 42-plant offer, establishes the foregoing testimony by Mr. Laug to be incredible. Mr. Laug admitted that respondents purchased all of the plants listed in the 42-plant offer only from the Smith Nursery. Mr. Smith testified that all of his sales to respondents were made under contracts duplicating Commission exhibit 93. This contract provides for the sale to respondents by Smith of the plants listed *only* in units of the 42-plant offer, and replacements thereof in case of returns. In view of the undisputed provisions of the contract and the testimony of Messrs.

Laug and Smith, it is apparent that respondents could not have sold thousands of these plants individually, inasmuch as they did not purchase them individually from Mr. Smith.

Even assuming that the plants sold by respondents were all alive, healthy, well-branched, and well-rooted, it is obvious they were of a value far less than represented by respondents. When it is also considered that respondents did not supply a white flowering dogwood tree but instead a red dogwood bush, did not supply a red Norway maple tree but instead a native swamp or red maple, did not supply a blue-blooming hydrangea or pink-blooming magnolia tree, together with the facts that many of the plants were not alive, healthy, well-rooted and well-branched, frequently were not of blooming size, many were collected from the wild, and many were not hardy in many of the States where sold, it becomes apparent that not only were they not worth more than $22 as represented but were not worth the amount charged by respondents. While not, of course, controlling, it is interesting to note that under their 1955 contract respondents paid Smith 85 cents for the entire order of 43 plants, including the magnolia tree as a bonus, or approximately 2 cents apiece. It is also of interest that in 1956 respondents' claimed value was more than $5 less for approximately the same plants, exclusive of the magnolia tree which was not included among the listed values, yet the expert witnesses testified that the value and price of nursery stock had increased in 1956 from that in 1954 and 1955.

The evidence establishes and it is found that respondents' 42-plant offer does not have the value represented.

(g) The offer does not include two red Norway maples.

As previously found, in 1954 respondents represented that the purchaser would receive two red Norway maple trees. While the word "Norway" was dropped from the 1955 and 1956 advertisements, the colored pictures included in those advertisements portrayed one of the red Norway maple trees, such as the Crimson King variety, according to the expert witnesses called in support of the complaint. Mr. Whiting testified that the public would think they were getting red-leafed maple trees. Dr. Rogers testified that the illustration appeared to be a form of the Norway red maple. Dr. Chadwick said it looked like a Crimson King maple, a type of Norway maple having red leaves throughout the summer. Mr. Rogers said the picture looked like a Japanese red maple, another tree which remains red through the summer. The Norway red maples, including the Crimson King, and the Japanese red maple, are far more valuable than the native red maple. It is undisputed that respondents did not furnish red Norway maples.

Respondents shipped the acer rubrum, commonly known as a native swamp or red maple. The botanical name of the Norway maple is acer platanoides, and the red varieties acer platanoides schwedleri, of which the Crimson King is a variety. Dr. Chadwick said that the acer rubrum is known as a red maple because of its red flowers in the spring rather than its leaves.

The evidence establishes and it is found that the offer does not include red Norway maples as represented.

(h) The offer does not include a white flowering dogwood tree.

Respondents' advertisements state that the purchaser will receive a white flowering dogwood tree (cornus florida). In addition, the color illustration portrays a white flowering dogwood tree. The record establishes, however, that respondents shipped instead a red ozier dogwood bush (cornus stolonifera), which does not have a good bloom, is a shrub and not a tree, and is not nearly as valuable as the cornus florida.[8]

Mr. Bruer, chief of the Tennessee Department of Agriculture Division, testified that he personally observed several hundred shipments of the offer made by Smith during 1954 and 1955 and saw cornus stolonifera rather than cornus florida being used. In fact, Smith identified one of the plants in the offer produced and opened at the hearing as a red ozier dogwood. Later when Smith produced samples of the plants used in the offer personally selected by him for use at the hearing, he produced a red ozier dogwood instead of a cornus florida, and testified that it was the type of shrub that he was putting in the Michigan bulb orders.

The record establishes and it is found that respondents do not furnish a white flowering dogwood tree as represented.

(i) The offer does not include two hydrangea bushes.

Counsel in support of the complaint concedes that the record does not sustain this allegation and accordingly it is not found.

(j) The plants listed as coralberries and red snowberries are in fact the same.

Respondents' 1954 and 1955 advertisements included red snowberries and coralberries as different plants which the purchaser would receive. For reasons not explained in the record, both of them were dropped from the 1956 offer. The record establishes that they are in fact the same plant, commonly known as coralberry. Dr. Chadwick testified that he knew of no such plant as a red snowberry. Neither Bailey's nor Taylor's Encyclopedias recognize red snowberries although both of them recognize and describe coralberry and snowberry.

[8] *Taylor's Encyclopedia*, page 240.

Some of the confusion in the record among the witnesses apparently arose from the fact that snowberry and coralberry are of the same family, whereas red snowberry is merely another name for coralberry. According to Taylor, page 1087, and Bailey, page 3293, symphoricarpos albus is the botanical name for snowberry, while symphoricarpos orbiculatus is the botanical name of coralberry. As might be expected, the fruit of the snowberry is white while the fruit of the coralberry is red.

Five expert witnesses called in support of the complaint testified that coralberry and red snowberry are common names of the same plant. Mr. Smith, when questioned about the matter, admitted that he could not explain the difference between a coralberry and a red snowberry. As previously noted, the coralberry ordered as a sample from the Tennessee Nursery by respondents was called a red snowberry by that nursery. Respondents pointed out that some of the witnesses testified that coralberry and snowberry are different plants. As indicated above in Taylor's and Bailey's Encyclopedias, there is no question but that snowberry and coralberry are different species of the same family. However, the record establishes that *red* snowberry is just another name for coralberry. Prior to 1956 when the coralberry and red snowberry were dropped, respondents in their advertisements did not identify the plants by their botanical names. In addition, when Mr. Smith produced the plants at the hearing which he personally selected he produced a coralberry, but no red snowberry.

The record establishes and it is found that the purchaser does not receive two different plants known as coralberry and red snowberry as represented, but in fact both are the same plant.

(k) A number of the plants included in the collection are not hardy.

In all of their advertising, respondents represented that the plants in this collection were hardy. The record establishes that respondents' advertising is disseminated throughout the entire United States, and that respondents sell their offer in every State of the Union. Respondents' 1955 advertisement contained a statement that respondents sold their stock nationally by mail. Mr. Smith testified that he had shipped the offer to each of the 48 States.

The record reveals that a number of the plants included in the offer are not hardy in the Northern States. At page 1216 of Taylor's Encyclopedia is found a colored map setting forth the various zones of hardiness in the United States, designated 1 to 9 from north to south, based upon average mean temperatures of the coldest months. Throughout this encyclopedia as well as throughout Bailey's Cyclopedia every plant listed carries a designation of the zones or areas in which it is not hardy. Mr. Bauge testified hypericum (called rock rose by respondents) cannot be grown in Iowa. Taylor's Encyclopedia, page 971, states that hypericum is not hardy north of zone 4. Zone 4 is a band extending roughly through the center portion of the United States including Maryland, West Virginia, Kentucky, northern Arkansas, and northern Oklahoma. It is south of all of the States in the Middle West and Rocky Mountain areas as well as New York and Pennsylvania, which are in zone 3, not to mention the more Northern States which are in zones 1 and 2. Bailey's Cyclopedia, page 1629, says that hypericum is not hardy in the North. Mr. Bauge also said cornus florida is not hardy in Iowa, and Taylor's Encyclopedia, page 240, states that it is not hardy north of zone 3. Iowa is in zone 2.

As previously found the record establishes that respondents' offer included ligustrum sinense as privet instead of amurense, which is the hardy privet sold in the North. In this connection respondents referred to their privet as Amur privet, which in itself represents that the hardy variety, amurense, was being offered,[9] and not the southern variety, sinense, which will not survive in the Northern States. Dr. Chadwick testified that respondents' privet was not hardy in Ohio. Dr. Rogers testified that it was not hardy north of Maryland. Messrs. Bruer and Holmes said that it was not hardy in the North. Bailey's Cyclopedia, page 1859, states that amurense is hardy in the North but that sinense is not hardy north of Long Island. Long Island is in zone 4, as previously described. Taylor's Encyclopedia lists sinense as not hardy north of zone 6, which would eliminate three-fourths of the United States.

Taylor's Encyclopedia also states that rose of sharon, coralberry, hydrangea arborescens, spirea japonica and multiflora rose are hardy only from zone 3 south.[10] Taylor, page 650, further states that magnolia acuminata, the type sold by respondents, is not hardy north of zone 4. Respondents argue that because other nurseries sold the same types of stock nationally, it should be concluded that all of the plants are hardy throughout the United States. As previously found herein, the misdoings of others, if any there be, do not justify respondents' representations.

The record establishes and it is found that many of the plants included in respondents' offer are not hardy in substantial portions of the United States as represented.

[9] Taylor's Encyclopedia, p. 891, says the common name for ligustrum amurense is amur privet.
[10] Pp. 496, 1088, 523, 1043 and 952.

(l) The offer has been shipped after the expiration of the planting season.

As previously found, the complaint alleged and respondents admitted that they represented that the 42 plant offer would be shipped in time for planting during the current planting season. A number of the expert witnesses were asked what would be the latest spring planting date for the collection of 42 plants. The record establishes that the latest spring planting date is earlier the farther south, and conversely later the farther north, the planting takes place. Mr. Boyer testified that the latest spring planting date in Michigan was about June 14, whereas nurseryman Smart testified that the last seasonal planting date in the Chicago area was the end of May. The record shows that the plants ordered in April by Mr. Holmes, Newark, N.Y., were received by him during the first week of June. This portion of New York is in the zone south of the one in which most of Illinois and Michigan appear. Mrs. Smith, a consumer witness, testified that the collection she ordered in the spring of 1954 was not received until the middle of the summer.

Mr. Smith testified that he continued shipping the offer during the 1956 season until June 20, considerably after the latest spring planting date in most of the United States. Many of the plants included in the offer are supposed to bloom and flower in the spring, considerably before June 20. Mr. Boyd, who operates a nursery in the same area as Mr. Smith, testified that the end of the shipping season in McMinnville, Tenn., is considered to be May 10 because after that unless the plants are kept dormant in cold storage they start to grow and the sap starts up in them. This is one reason why the planting season is earlier in the South and later in the North. Mr. Boyd's testimony is in accord with the evidence in the record that as long as plants are kept dormant they may be planted successfully during the season. Respondents' plants were not kept in cold storage.

The evidence in the record establishes and accordingly it is found that respondents frequently shipped the 42 plants after the expiration of their planting season.

(m) Purchasers do not receive plants tested for condition by a nursery expert under proper standards.

Respondents' 1955 and 1956 advertisements contained a printed certificate by the American Research and Testing Laboratories certifying that the plants had been tested and found to be alive, healthy, and hardy. Mr. Stokesberry was called as a witness by counsel supporting the complaint and testified that he was the owner and director of the American Research and Testing Laboratories, a private enterprise conducted for profit. He testified that in 1954 at the request of respondents' advertising agency he conducted a test of the plants in the 42 plant offer. He admitted that he was not an expert in either horticultural matters or the packing of plants. He contended that he conducted several tests of the plants but was unable to produce any records concerning any tests other than a report of his April 3, 1954 test, Commission's exhibit 32. He was unable to produce any work sheets or data concerning that report as well as the other alleged tests.

In his report of April 3, 1954, Mr. Stokesberry lists the various plants included in the 1954 and 1955 offers, which incidentally are not all the same as the 1956 offer even though respondents continued to use Mr. Stokesberry's certification in 1956. Mr. Stokesberry certified that all of the plants submitted to him were alive, viable and healthy, that he planted them 24 hours after receiving them, and that at the end of a 10-day observation period all of them were alive and growing. Mr. Stokesberry admitted that viable meant the same as alive. It will be noted that he did not certify the plants to be hardy although respondents quoted him as doing so in their advertisements, and in fact headed the entire quotation in large print with the caption, "Certified Hardy Plants."

Mr. Stokesberry testified that in order to secure an average or representative sample of respondents' offer, he ordered the collection through the mail from a newspaper advertisement, which was offered and received in evidence as respondents' exhibit 8. Although the date of this newspaper page was cut off and hence does not appear upon it, the exhibit proved to be identical with Commission's exhibit 7, a page of the Chicago Sunday Tribune of March 28, 1954. This is evidenced by the reverse side of respondents' exhibit 8, which is identical with the reverse side of Commission's exhibit 7, including the portion of the news article appearing on exhibit 7, as well as all of the other printed matter thereon. Under cross examination, Mr. Stokesberry admitted that undoubtedly the advertisement he produced was from the same day's paper as Commission's exhibit 7. Obviously, Mr. Stokesberry could not have ordered, received, planted and then observed for 10 days before April 3, 1954, plants ordered from an advertisement appearing in a newspaper on March 28, 1954, 6 or 7 days prior to the certification. Mr. Stokesberry was completely unable to explain the discrepancy of dates between his certification and the advertisement which he used in ordering the plants. This fact, as well as the fact that Mr. Stokesberry was unable to produce any of his test data or work sheets in connection with this test or the other alleged tests concerning which not even final reports were produced, raises a serious question concerning credibility and the weight, if any, to be given to his testimony.

Respondents attempted to explain the discrepancies which Mr. Stokesberry could not explain by later testimony from their advertising agency that the agency furnished the advertisement to Mr. Stokesberry and had secured it from a "bulldog edition of the Chicago Tribune." According to Mr. McMahon, this is an edition published about 2 weeks prior to the date on the publication. This appeared to be a belated attempt by respondents to repair the badly damaged credibility of the witness. No reference was made to a bulldog or predated edition of the newspaper until after the witness was confronted with the date and unable to explain the discrepancy between it and his certification. Even if a bulldog edition of the particular newspaper advertisement was available 2 weeks prior to its actual date of publication, the time element is such that it would have been practically impossible for the witness to have secured the advertisement, mailed it to respondents, in turn mailed by them to Smith in Tennessee, received the shipment of plants from Tennessee through the mails and then planted and observed them for 10 days prior to the issuance of the report.

For all of the foregoing reasons, the testimony of the witness is not credited. The certification printed in respondents' advertisement is clearly a representation to the public that respondents' plants have been tested for condition and hardiness by a reputable organization experienced and qualified in the field. The statement that the plants are certified as alive, hardy and healthy after testing by the American Research and Testing Laboratories would definitely lead the public to believe that appropriate tests under impartial standards had been made by a qualified and experienced organization. The record certainly does not support such a representation. The record establishes and it is found that purchasers do not receive plants tested for condition by a nursery expert under accredited and impartial standards. The evidence further establishes and it is found that such plants, even if certified, were not certified as hardy. It is further concluded and found that there is insufficient substantial evidence in the record to establish that such plants were in fact tested at all.

Even assuming *arguendo* that some plants had been tested and certified as represented by respondents, the representation in the advertisement would still be misleading and deceptive. Patently the impression conveyed to the public and prospective purchasers is that the plants *which they will receive* are certified as alive, healthy, and hardy, not one or a few samples of such plants tested a year or more prior to the advertisement. The plants received by the customers answering the advertisement have not been tested or certified in any manner. Only the most analytical and critical appraisal of respondents' representation in this regard might lead one to conclude that the plants to be received were not certified, and that only samples of like plants had been tested. This is further borne out by the fact that many reputable nurseries do in fact certify their stock as mature, healthy and hardy. Such certifications are of the stock sold and delivered, not samples thereof tested some time prior to the offer.

In summation, the record establishes and it is found that respondents' representation, that the plants offered for sale to the public have been tested by an accredited and qualified organization and certified to be alive, healthy, and hardy, is false.

(n) The pictures used in respondent's color advertisements represent that purchasers will receive a pink-blooming magnolia tree, a blue-blooming hydrangea, an orange-blooming trumpet vine, and a multiflora rose with flowers having the shape and petals of a tea rose.

In addition to the foregoing, this section of the complaint also alleged that respondents do not sell the items listed in the 42 plant offer individually by the thousands. This representation has been considered hereinabove in subsection (f) and found to be false. Counsel supporting the complaint concedes that there is no proof in the record to sustain the allegation that respondents falsely represented that purchasers would receive an orange-blooming trumpet vine, and accordingly no such finding is made.

Respondents' 1955 and 1956 color advertisements, as well as the descriptive material in its 1954 advertisement, represented that purchasers would receive a magnolia tree bearing pink and white blooms, typical of the well-known and popular magnolia soulangeana. In the upper left hand portion of respondents' color advertisements appears a picture of several beautiful pink and white magnolia blooms. In the 1954 and 1955 advertisements, a statement also is made that the magnolia tree offered bears large rose-pink blossoms. However, the record establishes that respondents' plant is a magnolia acuminata, which bears a small greenish-yellow flower and which is not generally recommended for home landscaping, the magnolia soulangeana being preferred for this purpose. Four of the expert witnesses called in support of the complaint testified that the colored illustration depicted the bloom of the magnolia soulangeana. Drs. Creech and Chadwick said that the magnolia shipped by respondents bore a greenish-yellow flower. According to Taylor's Encyclopedia, page 650, the flower of the acuminata is 2 to 3 inches high and not showy, whereas the flower of the soulangeana is 6 inches and among the most popular and handsome of the flowering shrubs. In 1956, after the issuance of the complaint, respondents changed the printed descriptive material concerning the magnolia to state that it "bears large greenish-white blossoms." However, this appears in the smallest print in the body of the advertisement, while the picture used is still that of three large pink and white blooms of the type found on the soulangeana.

At the upper right-hand side of the same color advertisement appears a blue hydrangea bloom. In each of the advertisements in the finer print respondents described their hydrangea as bearing immense blossoms of pure white. The record reveals that respondents sell the hydrangea arborescens which bears white blossoms, whereas the hydrangea macrophylla, a much more valuable plant grown extensively by florists, is the plant which bears the blue blooms. Taylor's Encyclopedia, page 523, identifies the arborescens as the wild hydrangea, commonly called seven-bark, bearing white flowers, and the macrophylla as the plant which bears the blue flowers. Respondents' offer does not include the common hydrangea which bears white flowers and is so well known, identified by Taylor as the hydrangea paniculata. While there is some discussion in the record about causing varieties of hydrangea to turn blue by the addition of iron or aluminum to the soil, this applies only to the pink blooming hydrangea, which under certain conditions of acid soil will turn blue, and not to white blooming hydrangea.[11] Respondents apparently concede that the illustration is incorrect because they sell white blooming hydrangea, but argue that in the printing process a color which is supposed to be white sometimes turns out with a bluish tint. This contention is without substance. Every advertisement received in the record showed the hydrangea with a blue bloom, while the same illustrations contained white blooming dogwood trees and magnolia blooms the inside of which were white, and not a single one of those were blue.

As previously found, the multiflora rose plant was included in the offer for the first time in 1956. Respondents concede that their 1956 advertisement contains an incorrect illustration of a multiflora rose. The illustration appearing in the advertisement, Commission's exhibit 47, shows four beautiful coral colored roses with the appearance, shape and petals of a tea or floribunda rose, i.e., roses as the public normally thinks of them. As has previously been found in

[11] *Taylor's Encyclopedia*, p. 523.

subsection (a) hereof, the bloom of a multiflora rose is about like that of a strawberry plant and in no way resembles a real rose. Although this illustration appeared in respondents' 1956 advertisement, they testified at the hearing that they have since ordered it changed.

All of the experts who testified concerning the illustration in question said in their opinion it appears to be a garden rose, such as a tea or floribunda. Mr. Foster, the artist employed by respondents to draw the illustrations, testified that he thought the multiflora rose was one of the climbing roses, and copied the Crimson Rambler, a climbing rose, for the illustrations. He testified that he looked the matter up in Taylor's Encyclopedia and ascertained that the multiflora rose was a rambler, and the Crimson Rambler was the most common variety. However, Taylor's Encyclopedia, page 952, under multiflora rose, states that the multiflora rose *bred* with rosa cathayensis is "the source of many important climbing or prostrate horticultural varieties, *possibly* entering into the variety known as Crimson Rambler." [Emphasis added.] Bailey's Cyclopedia, page 2985, states that the Seven Sisters and Crimson Rambler roses are hybrid varieties derived form the multiflora rose. There is no resemblance between the bloom of the multiflora rose and the true hybrid climbing roses such as Crimson Rambler and Seven Sisters.

