IN THE MATTER OF

# HUDSON PULP AND PAPER CORP.

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

*Docket 6599. Complaint, July 19, 1956—Decision, May 7, 1958*

Order requiring a manufacturer of paper napkins and towels, and toilet and facial tissues, with principal office in New York City, to cease discriminating in price in violation of section 2(d) of the Clayton Act by paying broadcasting companies for time furnished to certain favored grocery chains for their own advertising purposes in return for which the participating chains gave in-store promotions to respondent's products in their stores located in the trade area reached by the radio or TV station utilized, without making compensation for such benefits available on proportionally equal terms to all the competitors of the favored customers.

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

*Appell, Austin & Gay*, by *Mr. Cyrus Austin*, and *Mr. Felix G. Langer* and *Mr. Emanuel E. Sternfield*, all of New York, N.Y., for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

## THE PLEADINGS

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

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

Respondent in its answer denies that any broadcasting company served as a medium or intermediary between respondent and any of

its grocery-chain customers; that any payments were made by the respondent to any broadcasting company for the benefit of any of respondent's customers; and that respondent's acts and practices have violated section 2(d) of the Clayton Act, as amended.

STIPULATION OF FACTS

In lieu of hearings and the presentation of evidence, counsel supporting the complaint and counsel for the respondent agreed upon, and submitted to the hearing examiner, a stipulation as to the facts involved in this controversy, with the understanding that such stipulation, together with the pleadings herein, was to constitute the entire evidentiary record. This stipulation has been duly incorporated into the record, and, together with the pleadings, does constitute the entire factual basis of this decision.

AMICI CURIAE

Subsequent to the submission of the stipulation as to the facts, Columbia Broadcasting System, Inc. and National Broadcasting Co., Inc. applied for and were granted permission to submit briefs as *amici curiae*. These briefs supplement the brief of counsel for the respondent, and request that the complaint herein be dismissed.

IDENTITY OF RESPONDENT

Respondent Hudson Pulp & Paper Corp. is a Maine corporation, with its principal office and place of business located at 477 Madison Avenue, New York, N.Y.

ACTS IN COMMERCE

For a number of years respondent has been engaged in the business of selling and distributing its products, including paper napkins and towels, toilet tissue and facial tissue, to competing customers, including independent grocers and grocery chains, located throughout some of the States of the United States and in the District of Columbia. Many of such competing grocery customers are located in the Chicago metropolitan area and in the New York City metropolitan area, which extends into the adjacent States of New Jersey and Connecticut. The quantity of the above-mentioned products sold by respondent in those areas during the past several years has been substantial. As a result of such sales, respondent is now, and has been for some time, engaged in commerce, as "commerce" is defined in the Clayton Act as amended.

ORIGIN OF THE SALES-PROMOTION PLAN

In 1950 and in 1951 the sale of broadcasting time had become difficult, and the American Broadcasting Co., Columbia Broadcasting System, Inc., and National Broadcasting Co., Inc., hereinafter referred to, respectively, as "ABC," "CBS," and "NBC," devised a plan to enable them to promote the sale of such time to manufacturers and sellers of grocery products by offering to them radio and television time at the regular current rate, supplemented by the promise of certain in-store promotion facilities as an added inducement. Although the various sales-promotion plans devised by the several broadcasting companies are substantially the same, each broadcasting company developed its own plan independently of the others.

THE SALES-PROMOTION PLAN

In initiating its sales-promotion plan, ABC negotiated contracts with certain grocery chains in the Chicago metropolitan area, and CBS and NBC in the New York City metropolitan area, whereby the broadcasting company agreed to furnish radio time or television time of a stated amount or value to each grocery chain each week during the term of the contracts. These contracts provided that the broadcasting time so furnished would be used by the chain stores only for their own advertising. In consideration for such broadcasting time, the chain stores agreed to conduct in their stores a specific number of promotional displays of products sold therein, each such promotion to be continued for the duration of 1 week. The contract did not specify the products to be displayed or the dates for their promotion, but provided that such products were to be agreed upon and the dates for their promotion fixed upon the suggestion or designation of the broadcasting company, subject to the approval of the chain, and also subject to the right of the chain to decline to promote any product not deemed by it to be suitable for promotion in its store. These contracts were made without any prior commitment or agreement involving anyone other than the broadcasting company and the grocery chain.

After the above-described contracts between the broadcasting companies and the grocery chains had been entered into, the broadcasting companies solicited respondent and other manufacturers and sellers of grocery products to purchase radio or television time from them, and, as an added inducement for such purchase, offered in-store promotion of respondent's products in the chain stores with which the broadcasting companies already had contracts. The CBS plan was called "Supermarketing;" the NBC plan, "Chain Lightning;" and

the ABC plan, "Mass Merchandising" or "Sell-A-Vision." In support of these plans, brochures and circulars were disseminated from time to time by the broadcasting companies, which informed respondent and others that by purchasing radio or television time for certain periods in minimum amounts at the then regular station rate for such time, the advertiser would qualify, at no added cost, for one or more week-long promotional displays of its products in the stores of certain grocery chains. The brochure stated that the broadcasting company was able to furnish these displays by reason of the existing contracts which it had already negotiated with the grocery chains. Among other things, such brochures and circulars presented the advertising advantages of the several plans as follows:

HERE'S HOW IT WORKS * * * it's only available to WBKB food advertisers. * * * provides them with prime display space in 600 food stores in the Chicago area. * * * These 600 stores make up the two largest corporate chain groups in Chicago—A&P and National Tea. HERE'S WHAT YOU GET * * * Advertiser's product is featured exclusively during his particular week. * * * Qualifying advertisers receive either end or dump displays, whichever is most satisfactory to the individual product. In the case of cigarettes and refrigerated products a special display pattern must be worked out for each, since the end or dump style cannot be used. Bread cannot be featured in the plan. * * *

* * * Displays are set up by individual store managers who are directed by the executive officers of the chains who feature a specific product during a specific week.

* * * Retail newspaper linage, window streamers and in-store promotion is not included in agreement, but in most cases to date both chains have cooperated fully and given *Shopper-Stopper* products these promotional benefits.

*HERE'S WHAT "SHOPPER-STOPPER" DOES FOR ADVERTISERS* * * *

* * * We moved out great quantities of both of these items and all retail outlets and the follow through by the chain stores in setting up in-island displays and getting us group dealer ad mentions was really phenomenal.

* * * Want to thank you and WBKB-TV for this excellent tie-up; and, certainly want to get in on any other tie-ups that you have arranged for the future * * *

J. W. SHARPE,
*District Sales Manager,*
*Kellogg Sales Co.*

Super Market displays increase your sales * * * but Super Market display space is scarce. The average Super Market has room for 10 displays, 6 of which are reserved for the retailer's own needs. This leaves 4 displays per week "up for grabs" for your product * * * and three thousand others. In 1953 the 76 leading nationally advertised food products were only able to win display space above normal selling space in stores accounting for a meager 3 percent of sales (Nielsen Food Index).

Supermarket display space is costly too! If the value of all of the CHAIN-LIGHTNING displays currently available were conservatively estimated at five dollars per store per week, the total worth would be over $15,000 per week.

CHAIN LIGHTNING is the Radio merchandisng plan that puts your product physically in front of the competition in more than three thousand supermarkets

in the richest retail areas in the land. It combines the hard hitting selling power of local Radio advertising with the impact of point-of-sale displays to:

* * * Pre-sell your customers in their homes * * * Clinch the sale in the food food store * * *.

The average Super Market carries over 3,000 items.

In this vast jungle of brands, sizes, packages, cans and jars, any single product has little chance of capturing the attention of retailer or shopper.

If the retailer divided his day equally among his 3,000 items—each would receive 10 seconds of his time!

If the shopper divided her 45-minute Super-Market visit among the 3,000 items—she'd give each less than a second of her attention!

Respondent participated in the above-described plans by entering into contracts with the broadcasting companies for the purchase of broadcasting time. These contracts contain no reference to in-store promotion. In fact, respondent's contracts with ABC and CBS contain the following clause or its equivalent:

This contract contains the entire agreement between the parties and is not subject to oral modification.

The NBC contract contains a similar clause, as follows:

This contract constitutes the entire agreement between the parties relating to the subject matter thereof.

The various payments made by Respondent to the several broadcasting companies from 1952 through 1956 were, as follows:

| Year | Broadcasting company | Station | Amount paid | Yearly total |
|---|---|---|---|---|
| 1952 | CBS | WCBS (New York) | $27,676.00 | $27,676.00 |
| 1953 | ABC | WBKB (Chicago) | 9,500.00 | 72,095.64 |
| | CBS | WCBS (New York) | 62,595.64 | |
| 1954 | ABC | WBKB (Chicago) | 38,500.00 | 154,619.20 |
| | CBS | WCBS (New York) | 36,764.20 | |
| | NBC | WNBC (New York) | 79,355.00 | |
| 1955 | ABC | WBKB (Chicago) | 26,250.00 | 100,422.09 |
| | CBS | WCBS (New York) | 43,691.38 | |
| | NBC | WNBC (New York) | 30,480.71 | |
| 1956 | CBS | WCBS (New York) | 36,584.50 | 36,584.50 |

The three plans under which the above-listed payments were made all required of the respondent a minimum payment over a minimum period of time, to qualify for a minimum amount of in-store promotion. There were a number of variations of all of these three plans. A recounting of the many details of such variations is here deemed unnecessary.

After the respondent had contracted with the broadcasting companies, as above described, the respondent was notified by such broadcasting companies that some of the respondent's products would be displayed in the stores of certain grocery chains on certain dates.

In many instances, the respondent thereupon contacted the designated chain store for the purpose of arranging the type and details of the in-store promotional displays.

All of respondent's customers who received radio or television advertising time from the broadcasting companies, pursuant to the contract described herein, were grocery chains who have been and are in competition in the resale of respondent's products with other grocery chains and independent customers of respondent who did not receive and who were not offered such broadcasting time or anything of value in lieu thereof.

## THE ISSUE

The section of the Clayton Act, as amended, under which this proceeding is brought provides, as follows:

§2.(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Since the complaint alleges and the answer denies that respondent paid money to said broadcasting companies for the benefit of certain of respondent's chain-store customers as compensation or in consideration for services or facilities furnished respondent by those customers, and that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the above-quoted provision of the Clayton Act, the issue herein is as follows:

Did respondent pay or contract for the payment of something of value to any of the three broadcasting companies named herein "for the benefit of a customer" and "as compensation or in consideration" for in-store sales promotion furnished by such customer to respondent, without making the same benefit available on proportionally equal terms to all its other customers competing with the customers so favored, within the meaning of section 2(d) of the Clayton Act as amended?

## THE ISSUE RESOLVED

Counsel supporting the complaint, in effect, contends that the facts herein stipulated show that the respondent, by adopting and using the sales-promotion plan of the broadcasting companies, attempted

to escape legal accountability by doing indirectly that which respondent knew it could not lawfully do directly; that is, procure in-store promotion for its products by providing benefits in the form of broadcasting time for the use of a few favored customers without making the same or similar benefits available to its other competing customers. Counsel further contends that the several transactions heretofore described, instead of being unrelated business operations as they may appear when considered separately, constitute, in fact and in reality, one complete transaction, which can be properly evaluated only as a whole.

Counsel for respondent vigorously contradicts the above-stated contentions, and affirmatively asserts that the facts show that respondent did not pay or contract for the payment of anything of value to any of the broadcasting companies for the broadcasting time furnished to respondent's customers, and that the respondent did not pay or contract to pay anything of value as "compensation or in consideration" for promotional services furnished to the respondent by any of its customers.

Let us re-examine the facts in the light of these contentions. The facts show that the sales-promotion plan in question, like the issue herein, is composed of three elements. First, we have a separate contract between the broadcasting company and a chain store, promising such store certain broadcasting time for its own purposes in return for in-store promotion of certain products to be later designated by the broadcasting company. Second, we have a separate contract, of a later date, between the broadcasting company and the respondent, providing for the purchase by the respondent of certain broadcasting time for its own advertising purposes, at the standard rate of payment then current. This contract is expressly limited to the provisions contained therein. Third, we have brochures and circulars disseminated by the broadcasting company for the purpose and with the effect of inducing the respondent to enter into the contract with the broadcasting company. We also have correspondence between and among the various parties to both contracts, relative to the various phases of the sales-promotion plan and the details of the in-store displays.

When the above transactions are considered in their interrelationship with each other, the true significance of the several phases of the sales-promotion plan, and the true relationship established between the parties thereto, become apparent. Thus we see that the in-store promotion feature of the plan, although astutely excluded from the narrow specifications of the contract between respondent and the broadcasting company, was actually the primary cause and the chief

consideration for the execution of that contract. The respondent was required, not merely to purchase radio or television time in order to acquire the right to in-store promotions, but was required to purchase a specified minimum amount of such time in order to so qualify. It is reasonable to conclude, since broadcasting time in 1950 and 1951 was in fact hard to sell, that respondent would not have purchased broadcasting time at all, or would have purchased it only at a reduced price or in a lesser amount, without the inducement of the in-store promotion. We also see that the respondent made the only money payment involved in the whole transaction, and was therefore the sole financial support of the plan. Without such support, it is reasonable to assume that the plan would not have matured, but would have proven financially unprofitable and therefore of short duration. It follows, therefore, that the respondent, as the sole financial supporter of the plan, paid for the braodcasting time granted the chain-store for in-store promotional displays, as well as for the broadcasting time purchased for respondent's own use.

The facts show clearly that the responsible officials of the respondent knew, or should have known, when they entered into the plan presented to respondent by the broadcasting company, that respondent, in adopting such plan, would be supplying the consideration which would constitute compensation for the benefits to be received by a few favored customers, to the prejudice of their competitors. The fact that the payment for the broadcasting time furnished to the favored chain stores was indirect rather than direct does not alter its legal or practical effect; neither does the fact that the respondent made the payment in question primarily in its own behalf and without a prior agreement with the chain store. On these points, counsel supporting the complaint very aptly quotes from the statement of counsel for the respondent, in his book entitled "Price Discrimination and Related Problems Under the Robinson-Patman Act," revised edition, 1953, page 116, as follows:

> It is no defense for a seller charged with a violation of either of these sections [sec. 2(d) and sec. 2(e)] to show that he furnished or paid for a service solely in his own interest and not pursuant to any prior understanding with the purchaser. These sections prohibit discrimination in merchandising allowances or services irrespective of whether the making of the payment or furnishing of the service was a term or condition of sale, or amounted to an indirect price discrimination.

Respondent also contends, as do the broadcasting companies as *amici curiae*, that respondent's payment to the broadcasting company was in fulfillment of a separate, individual contract, and was in no wise a consideration for the in-store promotions later supplied. In fact, respondent contends that the supplying of the in-store promo-

tions to the respondent was a gratuity, and was "free" within the interpretation of the Commission in the matter of *Walter J. Black, Inc.*, Federal Trade Commission docket No. 5571 (1953). This contention is fallacious, because we are not here concerned, as was the Commission in the case cited, with the question of whether a certain advertisement was misleading. On the contrary, we are here concerned with determining, from all the relevant facts, whether the payment made by the respondent to the broadcasting company was in reality compensation only for the broadcasting time purchased by the respondent for its own use, or whether such payment was made for a broader purpose, and did actually serve also as compensation for in-store displays furnished to respondent by some of its chain-store customers. We are persuaded by the facts that the payment by the respondent included the larger purpose, and was actually not only a self-serving payment, but also a payment on behalf of a few favored customers. We must conclude, therefore, that the case cited is in no way a precedent for the decision in the present proceeding.