While not alleged in this section of the complaint, respondents' color illustrations contain other misleading depictions as previously found herein, such as the large rose illustration at the top center of the advertisement, the white flowering dogwood tree, and the red leafed Japanese or Norway maple tree. In addition, respondents illustrate a rock rose bearing an orange pink bloom similar to the true rock rose, cistus purpurea, whereas what they sell is hypericum, known as St. Johns' Wart, which bears yellow flowers instead of rose-colored flowers.

The record establishes and it is found that by their colored illustrations respondents falsely represented that purchasers would receive a pink blooming magnolia, a blue blooming hydrangea, and a multiflora rose with flowers having the shape and petals of a tea, or true, rose.

3. The tulip and gladiolus bulb offer.

The complaint set forth and respondents admitted four advertisements published by them, three offering tulip bulbs and one offering gladiolus bulbs. The respective advertisements were received in evidence as exhibits. The three tulip offers were respectively 100 for \$1.69, 100 for \$ 1.98 and 100 for \$2.98, and the gladiolus offer was 100 for \$1. It was alleged and admitted that by these advertisements respondents represented that purchasers would receive: (a) bulbs of the size described; (b) bulbs which would bloom during the first flowering season after planting; and (c) bulbs which would produce flowers with an assortment of colors.

(a) The bulbs shipped by respondents are smaller than the size described.

The complaint alleged that the purchasers of respondents' gladiolus offer and the $1.69 and $1.98 tulip bulb offers did not receive bulbs as large as described in respondents' advertisements. The gladiolus advertisement, Commission's exhibit 4, described the bulbs as "small blooming varieties already 1 to 1½ inches in circumference." Some 600 of these bulbs obtained through sample orders placed by the Commission's investigators were received in evidence as Commission's exhibits 71 and 83. An examination of these bulbs reveals that in each order of 100 bulbs 30 to more than 40 were less than 1 inch in circumference.

Respondents' 100 for $1.69 tulip advertisement describes the bulbs as "medium size already 2½ inches in circumference," and their 100 for $1.98 tulip advertisement describes the bulbs as "medium size." In both advertisements reference is made to the fact that they were selected from the finest planting stock. Again referring to the American Standard for Nursery Stock addendum, tulips are graded as top-size, large, medium, and small. The grade "small" includes bulbs from 3⅝ inches to 4 inches in circumference, or more than an inch larger than those described in respondents' $1.69 offer. The addendum contains the statement that the grades listed therein conform in substance to generally accepted trade usage, and it would appear therefore that bulbs of the size described by respondents are not even offered for sale to the public. Tulips graded medium are from 4 to 4⅜ inches in circumference. In both of the tulip advertisements referred to above respondents describe their bulbs as "medium size," when the record establishes that they were substantially less than medium size and, according to their own dimensions with respect to the $1.69 offer, were more than 1 inch smaller than "small." Actually respondents' bulbs can best be described as planting stock not suitable for sale to the public.[12]

(b) Purchasers do not receive bulbs which generally will bloom the first season after planting.

The foregoing allegation concerns the same three offers: namely, the gladiolus bulbs and the 100 tulip bulbs for $1.69 and $1.98, respectively. As previously noted, respondents' gladiolus advertise-

[12] See note to Rule 5, Trade Practice Rules, Nursery Industry, Title 16, Part 34, C.F.R. (1957).

ment described the bulbs as "blooming varieties" and stated that they would "produce a rainbow of blooms." Both of the tulip advertisements stated the bulbs were guaranteed to give "many blooms the first season and a full normal bloom the second season and many years thereafter." The complaint alleged that as a result of these advertisements purchasers expected to receive bulbs of the size generally sold in the industry which could be expected to bloom the first season after planting, but that in fact many of them would not bloom because the bulbs were immature planting stock or bulblets.

The misrepresentation with respect to gladioli bulbs is the more obvious, inasmuch as respondents specifically described them as "blooming varieties." At the request of the National Better Business Bureau, Mr. Dowd of the Long Island Horticultural Institute test planted 10 samples of over 1,000 bulbs of respondents' gladioli offer, with the result that only 59.8 percent of them bloomed. He testified that these were No. 6 bulbs, ⅜ of an inch or larger in diameter,[13] which is larger than the 1 inch circumference described in respondents' advertisement and of course considerably larger than the many found above to be less than 1 inch in circumference.[14] A number of the expert witnesses testified that a large percentage of the size of gladiolus bulbs sold by respondents would not bloom the season after planting. Mr. Dowd said that about 35 percent of them would fail to bloom. Mr. Preston said that a majority of them would not bloom, while Mr. Neff said that 85 percent of them would not bloom. Even respondents' own expert, Mr. Van Dyke, admitted that No. 7 bulbs (less than ⅜ inch in diameter) would not produce more than 75 percent blooms. Patently it is a misrepresentation to describe bulbs as blooming varieties when from 25 percent to more than 50 percent of them will not bloom.

Respondents throughout their brief contended their gladioli bulbs are No. 6's when the record shows in fact that the majority of them, even assuming them to be as large as represented, were No. 7's. Mr. Van Dyke testified that more than 80 percent of No. 6 bulbs could not be expected to bloom the first year. However, when questioned about No. 7's, he said that about 75 percent of them should bloom "if given good care." He made no such qualification with respect to the bloomability of No. 6's. Actually his experience with No. 7's as testified to later demonstrated a substantially lower percentage. He testified that he planted approximately 400,000 No. 7 bulbs turned over to him by respondents, and that 60 to 65 percent of them bloomed.

[13] See Addendum, American Standard for Nursery Stock, Comm. ex. 41(a).

[14] One inch in circumference equals less than ⅓ inch in diameter.

Presumably, as a professional, Mr. Van Dyke gave these bulbs good care.

Respondents' brief with respect to the issue of the bloomability of the gladioli bulb offer seems somewhat confused. At page 75 thereof the statement is made with respect to the gladioli bulbs that no representations whatever were made other than that they would produce a rainbow of blooms, that they were 1 to 1½ inches in circumference and that if they did not flower 5 years they would be replaced. Again at pages 78 and 88, respondents' brief states that "nowhere in respondents' advertising is it represented that the purchaser will obtain 100 percent blooms from these $1 a hundred gladioli bulbs." Yet on page 80 respondents' brief states that the advertisement plainly sets forth that the bulbs are the blooming variety. As previously found, the latter is correct and the former is not.[15] The advertisement obviously represents that the gladioli bulbs are of blooming size. The fact is that a substantial percentage of such size bulbs cannot be expected to bloom the first season.

Respondents throughout their brief also contend that Mr. Dowd obtained 82.8 percent of blooms from his test planting when in fact only 59.8 percent of the bulbs he planted bloomed. Respondents arrived at this figure by computing the number of blooms against a total of 1,000 instead of the total planted by Mr. Dowd, which was 1,384. The point in issue is what percentage planted may be expected to bloom, and this percentage is indisputably 59.8 percent. It will further be recalled that these bulbs were all No. 6's or larger, whereas a majority in respondents' offer were No. 7's, which do not produce as large a percentage of blooms.

Respondents' brief at page 78 also contends that their gladioli advertisement is in conformity with the Commission's trade practice rules for the gladiolus bulb industry.[16] However, rule 3 of said rules makes it an unfair trade practice to misrepresent directly or indirectly the ability of gladioli to bloom or flower, and also provides: "When industry products are of such immaturity as not reasonably to be expected to bloom and flower satisfactorily the first season of their planting, such fact shall be clearly and conspicuously disclosed in all advertisements and sales promotional literature relating to such products: *Provided, however*, That such disclosure need not be made when the size of the product is specified in accordance with the requirements

[15] In this connection, Comm. ex. 11, a radio commercial used by respondents in 1955 to sell gladioli bulbs of exactly the same size, included the following representations: "But first, let me remind you these are not bulblets but actual bulbs in *blooming varieties* * * * Small but already 1 to 1½ inches in circumference * * * and these *blooming size* gladioli bulbs come in an assortment * * * ready for first *blooms this season* and many years ahead." [Emphasis added.]

[16] Title 16, part 206, C.F.R. (1957).

of section 206.2 *and sales of the products are confined to nurseries and commercial growers for their use as planting stock.*" [Emphasis supplied.] All of the sizes specified for use in describing gladioli bulbs in the trade practice rules as well as in the addendum to the American Standard for Nursery Stock deal with diameters of the bulbs, whereas respondents' advertised size is the circumference, which necessarily is more than three times larger than the diameter. This in itself might well deceive the public accustomed to sizes specified by diameter. The American Standard for Nursery Stock states that gladioli are designated by inches in diameter according to the trade practice rules, and tulips are designated by circumference.

With respect to the two tulip bulb offers of $1.69 and $1.98, the record reveals that substantial numbers of such bulbs do not bloom the season after planting. It is a reasonable interpretation of respondents' advertisements concerning these bulbs that the purchaser would expect to get high quality, medium size, imported bulbs in sizes generally sold commercially to the public which could be expected to bloom the next flowering season. In fact what respondents ship is planting stock, a large percentage of which cannot be expected to bloom the first season. Again referring to the trade practice rules for the nursery industry,[17] rule 5 provides that it is an unfair trade practice to deceive purchasers as to the ability of such products:

"(1) To bloom, flower, or fruit within a specified period of time;" and

"Note: Under this section, when flowering bulbs are of such immaturity as not reasonably to be expected to bloom and flower the first season of their planting, such fact shall be clearly and conspicuously disclosed in all advertisements and sales promotional literature relating to such products; *Provided, however,* That such disclosure need not be made when sales are confined to nurseries and commercial growers for their use as planting stock."

Respondents represented their $1.69 bulbs to be healthy, hardy bulbs carefully selected from the finest planting stock of famous Danish gardens, a wonderful selection of medium size bulbs guaranteed to give many blooms the first season, and full normal blooms the second season and many years thereafter. Respondents' representations concerning the $1.98 bulbs were substantially identical except instead of referring to them as a wonderful selection of medium size bulbs, they called them a prize selection of medium size bulbs. As previously found herein, with respect to tulip bulbs the term "medium" refers to bulbs 4 inches or larger in circumference, whereas both

[17] Footnote 13, *supra*.

of these offers were smaller, the $1.69 offer being described as 2½ inches in circumference. Obviously the use of the descriptive words, "medium size bulb," would lead the uninformed to conclude that the bulbs were of blooming size. The record establishes that very few blooms will result from tulip bulbs of the size contained in respondents' offer.

Substantially all of the witnesses including those called by respondents referred to the circumference of tulip bulbs in centimeters rather than in inches. Two and one-half inches, the circumference of the bulbs in the $1.69 offer, equals 6+ centimeters. Mr. Nelis, an expert tulip grower from Holland, Michigan, who had raised tulips for 33 years, testified that a bulb at least 8 centimeters in circumference is needed to guarantee blooms, that the majority of 7 centimeter bulbs do not bloom, and that very few blooms can be expected from 6 centimeter bulbs. Mr. Boyer testified that bulbs at least 9 centimeters in circumference are necessary to insure blooms the following spring. Mr. Van Bourgondien, a native of Holland who has been raising tulips commercially for 35 years, testified that no blooms can be expected from 5 centimeter bulbs and very few from 6 centimeter bulbs. Mr. DeGroot, an expert called by respondents, testified that about 60 percent of 6-centimeter bulbs could be expected to bloom.

Mr. Metzen, a consumer witness called in support of the complaint, testified that he purchased and planted respondents' $1.69 tulip collection, and the following summer approximately one-third of them came up with just one leaf and no flower. He observed them again the following year and there was no increase in the number of blooms. Possibly even more significant than the foregoing is the consumer survey conducted by the National Better Business Bureau of 300 of respondents' customers who purchased and planted the $1.98 tulip offer in 1953. This survey was conducted during the summer of 1954, and repeated in the summer of 1955. The 1954 survey shows that of more than 10,000 bulbs planted by the various customers of respondents, an average of 39.4 percent grew blooms. The 1955 survey shows that the next year an average of 37.7 percent of the same bulbs grew blooms, including both those left in the ground the two seasons and those dug up and replanted in the fall of 1954. This rather extensive survey establishes that respondents' representations concerning the bloomability of these tulips are false.

Other evidence received in the record concerning the bloomability of such size tulip bulbs consisted of certain test plantings conducted by Mr. Dowd for the National Better Business Bureau. While the record establishes that these were tulip bulbs furnished by respondents, they were not the particular bulbs contained in the offers under consideration, because they were purchased by Mr. Dowd in 1951 prior to the respondents' sale of Danish tulip bulbs. However, Mr. Forrest Laug testified that the blooming capacity of tulip bulbs depends upon their size, not their origin, which is substantially the same as the testimony of the various experts. One of the samples of bulbs received from respondents and planted by Mr. Dowd consisted of bulbs ranging from 6 to 9 centimeters in size. A group of photographs, which portray the tulips planted by Mr. Dowd, was received in evidence as Commission's exhibit 70. These photographs graphically show the paucity of blooms which can be expected from tulip bulbs of this size. During the hearing ruling was reserved on respondents' motion to strike Mr. Dowd's testimony concerning this test planting because it dealt with tulip bulbs not contained in the offers set forth in the complaint. The motion is herewith denied because the evidence offered is relevant with respect to the bloomability of bulbs of the particular size involved, regardless of whether they are domestic, Holland, or Danish bulbs.

In addition to the foregoing, certain admissions by respondents are found in a reported decision of the U.S. Customs Court, C.D. 1546, volume 88, No. 34, page 30, 1953, received in evidence as Commission's exhibit 45. This was a suit brought by Michigan Bulb Co. against the United States before the Customs Court, and involved the issue of whether or not tulip bulbs ranging in size from 5 to 8 centimeters in circumference are known commercially as tulip bulbs. It was the contention of plaintiff therein, Michigan Bulb Co., and the court held, that tulips less than 9 centimeters in circumference are not known commercially as tulip bulbs. A number of the expert witnesses called by Michigan Bulb Co. in that case testified on behalf of Michigan Bulb Co. that tulip bulbs of less than 9 centimeters in circumference cannot be expected to produce flowers the first season after planting. One of such witnesses was Mr. Boyer, called in support of the complaint in this proceeding. The witnesses for Michigan Bulb Co. testified, and the court found that a bulb is not designated as a tulip bulb until it is capable of producing a flower, and that bulbs of less than 9 centimeters in circumference cannot be expected to flower the first year. Obviously the position of Michigan Bulb Co. in that proceeding is diametrically opposed to respondents' position herein. Under the well established exception to the hearsay rule, respondents' admissions in that case are admissible in evidence herein as admissions by a party.

The record establishes and it is found that purchasers of respondents' gladiolus offer and \$1.69 and \$1.98 tulip offers did not receive bulbs of the size generally sold which could be expected to bloom the first flowering season after planting, as represented.

(c) The various tulip offers do not always produce flowers of assorted colors.

Respondents' $1.69 tulip advertisement states that purchasers will receive an assortment of gorgeous colors. The $2.98 tulip advertisement states that purchasers will receive 100 bulbs, 25 of each of 4 colors, red, yellow, white, and multicolor. A number of consumer witnesses called in support of the complaint testified to the contrary. Mrs. Sarantos, of South Bend, Ind., testified that she purchased tulip bulbs from respondents in 1953. When they bloomed the next spring they were all white with the exception of a few red ones. Mrs. Wilhelm of Ft. Wayne, Ind., testified that she purchased respondents' $2.98 offer in the fall of 1953 and that they all came up white. She said that she had ordered mixed colors. She dug them up and returned them to respondents. They advised her that she could have another collection for one-half price. Mrs. Swift of South Bend, Ind., testified that she purchased 100 of respondents' tulip bulbs in the fall of 1953. When they bloomed in the spring they were all red. Respondents contend that these witnesses might have ordered tulip offers not represented to be in assorted colors, but the record reveals the contrary since each witness testified that that was the subject of her complaint.

The record establishes and it is found that purchasers of respondents' assorted color tulip offers did not receive bulbs which produced an assortment of different colored tulips, as represented.

4. The winter flower garden offer.

The complaint alleged and respondents admitted that with respect to their indoor winter flower garden offer they represented that if the purchaser was not entirely pleased respondents would refund the full price. Respondents' advertisement was received in evidence as Commission's exhibit 82. Among other things it stated: "We guarantee every bulb to be blooming size. If not thoroughly pleased, return for full purchase price refund." The parties stipulated the receipt in evidence of Commission's exhibits 74 through 82, inclusive, concerning a transaction in which a Miss Goetz of New York City ordered respondents' indoor winter flower garden during the winter of 1955, and when it turned out to be a complete failure, wrote to respondents requesting a cash refund. Miss Goetz advised respondents that she had planted the bulbs according to directions but that they were dry and dead when they arrived, none of them grew, and that in fact they disintegrated, so that there was nothing left to return other than the cardboard or paper container and the soil therein. As Miss Goetz pointed out, there was no purpose in spending postage to return a paper container with dirt. Instead of a cash refund, respondents sent a replacement certificate. Miss Goetz advised respondents this was not satisfactory in view of their guarantee, and also advised the Commission by letter of the chain of events. Approximately 1 year later after a considerable exchange of correspondence between the parties respondents finally sent Miss Goetz a check refunding her purchase price.

The evidence in the record clearly establishes that Miss Goetz requested a refund and not a replacement certificate. Respondents pointed out that their letter offering to send Miss Goetz a refund of her purchase price if she returned to them the replacement certificate which they had sent to her approximately a year previously was written prior to their receipt of her letter advising them that she had informed the Commission of the matter and sent the certificate to it. While this is correct, it is undisputed that nearly a year expired between the time Miss Goetz originally requested a refund and respondents sent her a refund check, during which interval the complaint in this proceeding had been issued. Mr. Forest Laug testified that it was the policy of respondents to send replacement certificates for merchandise failures unless the purchaser specifically requested refund of the purchase price and returned the nursery stock. As previously pointed out, Miss Goetz advised respondents that the bulbs had disintegrated and there was nothing to return except the paper container and soil. The postage for a round trip of the container and soil from respondents to Miss Goetz was in excess of the purchase price of the offer.

Mr. Laug's testimony, the wording of the guarantee referred to above, and the foregoing sequence of events reveal that respondents' guarantee is misleading and deceptive. The guarantee itself advises the consumer: "If not thoroughly pleased, return for full purchase price refund." Of course a full price refund does not mean a replacement certificate. The wording of the guarantee is misleading further in that it does not specifically advise the consumer to return the merchandise. If that is what was meant, it would have been a simple matter to include a reference to the merchandise or nursery stock instead of the ambiguous phrase, "return for full purchase price refund."

Mr. Laug also testified that if the consumer stated that he did not want a replacement certificate but wanted his money back then he would get it back. However, this is contrary to the facts in the

Goetz transaction. From the beginning, Miss Goetz requested the return of her purchase price but respondents sent her a replacement certificate, even though they had been advised there was no merchandise left to return. While the testimony of Mr. Laug is somewhat confusing on this subject, it appears to be the policy of respondents to send replacement certificates to consumers who request refunds unless such consumers return the merchandise purchased even though it is dead and of no value. This, of course, would require consumers to spend the money necessary to ship the merchandise back to respondents. In the situation such as that of Miss Goetz where the nursery stock was dead and valueless, patently the average person would not spend the money necessary to return something which had no value, nor should they be required to do so in order to get a refund.

If respondents' policy concerning refunds and replacement certificates is as testified to by Mr. Laug, then the guarantee which appears in the various advertisements received in evidence concerning the 42-plant offer previously considered is false and misleading. All of those advertisements contain the following guarantee: "On arrival, deposit $2.98 plus c.o.d. postage with postman on our guarantee you must be completely satisfied or your purchase price back." There can be no question but that respondents' policy as expressed by Mr. Laug applies also to the 42-plant offer. Mr. Laug was asked the specific question: "Well, what if I wrote to you and said, 'My crop died. My 42-rose shrub offer is all dead.' Then would you write back, and what would you tell me?" Mr. Laug answered: "I would say the chances are you would get a replacement certificate."

The record establishes and it is found that respondents falsely represented that purchasers would receive a full price refund if not satisfied.