Counsel for the respondent further contends that the consideration received by the chain stores in the form of broadcasting time was not contingent or dependent on any act of the respondent, but was dependent solely on the contract between the broadcasting company and the chain store. He points out that this contract provides for the furnishing of broadcasting time to the chain store in compensation for in-store promotions of products to be later designated by the broadcasting company. The facts reveal that such designation was not made by the broadcasting company until after the signing of its contract with respondent for the purchase of broadcasting time. From these facts the conclusion is inescapable that the broadcasting company, when entering into the contract with the chain store, contemplated completing the overall plan, of which that contract was merely a part, only after successful negotiation of a second contract with some manufacturer for the purchase of broadcasting time, which would enable the broadcasting company, thereafter, to designate that manufacturer's products as those to be promoted in the in-store displays. We must conclude, therefore, that the contention stressing the independent character of the first contract is altogether unrealistic, and disregards the fact that the first contract was only preliminary to the contract with respondent, both contracts being, not independent transactions, but parts of a larger plan.

Counsel for the respondent seeks, in his brief, to invoke the rules of private contract law governing third-party beneficiaries. In connection with this argument, he states that

Most of the States recognize the right of a third person to sue upon a contract made for such person's benefit. Under that doctrine as applied by the courts a contract is not regarded as made for the benefit of a third party unless the intent to benefit that person clearly appears. Benefit resulting incidentally from a contract made by others is not sufficient. By these tests, the station contracts here in evidence plainly were not contracts for the benefit of the chains, whether or not the terms of the merchandising plans are read into them.

This argument is specious. We are not here concerned with an application of the rules of private contract law, but with the broader and more realistic principles of public law, which require an examination of the entire plan in question in all its related parts. As hereinbefore stated, the omission from respondent's contract of the benefit intended to be conferred, in the form of broadcasting time, upon the chain store in consideration of the in-store displays promised to respondent as an inducement to purchase broadcasting time for its own use appears, particularly in the light of the contentions herein made by counsel for respondent, to have been intentional, for the purpose of shielding the respondent from the force and effect of the Clayton Act. Such omission appears to be, palpably, an attempt to circumvent that Act by effectuating, indirectly through the agency of the broadcasting company, a practice which could not lawfully be effectuated directly.

The fact that this sales-promotion plan was instigated by the broadcasting company rather than by the respondent does not alter the fact that respondent, by accepting it, became a party thereto, and cannot now evade full responsibility therefor. Respondent's acceptance of the broadcasting company's tempting offer of in-store promotion would, of course, have become lawful, had the respondent required, as a condition for its acceptance, that the benefit of broadcasting time given in return for such in-store promotion be made equally available to all respondent's customers. Extension of the offer to all respondent's customers might have proved impracticable because of their number; but that factor offers no justification for respondent's unlawful conduct.

Counsel for the respondent cites the case of *State Wholesale Grocers* v. *The Great Atlantic and Pacific Tea Co.* (C.C.H. 1957 Trade Cases, pp. 73145, 73148–9, 73175) as condemning the contention of counsel supporting the complaint that the broadcasting companies would not continue to offer merchandising plans without the participation therein of manufacturers of grocery products, and that respondent, by its participation in the plan here involved, is contributing to and making possible the continuance thereof. Counsel, in quoting that decision, has disregarded the several basic, factual differences between that case

and the instant proceeding. Lengthly analysis of such differences is here deemed unnecessary. Counsel for the respondent has wisely refrained from stating that the case cited is a valid precedent upon which to base a decision herein. We agree with that omission; the case cited is not a precedent nor a parallel to the instant proceeding, and can be of no assistance in the adjudication thereof.

CONCLUSION

In reaching our conclusion in this proceeding, we recognize that the section of the Robinson-Patman Act amending the Clayton Act with which we are presently concerned was designed by Congress to protect small, independent merchants against unfair and discriminatory competitive advantages, in the form of payments, rebates or advertising allowances, granted by manufacturers and distributors to the larger chain stores with which the small stores must compete at the retail level. In other words, as applied to the facts of the present proceeding, the provision of section 2(d) of the Clayton Act as amended was specifically designed to protect the small businessman buying respondent's products from the competitive injury resulting from respondent's large chain-store customers receiving advertising allowances in the form of broadcasting time in return for in-store sales promotion in which the smaller merchants were never given an opportunity to participate.

We recognize, also, that section 2(d) of the Clayton Act as amended makes no distinction between a benefit conferred directly and one conferred indirectly, but expressly forbids the conferring of any discriminatory benefit, by providing that no payment shall be made "for the benefit of a customer" unless the opportunity to share in that benefit is equally bestowed upon all competing customers.

In the light of these principles, we must conclude that, in the present proceeding, the respondent, by its payment to the broadcasting company, paid or contracted to pay something of value for its own benefit and also for the benefit of certain chain-store customers in consideration for in-store promotional facilities furnished to respondent by such favored customers, without making the same or similar benefits available on proportionally equal terms to all respondent's other customers who compete in the retail distribution of respondent's products with the customers so favored. These acts and practices clearly violate section 2(d) of the Clayton Act as amended. Accordingly,

*It is ordered*, That respondent, Hudson Pulp & Paper Corp., a corporation, its officers, agents, representatives or employees, directly

or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of grocery products, including paper napkins and towels, toilet tissue and facial tissue, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's said products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

DECISION OF THE COMMISSION

Respondent, Hudson Pulp & Paper Corp., having filed an appeal from the hearing examiner's initial decision finding that said respondent has violated the provisions of section 2(d) of the Clayton Act, as amended, and ordering it to cease such violation; and

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondent and counsel in support of the complaint and the briefs of Columbia Broadcasting System, Inc., and National Broadcasting Co., Inc., as *amici curiae*, and having determined that the findings and conclusions in the initial decision are fully substantiated on the record and that the order contained therein is appropriate in all respects to dispose of this matter:

*It is ordered*, That respondent's appeal be, and it hereby is, denied.

*It is further ordered*, That the hearing examiner's initial decision filed October 9, 1957, be, and it hereby is, adopted as the decision of the Commission.

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

IN THE MATTER OF

# P. LORILLARD CO.

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

*Docket 6600. Complaint, July 19, 1956—Decision, May 7, 1958*

Order requiring a manufacturer of cigarettes, with principal office in New York City, to cease discriminating in price in violation of section 2(d) of the Clayton Act by paying broadcasting companies for time furnished to certain favored grocery chains for their own advertising purposes in return for which the participating chains gave in-store promotions to respondent's products in their stores located in the trade area reached by the radio or TV station utilized, without making compensation for such benefits available on proportionally equal terms to all the competitors of the favored customers

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

*Appell, Austin & Gay*, by *Mr. Cyrus Austin*, and *Perkins, Daniels & Perkins*, by *Mr. Robert McCormack*, New York, N.Y., for respondent.

## INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

### THE PLEADINGS

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

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

Respondent in its answer denies that any broadcasting company served as a medium or intermediary between respondent and any of its grocery-chain customers; that any payments were made by the respondent to any broadcasting company for the benefit of any of

respondent's customers; and that respondent's acts and practices have violated section 2(d) of the Clayton Act, as amended.

STIPULATION OF FACTS

In lieu of hearings and the presentation of evidence, counsel supporting the complaint and counsel for the respondent agreed upon, and submitted to the hearing examiner, a stipulation as to the facts involved in this controversy, with the understanding that such stipulation, together with the pleadings herein, was to constitute the entire evidentiary record. This stipulation has been duly incorporated into the record, and, together with the pleadings, does constitute the entire factual basis of this decision.

AMICUS CURIAE

Subsequent to the submission of the stipulation as to the facts, Columbia Broadcasting System, Inc., applied for and was granted permission to submit a brief as *amicus curiae*. This brief supplements the brief of counsel for the respondent, and requests that the complaint herein be dismissed.

IDENTITY OF RESPONDENT

Respondent P. Lorillard Co. is a New Jersey corporation, with its principal office and place of business located at 119 West 40th Street, New York 18, N.Y.

ACTS IN COMMERCE

For a number of years respondent has been engaged in the business of selling and distributing its products, including cigarettes, to competing customers, including independent grocers and grocery chains, located throughout some of the states of the United States and in the District of Columbia. Many of such competing grocery customers are located in the Chicago metropolitan area, and in the New York metropolitan area, which extends into the adjacent States of New Jersey and Connecticut. The quantity of the above-mentioned products sold by respondent in those areas during the past several years has been substantial. As a result of such sales, respondent is now, and has been for some time, engaged in commerce, as "commerce" is defined in the Clayton Act as amended.

ORIGIN OF THE SALES-PROMOTION PLAN

At the time when the broadcasting companies began contracting with grocery chains, the sale of broadcasting time had become diffi-

cult, and the American Broadcasting Co. and Columbia Broadcasting System, Inc., hereinafter referred to, respectively, as "ABC" and "CBS," devised plans to enable them to promote the sale of such time to manufacturers and sellers of grocery products by offering to them radio and television time at the regular current rate, supplemented by the promise of certain in-store promotion facilities as an added inducement. Although the various sales-promotion plans devised by the broadcasting companies are substantially the same, each broadcasting company developed its own plan independently of the other.

THE SALES-PROMOTION PLAN

In initiating their sales-promotion plans, ABC negotiated contracts with certain grocery chains in the New York City metropolitan area, and CBS in the Chicago metropolitan area, whereby the broadcasting company agreed to furnish radio time or television time of a stated amount or value to each grocery chain each week during the term of the contracts. These contracts provided that the broadcasting time so furnished would be used by the chain stores only for their own advertising. In consideration for such broadcasting time, the chain stores agreed to conduct in their stores a specific number of promotional displays of products sold therein, each such promotion to be continued for the duration of one week. The contract did not specify the products to be displayed or the dates for their promotion, but provided that such products were to be agreed upon and the dates for their promotion fixed upon the suggestion or designation of the broadcasting company, subject to the approval of the chain, and also subject to the right of the chain to decline to promote any product not deemed by it to be suitable for promotion in its store. These contracts were made without any prior commitment or agreement involving anyone other than the broadcasting company and the grocery chain.

After the above-described contracts between the broadcasting companies and the grocery chains had been entered into, the broadcasting companies solicited respondent and other manufacturers and sellers of grocery products to purchase radio or television time from them, and, as an added inducement for such purchase, offered in-store promotion of respondent's products in the chain stores with which the broadcasting companies already had contracts. The CBS plan was called "Supermarketing," and the ABC plan, "Mass Merchandising" or "Sell-A-Vision." In support of these plans, brochures and circulars were disseminated from time to time by the broadcasting companies, which informed respondent and others that by purchasing

radio or television time for certain periods in minimum amounts at the then regular station rate for such time, the advertiser would qualify, at no added cost, for one or more week-long promotional displays of its products in the stores of certain grocery chains. The brochures stated that the broadcasting company was able to furnish these displays by reason of the existing contracts which it had already negotiated with the grocery chains. Among other things, such brochures and circulars presented the advertising advantages of the sales-promotion plans as follows:

WABC–TV (Channel 7) offers you a remarkable sales plan—SELL-A-VISION

It combines—

1. The powerful selling force of WABC–TV, selling and demonstrating your product in the *home via television;* and

2. The effective selling force of WABC–TV's mass merchandising at the *point of purchase.*

CHANNEL 7 SELL-A-VISION IS PROMOTED 7 WAYS:

1. Floor displays
2. End displays
3. Dump displays
4. Basket displays
5. Shelf strips
6. Refrigerated space and signs
7. Wire bins at check-out counters

* * * for cigarettes, candy and refrigerated products, a special display pattern is worked out for each advertiser.

WBBM SUPERMARKETING—STEP BY STEP

1. As soon as client interest in WBBM Supermarketing is expressed, the WBBM Merchandising Department conducts a thorough check of each chain to determine products acceptability and the approximate extent of co-operation to be expected.

2. When the order is placed, a "plans" meeting is held with the client and agency to discuss:

(a) In-store displays
(b) Point-of-sales promotion material
(c) Client preference for dates of in-store promotions
(d) Newspaper and handbill support from chains
(e) Development of WBBM brochure for client's sales force

3. A meeting is scheduled with the client's sales force, or broker, or sales representatives to acquaint them fully of the mechanics of WBBM Supermarketing and to discuss any pertinent sales problems.

4. WBBM then contacts the chains and schedules the in-store promotions as per client's sales preference, and confirms these dates to the client, client's sales force, and agency.

5. An in-person call on the chain is made by the client's sales representative and WBBM Merchandising Manager Don Martin to finalize all details involved.

* * * * * * *

7. WBBM Merchandising Manager attends client's sales force meetings during the campaign to closely follow its progress and to assist on any problems which may arise. * * *

Respondent participated in the above-described plans by entering into contracts with the broadcasting companies for the purchase of broadcasting time. These contracts contain no reference to in-store promotion. In fact, respondent's contracts with ABC and CBS contain the following clause or its equivalent:

This contract contains the entire agreement between the parties and is not subject to oral modification.

The various payments made by respondent to the two broadcasting companies from 1953 through 1956 were, as follows:

| Year | Broadcasting company | Station | Amount paid | Yearly total |
|---|---|---|---|---|
| 1953 | ABC | WABC-TV (New York) | $11,804.13 | $11,804.13 |
| 1954 | ABC | WABC-TV (New York) | 72,497.14 | 113,720.60 |
| | CBS | WBBM (Chicago) | 41,223.46 | |
| 1955 | ABC | WABC-TV (New York) | 107,629.12 | 210,758.74 |
| | CBS | WBBM (Chicago) | 103,129.62 | |
| 1956 | ABC | WABC-TV (New York; to June 30, 1956) | 31,531.00 | 76,002.64 |
| | CBS | WBBM (Chicago; to June 30, 1956) | 44,471.64 | |

The two plans under which the above-listed payments were made both required of the respondent a minimum payment over a minimum period of time, to qualify for a minimum amount of in-store promotion. There were a number of variations of both of these plans. A recounting of the many details of such variations is here deemed unnecessary.

After the respondent had contracted with the broadcasting companies, as above described, the respondent was notified by them that respondent's cigarettes would be displayed in the stores of certain grocery chains on certain dates. In many instances, the respondent thereupon contacted the designated chain store for the purpose of arranging the type and details of the in-store promotional displays.

All of respondent's customers who received radio or television advertising time from the broadcasting companies, pursuant to the contracts described herein, were grocery chains who have been and are in competition in the resale of respondent's products with other grocery chains and independent customers of respondent who did not receive and who were not offered such broadcasting time or anything of value in lieu thereof.

## THE ISSUE

The section of the Clayton Act, as amended, under which this proceeding is brought provides, as follows:

§ 2.(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration

for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Since the complaint alleges and the answer denies that respondent paid money to said broadcasting companies for the benefit of certain of respondent's chain-store customers as compensation or in consideration for services or facilities furnished respondent by those customers, and that the benefits as furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the above-quoted provision of the Clayton Act, the issue herein is as follows:

Did respondent pay or contract for the payment of something of value to either of the two broadcasting companies named herein "for the benefit of a customer" and "as compensation or in consideration" for in-store sales promotion furnished by such customer to respondent, without making the same benefit available on proportionally equal terms to all its other customers competing with the customers so favored, within the meaning of section 2(d) of the Clayton Act as amended?

## THE ISSUE RESOLVED

Counsel supporting the complaint, in effect, contends that the facts herein stipulated show that the respondent, by adopting and using the sales-promotion plan of the broadcasting companies, attempted to escape legal accountability by doing indirectly that which respondent knew it could not lawfully do directly; that is, procure in-store promotion for its products by providing benefits in the form of broadcasting time for the use of a few favored customers without making the same or similar benefits available to its other competing customers. Counsel further contends that the several transactions heretofore described, instead of being unrelated business operations as they may appear when considered separately, constitute, in fact and in reality, one complete transaction, which can be properly evaluated only as a whole.

Counsel for respondent vigorously contradicts the above-stated contentions, and affirmatively asserts that the facts show that respondent did not pay or contract for the payment of anything of value to any of the broadcasting companies for the broadcasting time furnished to respondent's customers, and that the respondent did not pay or contract to pay anything of value as "compensation or in considera-

tion" for promotional services furnished to the respondent by any of its customers.

Let us re-examine the facts in the light of these contentions. The facts show that the sales-promotion plan in question, like the issue herein, is composed of three elements. First, we have a separate contract between the broadcasting company and a chain store, promising such store certain broadcasting time for its own puposes in return for in-store promotion of certain products to be later designated by the broadcasting company. Second, we have a separate contract, of a later date, between the broadcasting company and the respondent, providing for the purchase by the respondent of certain broadcasting time for its own advertising purposes, at the standard rate of payment then current. This contract is expressly limited to the provisions contained therein. Third, we have brochures and circulars disseminated by the broadcasting company for the purpose and with the effect of inducing the respondent to enter into the contract with the broadcasting company. We also have correspondence between and among the various parties to both contracts, relative to the various phases of the sales-promotion plan and the details of the in-store displays.

When the above transactions are considered in their interrelationship with each other, the true significance of the several phases of the sales-promotion plan, and the true relationship established between the parties thereto, become apparent. Thus we see that the in-store promotion feature of the plan, although astutely excluded from the narrow specifications of the contract between respondent and the broadcasting company, was actually the primary cause and the chief consideration for the execution of that contract. The respondent was required, not merely to purchase radio or television time in order to acquire the right to in-store promotions, but was required to purchase a specified minimum amount of such time in order to so qualify. It is reasonable to conclude, since the plan in question resulted from the difficulty of selling broadcasting time, that it was continued for the same reason, and that respondent would not have purchased broadcasting time at all, or would have purchased it only at a reduced price or in a lesser amount, except for the inducement of the in-store promotion. We also see that the respondent made the only money payment involved in the whole transaction, and was therefore the sole financial support of the plan. Without such support, it is reasonable to assume that the plan would not have matured, but would have proven financially unprofitable and therefore of short duration. It follows, therefore, that the respondent, as the sole financial supporter

of the plan, paid for the broadcasting time granted the chain store for in-store promotional displays, as well as for the broadcasting time purchased for respondent's own use.

The facts show clearly that the responsible officials of the respondent knew, or should have known, when they entered into the plan presented to respondent by the broadcasting company, that respondent, in adopting such plan, would be supplying the consideration which would constitute compensation for the benefits to be received by a few favored customers, to the prejudice of their competitors. The fact that the payment for the broadcasting time furnished to the favored chain stores was indirect rather than direct does not alter its legal or practical effect; neither does the fact that the respondent made the payment in question primarily in its own behalf and without a prior agreement with the chain store. On these points, counsel supporting the complaint very aptly quotes from the statement of counsel for the respondent, in his book entitled "Price Discrimination and Related Problems Under the Robinson-Patman Act," revised edition, 1953, page 116, as follows:

> It is no defense for a seller charged with a violation of either of these sections [sec. 2(d) and sec. 2(e)] to show that he furnished or paid for a service solely in his own interest and not pursuant to any prior understanding with the purchaser. These sections prohibit discrimination in merchandising allowances or services irrespective of whether the making of the payment or furnishing of the service was a term or condition of sale, or amounted to an indirect price discrimination.

Respondent also contends, as does Columbia Broadcasting System, Inc. as *amicus curiae*, that respondent's payment to the broadcasting company was in fulfillment of a separate, individual contract, and was in no wise a consideration for the in-store promotions later supplied. In fact, respondent contends that the supplying of the in-store promotions to the respondent was a gratuity, and was "free" within the interpretation of the Commission in the matter of *Walter J. Black, Inc.*, Federal Trade Commission docket No. 5571 (1953). This contention is fallacious, because we are not here concerned, as was the Commission in the case cited, with the question of whether a certain advertisement was misleading. On the contrary, we are here concerned with determining, from all the relevant facts, whether the payment made by the respondent to the broadcasting company was in reality compensation only for the broadcasting time purchased by the respondent for its own use, or whether such payment was made for a broader purpose, and did actually serve also as compensation for in-store displays furnished to the respondent by some of its chain-store customers. We are persuaded by the facts that the payment

by the respondent included the larger purpose, and was actually not only a self-serving payment, but also a payment on behalf of a few favored customers. We must conclude, therefore, that the case cited is in no way a precedent for the decision in the present proceeding.

Counsel for the respondent further contends that the consideration received by the chain stores in the form of broadcasting time was not contingent or dependent on any act of the respondent, but was dependent solely on the contract between the broadcasting company and the chain store. He points out that this contract provides for the furnishing of broadcasting time to the chain store in compensation for in-store promotions of products to be later designated by the broadcasting company. The facts reveal that such designation was not made by the broadcasting company until after the signing of its contract with respondent for the purchase of broadcasting time. From these facts the conclusion is inescapable that the broadcasting company, when entering into the contract with the chain store, contemplated completing the overall plan, of which that contract was merely a part, only after successful negotiation of a second contract with some manufacturer for the purchase of broadcasting time, which would enable the broadcasting company, thereafter, to designate that manufacturer's products as those to be promoted in the in-store displays. We must conclude, therefore, that the contention stressing the independent character of the first contract is altogether unrealistic, and disregards the fact that the first contract was only preliminary to the contract with the respondent, both contracts being, not independent transactions, but parts of a larger plan.

Counsel for the respondent seeks, in his brief, to invoke the rules of private contract law governing third-party beneficiaries. In connection with this argument, he states that

> Most of the States recognize the right of a third person to sue upon a contract made for such person's benefit. Under that doctrine as applied by the courts a contract is not regarded as made for the benefit of a third party unless the intent to benefit that person clearly appears. Benefit resulting incidentally from a contract made by others is not sufficient. By these tests, the station contracts here in evidence plainly were not contracts for the benefit of the chains, whether or not the terms of the merchandising plans are read into them.

This argument is specious. We are not here concerned with an application of the rules of private contract law, but with the broader and more realistic principles of public law, which require an examination of the entire plan in question in all its related parts. As hereinbefore stated, the omission from respondent's contract of the benefit intended to be conferred, in the form of broadcasting time, upon the chain store in consideration of the in-store displays

promised to respondent as an inducement to purchase broadcasting time for its own use appears, particularly in the light of the contentions herein made by counsel for respondent, to have been intentional, for the purpose of shielding the respondent from the force and effect of the Clayton Act. Such omission appears to be, palpably, an attempt to circumvent that Act by effectuating, indirectly through the agency of the broadcasting company, a practice which could not lawfully be effectuated directly.

The fact that this sales-promotion plan was instigated by the broadcasting company rather than by the respondent does not alter the fact that respondent, by accepting it, became a party thereto, and cannot now evade full responsibility therefor. Respondent's acceptance of the broadcasting company's tempting offer of in-store promotion would, of course, have become lawful, had the respondent required, as a condition of its acceptance, that the benefit of broadcasting time given in return for such in-store promotion be made equally available to all respondent's customers. Extension of the offer to all respondent's customers might have proved impracticable because of their number; but that factor offers no justification for respondent's unlawful conduct.

Counsel for the respondent cites the case of *State Wholesale Grocers* v. *The Great Atlantic and Pacific Tea Co.* (C.C.H. 1957 Trade Cases, pp. 73145, 73148–9, 73175) as condemning the contention of counsel supporting the complaint that the broadcasting companies would not continue to offer merchandising plans without the participation therein of manufacturers of grocery products, and that respondent, by its participation in the plan here involved, is contributing to and making possible the continuance thereof. Counsel, in quoting that decision, has disregarded the several basic, factual differences between that case and the instant proceeding. Lengthy analysis of such differences is here deemed unnecessary. Counsel for the respondent has wisely refrained from stating that the case cited is a valid precedent upon which to base a decision herein. We agree with that omission; the case cited is not a precedent nor a parallel to the instant proceeding, and can be of no assistance in the adjudication thereof.

## CONCLUSION

In reaching our conclusion in this proceeding, we recognize that the section of the Robinson-Patman Act amending the Clayton Act with which we are presently concerned was designed by Congress to protect small, independent merchants against unfair and discriminatory competitive advantages, in the form of payments,

rebates or advertising allowances, granted by manufacturers and distributors to the larger chain stores with which the small stores must compete at the retail level. In other words, as applied to the facts of the present proceeding, the provision of section 2(d) of the Clayton Act as amended was specifically designed to protect the small businessman buying respondent's products from the competitive injury resulting from respondent's large chain-store customers receiving advertising allowances in the form of broadcasting time in return for in-store sales promotion in which the smaller merchants were never given an opportunity to participate.

We recognize, also, that section 2(d) of the Clayton Act as amended makes no distinction between a benefit conferred directly and one conferred indirectly, but expressly forbids the conferring of any discriminatory benefit, by providing that no payment shall be made "for the benefit of a customer" unless the opportunity to share in that benefit is equally bestowed upon all competing customers.

In the light of these principles, we must conclude that, in the present proceeding, the respondent, by its payment to the broadcasting company, paid or contracted to pay something of value for its own benefit and also for the benefit of certain chain-store customers in consideration for in-store promotional facilities furnished to respondent by such favored customers, without making the same or similar benefits available on proportionally equal terms to all respondent's other customers who compete in the retail distribution of respondent's products with the customers so favored. These acts and practices clearly violate section 2(d) of the Clayton Act as amended. Accordingly,

*It is ordered*, That respondent, P. Lorillard Co., a corporation, its officers, agents, representatives or employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of grocery products, including cigarettes, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

DECISION OF THE COMMISSION

Respondent, P. Lorillard Co., having filed an appeal from the hearing examiner's initial decision finding that said respondent has violated the provisions of section 2(d) of the Clayton Act, as amended, and ordering it to cease such violation; and

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondent and counsel in support of the complaint and the brief of Columbia Broadcasting System, Inc., as *amicus curiae*, and having determined that the findings and conclusions in the initial decision are fully substantiated on the record and that the order contained therein is appropriate in all respects to dispose of this matter:

*It is ordered*, That respondent's appeal be, and it hereby is, denied.

*It is further ordered*, That the hearing examiner's initial decision filed October 9, 1957, be, and it hereby is , adopted as the the decision of the Commission.

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

IN THE MATTER OF

# JOSKE BROS. CO.

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

*Docket 6992. Complaint, Dec. 16, 1957—Decision, May 7, 1958*

Consent order requiring furriers in San Antonio, Tex., to cease violating the Fur Products Labeling Act by labeling which contained fictitious prices and misrepresented the regular retail selling prices; by invoicing which did not comply with requirements; by advertising which failed to disclose the names of animals producing certain furs, the country of origin of imported furs, and the fact that certain products contained artificially colored, or cheap or waste, fur, and which represented falsely price reductions and percentage savings; and by failing to maintain adequate records on which the pricing claims were based.

*Mr. S. F. House* supporting the complaint.
*Mr. Gilbert M. Denman, Jr.*, for respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On December 16, 1957, the Federal Trade Commission issued a complaint charging Joske Bros. Co., a corporation, hereinafter called respondent, with misbranding and falsely and deceptively invoicing and advertising fur products in violation of the Federal Trade Commission Act and the Fur Products Labeling Act.

After issuance and service of the complaint, the respondent, its counsel and counsel supporting the complaint entered into an agreement for a consent order. The order disposes of the matters complained about. The agreement had been approved by the director and assistant director of the Bureau of Litigation.

The pertinent provisions of said agreement are as follows: Respondent admits all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; the record herein shall consist solely of the complaint and the agreement; respondent waives the requirement that the decision must contain a statement of findings of fact and conclusion of law; respondent waives further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondent waives any right to challenge

or contest the validity of the order entered in accordance with the agreement and the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

The undersigned hearing examiner having considered the agreement and proposed order and being of the opinion that the acceptance thereof will be in the public interest, hereby accepts such agreement, makes the following jurisdictional findings, and issues the following order:

JURISDICTIONAL FINDINGS

1. Respondent Joske Bros. Co., trading as Joske's of Texas, is a corporation existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at Alamo Plaza, San Antonio, Tex.

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

ORDER

*It is ordered*, That respondent Joske Bros. Co., a corporation, and its officers, whether trading as Joske's of Texas or any other trade name, or in any other manner, and respondent's representatives, agents, and employees, directly or though 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. Misbranding fur products by:

1. Representing on lables affixed to the fur products or in any other manner, that certain amounts are the regular and usual prices of fur products when such amounts are in excess of the prices at which respondent usually and customarily sold such products in the recent regular course of its business.

B. 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 invioce;

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

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

2. Setting forth information required under section 5(b)(1) of the Fur Products Labeling 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:

1. Fails to disclose:

(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 bleached, dyed, or otherwise artificially colored fur, when such is the fact;

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

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

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

3. Represents directly or indirectly through percentage savings claims, that the regular or usual retail prices charged by respondent for fur products in the recent regular course of its business, are reduced in direct proportion to the amounts of savings stated, when contrary to the fact.

D. Making price claims or representation in advertisements respecting reduced prices, comparative prices or percentage savings of fur products, unless there are maintained by respondent adequate records disclosing the facts upon which such claims or representations are based.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

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

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

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

IN THE MATTER OF

# HYBERN, INC., ET AL.

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

*Docket 7087. Complaint, Jan. 14, 1958—Decision, May 7, 1958*

Consent order requiring importers in Los Angeles, engaged in selling a wide variety of merchandise at retail through their retail stores and by mail order to customers direct, to cease advertising falsely that binoculars were selling at great price reductions and were identical or similar to U.S. Army issue; and to cease selling binoculars, telescopes, monoculars, and like products without clearly disclosing the Japanese origin.

*Mr. Michael J. Vitale* and *Mr. Alvin D. Edelson* for the Commission.
No appearance for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding issued January 14, 1958, charges the respondents Hybern, Inc., Hyfield, Inc., and Sepulanat, Inc., corporations, located at 4400 Sunset Boulevard, Los Angeles, Calif., and Hyman Fink and Bernard Field, individually and as officers of said corporations, located at the same address as the corporate respondents, with violation of the provisions of the Federal Trade Commission Act in the sale and distribution of optical equipment, binoculars, monoculars, telescopes, or other similar products, which respondents import from Japan and retail under the trade name "Akron," or other trade names.

After the issuance of the complaint, respondents Hybern, Inc., Hyfield, Inc., and Sepulanat, Inc., corporations, and Hyman Fink and Bernard Field, individually and as officers of said corporations, entered into an agreement containing consent order to cease and desist with counsel in support of the complaint, disposing of all the issues in this proceeding, which agreement was duly approved by the director and assistant director of the Bureau of Litigation.

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

By the terms of said agreement, the said respondents admitted all the jurisdictional facts alleged in the complaint and agreed that the

record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with the allegations.

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

Respondents further agreed that the order to cease and desist, issued in accordance with said agreement, shall have the same force and effect as if made after a full hearing.

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

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

ORDER

*It is ordered,* That respondents Hybern, Inc., a corporation, Hyfield, Inc., a corporation, Sepulanat, Inc., a corporation, their officers, and Hyman Fink and Bernard Field, individually and as officers of the corporate respondents, and their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of binoculars, monoculars, telescopes, or other merchandise, do forthwith cease and desist from:

1. Representing, directly or by implication, that any specific amount is the regular retail price of merchandise when such amount is in excess of the price at which such merchandise is customarily and usually sold at retail by the respondents in the normal course of their business.