5. The evergreen offer.

Respondents' advertisements concerning their evergreen offer represented that the evergreens were all certified by the State department of agriculture. The portion of the advertisement quoted in the complaint reads as follows: "Beautiful young evergreens for spring planting * * * All certified by State department of agriculture * * * Michigan Bulb Co., Grand Rapids 2, Mich." The complaint alleged and respondents denied that the foregoing was a representation that such evergreens had been grown in the State of Michigan and inspected by the department of agriculture of that State prior to shipping.

With respect to this issue, the facts are, as with the 42-plant offer, that evergreens were purchased by respondents from Smith in Tennessee, inspected by officials of that State, and shipped to the purchasers from the State of Tennessee. The certification of both offers was only that the stock had been inspected and was apparently free of insect pests and diseases, and had nothing to do with the quality of the plants. An analysis of the advertisement in question reveals that it is deceptive in that it leaves the impression that the evergreen trees have been grown in and certified by the State of Michigan. Technically, of course, there is no literally false statement in the advertisement inasmuch as the trees are certified by the State department of agriculture of Tennessee, and the advertisement does not specifically state that the trees are either grown in or inspected by the State of Michigan. However, the name and address of the company would clearly leave the impression that the certification and source is the State of Michigan. It is, of course, well established that representations, although literally true, may still in their overall effect be deceptive by what is reasonably implied.[18]

It is accordingly concluded and found that respondents falsely represented that the evergreen trees were grown in the State of Michigan and certified by the Michigan State Department of Agriculture.

6. Additional findings proposed by counsel supporting the complaint.

In addition to the findings hereinabove made, counsel in support of the complaint proposed several findings concerning which there were no allegations in the complaint, and consequently the representations involved therein were not put in issue by the pleadings in this proceeding. In connection with subsubsection (n) of subsection 2 of section B above dealing with the allegation that the purchaser does not receive certain plants illustrated in the color advertisements, counsel in support of the complaint also proposed a finding that as a result of such color illustrations respondents represented that the purchaser would receive a red-leafed maple tree, either a Japanese or Crimson King Maple, and a finding that the illustrations depicted plants more valuable than those actually shipped by respondents. In view of the fact that a finding has already been made above in subsubsection (g) that the purchaser does not receive two Norway red maples as represented, and because the complaint did not allege that by the color illustrations respondents represented that the purchaser would receive a red-leafed maple tree, it is unnecessary and inappropriate to make such a finding. The same conclusion applies to the proposed finding of misrepresentation of value by depiction inasmuch as in subsubsection (f) above it has been found

[18] *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178; *P. Lorillard Co.* v. *F.T.C.*, 186 F. 2d 52 (C.A. 4, 1950); *Positive Products Co.* v. *F.T.C.*, 132 F. 2d 165 (C.A. 7, 1942).

that the plants shipped by respondents do not have the value represented by them, and such misrepresentation was not alleged in the complaint.

Counsel in support of the complaint also proposed a finding that respondents' invention of new names for plants, such as red snowberry, spirea crimson, and spirea rosea, as well as their use of names having only a regional application, such as rock rose for the plant hypericum, have the tendency and capacity to mislead and deceive prospective purchasers. This allegation was neither included in the complaint nor litigated at the hearing. While there is some evidence in the record that the aforesaid names were either invented by respondents or had a limited regional application, in the absence of such an allegation and adequate litigation of such an issue it would be a deprivation of due process to make such a finding. Obviously, nobody can tell what kind of proof might have been offered with respect to these matters if respondents had been confronted with such issues.

In addition, counsel in support of the complaint requested a finding that respondents' acts and practices as hereinabove found also violated rules 1, 2, 4, 5, 6, 8 and 11 of the Commission's trade practice rules for the nursery industry.[19] There can be no question but what the practices hereinabove found are in violation of such trade practice rules as well as the trade practice rules of the Commission for the gladiolus bulb industry.[20] However, as found above, no such allegation was included in the complaint and the Commission's rules make clear that violations of the trade practice rules as such are not to be alleged as violations of the act, even though such rules also indicate that they are in fact violations of the act. Rule 2.22 of the Commission's rules of practice contains the following statement: "The group I rules are those which define practices which are considered by the Commission to be violative of laws administered by it." (The rules in question here are group I rules.) However rule 2.30 of said rules of practice provides as follows: "Formal complaint proceedings involving practices which are violative of trade practice rules charge violation of the statutory provision on which the rules are premised, and *do not charge violation of the trade practice rule*." [Emphasis supplied.] Accordingly no such finding is made.

C. *Respondents' Defense and Contentions*

In addition to respondents' contentions concerning the merits of their representations considered above, respondents also contend

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[19] See footnote 13, *supra*.
[20] Title 16, part 206, C.F.R. (1957).

that no order should be issued because there is no showing in the record that the public was actually misled by the various representations, and in any event respondents' guarantee of replacement or refund prevents injury to the public. Neither of these contentions has merit. It is well settled that where persons engage in unfair and deceptive representations of their products in commerce, the Commission may properly infer that such representations mislead the public into the purchase of such products, thereby unfairly diverting trade from competitors and causing substantial injury to competition.[21]

Aside from the fact that it has been found hereinabove that respondents' guarantees are false and misleading, it is well settled that a guarantee to refund the purchase price, even if literally true and fully lived up to, is no defense to or justification for misrepresenting a product to the public.[22]

D. *The Effect of the Unlawful Practices*

The acts and practices of respondents as hereinabove found have had and now have the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to such representations and thereby induce the purchase in commerce of substantial quantities of respondents' nursery products. As a result, 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.

CONCLUSIONS OF LAW

1. Respondents are engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of their business in commerce, as "commerce" is defined in the act.

2. The acts and practices of respondents hereinabove found are all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the act.

3. As a result of the above-found acts and practices of respondents, substantial injury has been done to competition in commerce.

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[21] *F.T.C.* v. *Raladam Co.*, 316 U.S. 149 (1942); *Progress Tailoring Co.* v. *F.T.C.*, 153 F. 2d 103 (C.A. 7, 1946); *Herzfeld* v. *F.T.C.*, 140 F. 2d 207 (C.A. 2, 1944); *Brown Fence & Wire Co.* v. *F.T.C.*, 64 F. 2d 934 (C.A. 6, 1933).

[22] *F.T.C.* v. *Algoma Lumber Co., et al*, 291 U.S. 67 (1934); *Fairyfoot Products Co.* v. *F.T.C.*, 80 F. 2d 684 (C.A. 7, 1935); *Capon Springs Mineral Water, Inc., et al* v. *F.T.C.*, 107 F. 2d 516 (C.A. 3, 1939).

4. This proceeding is in the public interest, and an order to cease and desist above-found unlawful practices should issue against respondents.

5. Respondents have not, as alleged in the complaint, violated the act by representing, with respect to their perennial plant offer, that such perennial are of flowering size which will bloom the first season after planting, and with respect to the 42-rose plant offer, that such offer includes two hydrangea bushes, and a trumpet vine bearing orange blooms.

ORDER

It is ordered, That respondents Michigan Bulb Co., a corporation, and its officers; Gerald C. Laug, individually and as an officer of said corporation; Forrest Laug and Louis Laug, individually, as officers of said corporation and as co-partners trading and doing business as Holland Bulb Co.; and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of bulbs, bulblets, planting stock, corms, roots, plants, shrubs, trees, and other related items (hereinafter collectively referred to as nursery stock) in commerce, as "commerce" is defined in the act, do forthwith cease and desist from:

A. Misrepresenting directly or indirectly by description, depiction, failure to reveal or otherwise:

1. The name, common or botanical, of said nursery stock;

2. The species, genus, family, appearance, grade, size, maturity, age, color of bloom, extent of bloom, type of bloom, hardiness, condition, vigor, growth or physical characteristics of said nursery stock;

3. The type of testing, inspection or certification given said nursery stock;

4. The catalogue or retail value of said nursery stock; and

5. The origin or place where said nursery stock is grown.

B. Representing directly or indirectly by description, depiction, failure to reveal or otherwise, that:

1. Said nursery stock:

a. Is field grown unless such be the fact;

b. Has bloomed or flowered, unless such be the fact;

c. Is of blooming size or will bloom in the same season planted or any season thereafter unless such be the fact;

d. Is well branched, well rooted, live, healthy or in good planting condition, unless such be the fact and unless said stock is delivered to the purchaser in such condition;

e. Will be shipped in time for seasonal planting, unless such be the fact;

f. Has been tested and certified for condition or hardiness by an accredited expert, unless such be the fact; and

g. Has been grown in the State of Michigan and inspected and certified by that State's department of agriculture unless such be the fact.

2. The purchaser's money will be refunded if the purchaser is not satisfied with the nursery stock received, unless such be the fact.

It is further ordered, That the allegations of the complaint that respondents falsely and deceptively represented their perennials to be of flowering size which would bloom the first season after planting, and their 42-rose plant offer to include two hydrangea bushes and a trumpet vine bearing orange blossoms, be and hereby are dismissed.

OPINION OF THE COMMISSION

By KERN, Commissioner:

Respondents have appealed from the hearing examiner's initial decision finding that they have engaged in unfair methods of competition and unfair and deceptive acts and practices in violation of the Federal Trade Commission Act substantially as alleged in the complaint heretofore issued in this proceeding. The order to cease and desist contained in the initial decision in substance would prohibit respondents from the use of various misrepresentations in connection with the sale and distribution of nursery stock. There is no dispute that the representations attacked in the complaint were, in fact, made. Respondents, however, deny that the representations were false, deceptive or misleading.

The initial decision in considerable detail digests, reviews and weighs the factual evidence of record as well as the expert and other testimony adduced. In view of our disposition of respondents' appeal, we deem it unnecessary to restate that evidence here.

The hearing examiner in his initial decision made definite and specific findings as to the facts, conclusions of law and included, as indicated, an order to cease and desist. On appeal the issues raised essentially are no different than those presented before the hearing examiner and resolved by him adversely to respondents. Believing, as we do, that the hearing examiner was correct in his resolution of those issues in an extensive initial decision, we abstain from a laborious restatement of such issues. Suffice it to say that, upon the basis of the whole record, including briefs in support of and in opposition to respondents' appeal and oral argument, the Commission has concluded that the hearing examiner's evidentiary rulings, his findings, inferences, and conclusions drawn therefrom, are fully and completely substantiated on the record and that the order to cease and desist contained in the initial decision is adequate and appropriate to dispose of this proceeding.

Accordingly, respondents' appeal is denied and the hearing examiner's initial decision is adopted as the decision of the Commission. An appropriate order will be entered.

Mr. Secrest did not participate in the decision of this matter.

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 rendered its decision denying the appeal of respondents and adopting the initial decision as the decision of the Commission:

It is ordered, That respondents Michigan Bulb Co., a corporation, and Gerald C. Laug, Forrest Laug, and Louis Laug 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 inital decision.

Commissioner Secrest not participating.

IN THE MATTER OF

AMERICAN PACKING COMPANY ET AL.

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

Docket 6904. Complaint, Oct. 7, 1957—Decision, Apr. 17, 1958

Consent order requiring packers of canned salmon in Seattle, Wash.—making sales generally through both primary and subbrokers, each of whom received brokerage at the rate of 2½ percent of the selling price—to cease violating sec. 2(c) of the Clayton Act by making sales direct to certain chain customers on which the price of the product was reduced by the approximate amount of brokerage normally paid, or 5 percent; by making sales to large chain customers where only one broker was used on which they allowed a lower price by approximately one-half the usual brokerage, or 2½ percent; and by making numerous sales through buyers' own purchasing agents on which they allowed a discount in lieu of brokerage of 2½ percent in the form of a lower price.

Mr. Cecil G. Miles and *Mr. John J. McNally* for the Commission.

Johnson, Dafoe & Jonson, by *Mr. Carl A. Jonson* and *Mr. B. F. Reno, Jr.*, of Seattle, Wash., for respondents.

COMPLAINT

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

PARAGRAPH 1. Respondent American Packing Co., hereinafter sometimes referred to as American or as respondent corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington with its principal office and place of business located at 711 Second Avenue, Seattle, Wash. Since its incorporation in the spring of 1950 respondent corporation has been and is now engaged in packing, selling and distributing canned salmon. Its sales volume during the year 1955 was in excess of $1 million.

PAR. 2. Respondents John J. Theodore and Karl V. Sjoblom are individuals and officers of respondent corporation with their principal office and place of business located at 711 Second Avenue, Seattle, Wash. Respondent Theodore is president and owns 49 percent of the capital stock of the corporate respondent, while respondent Sjoblom is vice president and owns 51 percent of the corporate stock of said corporate respondent. As officers and owners, as described above, these individual respondents have exercised for sometime past and still exercise authority and control over the corporate respondent and its business activities, including the direction of its sales and distribution policies.

PAR. 3. Respondents, and each of them, for the past several years have sold and distributed their canned salmon in commerce to customers located in the several States of the United States, generally through both primary and field or subbrokers. The primary brokers are usually located in the State of Washington, but chiefly in the city of Seattle and vicinity. A number of these primary brokers employ field or subbrokers who are usually located in the various States where the customers, or buyers are located. These field or subbrokers generally assist the primary broker in locating and contacting said customers or buyers in connection with the sale of respondents' product. The primary broker is usually paid at the rate of 5 percent of the net selling price of the product, except where a field or subbroker is employed, and in those instances they each receive brokerage at the rate of 2½ percent of the net selling price of product sold.

In a substantial number of instances, however, respondents have made sales direct to certain chain customers without going through either a primary broker or a field broker, and on these sales the price of the product is reduced to these chain customers by the amount, or the approximate amount, of the brokerage normally paid to their brokers, or a reduction of approximately 5 percent. In other instances respondents make sales to large chain customers where only one broker is used—either the primary or the field broker—and in these instances respondents allow these chain customers a lower price by the approximate amount of one-half the usual brokerage normally paid, or a reduction of approximately 2½ percent. Still in other instances respondents make numerous and substantial sales to buyers through said buyers' own representatives or purchasing agents, and on these sales respondents grant or allow these customers a discount in lieu of brokerage by the approximate amount of 2½ percent in the form of lower price, or the approximate amount of brokerage usually paid when sales are made only through either a primary or a field broker.

PAR. 4. In the course and conduct of their business since 1950 respondents, and each of them, have sold and distributed and now sell and distribute their canned salmon in commerce as "commerce" is defined in the aforesaid Clayton Act, to buyers located in the several States of the United States other than the State in which respondents are located. Said respondents transport or cause such canned salmon, when sold, to be transported from their place of business in the State of Washington to customers located in the various other States of the United States. There is and has been at all times mentioned herein a continuous course of trade in commerce in said canned salmon across State lines between respondents and the respective buyers of said product.

PAR. 5. In making payments of commissions, brokerage fees or discounts, or allowances in lieu thereof as alleged and described above, the respondents and each of them in the course and conduct of their business in commerce, as "commerce" is defined in the aforesaid Clayton Act, have paid, granted or allowed, and are now paying, granting or allowing, something of value as a commission, brokerage, or other compensation, or allowance or discount in lieu thereof, in connection with the sale of their canned salmon to buyers who were and are purchasing for their own account for resale, or to agents or intermediaries who were and are in fact acting for or in behalf of or who were and are subject to the direct or indirect control of said buyers.

PAR. 6. The acts and practices of the respondents as above alleged and described are in violation of subsection (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., title 15, sec. 13).

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on October 7, 1957, charging Respondents with paying, granting or allowing something of value as commission, brokerage or other compensation, or allowance or discount in lieu thereof, in connection with the sale of their canned salmon to buyers purchasing for their own account for resale, or to agents or intermediaries acting for or in behalf of, or subject to the direct or indirect control of, said buyers, in violation of section 2(c) of the Clayton Act as amended (U.S.C., title 15, sec. 13).

Thereafter, on February 11, 1958, 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 of the Commission's Bureau of Litigation, and thereafter submitted to the hearing examiner for consideration.

The agreement identifies respondent American Packing Co. as a Washington corporation, with its office and principal place of business located at 711 Second Avenue, Seattle, Wash.; respondents John J.

Theodore and Karl V. Sjoblom as individuals and as president and vice president, respectively, of the corporate respondent, and having the same address as the corporate respondent.

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 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. 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, when it shall have become a part of the decision of the Commission, 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 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 American Packing Co., a corporation, and its officers; and John J. Theodore and Karl V. Sjoblom, individually and as officers of respondent corporation, and respondents' directors, agents or employees, directly or indirectly, or through any corporate, partnership, or other device, in connection with the sale of their seafood products, including canned salmon, in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of their seafood products to such buyer for his own account.

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 17th day of April 1958, become the decision of the Commission; and, accordingly:

It is ordered, That respondents American Packing Co., a corporation, and John J. Theodore and Karl V. Sjoblom, individually and as president and vice president, respectively, of American Packing Co., 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

QUEEN FISHERIES, INC., ET AL.

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

Docket 6906. Complaint, Oct. 7, 1957—Decision, Apr. 17, 1958

Consent order requiring a corporation engaged in selling canned salmon from its warehouse in Seattle, Wash., where it stored the product of the floating cannery it operated in Alaska waters, to cease paying illegal brokerage in violation of section 2(c) of the Clayton Act by reducing its prices by the approximate amount of the brokerage fees, or 5 percent on sales made to a large grocery chain through the chain's wholly owned subsidiary and buying agent.

Mr. Cecil G. Miles and *Mr. John J. McNally* for the Commission.
Mr. Erling H. Bendiksen, of Seattle, Wash., for respondents.

COMPLAINT

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

PARAGRAPH 1. Respondent Queen Fisheries, Inc., hereinafter sometimes referred to as respondent Queen or as corporate respondent, is a corporation, organized, existing and doing business under and by virtue of the laws of the territory of Alaska with its principal office and place of business located at 607 Third Avenue, Seattle, Wash. Respondent Queen operates a floating cannery in Alaska waters where it cans the salmon caught during the season. At the end of said season it returns to Seattle where the canned salmon is stored in a warehouse known as Salmon Terminals from which it is sold and distributed by respondent Queen to its various customers located throughout the United States. Respondent Queen's volume of salmon sales approximates $900,000 annually.

PAR. 2. Respondent Erling H. Bendicksen is an individual and is president and owner of all the capital stock of respondent Queen with his principal office located at 607 Third Avenue, Seattle, Wash. As president and owner of respondent Queen he has exercised for the past several years, and still exercises authority and control over the corporate respondent and its business operations, including the direction of its sales and distribution policies.

From the same offices listed above respondent Bendicksen also operates as a sole proprietorship the firm of E. H. Bendicksen Co. which is engaged primarily in the sale and distribution of oysters. As owner and operator of both companies, respondent Bendicksen in many instances has made sales of salmon for respondent Queen but billed the customer on invoices headed "E. H. Bendicksen Company".

PAR. 3. Respondents, both corporate and individual, now sell and distribute, and for the past several years have sold and distributed, their canned salmon in commerce to customers located in the several States of the United States. They sell and distribute their products through brokers to buyers and direct to buyers. When selling through brokers they pay the broker for his services a commission or brokerage fee of 5 percent of the net selling price of the merchandise sold. In a number of instances substantial sales have been and are now being made to a large grocery chain through the chain's wholly owned subsidiary and buying agent, and on these sales respondents' prices for their canned salmon have been and are being reduced by the approximate amount of the brokerage fees or commissions usually paid when making sales through their brokers.

PAR. 4. In the course and conduct of their business for the past several years, but more particularly since July 1, 1954, to the present time, respondents, both corporate and individual, have sold and distributed and now sell and distribute their canned salmon in commerce as "commerce" is defined in the aforesaid Clayton Act to buyers located in the several States of the United States other than the State of Washington in which respondents are located. Said respondents, and each of them, transport or cause such canned salmon, when sold, to be transported from their place of business in the State of Washington to customers located in various other States of the United States. There has been at all times mentioned herein a continuous course of trade in commerce in said canned salmon across State lines between respondents and the respective buyers of said products.

PAR. 5. In making payments of commissions, brokerage fees, or discounts or allowances in lieu thereof as alleged and described above, the respondents, both corporate and individual, in the course and conduct of their business in commerce as hereinabove described have paid, granted or allowed, and are now paying, granting or allowing, something of value as a commission, brokerage or other compensation, or an allowance or discount in lieu thereof in connection with the sale and distribution of their canned salmon to buyers who were and are purchasing for their own account for resale, or to agents or intermediaries who were and are in fact acting for or in behalf of, or who were and are subject to the direct or indirect control of said buyers.