2. Representing, directly or by implication, that their binoculars are identical, or similar to U.S. Army issue binoculars; or identical or similar to any other type of binocular, when such is not the fact.

3. Offering for sale or selling any product, the whole or any substantial part of which was made in Japan, or in any other foreign country, without clearly and conspicuously disclosing the foreign origin of such product or part 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 7th day of May 1958, become the decision of the Commission; and, accordingly:

*It is ordered*, That 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

# CROSSE & BLACKWELL CO.

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

*Docket 6463. Complaint, Nov. 21, 1955—Decision, May 8, 1958*

Order requiring a producer of a wide variety of food products, with annual sales amounting to approximately $14 million, to cease violating section 2(d) of the Clayton Act by making payments for advertising or other services in connection with the sale of its products to certain food chains without making such allowances available on proportionally equal terms to all their competitors.

*Mr. Andrew C. Goodhope, Mr. Fredric T. Suss* and *Mr. Alvin D. Edelson* for the Commission.

*Niles, Barton, Yost & Dankmeyer*, of Baltimore, Md. and *Mr. James W. Cassedy*, of Washington, D.C. for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER.

This proceeding began with complaint, which issued November 21, 1955, charging the respondent with having made payments of advertising allowances to some of its customers while neither offering or paying similar or proportionate advertising allowances to others of its customers competitively engaged with the recipients in the resale of respondent's products, all in violation of subsection (d) of section 2 of the Clayton Act (U.S. Title 15, sec. 13). Thereafter, initial hearing having been scheduled February 6, 1956, and subpena duces tecum having been served upon respondent's appropriate official for production of books and records indicating the advertising payments alleged, respondent moved to quash said subpena, which the undersigned denied on January 20, 1956, and thereafter on January 23, 1956, respondent filed a motion for a bill of particulars and dismissal of the complaint. Both of these motions were denied by the undersigned hearing examiner on January 25, 1956, whereupon respondent appealed the denial of its motion to quash subpena duces tecum to the Commission, which appeal the Commission, on March 15, 1956, denied. On February 7, 1956, respondent filed its answer to the complaint, and hearing for the reception of testimony and evidence was again fixed for March 28, 1956, the subpena previously served being made returnable at that time.

At this hearing the president of respondent appeared in response to the subpena but refused to produce the documents, books and records

called for therein, asserting that the Federal Trade Commission had no authority under its act or under the Clayton Act to issue and require the production of documentary evidence in a case involving alleged violation of the Clayton Act.

Thereafter counsel supporting the complaint, in the name of the Commission, brought an original action in the United States District Court of Baltimore against the president of the respondent, in accordance with the appropriate provisions of the Federal Trade Commission Act, which action resulted in a decision upholding the authority of the Federal Trade Commission to issue a subpena duces tecum for the enforcement of the Clayton Act (*F.T.C.* v. *Menzies*, 145 F. Supp. 164). Thereafter the defendant in that case appealed to the United States Circuit Court of Appeals for the Fourth Circuit for reversal of the judgment of the District Court which, after argument, consideration, briefs and facts, affirmed the judgment below on March 7, 1957. Thereafter, within the time allowed, petition for certiorari to the Supreme Court of the United States was filed by defendant in this case and denied.

Hearing was again set June 18, 1957, but prior thereto, on May 27, 1957, respondent filed a motion to dismiss the entire proceeding on the ground that it was subject to the exclusive jurisdiction of the Secretary of Agriculture by virtue of exclusionary provisions of both section 5(a)(6) of the Federal Trade Commission Act (15 U.S.C. sec. 45) and the Packers and Stockyards Act of 1921 (7 U.S.C. sec. 227). After a brief hearing on facts in support of this motion only, and consideration of briefs and arguments, complaint was dismissed by the undersigned in an initial decision dated August 2, 1957. Prompt appeal to the Commission was there upon filed and prosecuted by counsel in support of the complaint, and the Commission on consideration of the record, briefs, and arguments, on November 13, 1957, reversed the dismissal and remanded the proceeding to the undersigned for further proceedings in accordance with that opinion.

Thereafter the case was set down for the fourth time for trial to begin February 17, 1958, but prior thereto, on January 30, 1958, in order to avoid the expense and time incident to trial on the merits, counsel in support of the complaint and counsel for respondent entered into a stipulation on the record at a special hearing held for that purpose which stipulation provides in substance that counsel supporting the complaint has available substantial evidence, both testimonial and documentary, which if received in evidence would sustain all of the factual allegations of the complaint, and that respondent does not contradict such proof, respondent expressly reserving, however, its

claim that it is under the exclusive jurisdiction of the Secretary of Agriculture and that the Federal Trade Commission has no jurisdiction of the cause of action. In addition it was stipulated that without further notice the undersigned and the Commission could proceed to make findings of fact draw conclusions and enter an appropriate order as though such evidence was in the record. In accordance with this stipulation, and on the entire record, the hearing examiner makes his following findings of fact.

## FINDINGS OF FACT

Respondent Crosse & Blackwell Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 6801 Eastern Avenue, Baltimore, Md.

Respondent is now and has been engaged in the business of producing and selling a wide variety of food products. Respondent sells approximately 150 products under the brand name "Crosse & Blackwell" and approximately 35 products under the brand name "Keiller." The principal items produced and sold by respondent are canned nut rolls, marmalades, soups, tomato products, pickles, and relishes. Respondent sells its products through food brokers and distributors, and, in addition, sells its products direct to customers who sell at retail, including retail chain store organizations. Sales made by respondent of its products are substantial, amounting to approximately $14 million annually.

In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended. Respondent ships its products, or causes them to be transported, from its principal place of business located in the State of Maryland to customers located in the same and other States of the United States and the District of Columbia.

In the course and conduct of its business in commerce, respondent has paid, or contracted for payment of, something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

For example, during the year 1955 respondent contracted to pay and did pay $100 to the Giant Food Shopping Center, Inc., Washington, D.C., and $2,100 to the Food Fair Stores, Inc., Philadelphia,

Pa., as compensation or as an allowance for advertising or other service or facility furnished by or through Giant Food Shopping Center, Inc., and Food Fair Stores, Inc., in connection with their offering for sale or sale of products sold to them by respondent. Such compensation or allowance was not offered or otherwise made available by respondent on proportionally equal terms to all other customers competing with Giant Food Shopping Center, Inc., or Food Fair Stores, Inc., in the sale and distribution of respondent's products.

CONCLUSION

The acts and practices of the respondent, as alleged above, violate subsection (d) of section 2 of the Clayton Act, amended by the Robinson-Patman Act.

ORDER

*It is ordered*, That respondent Crosse & Blackwell Co., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the sale of canned nut rolls, marmalades, soups, tomato products, pickles, relishes and other products in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of any customer, any payment of anything of value as compensation or in consideration for any advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of canned nut rolls, marmalades, soups, tomato products, pickles, relishes, and other products sold to him by respondent, unless such payment is affirmatively offered or otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale of such canned nut rolls, marmalades, soups, tomato products, pickles, relishes, and other products.

OPINION OF THE COMMISSION

By Gwynne, Chairman:

Respondent is charged with violation of section 2(d) of the amended Clayton Act by the giving of illegal advertising allowances.

During the proceedings herein, respondent filed a motion to dismiss the case on the ground that it was subject to the exclusive jurisdiction of the Secretary of Agriculture by virtue of section 5(a)(6) of the Federal Trade Commission Act and the Packers and Stockyards Act of 1921. The hearing examiner sustained the motion and dismissed the complaint.

On appeal, the Commission reversed the holding of the hearing examiner and remanded the case for further proceedings. Counsel for both parties have now entered into a stipulation disposing of the case without a trial on the merits and making it unnecessary to introduce evidence in support of the complaint. The hearing examiner accordingly made findings of fact, conclusion of law and entered an order against respondent.

Respondent's appeal raises only the issue as to whether jurisdiction over the acts and practices charged against respondent in the complaint is exclusively in the Secretary of Agriculture, and that the Federal Trade Commission is without jurisdiction. The Commission considered this question in the previous appeal of respondent and the opinion filed therein sets out our views.

The findings, conclusion and order of the hearing examiner are adopted as the findings, conclusion and order of the Commission.

For the reasons set out in our previous opinion, respondent's appeal is denied, and it is directed that an order issue accordingly.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision filed February 6, 1958, including briefs in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and adopting the initial decision as the decision of the Commission:

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

IN THE MATTER OF

# SUNKIST GROWERS, INC.

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

*Docket 6595. Complaint, July 19, 1956—Decision, May 8, 1958*

Consent order requiring a Los Angeles producer of fresh and frozen fruit juices to cease discriminating in price in violation of section 2(d) of the Clayton Act by paying broadcasting companies for time furnished to certain favored grocery chains for their own advertising purposes in return for which the participating chains gave in-store promotions to respondent's products in their stores located in the trade area reached by the radio or TV station utilized, without making compensation for such benefits available on proportionally equal terms to all the competitors of the favored customers.

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

*Pope, Ballard & Loos*, by *Mr. Karl D. Loos, Mr. Dickson R. Loos* and *Mr. P. C. King, Jr.*, of Washington, D.C., for respondent.

## COMPLAINT

The Federal Trade Commission having reason to believe that Sunkist Growers, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of subsection (d) of section 2 of the Clayton Act (U.S.C., title 15, sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Sunkist Growers, Inc., is a corporation organized, existing, and doing business under the laws of the State of California with its principal office and place of business located at 707 West Fifth Street, Los Angeles, Calif.

PAR. 2. Respondent is now and for a number of years has been engaged in the business of selling and distributing its products, including fresh and frozen juices, in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers, including independent grocers and grocery chainstores, located throughout some of the States of the United States and in the District of Columbia.

PAR. 3. In the course of said business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers

in connection with the offering for sale or sale of products sold to them by respondent, and payments were not made available on proportionally equal terms to all other customers competing in the distribution of respondent's products.

Among the payments alleged herein were payments made by respondent to certain broadcasting companies for the benefit of certain favored customers of respondent as compensation and in consideration for promotional services or facilities furnished by these favored customers in connection with the offering for sale and sale of respondent's products. Said benefits consisted of time furnished through such broadcasting companies to the favored customers for said customers' own advertising purposes. The examples set forth in paragraphs 4 through 6 herein are illustrative of the methods by which respondent made such payments to certain favored customers and failed to make them available to its other customers.

PAR. 4. American Broadcasting-Paramount Theaters, Inc. (and certain of its subsidiaries and affiliates), hereinafter referred to as "ABC," serving as a medium or intermediary between respondent and other manufacturers and distributors of grocery products on the one hand, and certain grocery chains on the other hand, introduced a "mass merchandising" plan for TV in 1952, and a "radiodizing" plan for radio in 1955 in the metropolitan New York City area. Similar plans have been introduced by ABC in other metropolitan areas since that time. Under these plans ABC entered into agreements with certain grocery chains which provided that said grocery chains were to receive free TV time, and/or radio time, for the purpose of their own advertising, the value of such free time varying from $750 per week for the smallest grocery chain to approximately $9,500 per week for the largest grocery chain participating. In return the participating grocery chains agreed to give in-store promotions to the aforesaid products of respondent in their stores located in the trade area reached by the ABC radio or TV station utilized. Thereafter, ABC solicited a number of manufacturers and distributors of grocery products, including respondent, to purchase TV and/or radio time over its facilities at the regular rate by offering as an extra inducement the above referred to in-store promotions in the stores of the participating grocery chains located in the trade area reached by the ABC radio or TV station utilized.

Using these plans, respondent has entered into contracts in the following amounts with ABC which entitled it to TV and/or radio time and in-store promotions in stores of the participating grocery chains:

| ABC station | Location | Dates | Approximate amount paid by respondent |
|---|---|---|---|
| WABC-TV | New York City | Aug. 1952 to Aug. 8, 1954 | $62,247 |

Compensation for in-store promotional services furnished by respondent's grocery chain customers who participated in the plans as above described is included in the above payments made by respondent to ABC. Such compensation was not offered or otherwise made available by respondent on proportionally equal terms to all other customers competing with the favored customer or customers in the sale and distribution of respondent's products.

PAR. 5. Columbia Broadcasting System (and certain of its subsidiaries and affiliates), hereinafter referred to as "CBS," serving as a medium or intermediary between respondent and other manufacturers and distributors of grocery products on the one hand, and certain grocery chains on the other hand, introduced a "super marketing" plan in the metropolitan New York City area in 1951. Similar plans have been introduced by CBS in other metropolitan areas since that time. Under these plans CBS entered into agreements with certain grocery chains which provided that said grocery chains were to receive free radio time for the purpose of their own advertising, the value of such free time varying from $100 per week for the smallest grocery chain to approximately $4,700 per week for the largest grocery chain participating. In return the participating grocery chains agreed to give in-store promotions to the aforesaid products of respondent in their stores located in the trade area reached by the CBS radio station utilized. Thereafter, CBS solicited a number of manufacturers and distributors of grocery products, including respondent, to purchase radio time over its facilities at the regular rate by offering as an extra inducement the above referred to in-store promotions in the stores of the participating grocery chains located in the trade area reached by the CBS radio station utilized.

Using these plans, respondent has entered into contracts in the following amounts with CBS which entitled it to radio time and in-store promotions in stores of the participating grocery chains:

| CBS station | Location | Dates | Approximate amount paid by respondent |
|---|---|---|---|
| WCBS | New York City | June 1, 1954 to Oct. 29, 1955 | $39,596 |

Compensation for in-store promotional services furnished by respondent's grocery chain customers who participated in the plans as above described is included in the above payments made by respondent to CBS. Such compensation, or allowance, was not offered or otherwise made available by respondent on proportionally equal terms to all other customers competing with the favored customer or customers in the sale and distribution of respondent's products.

PAR. 6. National Broadcasting Co. (and certain of its subsidiaries and affiliates), hereinafter referred to as "NBC," serving as a medium or intermediary between respondent and other manufacturers and distributors of grocery products on the one hand, and certain grocery chains on the other hand, introduced a merchandising plan called "Chain Lighting" in the metropolitan New York City area in 1951. Similar plans have been introduced by NBC in other metropolitan areas since that time. Under these plans NBC entered into agreements with certain grocery chains which provided that said grocery chains were to receive free radio time for the purpose of their own advertising, the value of such free time varying from $100 per week for the smallest grocery chain to approximately $6,600 per week for the largest grocery chain participating. In return the participating grocery chain agreed to give in-store promotions to the aforesaid products of respondent in their stores located in the trade area reached by the NBC radio station utilized. Thereafter, NBC solicited a number of manufacturers and distributors of grocery products, including respondent, to purchase radio time over its facilities at the regular rate by offering as an extra inducement the above referred to in-store promotions in the stores of the participating grocery chains located in the trade area reached by the NBC radio station utilized.

Using these plans, respondent has entered into contracts in the following amounts with NBC which entitled it to radio time and in-store promotions in stores of the participating grocery chains:

| NBC station | Location | Dates | Approximate amount paid by respondent |
|---|---|---|---|
| WRCA | New York City | May 2, 1954 to July 31, 1954 | $19,500 |

Compensation for in-store promotional services furnished by respondent's grocery chain customers who participated in the plans as above described is included in the above payments made by respondent to NBC. Such compensation was not offered or otherwise made available by respondent on proportionally equal terms to all

other customers competing with the favored customer or customers in the sale and distribution of respondent's products.

PAR. 7. The acts and practices of respondent as alleged above are in violation of the provisions of subsection (d) of section 2 of the Clayton Act, as amended.

## INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on July 19, 1956, charging respondent with purchasing radio and TV time from certain broadcasting companies for the benefit of certain of its favored chainstore customers, as compensation to such customers for in-store services furnished by them to promote the sale of respondent's products, without offering or otherwise making such radio and TV time available on proportionally equal terms to all other of respondent's customers who compete with such favored customers in the sale and distribution of respondent's products, in violation of section 2(d) of the Clayton Act (U.S.C., title 15, sec. 13), as amended by the Robinson-Patman Act.

On April 4, 1957, respondent, its 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.

Respondent Sunkist Growers, Inc., is identified in the agreement as a California corporation, with its office and principal place of business located at 707 West Fifth Street, Los Angeles, Calif.

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

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

All parties further agree that this agreement is entered into subject to the condition that the effective date of the initial decision based thereon shall be stayed by the Commission, and that the initial decision shall not become the decision of the Commission herein, until and unless the Commission issues an order to cease and desist in the proceeding entitled "In The Matter Of Piel Bros., Inc., Docket No. 6598"; and that, in the event a Commission order to cease and desist issued in that proceeding is vacated and set aside on its merits on an appeal taken to any United States court, within ninety days after the effective date of such order, then the order to cease and desist herein shall cease to be of any effect.

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 respondent and over its acts and practices as alleged in the complaint; and finds that this proceeding is in the public interest. Therefore,

*It is ordered*, That respondent, Sunkist Growers, Inc., a corporation, its officers, agents, representatives or employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of grocery products, including fresh and frozen juices, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's said products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

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

The Commission, on June 6, 1957, having issued an order extending until further order the date on which the hearing examiner's initial decision in this proceeding otherwise would have become the decision of the Commission under section 3.21 of the rules of practice; and

The purpose of said order having been to effectuate a condition in the agreement containing a consent order theretofore executed by the

respondent and counsel in support of the complaint, which condition was that the initial decision based on the agreement should not become the decision of the Commission unless and until the Commission should issue an order to cease and desist in the matter of Piel Bros., Inc., Docket No. 6598; and

The Commission, on May 7, 1958, having adopted as its own decision the hearing examiner's initial decision containing an order to cease and desist in the matter of Piel Bros., Inc., Docket No. 6598:

*It is ordered*, That the hearing examiner's initial decision herein, filed May 2, 1957, be, and it hereby is, adopted as the decision of the Commission in disposition of this proceeding.

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

IN THE MATTER OF

# MID-TEX CORPORATION ET AL.

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

*Docket 6788. Complaint, Apr. 30, 1957—Decision, May 8, 1958*

Consent order requiring a corporation in Pittsburgh, Pa., one of several affiliated corporations charged in the complaint, to cease using bait advertising to obtain leads to prospective purchasers to whom they attempted to, and frequently did, sell much higher priced storm windows and screens, disparaging the advertised products to induce cancellation of purchase orders therefor and subsequent purchase of the higher priced products.

As to the remaining respondents, the matter was settled by a similar order dated Oct. 30, 1958, 55 F.T.C. ——.

By *J. Earl Cox*, hearing examiner.

*Mr. Edward F. Downs* and *Mr. Thomas A. Sterner* for the Commission.

*Mr. Maurice F. Baruth*, of Pittsburgh, Pa., and *Mr. David Fisher*, of New York, N.Y., for respondents Famous Window Co. of Pennsylvania, Harold Brown and Jesse Kessler.

## INITIAL DECISION AS TO RESPONDENTS DOLPH GREENE AND HERBERT ARMSTRONG INDIVIDUALLY AND AS TO FAMOUS WINDOW CO. OF PENNSYLVANIA, A CORPORATION, AND HAROLD BROWN AND JESSE KESSLER, INDIVIDUALLY AND AS OFFICERS OF SAID CORPORATION

The complaint in this proceeding charges that the several respondents have violated the Federal Trade Commission Act through the use of false, misleading and deceptive advertising in connection with the sale and distribution of aluminum storm windows, screens, and doors. The respondents are charged with representing that certain of their products were available to the public and could be procured at the various low prices listed in newspaper, radio, and television advertisements, whereas, in fact, "respondents were not interested in selling and were not making a bona fide offer to sell" the advertised items, but wanted to obtain leads and information "on persons interested in purchasing" products of better quality and higher prices than those advertised.

Respondents Dolph Greene and Herbert Armstrong were not individually served with a summons and copy of the complaint, and the complaint should, therefore, be dismissed without prejudice, as to them.

Subsequent to the issuance of the complaint, respondents Famous Window Co. of Pennsylvania, a corporation, and Harold Brown and Jesse Kessler, individually and as officers of said corporation, entered into an agreement containing consent order to cease and desist, which agreement was duly approved by the Director and an Assistant Director of the Commission's Bureau of Litigation.

The other respondents named in the complaint herein have either opposed the allegations of the complaint; have rested their case following the presentation of evidence in support of such allegations; or are in default for answer and appearance. As to them, another and separate initial decision will hereafter be issued.

The agreement identifies respondent Famous Window Co. of Pennsylvania as a Delaware corporation, with its office and principal place of business located at 2757 Saw Mill Run Boulevard, Pittsburgh, Pa., and respondents Harold Brown and Jesse Kessler as individuals and officers thereof. Respondents signatory thereto admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. The agreement disposes of all of this proceeding as to the respondents signatory thereto, who waive any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

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

As to the respondents who entered into said agreement, the order agreed upon fully disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein as

being in violation of the Federal Trade Commission Act. The hearing examiner, therefore, accepts the agreement containing consent order to cease and desist as part of the record upon which this decision is based; finds this proceeding to be in the public interest; and issues the following order, which conforms to the order set forth in said agreement except that it includes a provision dismissing the complaint as to the two other respondents hereinabove found not to have been duly served:

*It is ordered,* That respondent Famous Window Co. of Pennsylvania, a corporation, and its officers and respondents, Harold Brown and Jesse Kessler, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of storm windows, screens, or any other home improvement 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 certain storm windows, screens, or any other home improvement products are offered for sale when such offer is not a *bona fide* offer to sell such storm windows, screens, or other home improvement products.

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

The Commission having considered the hearing examiner's initial decision, filed March 11, 1958, purporting to dispose of this proceeding as to the respondents, Famous Window Co. of Pennsylvania, a corporation, and Harold Brown and Jesse Kessler, individually and as officers of said corporation, and Dolph Greene and Herbert Armstrong, on the basis of an agreement containing a consent order to cease and desist theretofore executed by Famous Window Co. of Pennsylvania, Harold Brown and Jesse Kessler and counsel in support of the complaint; and

It appearing that the order contained in the initial decision departs from the order agreed upon by the parties in that it provides for dismissal of the complaint without prejudice as to Dolph Greene and Herbert Armstrong; and

The Commission being of the opinion that the initial decision should be corrected in this respect:

*It is ordered,* That the last paragraph in the order contained in the initial decision be, and it hereby is, eliminated.

*It is further ordered*, That the initial decision as so modified shall, on May 8, 1958, become the decision of the Commission.

*It is further ordered*, That the respondents, Famous Window Co. of Pennsylvania, a corporation, and Harold Brown and Jesse Kessler, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this decision, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order contained in the aforesaid initial decision as modified.

IN THE MATTER OF

# GOLDRING'S INC.

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

*Docket 6991. Complaint, Dec. 16, 1957—Decision, May 8, 1958*

Consent order requiring a New York City furrier to cease violating the Fur Products Labeling Act by using fictitious prices in newspaper advertisements and on labels and failing to maintain adequate records as a basis for such advertised prices; by failing in advertising to reveal the names of fur-bearing animals, the country of origin of imported furs, or that certain furs were artificially colored; by mutilating attached labels; and by failing in other respects to comply with the labeling and invoicing requirements of the act.

*Mr. S. F. House*, counsel supporting the complaint.

*Goldstein, Judd & Gurfein* by *Mr. Saul A. Shames* of New York, N.Y. for respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

On December 16, 1957, the Federal Trade Commission issued a complaint charging Goldring, Inc.,[1] a corporation, hereinafter called respondent, with misbranding, falsely and deceptively invoicing and advertising fur products in violation of the Federal Trade Commission Act and the Fur Products Labeling Act.

After issuance and service of the complaint, the respondent, its counsel and counsel supporting the complaint entered into an agreement for a consent order. The order disposes of the matters complained about. The agreement has been approved by the Director and Assistant Director of the Bureau of Litigation.

The pertinent provisions of said agreement are as follows: The respondent admits all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the offical record of the proceeding unless and until it becomes a part of the decision of the Commission; the record herein shall consist solely of the complaint and the agreement; respondent waives the requirement that the decision must contain a statement of findings of fact and conclusion of law; respondent waives further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside

[1] Incorrectly identified in the complaint as Goldring's Inc.

in the manner provided by statute for other orders; respondent waives any right to challenge or contest the validity of the order entered in accordance with the agreement and the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

The undersigned hearing examiner having considered the agreement and proposed order and being of the opinion that the acceptance thereof will be in the public interest, hereby accepts such agreement, makes the following jurisdictional findings, and issues the following oorder:

JURISDICTIONAL FINDINGS

1. Respondent, Goldring, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 500 Seventh Avenue, New York, N.Y.

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

ORDER

*It is ordered*, That respondent Goldring, Inc., a corporation and its officers, and respondent's representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, 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. Misbranding fur products by:

(1) Representing on labels affixed to the fur products or in any other manner, that certain amounts are its regular and usual prices of fur products when such amounts are in excess of the prices at which respondent usually and customarily sold such products in the recent regular course of its business.

(2) 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 by the rules and regulations promulgated under the Fur Products Labeling Act;

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.

(3) Setting forth on labels attached to fur products:

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

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

(4) Failure to show on labels attached to fur products an item number or mark assigned to fur products as required by rule 40(a) of the rules and regulations.

B. Mutilating or participating in the mutilation 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.

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 products 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.

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

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:

(1) Fails to disclose:

a. The name or names of the animal or animals which produced the fur or furs contained in the fur products, as set forth in the Fur Products Name Guide and as prescribed under the said rules and regulations;

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

c. The name of the country of orgin of any imported furs contained in a fur product;

d. All the information required under section 5(a) of the Fur Products Labeling Act and the rules and regulations thereunder in close proximity with each other and in type of equal type and conspicuousness.

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

(3) Represents directly or by implication through percentage savings claims, that its regular or usual retail prices charged by respondent for fur products in the recent regular course of its business, are reduced in direct proportion to the amounts of savings stated, when contrary to the fact.

E. Making price claims and representations of the types referred to in paragraph D2 and D3 above unless there are maintained by respondent full and adequate records disclosing the facts upon which such claims or representations are based.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 8th day of May, 1958, become the decision of the Commission; and, accordingly:

*It is ordered*, That the respondent, Goldring, Inc. (incorrectly

identified in the complaint as Goldring's, Inc.), herein shall within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.

IN THE MATTER OF

# ISIDORE FUCHS, INC., ET AL.

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

*Docket 6882. Complaint, Sept. 11, 1957—Decision, May 9, 1958*

Consent order requiring a furrier in New York City to cease violating the Fur Products Labeling Act by failing to invoice certain fur products as required.

*Mr. Morton Nesmith* and *Mr. John J. Mathias* for the Commission.
*Mr. Isidore Fuchs*, of Brooklyn, N.Y., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents with falsely and deceptively invoicing 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.

After the issuance of the complaint, respondents and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director and an Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the hearing examiner for consideration.

The agreement identifies respondent Isidore Fuchs, Inc. as a New York corporation, whose address is 214 West 29th Street, New York, N.Y.; and respondent Isidore Fuchs as the principal officer of said corporation, having his address at 3255 Shore Parkway, Brooklyn, N.Y. The agreement states that the individual respondent, Isidore Fuchs, formulates, directs and controls the acts, practices and policies of the said corporate respondent.

The agreement provides, among other things, that 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; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an ad-

mission by the respondents that they have violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

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

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

*It is ordered*, That the respondents Isidore Fuchs, Inc., a corporation, and its officers, and Isidore Fuchs, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the manufacture for introduction into commerce, or the sale, advertising, offering for sale, transportation or distribution of fur products in commerce, or in connection with the manufacture for sale, 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:

1. Falsely or deceptively invoicing fur products by:

(a) Failing to furnish invoices to purchasers of fur products showing:

(1) 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;

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

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

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

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

(6) 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 shall, on the 9th day of May 1958, become the decision of the Commission; and, accordingly:

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

Decision

IN THE MATTER OF

# KANTROWITZ & NEIDITCH, INC., DOING BUSINESS AS CONNECTICUT FURRIERS OF HARTFORD ET AL.

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

*Docket 6975. Complaint, Dec. 11, 1957—Decision, May 9, 1958*

Consent order requiring furriers in Hartford, Conn., to cease violating the Fur Products Labeling Act by advertising in newspapers which did not identify the animals producing certain furs or disclose when furs were artificially colored, and which advertised comparative prices not based on current market values; by failing to keep adequate records as a basis for such pricing claims; and by failing in other respects to comply with the invoicing and labeling requirements of the Act.

*Thomas A. Ziebarth*, Esq., for the Commission.
*Charles Gold*, Esq., of New York, N.Y., for the respondents.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

The complaint in this proceeding, issued December 11, 1957, charges respondents Kantrowitz & Neiditch, Inc., a corporation, and Samuel Kantrowitz and Israel Neiditch, individually and as officers of the respondent corporation, with violation of the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and the rules and regulations promulgated under the last named Act, in connection with the sale, advertising and offering for sale, transportation and distribution, shipping and receiving in commerce, of fur and fur products, as the designations "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act.

After the issuance of said complaint respondents, on February 25, 1958, entered into an agreement for a consent order with counsel in support of the complaint, disposing of all of the issues in this proceeding, which agreement was duly approved by the Director and Assistant Director of the Bureau of Litigation of the Federal Trade Commission. It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the respondents admitted all of the jurisdictional allegations of the complaint and agreed that the record herein may be taken as though the Commission had made

findings of jurisdictional facts in accordance with such allegations. By said agreement the parties expressly waived a hearing before the hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner and the Commission to which the respondents may otherwise be entitled under the Federal Trade Commission Act or the rules of practice of the Commission.

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

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

Said agreement recites that respondent Kantrowitz & Neiditch, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 90 Church Street, Hartford, Conn. It does business as Connecticut Furriers of Hartford. Respondents Samuel Kantrowitz and Israel Neiditch are individuals and are, respectively, president and secretary-treasurer of the corporate respondent and have the same address as said corporate respondent.

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

ORDER

*It is ordered*, That respondents Kantrowitz & Neiditch, a corporation, whether trading under its own name, as Connecticut Furriers of Hartford, or under any other trade name, and its officers; and Samuel Kantrowitz and Israel Neiditch, 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, offering for sale, transportation, or distribution of fur products in commerce, or in connection with the sale, advertising, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur," and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. Misbranding fur products by:

a. Failing to affix labels to fur products showing:

(1) 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;

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

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

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

(5) 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;

(6) The name of the country of origin of any imported furs used in the fur product;

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

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

3. Falsely or deceptively invoicing fur products by:

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

(1) 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;

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

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

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

(5) The name and adress of the person issuing such invoice;

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

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

4. Falsely or deceptively advertising fur products through the use of any advertisement, 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:

a. Fails to disclose:

(1) The name or names of the animal or animals which produced the fur or furs contained in the fur products as set forth in the Fur Products Name Guide;

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

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

6. Makes pricing claims and representations of the types referred to in paragraph 5 above, unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims or representations are based.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner shall, on the 9th day of May 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.