PAR. 6. The acts and practices of respondents, both corporate and individual, as above alleged and described are in violation of subsection (c) of section 2 of the Clayton Act as amended by the Robinson-Patman Act (U.S.C., title 15, sec. 13).

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on October 7, 1957, charging respondents with paying, granting or allowing something of value as commission, brokerage, or other compensation, or allowance or discount in lieu thereof, in connection with the sale and distribution of their canned salmon to buyers purchasing for their own account for resale, or to agents or intermediaries acting for or in behalf of, or subject to the direct or indirect control of, said buyers, in violation of section 2(c) of the Clayton Act as amended (U.S.C., title 15, section 13).

Thereafter, on January 27, 1958, respondents 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 of the Commission's Bureau of Litigation, and thereafter submitted to the hearing examiner for consideration.

The agreement identifies respondent Queen Fisheries, Inc., as an Alaska corporation, with its office and principal place of business located at 607 Third Avenue, Seattle, Wash., and respondent Erling H. Bendiksen (erroneously spelled in the complaint as Erling H. Bendicksen) as an individual and as president and owner of all of the capital stock of respondent Queen Fisheries, Inc., with the same address as the corporate respondent.

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 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. 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, when it shall have become a part of the decision of the Commission, 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 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 Queen Fisheries, Inc., a corporation, and its officers, and Erling H. Bendiksen, individually, and as an officer of respondent corporation, and respondents' officers, directors, agents, representatives or employees, directly or indirectly, or through any corporate, or other device, in connection with the sale of their seafood products in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of their seafood products to such buyer for his own account.

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 17th day of April 1958, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Queen Fisheries, Inc., a corporation, and Erling H. Bendiksen (erroneously spelled in the complaint as Erling H. Bendicksen), individually and as president of Queen Fisheries, Inc., shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

ALASKA TRANSPORTATION COMPANY ET AL.

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

Docket 6907. Complaint, Oct. 7, 1957—Decision, Apr. 17, 1958

Consent order requiring canners of salmon and crab meat in Seattle, Wash., to cease paying illegal brokerage in violation of section 2(c) of the Clayton Act by reducing their prices to large grocery chains which bought direct or through their wholly owned subsidiaries or buying agents, by the 5 percent which would normally be paid for brokerage.

Mr. Cecil G. Miles and *Mr. John J. McNally* for the Commission.

Graham, Green & Dunn, by *Mr. James Wm. Johnston*, of Seattle, Wash., for respondents.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are now violating the provisions of subsection (c) of section 2 of the Clayton Act, as amended (U.S.C., title 15, sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Alaska Transportation Co., is a corporation organized, existing and doing business under and by virtue of the laws of the Territory of Alaska, with its principal office located at 2101 Exchange Building, Seattle, Wash.

Respondent Pelican Cold Storage Co. is a corporation, organized, existing, and doing business under and by virtue of the laws of the Territory of Alaska, with its principal office located at Suite 427, Colman Building, Seattle, Wash.

Respondent Coastal Glacier Sea Foods, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the Territory of Alaska, with its principal office and place of business located at Suite 427, Colman Building, Seattle, Wash.

Respondent Norton Clapp is an individual and is president and owner of a substantial majority of the capital stock of the above named three corporate respondents, with his principal office located at 2101 Exchange Building, Seattle, Wash.

Respondent Allan H. Link is an individual and is vice president and treasurer of corporate respondent Alaska Transportation Co., with his principal office located at Suite 427, Colman Building, Seattle, Wash.

Respondent Prosper S. Ganty is an individual and is executive vice president of corporate respondent Pelican Cold Storage Co., with his principal office located at Suite 427, Colman Building, Seattle, Wash.

As officers and/or owners the individual respondents, acting for and through corporate respondents exercise authority and control over all of respondents' corporate and partnership business operations, including their sales and distribution policies.

PAR. 2. The respondents, both corporate and individual, have been for the past several years and are now engaged, among other things, in canning, packing, selling and distributing salmon and crabmeat through two partnerships doing business as the Pelican Packing Co. and the Pelican Sales Co. The former operates a cannery in Pelican, Alaska, where it cans and packs the salmon and crabmeat, after which the seafood is shipped to Seattle, Wash., where the latter company handles all sales and distribution thereof. Respondents' volume of sales of its salmon and crabmeat, hereinafter sometimes referred to as seafood products, amount to approximately $1 million annually.

PAR. 3. Respondents and each of them sell and distribute their seafood products in commerce to customers located in the several States of the United States. Respondents sell and distribute said products to customers through brokers and to large chain customers direct, or through the chains' wholly owned subsidiaries or buying agents. When selling through brokers, respondents pay them for their services a commission or brokerage fee at the rate of 5 percent of the net selling price of the merchandise sold. When selling direct to the large grocery chains, or through the chains' wholly owned subsidiaries or buying agents, respondents' prices for their seafood products have been and are now being reduced to these chains by the approximate amount of the brokerage fees or commissions usually paid by respondents when making sales through their brokers.

PAR. 4. In the course and conduct of their business in commerce for the past few years, but more particularly since 1955 to the present time, respondents, and each of them, have sold and distributed and now sell and distribute their seafood products in commerce as "commerce" is defined in the aforesaid Clayton Act to buyers located in the several States of the United States other than the State of Washington in which respondents are located. Said respondents, and each of them, transport or cause such seafood products when sold to be transported from their place of business in the State of Washington to customers located in various other States of the United States. There has been at all times mentioned herein, a continuous course of trade in commerce in said seafood products across State lines between respondents, and each of them, and the respective buyers of said products.

PAR. 5. In making payments of commissions, brokerage fees or discounts or allowances in lieu thereof to customers purchasing direct as alleged and described above respondents and each of them in the course and conduct of their business in commerce as hereinabove described have paid, granted, or allowed, and are now paying, granting, or allowing something of value as a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection with the sale and distribution of their seafood products to direct buyers who were and are purchasing for their own account for resale, or to agents or intermediaries who were and are in fact acting for or in behalf of, or who were and are subject to the direct or indirect control of said buyers.

PAR. 6. The acts and practices of respondents, and each of them, as above alleged and described are in violation of subsection (c) of section 2 of the Clayton Act, as amended (U.S.C., Title 15, sec. 13).

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on October 7, 1957, charging respondents with paying, granting or allowing something of value as commission, brokerage or other compensation, or allowance or discount in lieu thereof, in connection with the sale and distribution of their seafood products to direct buyers purchasing for their own account for resale, or to agents or intermediaries acting for or in behalf of, or subject to the direct or indirect control of, said buyers in violation of section 2(c) of the Clayton Act, as amended (U.S.C., title 15, sec. 13).

Thereafter, on February 11, 1958, respondents Alaska Transportation Co., a corporation, and as copartner doing business as Pelican Packing Co. and Pelican Sales Co.; Pelican Cold Storage Co., a corporation, and as copartner doing business as Pelican Packing Co.; Coastal Glacier Sea Foods, Inc., a corporation, and as copartner doing business as Pelican Sales Co., all by respondent Norton Clapp, as president thereof; respondent Prosper S. Ganty, individually and as an officer of Pelican Cold Storage Co.; 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 respondents as follows:

Respondent Alaska Transportation Co. as an Alaska corporation, with its office and principal place of business located at 2101 Exchange Building, Seattle, Wash.; also as a copartner doing business as Pelican Packing Co. and Pelican Sales Co., with offices located at Suite 427, Colman Building, Seattle, Wash.;

Respondent Pelican Cold Storage Co. as an Alaska corporation, with its office and principal place of business located at suite 427, Colman Building, Seattle, Wash.; also as a copartner doing business as Pelican Packing Co., with offices at the same address;

Respondent Coastal Glacier Sea Foods, Inc., as an Alaska corporation, with its office and principal place of business located at Suite 427, Colman Building, Seattle Wash; also as a copartner doing business as Pelican Sales Co., with offices at the same address;

Respondent Norton Clapp as an individual and as president of the three corporate respondents above named, with his office and principal place of business located at 2101 Exchange Building, Seattle, Wash.;

Respondent Allan H. Link as an individaul and as vice president and treasurer of respondent Alaska Transportation Co., with his office and principal place of business at 1501 Exchange Building, Seattle, Wash.;

Respondent Prosper S. Ganty as an individual and as executive vice president of corporate respondent Pelican Cold Storage Co., with his office and principal place of business located at suite 427, Colman Building, Seattle, Wash., who, in his official and individual capacities, exercises substantial authority and control over all of respondents' seafood business operations, including their sales and distribution policies.

The agreement states that individual respondents Norton Clapp and Allan H. Link have, for some time past, delegated all authority and control over all of the respondents' corporate and partnership seafood business operations, including their sales and distribution policies, to individual respondent Prosper S. Ganty, and do not and for the period of time material to this proceeding have not, exercised such authority or control; in support of which statement, separate affidavits executed by respondents Norton Clapp and Allan H. Link are attached to and incorporated in the agreement as exhibits "A" and "B". All parties agree that for the reasons set forth in these affidavits, the complaint herein should be dismissed as to respondents Norton Clapp and Allan H. Link.

Respondents signatory to the agreement 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.

Said respondents waive any further procedure before the hearing examiner and the Commission; the making of findings of fact and 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. 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, when it shall have become a part of the decision of the Commission, 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.

Upon consideration of the allegations of the complaint and the provisions of the agreement and the proposed order, the hearing examiner observes that the agreement specifies the dismissal of the complaint herein as to respondents Clapp and Link, for the reasons above stated, but, simultaneously, the order contained in the agreement is directed against respondent "Prosper S. Ganty, individually and as executive vice president of respondent Pelican Cold Storage Co.; and all of respondents' other officers", which includes respondents Clapp and Link in their stated official capacities. The hearing examiner believes that this apparent contradiction was unintentional, and that the parties to the agreement intended that the complaint herein should be dismissed as to respondents Clapp and Link as individuals, but not as officers of the respondent corporations; and the provisions of the agreement and order are so interpreted. In consonance with this interpretation, the hearing examiner modifies the order to cease and desist by including therein respondents Clapp and Link specifically in their official capacity only, and by adding to the order of dismissal the one word "individually," thus obviating the apparent inconsistency; and, with such modification, 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 Alaska Transportation Co., a corporation; Pelican Cold Storage Co., a corporation; Coastal Glacier Sea Foods, Inc., a corporation, and as copartners doing business as Pelican Packing Co., and Pelican Sales Co.; Norton Clapp and Allan H. Link, as officers of the above named corporations; Prosper S. Ganty, individually and as executive vice president of Respondent Pelican Cold Storage Co.; and all of respondents' other officers, directors, agents, representatives or employees, directly or indirectly, or through any corporate, partnership, or other device, in connection with the sale of their seafood products, including canned salmon and crabmeat, in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of their seafood products to such buyer for his own account.

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to respondents Norton Clapp and Allan H. Link, individually.

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 17th day of April 1958, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Alaska Transportation Co., a corporation, and as copartner doing business as Pelican Packing Co., and Pelican Sales Co.; Pelican Cold Storage Co., a corporation and as copartner, doing business as Pelican Packing Co.; Coastal Glacier Sea Foods, Inc., a corporation, and as copartner doing business as Pelican Sales Co.; Norton Clapp and Allan H. Link, as officers of the above named corporations; and Prosper S. Ganty, individually and as an officer of the above named corporations, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

KATTEN & MARENGO, INC., ET AL.

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

Docket 6958. Complaint, Nov. 25, 1957—Decision, Apr. 17, 1958

Consent order requiring a department store in Stockton, Calif., and the furrier leasing the store's fur department, to cease violating the Fur Products Labeling Act by removing or mutilating labels required to be affixed to fur products; by labeling which set forth the name of an animal other than that producing a particular fur; by labeling and invoicing which failed to set forth information as required; and by advertising which failed to disclose that certain fur products were artificially colored.

Mr. John J. McNally for the Commission.
Respondents, of Stockton, Calif., for themselves.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on November 25, 1957, charging respondents with misbranding and falsely and deceptively invoicing and advertising certain of their fur products, in violation of the Federal Trade Commission Act and of the Fur Products Labeling Act and the rules and regulations promulgated thereunder.

Thereafter, on February 6, 1958, respondents 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 Katten & Marengo, Inc., as a California corporation, operating a retail department store in Stockton, Calif., under the name Katten & Marengo, Uptown; respondent Freeman Fine Furs, Inc., as a California corporation which leases the fur department in said department store; and respondent Samuel Freeman as an individual who is president of the corporate respondent, Freeman Fine Furs, Inc.; all respondents having their office and principal place of business at 500 East Main Street, Stockton, Calif.

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 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. 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, when it shall have become a part of the decision of the Commission, 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.

Having considered 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 Katten & Marengo, Inc., a corporation, and its officers; Freeman Fine Furs, Inc., a corporation, and its officers; and Samuel Freeman, individually and as an officer of corporate respondent Freeman Fine Furs, Inc.; and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale, in commerce; or the transportation or distribution in commerce, of fur products; or in connection with the sale, advertising, 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. Removing or participating in the removal of labels required by the Fur Products Labeling Act to be affixed to fur products, prior to the time any fur product is sold and delivered to the ultimate consumer;

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 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, 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, 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, the name or names of any animal or animals other than the name provided for in paragraph B.1(a) above;

3. Setting forth, on labels attached to fur products, the information required by section 4(2) of the Fur Products Labeling Act:

(a) In abbreviated form;

(b) Mingled with nonrequired information;

(c) In handwriting;

4. Setting forth such required information on labels which do not meet the minimum size required by rule 27 of the rules and regulations;

5. Failing to set forth all of such required information on one side of labels attached to fur products as required by rule 29(a) of the rules and regulations;

6. Failing to separately set forth all of the required information on labels attached to fur products composed of two or more sections containing different animal furs, as required by rule 36 of the rules and regulations;

C. Falsely or deceptively invoicing fur products by:

1. Failure 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 paws, tails, bellies, or waste fur, when such is the fact;

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

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

2. Failing to set forth on invoices an item number or mark assigned to fur products as required by rule 40 of the rules and regulations;

D. 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 fails to disclose that such fur products contained or were composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact.

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 17th day of April 1958, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Katten & Marengo, Inc., a corporation, Freeman Fine Furs, Inc., a corporation, and Samuel Freeman, individually and as an officer of Freeman Fine Furs, Inc., shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

FARWEST FISHERMAN, INC., ET AL.

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

Docket 6905. Complaint, Oct. 7, 1957—Decision, Apr. 19, 1958

Consent order requiring a packer of canned salmon and other seafood in Anacortes, Wash.—making sales generally through both primary and field brokers, each of whom received brokerage at the rate of 2½ percent of the selling price—to cease paying illegal brokerage in violation of section 2(c) of the clayton Act by (1) granting a reduction of 2½ percent of the price to certan buyers when either a primary or a field broker was not used; (2) selling through primary brokers at a net price below that shown by the broker, who absorbed the difference out of brokerage; and (3) granting reductions in price in transactions where either the primary or the field broker took a reduction in brokerage.

Mr. Cecil G. Miles and *Mr. John J. McNally* for the Commission.

Bogle, Bogle & Gates, by *Mr. Robert W. Graham*, of Seattle, Wash., for respondents.

COMPLAINT

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

PARAGRAPH 1. Respondent Farwest Fishermen, Inc., hereinafter sometimes referred to as respondent corporation, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its principal office and place of business located at Anacortes, Wash. For several years respondent corporation has been, and is now, engaged in packing, selling and distributing canned salmon, tuna, and other seafood products. Its mailing address is Post Office Box 111, Anacortes, Wash.

PAR. 2. Respondent Sam Rubenstein, hereinafter sometimes referred to as individual respondent, is president of, and owns a controlling interest in, respondent corporation. As an officer and as an owner of respondent corporation said individual respondent has exercised, and at the present time is exercising, authority and control over the said corporate respondent and its business activities; including the direction of its sales and distribution policies. The business address of individual respondent is 1455 Northlake Place, Seattle, Wash.

PAR. 3. In the course and conduct of their business respondents have sold and distributed and now sell and distribute their canned salmon and other food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, to purchasers for resale located in the several States of the United States other than the State in which respondents are located. Respondents transport, or cause such products when sold to be transported, from their place of business in the State of Washington, to purchasers thereof located in the various other States of the United States. There is, and has been at all times mentioned herein, a continuous course of trade in commerce in said products across State lines by the respondents to the respective purchasers of said products.

PAR. 4. Respondents, for the past several years, have generally sold and distributed their said products through primary brokers located in Seattle, Wash. Said primary brokers frequently utilize the services of secondary or field brokers located in various marketing areas, in arranging for the sale and distribution of respondents' products. The brokerage commission deducted by the primary brokers utilized by respondents is customarily 5 percent of the net selling price. The field brokers are customarily compensated for their services by receiving 2½ percent of the net selling price from the primary brokers.

PAR. 5. In the course and conduct of their business as packers, sellers, and distributors of canned salmon and other seafood products in commerce, respondents in many instances have made payments, grants, allowances, or discounts by various means and in substantial amounts in lieu of brokerage to certain purchasers of their said products; these being large retail chainstores in the main.

Among and including, but not necessarily limited to, the methods or means employed by respondents in so doing were the following:

(a) Granting to certain buyers deductions from price by way of allowances, discounts, or rebates in the approximate amount of 2½ percent of the net price in transactions wherein either a primary broker or a field broker was not utilized.

(b) Selling, through primary brokers, to certain buyers at a net price below that accounted for by the primary broker to respondents; the difference being absorbed by the primary broker out of brokerage.

(c) Granting to certain buyers direct or indirect reductions in price in transactions wherein primary brokers or field brokers took a reduction in brokerage earnings.

PAR. 6. In making payments of commissions, brokerage fees, rebates, or discounts, or allowances in lieu thereof, as alleged and described above, respondents, in the course and conduct of their business in commerce, as "commerce" is defined in the aforesaid Clayton Act, have paid, granted or allowed, and are now paying, granting or allowing, something of value as a commission, brokerage or other compensation, or allowance or discount in lieu thereof, in connection with the sale of their said products to buyers who were and are purchasing for their own account for resale, or to agents or intermediaries who were and are in fact acting for or in behalf of, or who were and are subject to the direct or indirect control of said buyers.

PAR. 7. The acts and practices of respondents as above alleged and described are in violation of subsection (c) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., title 15, sec. 13).

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on October 7, 1957, charging respondents with paying, granting, or allowing something of value as commission, brokerage, or other compensation, or allowance or discount in lieu thereof, in connection with the sale of their canned salmon and other food products to buyers purchasing for their own account for resale, or to agents or intermediaries acting for or in behalf of, or subject to the direct or indirect control of, said buyers, in violation of section 2(c) of the Clayton Act as amended (U.S.C., title 15, sec. 13).

Thereafter, on January 23, 1958, 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 of the Commission's Bureau of Litigation, and thereafter submitted to the hearing examiner for consideration.

The agreement identifies respondent Farwest Fishermen, Inc., as a Washington corporation, with its office and principal place of business located in Anacortes, Wash., its mailing address being Post Office Box 111, Anacortes, Wash.; and respondent Sam Rubenstein as an individual and as president of the corporate respondent, with his office and principal place of business located at 1455 Northlake Place, Seattle, Wash.

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 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. 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, when it shall have become a part of the decision of the Commission, 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 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 Farwest Fishermen, Inc., a corporation, or its successor, and its officers; and Sam Rubenstein, individually and as president of said corporation, and respondents' directors, agents, representatives or employees, directly or indirectly, or through any corporate, partnership, or other device, in connection with the sale of their seafood products, including canned salmon, in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu therof, upon or in connection with any sale of their seafood products to such buyer for his own account.

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

It is ordered, That respondents Farwest Fishermen, Inc., a corporation, and Sam Rubenstein, individually and as President 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

ELLIOT KNITWEAR, INC., ET AL.

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

Docket 6637. Complaint, Sept. 17, 1956—Decision, April 25, 1958

Order requiring importers in New York City to cease violating the Wool Products Labeling Act by using the word "Cashmora" on tags, etc., on sweaters containing no cashmere fibers. *

Mr. S. F. House supporting the complaint.