Decision

IN THE MATTER OF

# HARRY WEISS DOING BUSINESS AS IDEAL BRUSH MANUFACTURING CO.

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

*Docket 6832. Complaint, July 8, 1957—Decision, May 10, 1958*

Consent order requiring a distributor in North Hollywood, Calif., of paint brushes to wholesalers and dealers, to cease using the abbreviation "Mfg." and the word "Manufacturing" in his trade name and on his merchandise, letterheads, invoices, guarantees, in trade show programs, and on display cards furnished to dealers, and thereby representing falsely that he owned or operated a factory in which his merchandise was manufactured.

*Mr. Michael J. Vitale* and *Mr. Arthur B. Edgeworth* for the Commission.

*Mr. U. R. Gerecht*, of Los Angeles, Calif., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondent with falsely and deceptively representing, by the use of the abbreviation "Mfg." and the word "Manufacturing," that he owns, operates, or controls a factory or factories wherein the paint brushes which he sells and distributes are manufactured, in violation of the provisions of the Federal Trade Commission Act.

After the issuance of the complaint, respondent, his counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director and an Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the hearing examiner for consideration.

The agreement identifies respondent Harry Weiss as an individual trading and doing business as Ideal Brush Manufacturing Co., with his office and principal place of business located at 3791 Cahuenga Boulevard, North Hollywood, Calif.

The agreement provides, among other things, that respondent admits all the jurisdictional facts alleged in the complaint, and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and

this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by the respondent that he has violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

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

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

*It is ordered*, That respondent Harry Weiss, trading and doing business as Ideal Brush Manufacturing Co., or trading and doing business under any other name or names, and respondent's agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of paint brushes or any other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using the abbreviation "Mfg." or the word "Manufacturing," or any other abbreviation or word of the same import or meaning, as a part of a trade or corporate name, or representing in any other manner that respondent manufactures any merchandise sold by him, unless and until he owns, operates or absolutely controls the manufacturing plant wherein such merchandise is manufactured.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner shall, on the 10th day of May 1958, become the decision of the Commission; and, accordingly:

*It is ordered*, That respondent Harry Weiss, an individual trading

and doing business as Ideal Brush Manufacturing Co., shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist.

IN THE MATTER OF

# GILBERT S. BISHOP DOING BUSINESS AS BISHOP HAIR EXPERTS

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

*Docket 6554. Complaint, May 15, 1956—Decision, May 12, 1958*

Order requiring an individual with principal place of business in Cincinnati, Ohio, and operating treatment offices at Pittsburgh, Pa.; Buffalo, N.Y., and Cincinnati, to cease advertising falsely—in newspapers and by means of advance advertising of traveling representatives who invited the public to call on a certain date at a certain place for diagnosis and advice—that by use of his preparations and treatments, excessive hair loss or baldness would be prevented or overcome in almost every case; that hair would be induced to grow upon the heads of all but about five percent of the cases; that fuzz and thin hair would be replaced by stronger and thicker hair; and that dandruff, itching, dryness, and oiliness of the hair and scalp would be permanently eliminated; to cease representing falsely by use of the designation "trichologist" that he and certain of his employees had been trained in dermatology and the branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair and that he had "expanded quickly from 1 office to 14 affiliated offices in North America."

*Mr. Harold A. Kennedy* for the Commission.

*Howrey & Simon*, by *Mr. Edward F. Howrey*, *Mr. Harold F. Baker*, and *Mr. John Bodner, Jr.*, of Washington, D.C., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

BACKGROUND STATEMENT

Complaint in this case issued May 15, 1956, charging violation of the Federal Trade Commission Act through the use by respondent of false, misleading and deceptive advertising and the dissemination thereof by the United States mails and other means in commerce concerning various cosmetic preparations of the respondent and represented by him to prevent excessive hair loss or baldness, to grow hair, replace fuzz, or thicken hair with thicker or stronger hair, or permanently eliminate dandruff, itching, dryness or oiliness of hair and scalp. Misrepresentation is also alleged in respondent's representations that he and associates were trichologists and that he had expanded from 1 to 14 treatment offices in the United States. The

answer denied substantially everything except respondent's identity and his business address. After nine hearings in four cities, counsel supporting the complaint completed his case. Motion to dismiss for lack of jurisdictional and failure to make out a prima facie case was made by counsel for respondent, denied, appealed, and the appeal denied. Thereafter, respondent offered in evidence several excerpts from medical tests, admission of which was refused, and after this ruling was appealed and denied, offered by way of defense a stipulation with reference to dissemination. The case was thereupon closed and date fixed for submission of proposed findings and conclusions by all counsel. These were filed August 30, 1957. The record consists of 1,108 pages of testimony, 63 exhibits in support of the allegations of the complaint, and five tendered but rejected exhibits by respondent. On consideration of the entire record, together with the proposed findings submitted by both sides and the law applicable thereto, the hearing examiner finds that this proceeding is in the public interest, and in addition makes the following:

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Gilbert S. Bishop is an individual doing business as Bishop Hair Experts with his office and principal place of business located at 1620 Madison Road, Cincinnati, Ohio. Respondent also maintains offices at 1305 Union Trust Building 14th and Walnut Streets, Cincinati, Ohio; 717 Liberty Avenue, Pittsburgh, Pa.; and 516 Walbridge Building, 43 Court Street, Buffalo, N.Y.

2. Respondent, after working as an employee for Thomas Management Corp., sometimes known as Thomas Hair Experts, and for the Mueller Hair Experts, entered this scalp treatment business on his own in 1952, and since that time has advertised widely his proficiency in treating conditions of the hair and scalp, and as a necessary and integral part thereof, has had concocted a number of preparations which are applied to the scalp either by operatives in his various offices or at home by his customers. These preparations are composed of the following ingredients in various combinations:

| | |
|---|---|
| Boric Acid | Glyceryl Monostearate |
| Castor Oil | Oil of Bay Terpeneless |
| Cetyl Alcohol | Oxyquinoline Sulfate |
| Detergent | Perfume |
| Deltyl Prime (isopropyl esters of fatty acids) | Phenol |
| Dyes | Propylene Glycol |
| | Resorcin |

| | |
|---|---|
| Stearic Acid | Water |
| Sulfonated Castor Oil (Nopco #1034) | Glycinol |
| | 60L (detergent) |
| Glycerin | AA 62 (foam stabilizer) |
| Color | Lecithin |
| Liquid Soap | Coal Tar |
| Hexachlorophene | Benzyl Benzoate |
| Hyamine No. 1622 | G–11 (antiseptic) |
| Isopropyl Alcohol | G–4 (fungicide) |
| Mineral Oil | Beta Napthol |
| Tincture Capsicum | Petroleum Base |
| Triethanolamine | Ammoniated Mercury |

3. Respondent's preparations are concocted from the above ingredients by a commercial laboratory in Cincinnati, Ohio, according to formulas and directions supplied by respondent, bottled and packaged by the laboratory and shipped by it, on respondent's order, either to his principal office for reshipment as needed to his other offices, or directly to those other offices, or shipped in kits, called Home Treatment Kits, directly to a purchaser. In any event, there has been, and is, a constant and substantial movement in commerce of these preparations.

4. Respondent divides his operations into two parts which he calls office treatment and home treatment. In the former, the customer has his scalp looked at by respondent or one of his employees in the offices in Cincinnati, Pittsburgh, or Buffalo, and a course of respondent's treatments prescribed. Frequently this means 60 visits at $5 each with a discount for lump-sum payment in advance. The treatment consists of massaging, brushing, shampooing, ultraviolet ray, and the application of one or more of respondent's preparations, plus the purchase of four bottles of cleansing agents—Shampoo, Glycinol, Triseptal and Solvent—and a hair brush. To reach customers in other cities, respondent will advertise in a local paper the advent of one of his "trichologists" at a given day in some local hotel room. Those who respond have their scalps looked at, treatment recommended, and are sold one of respondent's Home Treatment Kits at $65–75, containing a 3 months' supply of the above-mentioned 4 bottles of cleansing agents, plus 64 assorted vials of respondent's other preparations of 2 drams each, plus a booklet of instructions. No treatment is given in these hotel rooms. Respondent's overall income from these operations has been from $150,000 to $200,000 a year, of which something less than half comes from the Home Treatment Kit

operation. Substantially all of it results from respondent's extensive advertising.

5. Between January 1, 1953, and September of 1956, respondent advertised by 1 or repeated insertions in some 276 newspapers, published in 25 States, inviting readers to come to his places of business, or to hotel rooms visited by his traveling employees, for diagnosis and treatment. Typical excerpts from such advertising are as follows:

(a) An interview with G. S. Bishop, Director, Bishop Hair Experts. DO YOU BELIEVE: That baldness is inherited? That it's natural to lose hair as you get older? That baldness can not be prevented? That you can't grow thicker hair? "Outdated ideas," says one of the country's foremost authorities. "Baldness is not inherited, though some few people inherit a tendency toward it that may be overcome. Hair naturally grows fastest in the years from 35 to 60, according to scientific tests. Baldness can be prevented in almost every case if you start in time. You can grow thicker hair in any area where the 'hair factories' have not already closed down." * * *

"In my experience", Bishop said, "there's hardly a man or woman who won't benefit from our treatment. Our records show that 95 percent of the people who take treatment are satisfied with the results.

"Only about five percent are refused treatment, usually because they waited so long that they are slick-bald. We do not waste their time and money by accepting such 'hopeless' cases." * * *

"We can save and thicken the hair you have, improve its appearance. In areas where there is fuzz growing, you may have strong, vigorous, healthy hair. Best of all, we teach you how to keep it that way all your life.

"One of the most satisfactory things about Bishop treatment is that you notice results at once. After the first visit, in fact, your scalp will have a feeling of glowing, tingling health. Itching and dandruff soon disappear. Excess oiliness or dryness clears up. Before long, hairfall slows down to normal and replacement hairs are stronger and thicker."

In other words, no more messy coat collars * * * no more embarrassing dryness or oiliness to make your hair unmanageable and offensive * * * no more unfunny jokes about "Old Baldy". Instead, you'll have a good head of healthy hair that you can be proud of. * * *

For Out-of-Towers. In order to help hair-worried men and women who live out of town, or who travel a lot, Bishop's experts have developed a highly effective combination home-and-office treatment. Only occasional visits to the Bishop office are necessary, sometimes just the one examination visit. The rest you can do in your home. * * *"

(b) "It's never too late TO SAVE YOUR HAIR." City's leading scalp specialist backs up his statement with money back guarantee * * * by Will Blair, Special Writer.

"ALL POPULAR notions to the contrary notwithstanding, it is never too late to save your hair. That holds true whether you are 16 or 60, whether you have a little hair or a lot." * * *

"Merely saving your hair, keeping what you have, is actually the minimum benefit you can expect from Bishop treatment and the program of aftercare we give you. Your hair will certainly look better and feel better.

"In most cases, your hair will also grow better—stronger and thicker." * * * * * * Bishop boils down his accumulation of experience and thousands of case histories to one simple, matter-of-fact conclusion. That healthy scalp grows healthy hair! "Think about it a minute", Bishop urges. "It seems so obvious, you might say no intelligent person would deny its truth. But when you accept it as true, then you must rule out practically all the common beliefs about baldness. "For instance, most people think that baldness is handed down from father to son—inherited. Yet nobody would argue that you can inherit an unhealthy scalp. So you can't very well inherit baldness can you?"

"Another common idea is that a man just naturally loses his hair as he gets older. Why should he? There's no reason why he shouldn't keep his scalp healthy and his hair growing.

"You've also heard men say that nothing can be done to stop hair loss, once it starts. Why not? It's just a question of correcting an unhealthy scalp condition, and trading bad habits of haircare for good habits." * * *

(c) HOW TO END HAIR WORRIES * * * There'll be an examination first. Very painstaking, but absolutely free. By it we determine two things: 1. Will you benefit from Bishop treatment? 2. What should your treatment include?

You'll flunk this examination if you are already slick-bald, or if you have one of several abnormal systemic conditions. About five percent of those who come to see us are rejected for these reasons. But if you pass, and enroll, your hair worries are over. You'll *enjoy* the treatments. Yes, and the *results*. The least you can expect is to keep the hair you have now. All of it. And if you don't wait *too* long, you ought to be able to re-grow much of the hair you lost.

(d) Where you're growing fuzz you can usually grow real hair, trichologist says. * * *

Cincinnati, Ohio. New home treatment methods for growing thicker hair—and preventing baldness—will be demonstrated in Indianapolis, Indiana, this Sunday, September 26.

Trichologist C. O. Brown, of the famous Bishop Hair Experts organization, will be in charge. He will personally examine hair-worried men and women from 2 p.m. to 9 p.m. Sunday at the Hotel Lincoln.

(e) It's a one way TICKET DANDRUFF ITCHINESS DRY HAIR OILINESS THINNING BALDNESS THE TRIP to baldness is practically non-stop for most men. But it needn't be.

You can transfer from the "Baldness Line" by calling a stop to those common hair troubles * * * dandruff, itchy scalp, dry or oily hair, thinning * * * by acting decisively, intelligently, and quickly. See an expert—a Bishop hair expert, nationally famous. * * *

Life Long Benefits. Best of all, the benefits of Bishop treatment last the rest of your life. For when treatment is over, and your scalp is in condition to grow healthy hair, the Bishop expert gives you a program of home aftercare to ward off further trouble in the future. * * *

(f) * * * To get your hair to growing as it should, and to keep it growing, you need expert help. You need BISHOP HAIR EXPERTS' help. Take Bishop treatment to put your scalp into hair-growing condition. Follow the Bishop plan of after-treatment care to make sure your hair lasts a life-time.

(g) THIS WE CAN DO. These are the *present* facts about baldness. Come

to us with hair and we save that hair. All of it. In those areas of your scalp where the "hair factories" are not locked shut, we can *grow thicker hair*. Mere "fuzz" may be replaced with hair of full body and color. * * *

(h) As *professional* experts, we believe that this will not be true always—but it is certainly true today.

(i) Excessive hair loss, dandruff due to dry or oily hair, itchy scalp—all these conditions are so easy to correct in their early stages with the help of Bishop Hair Experts.

(j) Consider the vital matter of formulas. None of the common property medication is ever employed in our offices. We have surer, faster-acting formulas based on newer discoveries and research.

(k) Does Bishop grow hair? Best evidence that he does is that his organization expanded quickly from one office to 14 affiliated offices in North America; Buffalo, Pittsburgh, Cincinnati, Miami, Tampa, Houston, Dallas, San Antonio, Fort Worth, Oklahoma City, Tulsa, San Francisco, Montreal, Mexico City. And in addition to these permanent offices, their staff trichologists regularly do extension work in many other cities.

6. The above-quoted statements taken in full context fairly represent, either directly or by implication, to the reader, that through the use of respondent's preparations, methods and treatments, excessive hair loss or baldness will be prevented and overcome in almost every case, that hair will be induced to grow in almost every case, that fuzz and thin hair will be replaced by thicker and stronger hair, and that hair will grow in about 95 percent of the cases. Representing as respondent does that after his treatments "itching and dandruff soon disappear—excess oiliness or dryness clears up" or that these conditions "are so easy to correct * * * with the help of Bishop Hair Experts" connote to this hearing examiner elimination and cure. Disappearance, clearing up, and correction, imply permanent relief.

7. Trichology is a branch of dermatology and dermatology itself is a branch of medicine, and through the use of the designation "trichologist" the respondent has represented, directly and by implication, that he and his employees have had competent and thorough training in dermatology.

8. The last above-quoted representation (k) likewise fairly represents that respondent operates 14 permanent offices in the United States, Canada, and Mexico.