Goldstein, Golenbock & Barell, by *Mr. Martin C. Barell* and *Mr. Jack Verschleiser*, of New York, N. Y., for respondents.

Before: *John Lewis*, hearing examiner.

INITIAL DECISION AS TO BALANCE OF PROCEEDING

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondents on September 17, 1956, charging them with having violated the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, and the Federal Trade Commission Act, through various acts of misbranding wool products, including (1) labeling as "Pure Cashmere" sweaters containing a substantial quantity of fiber other than cashmere; (2) failing to show the name or the registration number of the manufacturer or other appropriate person on stamps, tags, or labels; (3) using the word "Angora," which is not the common generic name of the fiber referred to; (4) failing to indicate on labels and tags attached to sweaters that they were not manufactured by respondents; and (5) using the word "Cashmora" on labels attached to sweaters which contain no cashmere fiber. After being served with said complaint, respondents appeared by counsel and subsequently entered into an agreement containing a consent order to cease and desist, dated April 15, 1957, purporting to dispose of all of the issues in the proceeding as to all parties, except for the allegation of misbranding arising out of the use of the word "Cashmora." Said agreement was thereafter submitted to the undersigned who filed an initial decision on May 17, 1957, containing an order to cease and desist disposing of all

*Other allegations of the complaint were settled by consent order on June 25, 1957 (53 F.T.C. 1185).

of the issues covered by said agreement. Said initial decision became the decision of the Commission by order issued June 25, 1957.

With respect to the unresolved issue of misbranding arising out of respondents' use of the word "Cashmora" on stamps, tags or labels, a hearing was held in New York, N.Y., on June 17 and 18, 1957, before the undersigned hearing examiner, theretofore duly designated to hear this proceeding. Since respondents had not theretofore filed formal answer to the complaint, they were permitted at the outset of the hearing to make answer on the record with respect to the remaining issue. In substance, respondents admitted having used the word "Cashmora" on stamps, tags, or labels attached to certain of their products, the sale of such products in commerce, and the existence of substantial competition between themselves and other business organizations likewise engaged in the sale of such products in commerce, but denied that the use of such term on their products was in violation of the Wool Products Labeling Act and the rules and regulations promulgated thereunder or constituted unfair and deceptive acts and practices or unfair methods of competition, in commerce, in violation of the Federal Trade Commission Act. At said hearing testimony and other evidence were offered in support of, and in opposition to, the allegations of the complaint not theretofore disposed of by agreement, the same being duly recorded and filed in the office of the Commission. All parties were represented by counsel, participated in the hearing, and were afforded full opportunity to be heard and to examine and cross-examine witnesses.

At the close of the evidence in support of the complaint, counsel for respondents moved to dismiss the complaint upon the ground that there had been no showing of a violation of the Wool Products Labeling Act or that the public had in any way been deceived. Said motion was denied without prejudice. It was renewed at the close of all the evidence, based on the grounds previously indicated and on the additional ground that there was no showing that any deceptiveness in the use of the word "Cashmora" could not be cured by affixing an appropriate explanation to the label where it was used. Said motion to dismiss is disposed of in accordance with the findings, conclusions and order hereinabove made.

At the close of all the evidence the parties were granted leave to file proposed findings of fact, conclusions of law and a proposed order and/or supporting memoranda on or before August 1, 1957, which date was extended until August 12, 1957, on motion of counsel for respondents. Proposed findings of fact and conclusions of law, together with reasons in support thereof, have been filed by counsel supporting complaint. Counsel for respondents have filed a memorandum in support of their position, in lieu of proposed findings and conclusions. In their letter transmitting said memorandum counsel for respondents requested permission to make oral argument before the hearing examiner. In view of the fact that the issues are fully discussed in the proposed findings and supporting memorandum and in view of the relative simplicity of the issues of fact and law involved, it is the opinion of the hearing examiner that no useful purpose would be served by oral argument and the request therefor is accordingly denied. However, pursuant to oral telephonic request of counsel for respondents and confirmed by motion, respondents have been permitted to file a reply memorandum to the proposals of counsel supporting the complaint, which memorandum was filed on August 26, 1957. Proposed findings which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as immaterial.

Upon the entire record in the case and from his observation of the witnesses, the undersigned finds that this proceeding is in the interest of the public and makes the following:

FINDINGS OF FACT

I. The Parties and Their Business

1. Elliot Knitwear, Inc., and Elliot Import Corp., are corporations, organized, existing, and doing business under and by virtue of the laws of the State of New York, and have their office and principal place of business at 105 Madison Avenue, New York, N.Y. Respondent Elliot Import Corp. is engaged in the business of importing various types of knitwear products from abroad, including sweaters which are imported from Japan. Respondent Elliot Knitwear, Inc., is engaged in the sale and distribution, within the United States, of sweaters and other knitwear products imported from abroad by respondent Elliot Import Corp. The individual respondent Herman Gross is the president of both corporate respondents and formulates, directs and controls the acts, policies and practices of said corporate respondents.

2. The respondents Herman Gross and Samuel I. Gross are individuals and copartners who trade and do business under the firm name of Elliot Glove Co. Said partnership is engaged principally in the sale and distribution of imported gloves. The office and principal place of business of the partnership is the same as that of the corporate respondents.

II. Interstate Commerce and Competition

1. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more particularly since January 1, 1953, the respondents have introduced, sold, transported, distributed, delivered for shipment, and offered for sale in commerce, as "commerce" is defined in said act, wool products, as "wool products" are defined therein. Among such wool products have been sweaters bearing the name "Cashmora" on the label thereof, substantial quantities of which sweaters have been sold to retail dealers located in various States of the United States, for resale to the consuming public.

2. In the course and conduct of their business, respondents in the sale of such wool products, including sweaters as aforesaid, are in direct and substantial competition, in commerce, with other corporations, firms and individuals likewise engaged in the sale of wool products, including sweaters.

III. The Alleged Illegal Practices

A. *The Issues*

1. The only substantive allegation of the complaint which was not disposed of by the agreement for consent order dated April 15, 1957, is that charging respondents with having misbranded certain of their sweaters by using the word "Cashmora" on labels attached to such sweaters. It is alleged that such word serves as a representation that the sweaters contain cashmere, whereas such is not the fact. This practice is alleged to be a violation of the Wool Products Labeling Act which provides, in section 4 (a) (1) thereof, that a wool product is misbranded if it is "falsely or deceptively stamped, tagged, labeled or otherwise identified," and of rule 30 of the rules and regulations promulgated under said act, which provides that products subject to the act shall not bear or use "any stamp, tag, label, mark, or representation which is false, misleading or deceptive in any respect." The use of the word "Cashmora" is also alleged to constitute an unfair and deceptive act and practice and an unfair method of competition under the Federal Trade Commission Act.

The case of counsel supporting the complaint rests primarily on the admitted fact that respondents used the name "Cashmora" on sweaters which moved in commerce, it being the contention of counsel supporting the complaint that the name is inherently misleading and deceptive by reason of the implication that the sweaters so labeled contain cashmere. Counsel for respondents contend, on the other hand, that the name itself does not constitute a representation that the sweaters contain cashmere and that the record is lacking in substantial evidence that the name is misleading or deceptive.

2. In addition to the substantive issue presented with respect to whether the name "Cashmora" appearing on the labels of respondents' sweaters is deceptive, there is also presented a question as to the appropriate remedy to be used in the event such name is found to be deceptive. It is the position of counsel supporting the complaint that the proper remedy is an order which will prohibit entirely the use of the name "Cashmora" on sweaters which do not contain cashmere. The position of respondents is that even if the name can be held to be deceptive, the deception can be remedied by the use of appropriate language on the label indicating that the product does not contain cashmere, and that therefore the proper remedy is not a complete prohibition on the use of the word in question. Respondents contend that they have acquired a valuable property right in the name which justifies their continued use therof with proper explanatory language on the label.

B. *Background*

1. Respondents first began importing sweaters around the middle of 1954. Such sweaters were made entirely or in substantial part from cashmere fiber,[1] which is obtained from the Kashmir goat whose habitat is the Himalayan Mountains of Asia. Cashmere fiber is characterized by its unusually soft and luxurious feel.

2. Due to the increasing demand for cashmere sweaters and the limited supply of genuine cashmere fiber, the price of such sweaters became so expensive, that respondents sought to develop a blend of fibers from which could be manufactured sweaters that would serve as a cashmere substitute. Because of the demand for a "cashmere type sweater" respondents felt, according to the testimony of respondent Herman Gross, that if they could develop a blend of animal fibers which would have a finish similar to cashmere, they would have a "poor man's cashmere." Such blends, called in the trade a fur blend, were not new at the time, the Italians having produced one using French Angora yarn but, according to respondent Herman Gross, it did not have the " look or feel of cashmere."

3. Respondent Herman Gross went to Japan during the summer of 1955 to try to get respondents' Japanese supplier to develop a fur

[1] The complaint also contains a charge that respondents labeled as "Pure Cashmere" sweaters containing substantial quantities of fiber other than cashmere. However, this charge has been disposed of by the agreement for consent order above referred to.

blend which could serve as a cashmere substitute. As a result of such visit and further correspondence, the Japanese supplier produced what respondent Herman Gross characterized as "a cashmere-like fur blend," with a fiber content of 30 percent Angora rabbit and 70 percent lambs' wool. The sweater retailed at approximately $10.95, which was approximately one-third of the price of a similar cashmere sweater.

4. There was also developed, as a result of the joint efforts of respondent Herman Gross and the Japanese supplier, a label to be affixed to the new sweaters. The label bore the word "Cashmora" in large script-like letters, underneath which, in smaller letters, were the words "By Elliot," and on the bottom of the label in still smaller letters the Wool Products Labeling Act registration number and the designation of fiber content: "30 percent Angora—70 percent Lambs Wool."

5. A relatively small order for 1,000 dozen sweaters was sent by respondents to their Japanese supplier around the end of July 1955, while the latter was still working on perfecting a satisfactory blend. Quantity shipments under the order did not begin until early in 1956, for sale during the spring season of that year.

6. Respondents were highly successful in disposing of all of the first order of the "Cashmora" sweaters. According to respondent Herman Gross the principal reason for their success with the sweaters was that "it meets the poor man's need for a cashmere type sweater." Because of the favorable reaction to the sweater, respondents increased their order to 10,000 dozen for delivery during 1956. Respondents also began to feature the name "Cashmora" in national advertising vehicles such as New Yorker magazine, Vogue and Harper's Bazaar, and the magazine section of the New York Times.

7. So successful were respondents' efforts in 1956 that they sold out substantially all of their "Cashmora" line and had to temporarily cease offering it for sale in September 1956, as compared to other type sweaters of which only 51 percent had been sold during a comparable period. Respondents stepped up their advertising campaign in 1957 and increased their order of "Cashmora" sweaters to 25,000 dozen.

8. The "Cashmora" sweater has been widely sold in retail establishments all over the United States, including a number of prominent department stores. Some of the stores have set up so-called Cashmora departments, with point-of-sale signs and copies of advertisements featuring the sweater in a separate part of the store.

9. The "Cashmora" label has appeared on substantially all of the particular blend of sweaters in question since early in 1956. How-

ever, the label was modified after discussion with Government representatives during the spring of 1956, so that the word "Angora" was changed to "Angora Rabbit" and the words "By Elliot" were changed to "Imported by Elliot."[2] Following the issuance of the complaint in this proceeding, the words "No Cashmere" were added to the portion of the label where the fiber content appears.

C. *The Deceptive Character of the Name "Cashmora"*

1. It is the considered opinion and finding of the undersigned that the name "Cashmora" appearing on the labels of respondents' sweaters constitutes a representation, or may reasonably be deemed to imply to members of the purchasing public, that such sweaters contain cashmere. Since the sweaters do not contain cashmere it is clear, and it is so found, that the representation thus made is false and that the use of the word "Cashmora" on respondents' sweaters is misleading and deceptive.

2. Respondents contend that there is no substantial evidence in the record to support such a finding because no evidence was offered by counsel supporting the complaint to establish (a) that the word "Cashmora" constitutes a representation that the product bearing it contains cashmere or (b) that the name is false, misleading or deceptive. Respondents' position, in effect, is that no finding of misrepresentation or deception can be made, absent witnesses who will testify as to the deceptive character of the name.

3. The basic test for measuring the deceptive character of a name or advertisement is its "capacity to deceive" (*FTC* v. *Algoma Lumber Co.*, 291 U.S. 67, 81). The test, in effect, is "potential injury" to the public, as stated in the case which respondents themselves cite (*Jacob Siegel Co.* v. *FTC*, 150 F. 2d 751, reversed on other grounds, 327 U.S. 608), not actual injury. It is accordingly unnecessary to produce consumers who will testify as to their deception (*Charles of the Ritz Dist. Corp* v. *FTC*, 143 F. 2d 676, 680, C.A. 2, 1944; *Jacob Siegel Co.* v. *FTC*, *supra*).

4. In determining the capacity, tendency, or potentiality of a name or advertisement to decieve the standard of measurement is not what the careful, intelligent consumer would understand it to mean, but what impression it would produce on the average uninformed, unsophisticated, and sometimes careless member of the public. As

[2] The allegations of the complaint dealing with these two items of alleged misbranding were disposed of by the consent agreement previously referred to.

stated in *Positive Products Co.* v. *FTC*, 132 F. 2d 165, 167 (C.A. 7, 1942):

> The law is not made for experts but to protect the public—that vast multitude which includes the ignorant, the unthinking, and the credulous, who, in making purchases do not stop to analyze but too often are governed by appearances and general impressions.

To the same effect see *Charles of the Ritz Dist. Corp* v. *FTC*, *supra; FTC* v. *Standard Educ. Soc.*, 302 U.S. 112, 116; and *Donaldson* v. *Read Magazine Inc.*, 333 U.S. 178, 189.

It is unnecessary, in this connection, to establish that a majority of the members of the public, or any specific proportion thereof, would be likely to be deceived. It is sufficient that some portion thereof, in excess of a de minimis quantity, may be deceived. *Prima Products Inc.* v. *FTC*, 209 F. 2d 405, 409 (C.A. 2, 1954).[3] See also *Rhodes Pharmacal Co.*, 49 FTC 263, 283.

5. The question for determination here is whether there is any reasonable likelihood that a significant number of ordinary customers, including "the ignorant, the unthinking, and the credulous," would be led to believe, from the name "Cashmora" on the labels of respondents' sweaters, that the sweaters contain cashmere. Respondents argue strenuously that this determination cannot be made by the Commission unaided by witnesses who will in some way or other advise it what the public understanding is or is likely to be, or whether there is any reasonable likelihood of deception. With this, the undersigned cannot agree. As stated by the court of appeals in *E. F. Drew & Co., Inc.* v. *FTC*, 235 F. 2d 735, 741 (C.A. 2, 1956):

> The Commission is not required to sample public opinion to determine what meaning is conveyed to the public by particular advertisements. *Zenith Radio Corporation* v. *Federal Trade Commission*, 7 Cir. 1944, 143 F. 2d 29, 31; see also *New American Library of World Literature* v. *Federal Trade Commission*, 2 Cir. 1954, 213 F. 2d 143, 145. The Commission, which is deemed to have expert experience in dealing with these matters, *Federal Trade Comm'n* v. *R. F. Keppel & Bro., Inc.*, 1934, 291 U.S. 304, 314, is entitled to draw upon its experience in order to determine, in the absence of consumer testimony, the natural and probable result of the use of advertising expressions. *Siegel Co.* v. *Federal Trade Comm'n*, 1946, 327 U.S. 608, 614; *Federal Trade Comm'n* v. *Hires Turner Glass Co.*, 3 Cir. 1935, 81 F. 2d 362, 364.

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[3] In the *Prima Products* case it was argued no person of average intelligence would understand that a product which was represented as "waterproofing" masonry structures would do so under any and all conditions of use. To this, the court stated:

"It matters not that persons of average intelligence would scarcely expect cinder blocks 'waterproofed' by 'Aquella' or any other industry product to be proof against the passage of a certain amount of moisture by capillarity. We cannot say that there may not be *some* who might expect masonry structures thus 'waterproofed' to remain absolutely dry under any and all conditions of water pressure from without." [Emphasis supplied.]

To the same effect see *De Gorter* v. *FTC*, 244 F. 2d 270, 282 (C.A. 9, 1957).

While testimony of consumer witnesses and so-called experts has been held to be admissible in Commission proceedings, it is by no means a sine qua non to the establishment of a case of capacity to deceive. Where received, such evidence has been held not to override the inherent right of the Commission to determine the deceptive character of an advertisement from the advertisement itself and the circumstances attendant upon its use. Thus in *Rhodes Pharmacal Co.* v. *FTC*, 208 F. 2d 382, 387 (C.A. 7, 1953), the Commission was held to be justified in ignoring evidence of consumer understanding offered by respondents and to make its own determination of what impression an advertisement would have on the public. In the *Country Tweeds, Inc.*, case, Docket No. 5957, November 25, 1953, upon which respondents here place considerable reliance, the Commission held that the testimony of public witnesses, called by both Government counsel and respondents, as to their impression of the name used by respondents was "of doubtful probative value and of little assistance." It resolved the issue on the basis of the name itself and the circumstances surrounding its use. More recently, in the *Arrow Metal Products Corp.* case, Docket No. 6471, February 20, 1957, the Commission upheld its inherent right to determine the probable meaning conveyed to the public by a trade name and the deceptive potentialities thereof, without sampling public opinion, even though evidence of public understanding had been received into the record.

6. It is the opinion of the undersigned that based on the name itself and the context of its use, a reasoned judgment and finding can be made as to what ordinary members of the public would be likely to understand it to mean, without the calling of so-called public witnesses, actual consumers, or experts to testify as to their understanding or impression. In fact not only is the assistance of such witnesses not required here, but to produce such witnesses would be sheer superfluity.

Certainly if respondents had used the name "Cashmere" on their sweaters there would be no question but that it constituted a representation that the product contained cashmere fiber. The substitution of an "o" for the initial "e" in cashmere, and an "a" for the final "e," is hardly such a change that it can be held to destroy the obvious association of the name with cashmere. The finding of the Commission in the *Country Tweeds* case, *supra*, where the trade name "Kashmoor" on ladies' coats was involved, is particularly pertinent in this connection. After expressing its opinion as to the dubious value of consumer testimony, which has been above adverted to, the Commission stated:

> It seems clear that the name Kashmoor suggests the word cashmere, the two words being almost identical in sound. Further, the name Kashmoor closely resembles, not only in sound but in spelling as well, the word Kashmir, which is the name of one of the regions where the Cashmere goat is found.

While intent to deceive is not an element of the offense, it seems clear that respondents' entire effort here was directed toward creating an association between their product and cashmere. Admittedly they sought to develop a "cashmere type sweater," a "poor man's cashmere" (R. 34) because the genuine product which they had been handling had become too expensive. Other fur blends then on the market did not meet their requirements because they did not have the "look or feel of cashmere" (R. 35). The product which their Japanese supplier succeeded in developing had the "look and feel of cashmere" (R. 60). Respondents then proceeded to give the product a name bearing a striking similarity to the name of the product they were seeking to simulate. It cannot be assumed that the choice of this particular coined name was pure coincidence, having no connection with its resemblance to the word cashmere. Any doubt on this score is laid at rest by the testimony of respondents' sales manager who conceded that it was intended to associate their product with cashmere (R. 130). While he also denied that it was intended thereby to imply that the sweaters actually contained cashmere fiber, this is a distinction of such subtlety that all but the most astute of consumers would fail to appreciate it.

The meteoric rise in the sales of the Cashmora sweaters and the rapidity of their disposition, in sharp contrast to respondents' other line of sweaters, is mute testimony to the connotation which the public placed upon the name. While it may be that the product itself was an excellent one, it seems evident that a considerable portion of the success of the product lay in the name which respondents gave it. That the success of this name was not due to its sheer mellifluousness, but to the fact that it created in the mind of a fair segment of the purchasing public an association between respondents' cashmere-like product and the genuine product whose name it so closely resembles, would seem to be self-evident. The conclusion that this association was not merely of the general, amorphous character which respondents concededly were trying to create but involved, in a significant number of instances, an impression that respondents' product was composed, at least in part, of the genuine fibers would appear to be ineluctable.