9. All of these representations are either false, deceptive, or misleading. The uncontradicted and unanimous testimony of three experienced and highly qualified dermatologists is to the effect that from 85–95 percent of all baldness, consummated or progressive, is male pattern type, or in medical terms, alopecia prematura, that it is preceded or accompanied frequently by itching, dandruff, oiliness or dryness, that its cause is unknown but suspected to be either heredity or

hormone secretion and balance, or the aging process, that the cause here being unknown, there is neither a preventive or cure therefor, that no treatment has been found effective therefor, and that repondent's preparations, alone or in combination, will neither prevent nor cure it, will not restore or regrow hair, nor correct, except temporarily, itching, dandruff, oiliness or dryness and will do so then only if continued indefinitely, nor replace fuzz or thin hair with thicker or stronger hair. The fact that none of them had employed respondent's treatments or used his preparations is immaterial.

10. Respondent's advertising directly represents that baldness is arrestable and, by implication, curable, whereas dermatological opinion is that 85–95 percent of it is neither. Although respondent's treatments and preparations, particularly his shampoos, do have beneficial effects on those with dirty or uncared for hair and scalps, ordinary hygiene will in most instances produce the same results, and in either case, benefit is permanent only if continued indefinitely. The main impact of the advertising is on those who are growing bald, as shown by all the consumer witnesses who testified, and by the advertising itself, which is, therefore, deceptive and misleading, and are words of promise to the eye to be broken to the hope. Respondent's advertising creates an expensive illusion in any reader with alopecia prematura.

11. Since neither respondent nor any of his "staff" have had any training in medicine or dermatology, the use of the word "trichologist" in his advertising is plainly false. In fact, the testimoy shows that some members of this staff, hired from such occupations as supervisor for the International Harvester Co. were, after a few weeks of watching respondent examine scalps under a magnifying glass, put to doing the same thing. The deception is further enhanced by pictures of respondent in a white coat appearing in the advertisements and by letters signed by respondent's secretary as "technician."

12. Respondent's representation that "his organization expanded quickly from one office to 14 affiliated offices" is also false. Respondent maintains only three treatment offices—in Cincinnati, Pittsburgh, and Buffalo. The fact that he refers his customers who travel or move to other cities to "hair experts" in those cities, for one or more interim treatments, or for continuation, does not warrant the claim of expansion of his organization.

13. Respondent's advertisements are misleading in a further material respect and constitute "false advertisements" by reason of failure to reveal material facts in the light of representations made

therein. By advertising his preparations as a cure or remedy for baldness caused by scalp disorders, which respondent has represented as the cause in almost every case of baldness, he has suggested that there is a reasonable probability that baldness is due to the presence of a scalp disorder and that his preparations will be of benefit, and will constitute an effective treatment therefor. In truth and in fact the instances in which baldness is due to scalp disorders are rare. In the great majority of cases baldness is a male pattern type, having no relation to scalp disorders, and when baldness is of this type, respondent's preparations are of no value in the treatment thereof. Thus, there is no reasonable probability that any particular case of baldnes is caused by a condition for which respondent's preparations may be beneficial, and respondent's advertising is misleading because of respondent's failure to reveal the fact that in most cases, baldness is of the type known as male pattern baldness and that when baldness is of that type, respondent's preparations are of no value in the treatment thereof.

14. Respondent attempts to defeat liability for some of this advertising by his claim and testimony that he sold the so-called "Home Treatment Division" to his brother-in-law, one C. O. Brown, a resident of Louisville, Ky., on July 1, 1953, and did not repossess it until October or November of 1955, and that during this period he was completely divorced from that end of the business except to give advice on request, and therefore is not responsible for any of its activity. There is in the record an executed sales agreement dated July 1, 1953, whereby respondent agrees to sell and Brown to buy for $5,000 cash, receipt of which is acknowledged, plus 25 percent of gross receipts for 3 years, all of the inventory, good will, trade name, advertising and records of "Bishop Hair Experts, Home Treatment Division."

15. Brown, the purported purchaser, testified, however, that at Bishop's insistence he left in early 1953 a secure position as supervisor for International Harvester Co. in Louisville, Ky., to join respondent, that the latter took him to the office of the latter's lawyer in Cincinnati and told him to "Sign this paper in case the Federal Trade Commission should walk in to see me some day, I will have this contract to say I don't own the business, therefore, you still have got a job, I have still got a job, Ted Zimmer has still got a job." Brown further testified that he never paid the $5,000, never received any bill of sale, never even got a copy of the contract, and that the understanding was that it was never to go into effect but was merely a subterfuge, and that the contract was never mentioned between

them until early in 1956. Brown further testified that throughout the remainder of 1953, and during all of 1954, he traveled 18–25 days a month as a salesman for respondent selling home treatment kits to prospects in hotel rooms in various cities, that the orders therefor were sent into respondent's main office at 1620 Madison Road, Cincinnati, Ohio, from which place the kits were shipped to the purchasers at their homes, that he made all remittances to that office and sent all reports there, that he had nothing else to do with the operation of the business, and nothing to do with the advertising.

16. He further testified that in December of 1954, while on a visit to Cincinnati, respondent told him that an investigator for the Federal Trade Commission had called at respondent's principal office and, respondent not being there at the time, had talked to one of respondent's employees, making inquiries about the advertising involved in this proceeding and the operation of the business, and that respondent then said, "Let's move it to Louisville immediately," to which Brown agreed. Thereupon Brown and Bishop orally agreed that Brown would open up an office in Louisville, handle the home treatment business from there, under Bishop's supervision, pay the bills, and pay Bishop $800 a month, plus $100 a month for every salesman whom Brown might hire to work for him. According to his testimony he, thereafter, in February 1955, rented an office, hired an office girl, bought some furniture, and sent orders for home treatment kits into 1620 Madison Road as before. However, these kits were there packed and addressed, but instead of being shipped directly to the purchaser from there, the packages were put in large boxes and shipped to Brown at Louisville where Brown's office girl unpacked them and took them to the post office for mailing from Louisville. Being already sealed and addressed only postage had to be added. Although these kits were costing Bishop only $4.15 each, he charged Brown $7.50 each, and Brown in turn sold them to credulous propects for $65 or $70 each—a sad commentary on male vanity. Additionally, Brown testified that Bishop told him to keep the office help in the dark as to the operation and that if a Federal Trade Commission investigator showed up to say nothing and be out of town.

17. The issue of credibility raised by these directly contradictory statements is resolved against the respondent. I found him an evasive, devious and, at times, a supercilious witness, with a convenient "forgettery," vague on crucial points, with a lot of unsatisfactory explanations, usually couched in the subjunctive. His testimony on this point was either fabrication or prevarication; in any event unre-

liable. Brown, on the other hand, made an opposite impression and was corroborated in essential detail by his wife, who worked in the Louisville office, and by the office girl, both of whom testified that Bishop frequently inspected the office, examined records, gave orders, prepared or exercised veto over travel itineraries, had the sales reports sent first to Cincinnati and then later remailed to Louisville, dictated letters over the telephone from Cincinnati to be mailed out from Louisville, and generally exercised authority and control. Although Bishop obviously had a motive to prevaricate and Brown possibly, because Bishop has sued him civilly for a money judgment, neither of these female witnesses had any such motive.

18. Moreover, there are in this record three distinct instances of Bishop's testimony being flatly contradicated by wholly disinterested witnesses. Thus, he testified that he was trained at Chappelle Beauty College in New Orleans, yet the records of the institution and the knowledge of its teacher there since 1942 prove the contrary. Bishop also testified it was his policy never to accept for treatment in his Cincinnati office anyone from out of town, yet at least two witnesses from Kentucky were treated by him and sold his cleansing preparations, and finally he testified that any preparations sold with office treatment were included in the $5 visit fee, whereas most of his customers who testified had to buy the four bottles of cleansing liquids and pay for them in addition to the treatment fees.

19. Furthermore, there are many concrete and uncontradicted facts in the record which support Brown's version and give the lie to Bishop's. Thus, during 1954, Bishop withheld social security taxes from Brown and filed W–2 form showing Brown as his employee, reported substantial income from the "Home Treatment Division" as his own in 1953, 1954, and 1955 to the Internal Revenue Department and took deductions therefor, made collections and made refunds claimed by disillusioned purchasers of home treatment kits. Furthermore, Bishop had learned the business working for the Thomas and Mueller outfits, both of whom had had their somewhat bolder but substantially similar advertising to that involved here stopped by the Federal Trade Commission, and he was apparently aware that he too was skating on thin ice. Furthermore, he was getting, unknown apparently to Brown, a rebate from the laboratory on all kits purchased by Brown in 1955, the prices of which were fixed by him, not by the laboratory or by Brown. And why the devious means of shipment of these kits?

20. The conclusory finding on this point is that the alleged "sale" of the "Home Treatment Division of Bishop Hair Experts" by

the respondent to Brown in 1953 was wholly fictitious and ineffective, that respondent was, remained, and is, the sole owner of the entire business, was and is responsible for all of its operations and business pratices, including the advertising involved here.

21. Respondent's second contention of immunity from this proceeding is that respondent in his "office treatment division" is selling a service rather than a commodity and that none of his advertising of office treatment refers in any way to any product, preparation, or commodity, and that, therefore, sections 12 and 15 of the Federal Trade Commission Act grant no jurisdiction over respondent's office treatments.

22. Section 12(a) of the act reads:

> It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—
>
> (1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of foods, drugs, devices, or cosmetics * * *."

Section 15(e) states:

> The term "cosmetic" means (1) articles to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof intended for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such article; except that such term shall not include soap.

Section 15(a)(1) states:

> The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent of which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitively each ingredient of such drug.

23. There can be no question that respondent's advertisements of his office treatment were disseminated in commerce as the record shows substantial out of state circulation of the Cincinnati, Pittsburgh, and Buffalo newspapers, as well as others, in which these advertisements of "office treatment" at respondent's offices there ap-

peared, and the fact is so found. Respondent argues, however, that because there were no newspapers of purely intrastate circulation available in these cities, that because he did not want any interstate business, and instructed his offices to confine treatments to city residents only, he is not within Commission jurisdiction. The answer is, of course, that choice of media was freely his, that the statute is concerned with acts, practices and their effect, not with motives or desires, and that, instructions or not, he did treat and sell preparations to out of state customers who responded to these advertisements.

24. Nor can there be any question either that all of respondent's preparations, whether the cleansing agents, or the vial medications, are cosmetics within the above definitions, and the fact is so found.

25. It is true that most of the "office treatment" advertisements do not offer for sale any "commodity" or preparation or make any mention thereof but, on the other hand, some of these advertisements prominently invite travelers to take "do-it-yourself" or home treatments. Other advertisements state that respondent does not employ "common property" medication but that he has surer, faster acting formulas.

26. The sale of respondent's cosmetics is an integral part of the treatments advertised. Thus, of the ten witnesses who visited respondent's Cincinnati office for examination or treatment, all had been induced to do so by respondent's Cincinnati newspaper advertising, all had been sold the four bottles of cleansing agents and a brush for use at home, eight of them at an additional price to the cost of the treatments, and several had been urged to buy respondent's home treatment kits additionally. Respondent's manager, who had worked in all three offices for 6 months, further testified that the four bottles were regularly and customarily sold to office "clients" and that respondent's three offices regularly sell home treatment kits as well.

27. Under the law it is sufficient if the first contact or interview is secured by deception. *F.T.C.* v. *Standard Education Society, et al.*, 302 U.S. 112, 115; *Carter Products, Inc., et al.* v. *F.T.C.*, 186 F. 2d 821; *Fairyfoot Products Co.* v. *F.T.C.*, 80 F. 2d 684, 689.

28. The same specific claim on substantially the same basic facts was urged and rejected by the District Court for the Nothern District of Illinois in *U.S.* v *Thomas Management Corp.*, 1952 C.C.H. Trade Cases, paragraphs 67 and 251.

29. Finally, this question was extensively and squarely presented to the Commission in this proceeding in respondent's appeal of

February 28, 1957, and ruled on adversely to the respondent by the Commission May 15, 1957, by which ruling the hearing examiner is, of course, bound.

30. The conclusory finding, therefore, is that respondent has been, and is disseminating by United States mails and in commerce, false, deceptive, and misleading advertisements which induce, and have induced, and which are likely to induce, the purchase of cosmetics.

31. The use by the respondent of the foregoing false, misleading, and deceptive statements and representations, disseminated as aforesaid, has had and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true, and to induce a substantial portion of the purchasing public to visit respondent's various offices for the purpose of obtaining treatments and to purchase respondent's preparations, and to order said preparations because of such erroneous and mistaken belief, engendered as above set forth.

32. The aforesaid acts and practices of respondent are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

*It is ordered*, That the respondent Gilbert S. Bishop, an individual doing business as Bishop Hair Experts, or under any other name, and respondent's agents, representatives, and employees, directly or through any corporate or any other device, in connection with the offering for sale, sale, or distribution of the various cosmetic or other preparations as set out in the findings herein, or any other preparations for use in the treatment of hair or scalp conditions, do forthwith cease and desist from, directly or indirectly:

1. Disseminating or causing to be disseminated by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication, that the use of said preparations, alone or in conjunction with any method or treatment, will:

(a) Prevent or overcome excessive hair loss or baldness unless such representation be expressly limited to cases other than those known as male pattern baldness and unless the advertisement clearly and conspicuously reveals that in the great majority of cases of

baldness or excessive hair loss respondent's said preparations are of no value whatever;

(b) Induce hair to grow or will otherwise grow hair unless such representation be expressly limited to cases other than those arising by reason of male pattern baldness, and unless the advertisement clearly and conspicuously reveals that the use of said preparations will not grow hair in the great majority of cases;

(c) Replace fuzz or thin hair with thicker or stronger hair;

(d) Eliminate or cure dandruff, itching, dryness or oiliness of the hair or scalp.

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

3. Representing, directly or by implication, that respondent, his agents, representatives, or employees have had competent training in dermatology or other branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair, or are trichologists.

4. Representing, directly or by implication, that respondent owns, controls or operates more than three treatment offices.

## OPINION OF THE COMMISSION

By Gwynne, Chairman:

The complaint charges respondent with violation of the Federal Trade Commission Act through the dissemination of false, misleading, and deceptive advertising by the United States mails and by other means in commerce. After hearings, the hearing examiner made findings and entered the following order, which requires respondent to cease and desist from, directly or indirectly:

1. Disseminating or causing to be disseminated by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication, that the use of said preparations, alone or in conjunction with any method or treatment, will:

(a) Prevent or overcome excessive hair loss or baldness unless such representation be expressly limited to cases other than those known as male pattern baldness and unless the advertisement clearly and conspicuously reveals that in the great majority of cases of baldness or excessive hair loss respondent's said preparations are of no value whatever;

(b) Induce hair to grow or will otherwise grow hair unless such representation be expressly limited to cases other than those arising by reason of male pattern baldness, and unless the advertisement clearly and conspicuously reveals that the use of said preparations will not grow hair in the great majority of cases;

(c) Replace fuzz or thin hair with thicker or stronger hair;

(d) Eliminate or cure dandruff, itching, dryness or oiliness of the hair or scalp.

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

3. Representing, directly or by implication, that respondent, his agents, representatives or employees have had competent training in dermatology or other branches of medicine having to do with the diagnosis and treatment of scalp disorders affecting the hair, or are trichologists.

4. Representing, directly or by implication, that respondent owns, controls, or operates more than three treatment offices.

From this order and from certain findings and rulings of the hearing examiner, respondent has appealed.