7. Respondents cite a number of factors which they contend establish that the name "Cashmora" is not deceptive. These include (a) the wide difference in price which exists between cashmere sweaters and respondents' product, (b) the actual wool content appears on the label, (c) the word cashmere has many meanings, (d) the lack of complaints about the name, and (e) that neither respondents nor their many customers would have sold the sweaters if they believed the name to be deceptive. The facts cited by respondents do not, in the opinion of the undersigned, disprove the deceptive character of the trade name used by them for the reasons which follow.

a. The fact that respondents' sweaters sell for about one-third the price of genuine cashmere sweaters hardly tends to disprove the deceptive character of their brand name. It is common knowledge that retail establishments periodically advertise well-known, expensive brands at far less than their normal price as loss leaders or in clearance or other sales. Hope springs eternally in the human breast, and human nature being what it is, many a housewife believes that she will be successful in obtaining a real bargain. Moreover, while some of the more sophisticated and better-informed members of the public might conclude that it was unlikely the sweaters were cashmere because of the disparity in price, there would undoubtedly be many others, more naive and credulous, who would believe that they were buying genuine cashmere sweaters at unusal bargain prices. Respondents' argument also presupposes that the public generally is fully informed as to all the nuances of price differences and that there would not be some who would not appreciate the significance of the fact that the price of respondents' sweaters is substantially lower than that of cashmere.

Since, as above indicated, it is the tendency to deceive which is proscribed, and involves consideration of the likely effect of a representation or name on the "ignorant, the unthinking and the credulous," it seems evident that the name "Cashmora" loses none of its deceptive character because some persons, more astute and careful, would think twice because of their knowledge of price differences. As stated by the Supreme Court in *FTC* v. *Standard Education Soc.*, 302 U.S. 112, 116:

> * * * the fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced.

b. The fact that the wool content of "30 percent Angora Rabbit, 70 percent Lambs Wool" appears on the label likewise does not dispel the tendency of the name to deceive. The word "Cashmora" appears in large script-like letters, which dominate the whole label and immediately strike the eye. The designation of wool content appears on the bottom of the label in small, printed letters. It could obviously be overlooked by many persons who are not careful and observant. Also there would be many who while having heard of cashmere as a fine fiber, are not fully cognizant of its origin and would therefore not appreciate that angora and lambs wool do not constitute cashmere.[4]

While it may be that there would be many persons whose initial impression would be corrected after reading the wool content, there undoubtedly would be many others who would fail to notice it or appreciate its significance. The controlling consideration is the impression given by the label as a whole, when used on sweaters which feel and look like cashmere. Where the initial impression or the overall impression created by an advertisement is deceptive, the law is violated, even though the advertisement may be literally true or the true facts are later made known. *Rhodes Pharmacal Co.* v. *FTC*, 208 F. 2d 382, 387 (C.A. 7, 1953); *C. G. Optical Co.*, Docket No. 6260, January 18, 1957. In this case the overall impression created is clearly a deceptive one.

c. It is argued that there is no representation here that the sweaters contain cashmere fiber because the word cashmere has a broad, general connotation associated with softness of feel and touch. Respondents rely, in this connection, on the testimony of their sales manager that there are many coined words similar to cashmere, used on a variety of products, such as toilet tissue and paper towels, to create an impression of softness.

It is clear from the testimony of respondent Herman Gross himself that the primary and long-established meaning of the term cashmere is one associated with products made from the fiber of the Cashmere goat. While the products so made are characterized by unusual softness and fineness, there is no substantial evidence in the record of any accepted secondary meaning of the word associating

[4] See in this connection *Atlantic Sponge & Chamois Corp.*, Docket No. 6162, Nov. 29, 1955, where the Commission stated:

"It is true that the ordinary customer often does not know the composition and method of manufacture of many things he buys. Nevertheless, he does know that over the years many products have acquired a well-known name and, in buying under that name, he usually assumes that it is the traditional and accepted product he is buying and not something else."

it with a general quality of softness. Such a finding certainly cannot be based on the casual, inconclusive testimony of respondents' sales manager.[5] The Commission, in the *Country Tweeds* case, *supra*, declined to find any secondary meaning of the word cashmere associating it with soft, fine fabrics generally, although the evidence there was stronger than that which appears in this case.

In any event, whatever may be the meaning or understanding of the word cashmere or coined words similar thereto, in connection with other commodities, when such term is used in connection with sweaters, particularly sweaters bearing a resemblance to those made from cashmere fiber, there is no doubt, and it is so found, that an appreciable segment of the purchasing public would assume that the product is made from cashmere fiber.

d. With respect to the matter of complaints, respondents rely on the fact that they have received no complaints from either consumers or their store customers. They also cite the fact that consumers who have seen respondents' advertisements have written to them in favorable terms and have frequently referred to the wool content of the sweaters, thus indicating they were aware the sweaters did not contain cashmere.

While the testimony with respect to the lack of complaints was received in evidence without objection, it is entirely irrelevant. Likewise irrelevant is evidence in the form of postcards and letters from consumers commenting favorably on respondents' product. In view of the obviously deceptive character of the name used by respondents, in the context of its use, the fact that respondents have many satisfied customers cannot insulate them from action by the Commission (*Independent Directory Corp.* v. *FTC*, 188 F. 2d 468, 470 (C.A. 2, 1951)).

Despite the general irrelevance of the evidence relied on by respondents, it may be observed that the fact some customers referred to the specific wool content of respondents' product, as appearing in an advertisement, does not necessarily establish they were aware it did not contain cashmere. As above indicated, this would presuppose an awareness on their part of what cashmere is comprised. Furthermore, in a number of instances the writers made no reference to wool content, indicating they had paid no particular attention to this portion of the advertisement.

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[5] See, in this connection, as to the high degree of proof necessary to establish the existence of a secondary meaning for a term, *C. Howard Hunt Pen Co.* v. *FTC*, 197 F. 2d 273, 280 (C.A. 3, 1952), *Atlantic Sponge & Chamois Corp.*, Docket No. 6162, Nov. 29, 1955; and *Vulcanized Rubber & Plastics Co.*, Docket No. 6222, April 26, 1957.

e. Finally, the fact that respondents and many of their department store customers are "financially responsible organizations" and would not handle a product whose name they considered to be deceptive is wholly irrelevant. Congress, in its wisdom, conferred upon the Federal Trade Commission the function of passing upon the deceptive character of advertising. This function cannot be delegated to business firms, even to "financially responsible" ones. A determination of tendency to deceive must be made by the Commission, based on its expert judgment, and not on the opinions or financial soundness of the firms it was set up to regulate.

CONCLUDING FINDINGS

On the entire record, including the evidence above discussed and the reasonable inferences therefrom, it is concluded and found that by labeling or otherwise describing certain of their sweaters as "Cashmora," respondents have represented, directly or by implication, that said sweaters are composed, wholly or in substantial part, of cashmere fiber. It is further concluded and found that the labeling or otherwise describing of such sweaters as "Cashmora" by said respondents is false, misleading and deceptive in that such sweaters, while similar in appearance to sweaters made of genuine cashmere fiber, do not contain any cashmere fiber.

Since it has heretofore been found that respondents are in direct and substantial competition, in commerce, with other firms engaged in the sale of wool products, including sweaters, it may fairly be inferred that as a result of the practices hereinabove found, substantial trade in commerce has been and will be diverted to respondents from their competitors and that substantial injury has been and may continue to be done to competition in commerce.

CONCLUSION OF LAW

It is concluded that the use by respondents of the word "Cashmora" on tags, stamps, or labels attached to certain of their sweaters which do not contain cashmere constitutes the misbranding of wool products and that the introduction, sale and distribution of such products in commerce by respondents is a violation of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, including rule 30 of such rules and regulations, and that the labeling or otherwise describing of their sweaters as "Cashmora" by respondents constitutes a false and deceptive act and practice and an unfair method of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

THE REMEDY

1. The use of the word "Cashmora" on the labels of respondents' sweaters having been found to have a tendency to mislead and deceive in violation of the Wool Products Labeling Act and the Federal Trade Commission Act, the question next presented is whether there should be a complete prohibition on the use of the word on products not containing cashmere or whether, as respondents contend, qualified use of the name should be permitted. Respondents' position, basically, is that they have acquired valuable property rights in the name "Cashmora," that under the Supreme Court's decision in the *Jacob Siegel* case (327 U.S. 608), the Commission is required to consider whether some remedy short of "excision" of such name would give adequate protection, and that since no evidence has been offered that excision is required, respondents should be permitted to use the name with appropriate explanatory language indicating that the product in question contains no cashmere.

2. The *Jacob Siegel* case does, as respondents contend, require that consideration be given to the question of whether a remedy short of excision is possible in order to salvage a valuable trade name or product name. It does not however require, as respondents appear to suggest, that specific affirmative evidence dealing with the question of remedy must be offered by Government counsel. The nature of the particular remedy to be utilized may be determined by the Commission on the basis of its expert judgment and generalized experience, and in the light of what measures are best suited to rectifying the unlawful practices found to exist. It is given wide latitude in fashioning a remedy and its judgment will not be disturbed unless clearly unreasonable. As stated in the *Siegel* case (p. 612):

> The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.
>
> * * * The Commission is entitled not only to appraise the facts of the particular case and the dangers of the marketing methods employed (*Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494), but to draw from its generalized experience. See *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 801–805. Its expert opinion is entitled to great weight in the reviewing courts.

An argument such as respondents have made here was disposed of most recently by the Eighth Circuit Court of Appeals in *Chain Institute, Inc.* v. *FTC*, July 3, 1957, where respondents had urged that there was no evidentiary basis for a particular paragraph (number 3) in the Commission's order. The court disposed of this contention as follows:

> *The question of the adequacy of the evidentiary basis for the third ordering paragraph* as applied to all types of chains and to every petitioner, whether it had used all of the three delivered price systems or not, *is, to say the least, debatable. But if the Commission honestly and justfiably believed* that competition in the chain industry had been virtually destroyed by the conduct of petitioners and *that the third ordering paragraph was necessary to restore competitive prices*, we cannot say that the Commission's determination in that regard was purely arbitrary. The Commission, in cases such as this, is the trier of the facts, the appraiser of the credibility of witnesses, the weigher of evidence, the drawer of inferences, and, *within broad limits, the prescriber of remedies for trade practices found by it to be unfair.* Its determination as to the facts is as invulnerable to attack as is a jury verdict in a case triable by and properly submitted to a jury. It seems apparent that, unless a reviewing court can demonstrate that the Commission's order is legally or factually baseless, it may not be set aside. [Emphasis supplied.]

3. The Court in the *Jacob Siegel* case, in ordering the proceeding remanded to the Commission, did not rule that the Commission had committed error in prohibiting respondents from using the trade name there involved. It simply remanded the case for an administrative determination of the question whether a lesser remedy would be possible without sacrificing the ends of the law, since the Commission appeared not to have considered that question. The Court stated in this connection (pp. 613–614):

> [W]e do not reach the question whether the Commission would be warranted in holding that no qualifying language would eliminate the deception which it found lurking in the word Alpacuna. *For the Commission seems not to have considered whether in that way the ends of the Act could be satisfied and the trade name at the same time saved.* We find no indication that the Commission considered the possibility of such an accommodation. * * *
>
> [T]he courts are not ready to pass on the question whether the limits of discretion have been exceeded in the choice of the remedy until the administrative determination is first made. [Emphasis supplied.]

4. In determining whether a remedy short of excision is proper, the fact that respondents have acquired a valuable property right in the trade name is not controlling. Such fact may be a justification for requiring the Commission to consider the feasibility of a lesser remedy but unless, as the Court stated above, "the ends of the act could be satisfied" the Commission is not required to save the

trade name. It is elementary that the public interest takes precedence over any private property rights in conflict therewith. The basic question for determination, in this respect, is whether the deceptive character of the name "Cashmora" as used by respondents can be rectified by the use of explanatory, qualifying language. Unless it can, the fact that respondents may have acquired a valuable projerty right in the name is no consequence.

5. Following the issuance of the complaint herein, respondents modified their label by adding on the bottom thereof the words "No Cashmere" beneath the wool content designation of "30% Angora Rabbit" and "70% Lambs Wool." Presumably this is the type of explanatory or qualifying language which respondents consider would obviate any possible misunderstanding on the part of the public.

Despite the addition of the small printed words "No Cashmere," the word "Cashmora" appearing in large, script-like letters continues to dominate the sweater label. While possibly this situation could be alleviated somewhat by requiring that the words "No Cashmere" be in letters of equal size and prominence as Cashmora, there still remain too many opportunities for confusion. For example, the word "Cashmora" appears on the sweater box without qualification, which might give the prospective purchaser an initial impression of an association with cashmere. The so-called washing instruction card attached to the sweaters contains the legend:

Fine Imported
Cashmere
Cashmora
Lambswool

This could easily suggest to the uninitiated that Cashmora is a type of fabric like cashmere or a combination of cashmere and lambs wool.

The possibilities of continued confusion are enhanced by the fact that the sweaters are sold through retail establishments, some of which maintain so-called Cashmora departments with their own display and advertising material. Unless these stores are unusually careful in adding the words "No Cashmere" in large, conspicuous letters to all display material and the sales representations of store personnel are carefully controlled, the possibilities for deception would remain.

To permit respondents to continue using the name "Cashmora" would encourage others to use similar deceptive names, thereby aiding and abetting a trend from which the public must unevitably suffer. Thus, for example, one of respondents' competitors on the west coast is now simulating respondents' "Cashmora," by the name "Cashroma" on sweaters. If the use of the name "Cashmora" is permissible, then presumably the same claim can be made for Cashroma, and a myriad of similar names limited only by man's ingenuity.

6. It is the considered opinion of the undersigned that the name "Cashmora" is so closely associated with the word "Cashmere" and the possibilities of abuse are so numerous and so real, that it would be frustrating the purposes of the Wool Products Labeling Act and the Federal Trade Commission Act to permit respondents to continue, in any form, to call their product by a name suggestive of a fiber of which it contains not a hair.

To permit respondents on the one hand to call their product "Cashmora" and on the other hand to place on the label the words "No Cashmere" is, in the opinion of the undersigned, to countenance a contradiction in terms. As the court stated in *FTC* v. *Army & Navy Trading Company*, 88 F. 2d 776, 780, in prohibiting the use of the words "Army and Navy" by a company which had no military connections and did not obtain all of its goods from such sources:

> This single representation being untrue, it cannot be qualified; it can only be contradicted.

A similar ruling was made more recently by the Commission in *Arrow Metal Products Corporation*, Docket No. 6471, February 20, 1957, in which the product name "Porcenamel" was found by the Commission to be deceptive because of its tendency to lead members of the public to believe that respondents' product was made of "porcelain enamel." Respondents urged that they be permitted to continue to use the name with appropriate qualifying language to indicate that their product was not porcelain enamel. In holding that this was not an appropriate remedy the Commission stated:

> "Porcenamel" is not porcelain enamel and, being a generically different product, has different characteristics as a finish. Hence, a requirement that qualifying or disclaimer language, in one or more respects, be set forth in advertising and on labels where that term appears, obviously would be attended by sales representations of a contradictory and confusing import. In our opinion, therefore, the hearing examiner correctly concluded that an absolute prohibition of the expression "Porcenamel" was required in the public interest.

The Commission has in numerous other cases prohibited outright the use of trade or product names suggesting that a product is made of something of which it is not. Thus, in *Harry Gemson*, 32 FTC 1311, the use of the name "Camelite" or any other term which includes the word "camel" or any colorable simulation thereof was prohibited on products not composed of camel's hair. In *S. Friedman & Sons*, *Inc.*, 32 FTC 989, the use of such designations as "Sun Ray Cashmere" and "Sun Ray Cashmere DeLaine" was prohibited in connection with garments not composed of cashmere. In *Gladstone Brothers*, 37 FTC 645, the use of the word "Valcuna" was prohibited in connection with garments not made entirely of vicuna wool. In *Shepherd Knitwear Co.*, 45 FTC 1, the use of the word "Llamora" was prohibited in describing garments not made from llama wool.

Numerous court decisions have sustained the Commission's prohibition on the use of deceptive names. In *FTC* v. *Algoma Lumber Company*, 291 U.S. 67, the use of the term "white" to describe yellow pine was prohibited, even though qualified by the geographic descriptive word "California White Pine." In *Sea Island Thread Company* v. *FTC*, 22 F. 2d 1019, the use of the words "Satinsilk" and "Satin Silk" to describe a cotton thread was prohibited, even though qualified by the words "Mercerized Cotton." In *Masland Duraleather Co.* v. *FTC*, 34 F. 2d 733, the use of the word "Duraleather" was prohibited, as suggesting that the product was made of "durable leather," even though qualified by the words "Durable Leather Substitute." More recently, the Court of Appeals in *United States Navy Weekly, Inc.* v. *FTC*, 207 F. 2d 17 (C.A., D.C., 1953) upheld the Commission's conclusion that qualification or explanation that respondent's magazine entitled "United States Navy Magazine" was "Not owned by the Government" would not eliminate the tendency of the name to mislead and deceive.

7. Respondents suggest that the above authorities are not controlling since they either (a) were not proceedings under the Wool Act, (b) antedate the *Jacob Siegel* decision, or (c) involve the use "in the trade name of a product or item which was not contained in the item sold," unlike the instant case. None of these arguments has any merit for the following reasons:

a. The fact that none of the cases cited arises specifically under the Wool Act is of no consequence. Every act of mislabeling or deceptive labeling of wool products is, by the very terms of the Wool Products Labeling Act, also a violation of the Federal Trade Commission Act. The Wool Act is, if anything (as will hereafter appear), more stringent in its requirements with respect to the proper labeling of products. Consequently cases prohibiting the use of a deceptive name under the Federal Trade Commission Act would have a fortiori application in Wool Act proceedings. [6]

[6] See *De Gorter* v. *FTC*, 244 F. 2d 270, where decisions under the Federal Trade Commission Act were held applicable to a Fur Products Labeling Act proceeding.

b. While some of the above decisions antedate the *Jacob Siegel* case, others, such as the *U.S. Navy Weekly* case, the *Shepherd Knitwear* case and the *Arrow Metal Products* case were decided subsequent to the *Siegel* case. In any event, there is nothing in the *Siegel* case which makes it mandatory on the Commission to permit the continued, albeit qualified, use of a deceptive trade name. While remanding the case to the Commission to consider whether qualified use of the name there involved was possible, the Court cited with approval the *Algoma Lumber* case (291 U.S. 67, 81–82) in which the Commission had determined that an absolute prohibition on the use of the deceptive name was the proper remedy.

c. The present case is similar to those above cited since, contrary to the contention of respondents, it does involve "the trade name of a product or item which was not contained in the item sold." [7] While respondents deny that Cashmora suggests or implies cashmere, the undersigned has already found this to be the fact. A number of the cases above cited also involve a coined trade name suggestive of a fiber, finish, or other element not present in the item at issue, even though the precise name of the simulated genuine article was not used, e.g., Porcenamel, Camelite, Valcuna, Duraleather, and Llamora.

8. Respondents main argument that they should be permitted to continue to use the name Cashmora, with explanatory language, is based on the action taken by the Commission in the *Jacob Siegel* case, after the case was remanded to it, and the action later taken in the *Country Tweeds* case, based on the *Jacob Siegel* decision. The orders issued in these two cases permitted the qualified use of a trade name found to be deceptive. The action taken in these two cases, while persuasive, is not in the opinion of the undersigned controlling in the instant proceeding for the reasons hereinafter discussed.

In the *Siegel* case there was involved the brand name "Alpacuna" under which respondents advertised their coats. This was found to imply that the coats contained vicuna as well as alpaca fiber. While the coats did contain 50 percent alpaca fiber, they contained no vicuna. The Commission in its original decision (36 FTC 563) prohibited respondent from using the word "Alpacuna" or any similar name implying that their coats contained vicuna. After appeal, the Supreme Court remanded the proceeding for the purpose of having the Commission make an administrative determination whether a remedy short of excision would suffice. As has been noted above, the Court did not find that the Commission had committed error, but

[7] Rebuttal brief of respondents, pp. 5–6.

remanded the proceeding because it felt the Commission should first make its own determination on the question. While the Court referred to the principle that a valuable trade name should be protected "if less drastic means will accomplish the result," it also emphasized the "wide latitude for judgment" reserved to the Commission in making its determination.

On the remand the Commission decided, with two of its five members dissenting, to permit continued use of the name Alpacuna, provided that the constituent fibers were designated in immediate connection therewith, in large and conspicuous letters (43 FTC 256). The majority opinion, by Commissioner Freer, indicated that it was of the opinion that the truthful and conspicuous disclosure of content fibers "in advertising the garments" would eliminate "in many instances" the deceptive impression received from the name and, more important, that the use of proper labels under the Wool Products Labeling Act would dispel "any remaining confusion." [8]

The majority opinion in the *Siegel* case appears to have been considerably influenced by the fact that the respondent had used the name in question for over thirteen years and by its feeling that the proper labeling of the garments, in accordance with the Wool Act, would reduce the probability of deception to a minimum. In the instant proceeding the questionable name has been used for a relatively brief period of time, and the very labels which the Commission in the *Siegel* case thought would dispel the confusion are the labels on which the confusing name appears. It may also be noted that the initial thrust of the name involved in the *Siegel* case was on a fiber of which the product contained 50 percent, viz., alpaca; whereas in the instant case the primary emphasis of the name is on a fiber of which there is not a hair to be found in respondents' sweaters. The name is clearly more deceptive and less subject to removal of the deception by explanation.

Aside from all other distinctions is the fact that the instant proceeding is brought under the Wool Products Labeling Act, based on a charge of mislabeling, whereas the *Siegel* case involved a false advertising charge under the FTC Act. The former act, in the opinion of the undersigned, requires a greater degree of precision in labeling than may be required under the latter act, and therefore a form of order in a false advertising case under the Federal Trade

[8] The majority opinion states, in this latter respect (p. 263):

"Proper labels required by the Wool Products Labeling Act on the garments when sold and delivered to the consumer should dispel any remaining confusion or false impression persisting in the minds of those consumers who in a degree are inattentive or unanalytical or who may be characterized by the trade as 'impulse' buyers."

Commission Act permitting qualified use of a deceptive name may not be appropriate in a misbranding case under the Wool Act. The action taken by the Commission in the *Siegel* case, therefore has limited precedential value in the instant proceeding.

9. Respondents dispute the fact that there is any difference between what may be required in the labeling of a garment under the Wool Act from what may be permissible under the Federal Trade Commission Act. However, the legislative history of the Wool Act discloses that it was passed precisely because it was thought that the Federal Trade Commission Act was not sufficient to prevent the misbranding of wool products, and to insure a greater degree of accuracy in the labeling of such products.

The House committee specifically considered the objection that the proposed legislation was unnecessary since the Federal Trade Commission already had "ample power under existing law to deal with the unfair competition and deceptive acts and practices aimed at in the bill," and rejected it based on the testimony of Commission officials as to the inadequacy of existing legislation in coping with the evils in the industry.[9]

The Senate committee quoted with apparent approval the following statement of the Commission's Chief Counsel as to the need for the proposed legislation: [10]

> Its purpose is to protect producers, manufacturers, and consumers from the unrevealed presence of substitutes and mixtures in woven or knitted fabrics and in garments or articles of apparel made therefrom. There is a decided need for such protection. *The fact that the composition of textile fabrics cannot be detected by most buyers facilitates misrepresentation and deceptive concealment to the injury both of the buyer and of the fair competitor. In recent years the development of synthetic fibers and of skillful methods of finishing cloth has increased the opportunity for unfair competitors to exploit the public by misstating the character of the goods they sell.* Moreover, in many cases false impressions are conveyed to the consumer not by affirmative misrepresentation but by misleading failure to supply needed information. For example, if men's suits look and feel like wool the customer may never inquire whether they contain some cotton or rayon. Similarly, if rayon goods produced by a well-known silk manufacturer are *sold under special names* at silk counters, it may be that although the consumer is not told that the product is silk she will infer that it is *from its appearance, the place at which it is sold*, and the manufacturer's name. Both the public and the more scrupulous competitors suffer from such practices.
>
> The frequency with which such cases arise in the textile field makes it desirable that the Commission's present power to deal with specific instances of misrepresentation be supplemented by labeling requirements which will make misrepresentation more difficult. [Emphasis supplied.]

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[9] H.R. 907, 76th Cong., 1st sess., p. 7.

[10] S. Rept. 1216, 75th Cong., 1st sess., p. 8.

The House committee likewise quoted with approval a statement by the Commission's Chief Counsel as to the purpose and need of the bill as follows: [11]

> The bill is designed to protect producers, manufacturers, distributors, and consumers from the unrevealed presence of shoddy, substitutes, and mixtures in spun, woven, knitted, felted, or otherwise manufactured wool products. The evils which it is the purpose of this bill to correct occur in connection with "wool" and "part wool" products and *in relation to fabrics and articles which simulate wool or part-wool products.* The evils to be corrected by the bill also relate to the unrevealed use or presence of reclaimed wool or shoddy in fabrics. In my opinion the bill, if enacted into law, will accomplish the desired purpose. [Emphasis supplied.]

The simulation of a particular kind of wool product by means of a coined product name would appear to be no different than simulation of wool products generally, as referred to above.

The objective which Congress was seeking to achieve was stated to be the "requiring [of] truth in fabrics or fiber identification, in order that the consumer might know what he was purchasing, and be protected insofar as law may be able to protect him * * *." [12] The type of consumer with whom Congress was concerned was [13]—

> * * * the 90 percent of the American people who must, as the hearings disclose, purchase garment suits at a cost of $25 or less. The legislation is not needed for people who can pay $75 or $100 for a suit of clothes. It is the workingman, the farmer, the millions of clerks and office workers, and the great miscellany of employment in the lower income brackets who need protection.

In the light of the foregoing it can hardly be argued that there is no difference between the requirements of the Wool Products Labeling Act and the Federal Trade Commission Act in the labeling of wool products. The former was obviously intended to fill in the gaps left by the latter and to require a higher degree of care and precision in labeling to the end, among others, that there would be no simulation of wool products generally or of particular kinds of wool products. The action of Congress in this respect was similar to that later taken when it passed the Fur Products Labeling Act to prevent the labeling of fur products with coined names not generally understood by the public, and the Oleomargarine Act to prevent the advertising of oleomargarine products under the guise of being dairy products. Addressing itself to a somewhat parallel

[11] H.R. 907, 76th Cong., 1st sess., p. 7.
[12] Id., p. 6.
[13] Id., p. 7.

contention under the latter act, the Commission in the *E. F. Drew & Co.* case, Docket No. 6126, May 5, 1955, stated:

> If the amendment is to have any meaning we must conclude that it went beyond existing law which prohibited advertisements having the tendency and capacity to deceive, and reached a situation like the present where the suggestion that oleomargarine is a dairy product resulted from associating it with dairy terms.

To permit the labeling of a product with a coined name suggestive of a wool fiber which the product does not contain would, in the opinion of the undersigned, tend to seriously weaken the protection which the Wool Products Labeling Act was intended to provide for the very "miscellany of [consumers] in the lower income brackets" whom Congress intended to protect.[14] It would, moreover, be contrary to rule 25 of the rules and regulations issued in the Wool Products Labeling Act which provides:

> Words which constitute the name or designation of a fiber which is not present in the product shall not appear in or as a part of the listing or marking of required fiber content on the stamp, tag, label, or other mark of identification affixed to the wool product.

In the opinion of the undersigned the use of the word "Cashmora" (suggestive of cashmere) on respondents' labels, as well as any qualifying language referring to the lack of cashmere, would violate the letter and spirit of rule 25 and of the Wool Products Labeling Act.

10. As has been previously indicated, respondents also place considerable reliance on the *Country Tweeds* case, Docket No. 5957, November 25, 1953, in which the Commission permitted the continued use of the name "Kashmoor" in advertising and labeling women's coats, if accompanied by an explanation that the coats contained no cashmere. In that case the hearing examiner, while finding the name to be deceptive as implying that the coats contained cashmere, also found that there was a secondary meaning of cashmere, viz., a fine, soft dress fabric. Apparently influenced by this latter fact and relying on the *Siegel* decision, the examiner's order permitted continued use of the name Kashmoor with proper explanation.[15] The Commission, while disagreeing with the examiner's finding of secondary meaning, adopted the order recommended by him.

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[14] H.R. 907, 76th Cong., 1st sess., p. 6.

[15] The examiner stated in his decision that if cashmere meant solely the wool of the Kashmir goat "the absolute excision of the trade name would appear to be inescapable."

In the opinion of the undersigned the action taken in the *Country Tweeds* case is not determinative of the action to be taken here. In the first place the name "Cashmora" is somewhat closer to the word cashmere, than is the name "Kashmoor," and is therefore less susceptible of explanation. Secondly the name there involved was in use by respondents for a period of approximately two years before it was challenged by the Commission and therefore respondents there may be deemed to have acquired a greater equity in the name than is present in the instant case, where the name was in use for a relatively brief period when it was challenged.[16] Finally and most important, the *Country Tweeds* case involved a complaint brought under the Federal Trade Commission Act, while the instant proceeding involves the Wool Products Labeling Act as well. For the reasons above stated in connection with the *Siegel* case, orders permitting qualified use of a deceptive name under the former act have limited application to the latter act, where a matter of proper labeling is involved.

Respondents point out that in the *Country Tweeds* case the name Kashmoor was used on labels, as well as in advertising, and argue that the Commission in issuing its complaint under the Federal Trade Commission Act must have assumed that it could take effective action under that act to reach all the practices there charged. In answer to this contention it should be noted, firstly, that the labels there involved were not the labels affixed in compliance with the Wool Products Labeling Act.[17] Secondly, and more important, the fact that the Commission did not see fit to also issue its complaint under the Wool Products Labeling Act in the *Country Tweeds* case, does not preclude the possibility that the Commission may have administratively determined since that time that a more effective order can be issued under the Wool Act, and estop it from seeking to take effective action under the latter act.

11. In addition to the *Jacob Siegel* and *Country Tweeds* cases, respondents also cite *Stratbury Manufacturing Co.*, 45 FTC 853, where the use of the registered trademark "Alpagora" was permitted in connection with the advertising of coats not containing substantial proportions of alpaca and angora, provided that the constituent fibers were clearly disclosed or it was disclosed that the registered trademark was not to be construed as relating to fiber content.

The Commission's action with respect to *Stratbury Manufacturing Co.* is not determinative of the form of the order to be utilized in

[16] This point will be hereinafter discussed in greater detail.

[17] See para. 5(b) of findings as to the facts in the *Country Tweeds* case.

the instant case. It did not involve a formal proceeding, based on the issuance of a formal complaint, but was embodied in a stipulation to cease and desist. The facts and circumstances which led the Commission to accept such stipulation, in lieu of issuing a formal complaint, do not appear and their application to the instant situation cannot therefore be determined.

However, the action of the Commission in accepting a stipulation in a nonformal matter has no substantial precedential significance in a formal, litigated proceeding. It certainly does not establish a binding precedent that the use of coined, deceptive names will generally be permitted if accompanied by explanatory language. Any doubt on this score is set at rest by the action taken by the Commission in a number of other proceedings which have been cited above, including particularly *Shepherd Knitwear Co., Inc.*, 45 FTC 1, which involved an order in a formal, litigated case issued almost simultaneously with the acceptance of the stipulation in the *Stratbury Manufacturing Co.* matter. The Commission in the *Shepherd Knitwear* case overruled the recommended order of its examiner which would have permitted the use of the term "Llamora" to designate products containing no llama wool, provided the constituent fibers were set forth in connection therewith, and it prohibited outright the use of that term to describe products not containing llama fiber.

Aside from all other factors and considerations, the *Stratbury Manufacturing Co.* situation may be distinguished on the ground that the proviso permitting continued use of the name Alpagora, with appropriate explanation, related to the use of the term in advertising, whereas the instant proceeding involves a charge of misbranding under the Wool Products Labeling Act as well.

12. Basic to any resolution of the question of whether respondents should be permitted to continue using the term "Cashmora" on a qualified basis is a finding that they have acquired valuable property rights therein arising out of substantial and extensive usage of the name, so as warrant their using it in the face of a finding that it is deceptive. Of course, the fact that a deceptive name has been in use for a long time does not necessarily entitle the user to continue using it even on a qualified basis.[18] Unless the deception can be removed by explanation, long usage of the name is of no consequence. However, it is clear that unless a substantial equity in the name exists

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[18] As stated by Mr. Justice Cardozo in *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 80:

"There is no bar through lapse of time to a proceeding in the public interest to set an industry in order by removing the occasion for deception or mistake * * *."

there is no occasion for even considering whether the deceptive name is salvageable.[19]

Respondents contend that they have acquired valuable property rights in the name by virtue of substantial usage. In view of the finding already made by the undersigned that the name is inherently deceptive in the context of its use, and cannot be remedied by explanation, it would appear to be unnecessary to consider respondents' contention as to the existence of extenuating circumstance justifying consideration of whether the name can be salvaged. However, the undersigned has nevertheless considered respondents' contention in this respect and finds it to be without substantial merit.

Among the more salient facts and circumstances upon which respondents rely and which they contend establish a valuable equity in the name and their right to seek its continued use, with appropriate explanatory language, are the following: (a) The name has been in use for about 2 years; (b) they have sold substantial quantities of the sweaters, have advertised the name widely, and have committed themselves for additional substantial quantities of the sweater and for further advertising in 1957; and (c) that the name has become so well established that they would suffer severe financial loss if its use was not permitted. The contentions are considered seriatim below.

(a) Respondents contend that the name "Cashmora" has been in use for two years and hence that the factual situation is substantially identical to that in the *Country Tweeds* case, where respondent was found to have established a valuable property right in the name Kashmoor. Respondents conveniently overlook the fact that the name there involved was in use for approximately two years as of the time the complaint was issued, while the terminal date of the two-year period for which respondents here contend is that of the time of the hearing, some ten months after the date of the issuance of the complaint. Moreover, the record here establishes that respondents were advised as early as April 1, 1956, that the Commission considered their use of the name "Cashmora" to be objectionable.[20]

[19] This is conceded by respondents in the memorandum supporting their position where it is stated (p. 24):

"The respondents do not contend that the name 'CASHMORA' when first conceived had any possible standing, as such. Its value has arisen for the manifold reasons which are hereinafter set forth."

[20] In a conference held on April 1, 1956, between respondents' prior attorney and Commission representatives, respondents' attorney was advised that the use of the Cashmora labels, as well as other practices which gave rise to the complaint herein, were objectionable. While respondent Herman Gross denied that his then attorney had advised him that the Commission was questioning the use of the term Cashmora, it seems evident that he had at least constructive notice of this fact when this information was conveyed to his duly authorized attorney.

Respondents contend that they are justified in considering the period after the issuance of the complaint herein as extending the period of their bona fide usage of the name Cashmora. They rely, in this respect, on the fact that following the issuance of the complaint they entered into an agreement with counsel supporting the complaint, dated November 8, 1956, disposing of all the issues in this proceeding. One of the provisions of the order therein agreed upon permitted respondents to continue to use the term "Cashmora" provided its use was accompanied by words clearly and conspicuously stating that the fabric did not contain cashmere.

Due to the necessity for correcting typographical and other errors the agreement containing the aforesaid consent order was not transmitted to the undersigned until February 18, 1957. By order dated February 28, 1957, the undersigned rejected the aforesaid agreement because of the inclusion therein of the proviso in question permitting continued use of the name Cashmora.[21]

In the opinion of the undersigned, the fact that the abortive order which respondents agreed to in November 1956, permitted the continued use of the name "Cashmora" on a qualified basis does not enhance or extend respondents' equity or property right in the name Cashmora. The rules of the Commission provide that every agreement for consent order must be submitted to the hearing examiner for his approval and that the latter has the right to accept or reject such agreement, his decision in this respect being subject to joint appeal to the Commission by counsel for both sides. No such appeal was filed in this instance. In entering into the agreement, respondents and their counsel were fully mindful of the fact that such an agreement was one between themselves on the one hand and counsel supporting the complaint (a representative of the Commission's Bureau of Litigation) on the other hand, and could have validity only insofar as it was approved by hearing examiner and, ultimately, by the Commission. While respondents may not be criticized for their business judgment in determining to continue use of the name, in view of their hope that the agreement would be approved by a representative of the Commission acting in its judicial capacity, they cannot now seek to take advantage of the rejection of such agreement by

[21] Ordinarily no mention is made in an initial decision of a rejected consent agreement since under the Commission's rules of practice such agreement does not become part of the official record. This provision in the rules was inserted primarily for the benefit of the respondent so that his offer of settlement would not be deemed to reflect any lack of merit in his defense. Reference is made above to the rejected agreement and to the undersigned's order of rejection because such facts were included in the record at the request of respondents, who apparently felt that such facts would be to their advantage in demonstrating a justification for continued usage of the name after the issuance of the complaint (R. 89-92).

claiming that it enhanced or extended their property right in the name beyond the date of the issuance of the complaint.

In addition to seeking to extend the terminal date of their use of the name beyond the date it was challenged by the Commission, as part of their claim of 2 years' usage thereof, respondents have also sought to establish an initial date of use many months earlier than the date of its actual substantial use. Thus respondents contend that their first order for the Cashmora sweaters was placed on July 25, 1955, that the Cashmora label itself evolved in August 1955, and that sweaters bearing the labels were sold by sample to department and retail stores in Sepember 1955, approximately a year before the complaint was issued. Respondents' contention in this respect is based on an erroneous and exaggerated version of the facts, as established by the reliable evidence in the record.

The record does reflect an order by respondents for 1,000 dozen sweaters, dated July 25, 1955. However, this order was not received by respondents' Japanese supplier until early in August and was for a blend of sweaters which did not yet bear the Cashmora labels. The record discloses that the order was placed, on an experimental basis, for an angora lambs wool blend and that during the late summer and fall of 1955 respondents' supplier was experimenting with this and other blends in an effort to produce a sweater with a cashmere-like feel.[22]

The Cashmora label itself was not, as claimed by respondents, "evolved sometime in August 1955." While respondents' supplier did, on August 24, 1955, forward a sketch of a Cashmora label which it had prepared, various changes in the label were requested by respondents and it was not perfected and finally approved until the latter part of October 1955.[23] Likewise, respondents' claim that they began selling the Cashmora sweaters to the stores in September 1955, is not supported by the record. Respondents' supplier was still

[22] The order, which is dated July 25, 1955, refers to the sweaters as bearing an "LAW" label, the latter being the initials of "Ladies' Angora Wool" (RX 13 and 14; R. 45). It was placed after the return of respondent Herman Gross from a trip to Japan in the summer of 1955. A letter from the supplier, dated July 26, 1955, indicates that they had not received any order and states that Gross had informed them that when he returned to New York he "would investigate the market for LAW and give us a PO [purchase order] * * * for 1,000 dozen." (RX 6 B, par. 7). Gross replied by letter dated August 1, 1955, stating that he had sent a purchase order for "1,000 dozen of LAW" on July 25th and that the Japanese supplier should receive it around August 5 (RX 1 A, par. 5). In the same letter he stated that he hoped to promote the "LAW" sweater "in view of the unsettled situation regarding LCX", i.e., a 90 percent cashmere, 10 percent wool blend (R. 46, 82). Further correspondence between the parties during August and September indicates they were experimenting with colors, as well as with other blends which would result in a sweater with a "more cashmere like feeling" (RX 2 B, par. 11; RX 3 C, par. 24, 25; RX 8, par. 1; and RX 10).

[23] RX 7 B, par. 10; RX 4 A, par. 3; RX 4 B; RX 12 B, par. 12; and RX 5 A, par. 6.

experimenting with colors in September, and the label itself was not finally approved until the end of October 1955.[24] The earliest date on which it is probable that sweaters bearing the Cashmora label were exhibited to retailers is the latter part of October 1955 or sometime in November 1955. More important, however, is the fact that the sweaters did not reach the United States in any substantial quantities until early in 1956 and were not sold in substantial quantities to the public, bearing the Cashmora label, until the spring of 1956.[25]

It seems evident from the foregoing that the period which elapsed between the time sweaters bearing the Cashmora label were sold in any substantial quantities and the time when the Commission challenged the use of the label was a matter of weeks, or at most, months, rather than years. This is so whether the date of the Commission's challenge is deemed to be April 1, 1956, when it so advised respondents' attorney, or September 1956, when it issued the complaint in this proceeding. Under these circumstances respondents can hardly claim long and extensive usage of the name, as in the *Jacob Siegel* case (13 years), or even bring themselves within the briefer period of usage which existed in *Country Tweeds* case.

(b) The evidence as to respondents' commitments and liabilities incurred in connection with the sale of the Cashmora sweaters likewise fails to establish the existence of extenuating circumstances of such a nature as to justify respondents' continued use of the deceptive name, contrary to the public interest.

Respondents' initial order for 1,000 dozen, which was more or less a trial run for the sweaters, was disposed of within a relatively short time after it was offered to the public. The second, and somewhat more substantial order, for 10,000 dozen was disposed of almost in its entirety by September 1956. The third and presently outstanding order for 25,000 dozen sweaters was placed after the issuance of the complaint herein. Respondents' justification for placing this

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[24] By letter dated August 29, 1955, respondents' supplier advised that it was forwarding color swatches for the "LAW" sweater, and it was still working on some of the colors with which it was not satisfied (RX 8, par. 1). By letter dated September 17, 1955, the supplier advised respondents that the labels, modified in accordance with respondents' request, would not be ready for insertion on the sample sweaters, but would be air mailed for attachment by respondents (RX 12 B, par. 12). Respondents' letter of October 25, 1955, indicates that the new labels were not received until some time in October (RX 5 A, par. 6).

[25] Respondent Herman Gross testified that the sweaters "should have been delivered in October, November and December, but were late and I was unable to make decent sized deliveries until January" (R. 59). At another point he testified that sweaters bearing the Cashmora label were delivered in "Spring, 1956" (R. 68).

last order is that it was done after the consent agreement had been entered into. Respondents contend that it would result in financial catastrophe if they could not dispose of these sweaters with the Cashmora label.

The undersigned has heretofore indicated his view that the fact respondents saw fit to make additional commitments on the basis of a consent agreement which required further approval does not create any additional property right or equity on their part. Aside from this, however, the problem which respondents have sought to pose, arising from their outstanding order for 25,000 dozen sweaters, is more apparent than real. The order for these sweaters was placed in November 1956, and at the time of the hearing in this proceeding 90 percent of the sweaters had been received. If respondents' experience in the 1956 season is any criterion these sweaters have by this time been largely disposed of. Allowing for the time of any possible appeal, or only for the usual sixty-day period of compliance provided for in orders of the Commission in the event no appeal were taken, it seems obvious that the balance of the year 1957 will have elapsed and any sweaters still remaining will long since have been sold. This would appear to be the short answer to the problem posed by respondents unless, of course, they seek to take advantage of the period during which this matter has been under consideration before the examiner to make additional commitments for Cashmora sweaters.

Respondents also cite the fact that their Japanese supplier made substantial commitments based on the expectation of continuing orders for the Cashmora sweaters, by erecting a $300,000 to $400,000 addition to its plant, and that they would lose face with him if such orders were discontinued. The short answer to this is that the financial commitments of respondents' supplier is not a relevent factor in this proceeding. Aside from this, however, the facts are not as respondents endeavor to make them out to be. The fact is that respondents' supplier began to erect the additional facilities before it had made any shipments of the Cashmora sweaters and before it was even apparent that the Cashmora sweaters would be a success. It seems evident that the expectation of orders for the Cashmora sweaters was not a material factor in the expansion plans.[26]

[26] In a letter dated September 12, 1955, the supplier advised respondents that "our dyeing factory and the construction of our four-storied ferro concrete building are now in progress" (RX 11 A). It is obvious from the context that the construction of these facilities was due to a desire on the part of the supplier to improve its efficiency and possibly serve respondents' needs better in general, rather than because of the limited order for 1,000 sweaters, which was then being handled on an experimental basis.

Respondents also cite their expenditures and commitments for advertising in connection with the Cashmora sweaters. Thus they point out that they spent $25,000 in advertising the product in 1956, and have committed themselves for an additional $50,000 in 1957, with advertisements in such publications as the New Yorker magazine, Vogue, Harper's Bazaar and the magazine section of the New York Times.

It should be noted, in this connection, that the first national advertisement utilized by respondents was an advertisement in the New York Times magazine section in August 1956, about a month prior to the issuance of the complaint. The advertisements in Vogue and New Yorker magazines did not appear until after the issuance of the complaint, viz., in February 1957. Additional advertisements are for insertion in the fall of 1957.

It is apparent that the bulk of respondents' advertising expenditures were made after the issuance of the complaint herein. The facts with respect thereto are not such as to create any unusual extenuating circumstances entitling respondents to special consideration. In fact by the time the order in this proceeding becomes final respondents will have received the full benefit of such advertisements.

(c) Respondents contend that the failure to permit them to continue using the name Cashmora will result in a loss of "continuity" with respect to the name of a product which they have already sold in substantial quantities and which has been well advertised.

In the opinion of the undersigned the period of usage here involved, the quantity sold and the amount of advertising done are not such as to have established the name in the public eye to the extent that there would be any serious loss of continuity, as far as the public is concerned, if the product were offered under another name. In any event, if the undersigned were to accept the testimony of respondent Herman Gross literally, the success which respondents have had in the sale of the sweaters has been due to the fact that the sweaters are a "good value," and the fact that they bear the name Cashmora has not been an important factor (R. 60). On this basis there should be no reason why respondents should not continue to sell their sweaters successfully, without the name Cashmora. On the other hand if the name has been an important factor, it must be because, as the undersigned has found, it has been a deceptive factor in inducing sales. If this is the case there is no reason to permit the continuance of such deception.

The loss of "continuity" with which respondents appear to be primarily concerned is that relative to their retail stores outlets, rather than the public generally. According to respondents' sales manager, inability to use the name Cashmora would result in the loss of one-half of respondents' retail outlets. He conceded, however, that in time the retailers would accept them under another name.

In the view of the undersigned, the fears thus expressed were somewhat exaggerated. There is nothing to prevent respondents from advising their retail dealers that the same sweater is being marketed under a new name. If the product is as excellent as is claimed, there should be no difficulty in persuading the bulk of the dealers to continue to handle it. The only serious objection which might arise would be from those dealers who prefer to continue to associate the product with cashmere, as a selling inducement. The possible objections of this class of dealers cannot, of course, be considered a justification for permitting continued use of the deceptive name.

CONCLUSIONS AS TO THE REMEDY

1. While it is the policy of the law to protect valuable trade or product names, that policy must be accommodated to the fundamental policy under the Federal Trade Commission Act "of preventing unfair or deceptive trade practices." Unless the "ends of the act [can] be satisfied," the Commission is not required to permit continued use of a deceptive name (*Jacob Siegel* v. *FTC*, 327 U.S. 608, 612, 613).

2. In this proceeding the name "Cashmora" is so inherently deceptive in the context and circumstances of its use, that qualification or explanation on the labels of respondents' sweaters to the effect that such sweaters do not contain cashmere would not substantially remove the tendency and capacity of such name to deceive. Consequently, if this were solely a proceeding under the Federal Trade Commission Act, a complete prohibition of the name on products not made or composed of cashmere would be the appropriate remedy.

3. The requirements of the Wool Products Labeling Act are stricter and more precise than those under the Federal Trade Commission Act with respect to the proper labeling of wool products. Since this is also a proceeding under the Wool Products Labeling Act, a fortiori it would not be appropriate to permit respondents to label their product with a name suggestive of wool fiber of which it is not composed.

4. The Commission's action in the *Jacob Siegel* case (43 FTC 256) and the *Country Tweeds* case (Docket No. 5957, Nov. 25, 1953), in permitting continued use of a deceptive name with qualifying or explanatory language, is not applicable to the instant proceeding because of the differences in the facts and names involved, and because those

cases did not involve violations of the Wool Products Labeling Act.

5. In any event, the name here at issue was in use for so brief a time before it was challenged by the Commission, that it can hardly be said that respondents acquired a valuable property right therein under circumstances of such a bona fide or extenuating nature as to justify jeopardizing enforcement of either the Federal Trade Commission Act or Wool Products Labeling Act by permitting its continuation even on a qualified basis.

ORDER

It is ordered, That the respondents Elliot Knitwear, Inc., and Elliot Import Corp., both corporations, and their officers, and Herman Gross, individually and as an officer of said corporations, and respondents' respective agents, representatives, and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of wool products, as "wool products" are defined in and subject to the Wool Products Labeling Act, do forthwith cease and desist from misbranding such products by using the word "Cashmora" or any word of similar import on any stamp, tag or label attached to any wool product that is not made or composed of cashmere; *Provided, however*, That this shall not be construed as prohibiting use of the word "Cashmora" on a stamp, tag or label attached to a wool product composed in substantial part of cashmere if such word is accompanied by a clear and conspicuous statement of the percentage by weight of the cashmere contained therein.

OPINION OF THE COMMISSION

By KERN, Commissioner:

The complaint in this matter charges respondents with violating the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder through various acts of misbranding wool products. All issues except one have been previously disposed of in the hearing examiner's initial decision filed May 17, 1957, which was based upon an agreement containing a consent order to cease and desist. This became the decision of the Commission on June 25, 1957. The unresolved issue is that with respect to the allegation of misbranding arising out of the use of the trade name "Cashmora."

After hearings were held in due course covering the remaining issue, the examiner filed his initial decision as to the balance of the proceeding on October 18, 1957. He found in substance that respondents' use of the trade name "Cashmora" in labeling or otherwise describing certain of their sweaters constitutes a representation which is false, misleading and deceptive. Holding that respondents were in violation of the Act and Rules and Regulations as charged in this connection, he ordered them to cease and desist from such practices. Respondents have appealed from the initial decision of October 18, 1957.

There is no serious dispute over the facts. Before the importation of the sweater products involved in this proceeding, respondents had been importing sweaters made entirely or substantially of cashmere fiber. This fiber is obtained from the Cashmere goat found in the Himalayan Mountains and is noted for its softness and luxurious feel. In recent years there has been an increase in the demand for sportswear and sweaters generally, and a particular increase in the demand for sweaters made of cashmere fiber. Because of the limitations in supply, this has caused such price increases in cashmere sweaters as to put them out of reach of many potential purchasers. Cashmere sweaters recently sold for about $30 in the United States. Respondents therefore sought a substitute blend of fibers which would have the desirable characteristics of cashmere but which could be sold at a more reasonable price. Such a blend was developed by Japanese suppliers sometime in 1955. There was no cashmere in the blend. It consisted of 30 percent Angora rabbit and 70 percent lamb's wool. The sweaters made from this blend, with special manufacturing techniques, had the "look and feel of cashmere." They sold to the consumer for about one-third the price of a comparable sweater made of cashmere. It was in connection with the sale of these sweaters that respondents adopted the trade name "Cashmora."

"Cashmora" sweaters were first delivered to retailers in the United States in January, 1956, but they were not sold in substantial quantities until the spring season of 1956. The response of purchasers was overwhelming; orders were completely sold out. The total dollar volume of "Cashmora" sweaters sold in 1956 in the United States was $750,000. "Cashmora" sweaters ordered for delivery in 1957 were valued at $3,000,000.

The first national advertisement featuring the name "Cashmora" appeared in the New York Times in August 1956. Later, advertisements were placed in various national publications. Amounts expended for advertising were $25,000 in 1956 and $50,000 in 1957.

Respondents, though they concede that "Cashmora" sweaters contain no cashmere, strongly urge that the record is deficient as to proof

(1) that the use of the name "Cashmora" serves as a representation that the product so labeled contains cashmere, and (2) that, as used, the name "Cashmora" is false, misleading and deceptive.

In this matter there has been no testimony by consumers as to the probable impression gained by the public from the trade name "Cashmora." However, it is not necessary that the Commission sample public opinion to determine what meaning is conveyed to the public by particular representations. *E. F. Drew & Co., Inc.* v. *FTC*, 235, F. 2d 735, 741 (2d Cir. 1956); *Zenith Radio Corp.* v. *FTC*, 143 F. 2d 29, 31 (7th Cir. 1944). Moreover, the record need not show actual deception; it is sufficient that the representation has the capacity to deceive. *FTC* v. *Algoma Lumber Co.*, 291 U.S. 67 (1934); *E. F. Drew & Co., Inc.* v. *FTC*, *supra.*

In this instance the name "Cashmora" has been used in the labeling and in the advertising of sweaters which contain no cashmere but have the look and feel of cashmere. Where there is such a close association between a genuine product and one which simulates the genuine, very little is needed for there to be a tendency to mislead the public: in this instance, certainly not more than some small suggestion. Out of the myriad of coined names which respondents might have used, they adopted the name "Cashmora," which differs from "cashmere" only in a substitution of an "o" for the initial "e" and an "a" for the final "e". It is so close to the word "cashmere" that it can easily be mistaken for "cashmere," particularly in the context and in the circumstances in which it is used. Such a name clearly supplies the suggestion that respondents' products contain cashmere. The record demonstrates the heavy consumer preference for sweaters made of cashmere, and it is a fair inference from the record that respondents, by the use of "Cashmora," were trading on the good will which had been built up for the genuine textile.

The immediate and spectacular success in the sale of "Cashmora" sweaters, particularly in contrast to the depression in sales which respondents experienced in their other sweater lines, can be regarded as some indication of the deceptive capacity of the name. The circumstances shown amply support the examiner's findings and conclusions that the name "Cashmora" appearing on the labels of respondents' sweaters constitutes a representation, or may reasonably be deemed to imply to members of the purchasing public, that such sweaters contain cashmere and that, because they contain no cashmere, the representation so made is false, misleading and deceptive.

The other principal issue raised on this appeal has to do with the choice of remedy. Respondents insist that it should not be complete excision. In support of their position they cite cases such as *Jacob Seigel Co.* v. *FTC*, 327 U.S. 608 (1946), and *FTC* v. *Royal Milling Co.*, 288 U.S. 212 (1933). It is, of course, true that in these decisions the Supreme Court held that trade names are valuable business assets whose destruction should not be ordered "if less drastic means will accomplish the same result." We observe that both holdings involved trade names which were not wholly false but which rather could be taken in either a true or a false sense and hence were susceptible of full clarification through an appended legend. But neither opinion disavowed the well-established principle that flat contradictions of completely false designations are inadequate and inappropriate to correct deception. In *FTC* v. *Army and Navy Trading Co.*, 88 F. 2d 776, 779–80, 66 App. D.C. 394, 397–8 (1937), the Court said:

> * * * in these cases the selection of qualifying words effective to eliminate deception was feasible because the names involved made separate and distinct representations in respect of the origin and characteristics of single products, some of which representations were true and some of which were untrue. Therefore, qualifying words could be chosen which would eliminate any deceptive representations and leave standing the truthful ones alone. Thus in *Federal Trade Commission* v. *Royal Milling Co.* [288 U.S. 212 (1933)], the qualifying words "Not Grinders of Wheat" indicated definitely that the grain from which the flour is made did not originate with, i.e., was not ground by, the Royal Milling Co., but left standing the representation that the flour was mixed and blended by that company; and in the other three cases, the qualifying words clearly eliminated the deceptive representations of what the characteristics of the products were not, but left standing the true representations as to what the characteristics were. The qualifying words suggested for use in the instant case would not have the effect of wholly eliminating the deception. * * * This single representation [that the major portion of the merchandise offered for sale is in some sense Army and Navy goods] being untrue, it cannot be qualified; it can only be contradicted. The cases urged by the Trading Co. and above discussed, justify qualification of a trade name where qualification is possible; they do not justify contradiction.

With due deference to the *Siegel* enjoinder that trade names should not be destroyed where less drastic means will accomplish the same result, we are mindful that in the same decision the Supreme Court ruled that the question of whether deception in a trade name can be eliminated by qualifying language is primarily for the Commission to determine and "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." Because the term "Cashmora" implies, altogether contrary to fact, that the sweaters so marked are composed of cashmere wool, we hold that it cannot be cured by qualification. Respondents began to use the name only a few months before the Commission's investigator first advised them that the use of the term "Cashmora" to describe a noncashmere product was of doubtful legality. Thus they are hardly in a position to contend that this trade name has acquired value as a commercial symbol through long use. What is more, "long use of a misleading brand can vest no right in the user." *El Moro Cigar Co.* v. *FTC*, 107 F. 2d 429, 431 (4th Cir. 1939); see also *FTC* v. *Algoma Lumber Co.*, 291 U.S. 67, 79 (1934). There is nothing in the *Siegel* decision to the contrary, and in view of the judicial precedents cited our holding in the matter of *Country Tweeds, Inc.*, Docket No. 5957 (1953), cannot be taken as dispositive of the instant point.

An additional question raised on this appeal is whether the hearing examiner erred in suggesting that even if an order permitting a qualified use of a deceptive trade name would be appropriate in the disposition of a case instituted solely under the Federal Trade Commission Act, such an order would not be appropriate in a case brought under the Wool Products Labeling Act. He apparently had in mind the type of case where, as here, the deceptive name representing a certain fiber is used on a product containing none of such fiber, and in which the question is whether the continued use of the name of such product should be permitted with appropriate explanatory language. In our view of this case, elimination of the potential deception found in the respondents' use of the name "Cashmora" on products containing no cashmere would require complete excision in regard to such use even under the Federal Trade Commission Act. Thus, it is not necessary to rule on the existence of possible differences in the discretion the Commission may exercise in its selection of appropriate remedies to correct deception under these acts, and we express no opinion on this subject. To the extent that the initial decision may imply that there is some difference, we do not adopt it as our own.

The order contained in the initial decision is inappropriate, we believe, in several respects.

For one thing, Samuel I. Gross, a respondent in this proceeding named individually and as a copartner in the Elliot Glove Co., is improperly included in the order. The record shows that this company is a partnership which distributes wool and other types of gloves to retail and other establishments and that it does not handle sweaters. It further appears that the trade name "Cashmora" was used only with reference to sweaters. Since the Elliot Glove Co. did not deal in sweaters, the record will not support a finding that Samuel I. Gross, shown to be connected only with that company, has violated the act as charged in connection with the use of "Cashmora."

Moreover, the complaint does not allege nor did the hearing examiner find that respondents' use of the word "Cashmora" was deceptive except as used in labeling wool products containing no cashmere. It is not believed, therefore, that an order in this matter should prohibit the use of "Cashmora" on wool products composed in part of cashmere, if it is a substantial part, although this apparently would be the result under the examiner's order. On the other hand, an unqualified use of "Cashmora" on wool products containing cashmere but not composed wholly of cashmere might lead to deception of the public since this would suggest a product made of 100 percent cashmere. Accordingly, a proper order, while not prohibiting the use of "Cashmora" on a wool product composed in substantial part of cashmere, should provide that, if so used, there be an appropriate disclosure of the percentage of cashmere fiber contained in such product.

The order contained in the initial decision will therefore be modified to conform to the views herein expressed.

Respondents' appeal is denied.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of the above-named respondents from the initial decision of the hearing examiner filed October 18, 1957, and upon the briefs and oral argument in support of and in opposition to the appeal; and the Commission having rendered its decision denying the respondents' appeal and directing modification of the said initial decision in conformity with the Commission's opinion:

It is ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

It is ordered, That the respondents Elliot Knitwear, Inc., and Elliot Import Corp., both corporations, and their officers, and Herman Gross, individually and as an officer of said corporations, and respondents' respective agents, representatives, and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of wool products, as "wool products" are defined in and subject to the Wool Products Labeling Act, do forthwith cease and desist from misbranding such products by using the word "Cashmora" or any word of similar import on any stamp, tag, or label attached to any wool product that is not made or composed of cashmere; *Provided, however*, That this shall not be construed as prohibiting use of the word "Cashmora" on a stamp, tag or label attached to a wool product composed in substantial part of cashmere if such word is accompanied by a clear and conspicuous statement of the percentage by weight of the cashmere contained therein.

It is further ordered, That the respondents, Elliot Knitwear, Inc., and Elliot Import Corp., both corporations, and Herman Gross, individually and as an officer of said corporations, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

It is further ordered, That the said initial decision, as modified, is hereby adopted as the decision, of the Commission.