Respondent Gilbert S. Bishop, doing business as Bishop Hair Experts, has been in operation since 1952. Paragraph 4 of the initial decision sets out sufficiently the general methods of operation:

Respondent divides his operations into two parts which he calls office treatment and home treatment. In the former, the customer has his scalp looked at by respondent or one of his employees in the offices in Cincinnati, Pittsburgh, or Buffalo, and a course of respondent's treatments prescribed. Frequently this means sixty visits at $5 each with a discount for lump-sum payment in advance. The treatment consists of massaging, brushing, shampooing, ultraviolet ray, and the application of one or more of respondent's preparations, plus the purchase of four bottles of cleansing agents—Shampoo, Glycinol, Triseptal and Solvent—and a hair brush. To reach customers in other cities, respondent will advertise in a local paper the advent of one of his "trichologists" at a given day in some local hotel room. Those who respond have their scalps looked at, treatment recommended, and are sold one of respondent's Home Treatment Kits at $65–$75, containing a 3 months' supply of the above-mentioned 4 bottles of cleansing agents, plus 64 assorted vials of respondent's other preparations of 2 drams each, plus a booklet of instructions. No treatment is given in these hotel rooms. Respondent's overall income from these operations has been from $150,000 to $200,000 a year, of which something less than half comes from the Home Treatment Kit operation. Substantially all of it results from respondent's extensive advertising.

Respondent's brief presents for consideration on this appeal the following questions:

1. Whether section 12 of the Federal Trade Commission Act applies to advertisements which relate solely to a treatment and not a commodity.

2. Whether the examiner erroneously excluded from evidence passages from well-known medical treatises.

3. Whether the examiner unduly restricted respondent's right of cross-examination by limiting cross-examination with learned treatises to those treatises upon which the witness relied in the formation of his opinions.

4. Whether respondent's advertisements contain any representations that the treatment will "permanently eliminate" dandruff, scalp itch, excessive oilness and excessive dryness of the hair and scalp.

5. Whether the evidence of record is legally sufficient to support the examiner's order.

I

Section 12(a) of the Federal Trade Commission Act provides in part:

It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices or cosmetics; * * *

Section 15 provides in part:

For the purposes of sections 12, 13, 14—

(a)(1) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

The record contains a number of respondent's advertisements in newspapers, some of which were circulated in interstate commerce. At least two of respondent's advertisements did refer directly to a product in the following language: "Surer, faster-acting formulas" and "Consider the vital matter of formulas. None of the 'common property' medications is ever employed in our office. We have surer, faster-acting formulas based on newer discoveries and research."

We do not think that the presence of the word "treatment" or the absence of mention of a commodity or a description of its qualities is necessarily conclusive. The question is whether the net effect of the advertisement was likely to induce directly or indirectly the purchase of cosmetics. That it did have such effect is well illustrated by the following finding of the hearing examiner:

The sale of respondent's cosmetics is an integral part of the treatments advertised. Thus, of the 10 witnesses who visited respondent's Cincinnati office for examination or treatment, all had been induced to do so by respondent's Cincinnati newspaper advertising, all had been sold the four bottles of cleansing agents and a brush for use at home, eight of them at additional price to the cost of the treatments, and several had been urged to buy respondent's home treatment kits additionally. Respondent's manager, who had worked in all three offices for 6 months, further testified that the four bottles were regularly and customarily sold to office "clients" and that respondent's three offices regularly sell home treatment kits as well.

The four bottles of cleansing agents, known as "Shampoo," "Glycinol," "Triseptol," and "Solvent" are cosmetic within the meaning of section 12. These bottles were regularly sold and delivered to persons taking the office treatment for use in their own homes. The usual price was $14. Office treatments, of which a series, usually 60, were recommended, cost $5 each.

In other words, respondent's advertising brought interested parties to his office. There, they arranged for treatments and also bought cosmetics. This satisfies the requirements of the statute as to advertising "for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of cosmetics."

In *U.S.* v. *Thomas Management Corporation*, 1952–3 CCH Trade Cases, sec. 67,250, the court imposed civil penalties for violation of an order of the Commission entered after a stipulation between the parties. The order prohibited the dissemination of false advertising in connection with the offering for sale, sale, and distribution of various cosmetics.

The advertisements considered contained the following:

Important—Genuine, original Thomas treatments for the hair and scalp are available only in the form of professional services, given only in a Thomas office. (p. 67, 401)

The Court made the following conclusion of law:

While only one of the advertisements charged as a violation of the Commission's order makes direct reference to preparations, all of the claims therein relate to the results to be obtained by application of the preparations to the hair and scalp of persons attracted by the advertisements, either in the form of office treatments or home treatments, and are therefore representations about the preparations.

II

After the conclusion of the evidence in behalf of the complaint, respondent introduced four typed copies of excerpts from four different medical books as proof of the facts which they purported to state. The hearing examiner sustained an objection to the excerpts

on the ground that they were hearsay. The record does not disclose that an offer of proof was made as to the contents of the excerpts. Thereafter, respondent took an interlocutory appeal to the Commission questioning this and other rulings of the hearing examiner. The appeal was dismissed and, on July 10, 1957, the case was again before the hearing examiner. On that date, respondent made "an offer of proof" in substance as follows:

> That if allowed to do so, respondent could prove through the works of well-recognized dermatologists, that contrary to some of the testimony of the so-called experts who testified on behalf of Commission counsel, the leading dermatologists recommend the use of physiotherapy and preparations similar to those used by respondent for the treatment of itchiness, dandruff and baldness; that in treatment of itchiness, dandruff, dryness, oiliness and baldness, including male pattern baldness, local applications are recommended which are similar in composition to those used by respondent in administering his treatments; that in the treatment of male pattern baldness and other types of baldness, attention to the care of the hair is of great importance; that early and persistent massage of the scalp should be carried out daily; that massage and vibration of the scalp are important means of improving the local circulation, and hence stimulating growth of hair; that the use of treatments like respondent's will eliminate dandruff, itchiness, dryness, oiliness; will prevent or stop the excessive loss of hair and will induce the growth of new hair.

Respondent made no further or specific offer of any medical books or parts thereof.

The great weight of authority is that medical books and treatises are not admissible to prove statements therein contained. 32 C.J.S., p. 428; *U.S.* v. *One Device* (1947), 160 F. 2d 193; *Farmers Union Federated Cooperative Shipping Association* v. *McChesney* (Jan. 10, 1958), 251 F. 2d 441. Wigmore (3d ed., vol. 6, sec. 1690) points out that this is the general rule applied in all but one or two jurisdictions, although he urges that such books should be received under safeguarding procedures which he suggests. In *Dolcin Corp.* v. *F.T.C.* (1954), 219 F. 2d 742, the Court said:

> We think authoritative scientific writings can and should be freely used by administrative agencies.

The decision, however, was put on other grounds.

The Commission has consistently followed the rule laid down by a great majority of the courts. Even if the minority rule were to be followed, a proper foundation (such as suggested by Wigmore) to insure truthfulness would need to be established. The Alabama court which follows the minority rule has pointed out that excerpts must be from recognized authorities and must be relevant and applicable to the facts. *Watkins* v. *Potts* (1929), 122 So. 416.

It may be true that the hearing examiner would have followed the majority rule and not allowed the offer in any event. Nevertheless, the record is insufficient to determine whether the books, intended to be offered after the interlocutory appeal, were authoritative, or, if so, whether the excerpts were proper under the issues presented.

## III

Respondent's claim that the hearing examiner unduly restricted his right of cross-examination is based on the cross-examination of three doctors who testified in behalf of the complaint.

There is considerable difference of opinion as to the permissible extent of cross-examination of an expert medical witness by the use of medical books and writings. It is generally held that if the witness bases his testimony in whole or in part on a certain medical book, he may be cross-examined thereon and excerpts therefrom may be read to him for the purpose of discrediting his testimony. 32 C.J.S., p. 428. In case of such use, no other foundation is necessary. See *Farmers Union Federated Cooperative Shipping Association* v. *McChesney*, *supra*.

Many authorities extend the rule to reliance on medical authorities generally and permit cross-examination on any text which the witness recognizes as authoritative. *Garfield Memorial Hospital* v. *Marshall* (1953), 204 F. 2d 721; *Farmers Union Federated Cooperative Shipping Association* v. *McChesney*, *supra*.

Where the witness relies on his own experience and not on medical books, there is a difference of opinion as to the use of such books for impeachment purposes.

Some authorities hold that it may not be done. *E. I. DuPont de Nemours & Co.* v. *White* (1925), 8 F. 2d 5. The court there was applying the New Jersey law but concluded that the Federal rule was the same; *Woelfle* v. *Conn. Mut. Life Ins. Co.* (1939), 103 F. 2d 417, where the court held the refusal not to be reversible error. For a list of cases both pro and con, see 82 A.L.R. 440.

There are cases holding that such cross-examination is proper. *Victor American Fuel Co.* v. *Tomljanovich* (1916), 232 F. 662; *Lawrence* v. *Nutter* (1953), 203 F. 2d 540; *Kern* v. *Pullen*, Oreg. (1931), 6 P. 2d 224; *Laird* v. *Boston and M. R.R., N.H.* (1922), 117 A. 591; *Bowles* v. *Bourdon*, Tex. (1949), 219 S.W. 2d 779; *Cooper* v. *Atchison T. & S.F.R. Co.* (1941), 148 S.W. 2d 773, holding also that cross-examination is not limited to matters with which the witness agrees.

*Reilly* v. *Pinkus* (1949), 338 U.S. 269, had to do with proceedings for a Postal Department fraud order. The evidence of experts called by the Government rested on their general professional knowledge. To some extent, this knowledge was acquired from medical textbooks and publications on which these experts placed reliance. On cross-examination, respondent sought to question the witnesses concerning statements in other medical books, some of which, at least, were shown to be respectable authorities. The questions were not permitted. The Supreme Court said:

> We think this was an undue restriction on the right to cross-examine. It certainly is illogical, if not actually unfair, to permit witnesses to give expert testimony based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books.

The court pointed out in reversing the decision that the issues in a fraud case make such cross-examination peculiarly appropriate because an actual intent to deceive is necessary.

At least one court has apparently taken the view that the reasoning of the Supreme Court ruling does not apply in cases where no issue of fraudulent intent is involved. See *Carter Products, Inc.* v. *F.T.C.* (1953), 201 F. 2d 446. Other courts give the ruling a more general application. In *Dolcin Corporation* v. *F.T.C.*, *supra*, the court said:

> *Reilly* v. *Pinkus*, we think, stands for the general proposition that an expert witness who bases an opinion to a significant degree upon his reading may be cross-examined as to that opinion by reference to other reputable works in his field. It is not necessary for the witness to have relied in his testimony upon the particular authority the cross-examiner seeks to use. And we do not think that the Court limited its ruling to cases involving fraud. (See also *Lawrence* v. *Nutter*, *supra*.)

We think that the language of *Reilly* v. *Pinkus* and *Dolcin*, *supra*, support the more liberal rule as to cross-examination, even though the actual decision may be explained on other and more limited grounds. This rule has also been announced by many of the later authorities and is more consistent with principles of justice and courtroom realities. It seems a strange rule which would permit an expert to bolster his own view by a certain text and then not permit the opposition to question him concerning other authoritative texts which do not agree with him.

In spite of the differences of opinion on some phases of this subject, there is substantial agreement on two propositions:

(1) The trial judge has a high degree of discretion in the matter

of cross-examination. In *Woelfle* v. *Conn. Mut. Life Ins. Co.*, *supra*, the court said:

> Whatever the correct rule may be, it is apparent that the scope of such cross-examination must necessarily be left largely to the good common sense and sound judgment of the trial court, whose rulings should be upheld unless they constitute a clear abuse of a sound judicial discretion.

This has been emphasized in many cases. See, for example, *Mutual Benefit Health & Accident Assn.* v. *Francis* (1945), 148 F. 2d 590.

(2) Where the witness has not relied on a particular book or treatise, the reading of excerpts from such books where no foundation was laid establishing the volume as a standard recognized authority is improper. See *Farmers Union Federated Cooperative Shipping Association* v. *McChesney*, *supra*, where the error was considered sufficient for reversal. The authoritative character of the book may be established by the witness being cross-examined. Some cases indicate that it may be established by other witnesses. See discussions in *Dolcin Corp.* and also *Reilly* v. *Pinkus*.

The first witness, Dr. Robert Brandt was cross-examined at some length concerning certain medical books. The record indicates that his cross-examination was not unduly restricted.

The second witness was Dr. Donald Birmingham. Many objections were made to the cross-examination of this witness. The rulings of the hearing examiner were in many instances based on the view that a medical book cannot be used in cross-examination unless the witness has relied on the book, at least in part, in his testimony. Nevertheless, counsel was eventually allowed to cross-examine as to the Ormsby and Montgomery and as to the Savill books. In accordance with stipulation between counsel, the witness was, in effect, interrogated about the following additional books: "Diseases of the Hair" by Dr. Lee McCarthy. "Practical Dermatology" by Dr. George M. Lewis. "Your Hair and Its Care" by Levin and Behrman.

It was stipulated that the questions asked of Dr. Brandt should be considered propounded to the witness as to each of these books mentioned and should be considered as overruled on the grounds of improper cross-examination. The record indicates that the witness had not read the books; nor is there any evidence that he accepted them as recognized authorities; nor that they were, in fact, so recognized generally.

Dr. James Willis Burks, Jr., insisted that his opinions were based on his own experience and not on books, although he had read and reviewed and was familiar with many called to his attention. The

doctor was not permitted to say what books dealing with hair and scalp he did classify as the outstanding authorities, although he did say later that Ormsby and Montgomery was an outstanding authoritative work. The hearing examiner did not permit the use of books in cross-examination for the reason that the opinoin of the witness was based on experience, not on books. However, use of the Ormsby and Montgomery book was permitted to refute the witness' statement that no practicing dermatologist treats male pattern baldness. Thus, it appears that Dr. Brandt was cross-examined as to various texts and that Dr. Birmingham was cross-examined as to the only texts which met the test of authoritative quality. Although the questioning of Dr. Burks was more restricted, it appears to us that on the whole record the opportunity to compare statements of the witnesses with statements of other recognized authorities as to the important matters in controversy was not unduly restricted. The hearing examiner has considerable discretion in these matters. While we disagree with some of his rulings, we do not believe that there was any abuse of discretion or any denial of substantial justice.

IV

Respondent challenges that part of the order which requires him to cease and desist from representing his preparations will eliminate or cure dandruff, itching, dryness or oiliness of the hair or scalp on the ground that such order is not warranted by the advertising complained of.

The advertising contains the following:

> You can transfer from the "Baldness Line" by calling a stop to those common hair troubles. * * * dandruff, itchy scalp, dry or oily hair, thinning. * * * by acting decisively, intelligently, and quickly. See an expert—a Bishop hair expert, nationally famous. * * *
>
> In other words, no more messy coat collars * * * no more embarrassing dryness or oiliness to make your hair unmanageable and offensive. * * * no more unfunny jokes about "Old Baldy." Instead, you'll have a good head of healthy hair that you can be proud of.
>
> Excessive hair loss, dandruff due to dry or oily hair, itchy scalp—all these conditions are so easy to correct in their early stages with the help of Bishop Hair Experts.

We conclude the findings and order of the hearing examiner on this point are correct.

V

Respondent finally questions the sufficiency of the record to support the examiner's order.

The evidence of counsel supporting the complaint covers over 1,100 pages, together with many exhibits. It includes both expert and lay testimony. The initial decision sets it out in summary and makes findings as to the ultimate facts. We have examined the record and conclude that the hearing examiner correctly decided this issue.

The findings and order of the hearing examiner are adopted as the findings and order of the Commission. Respondent's appeal is denied and it is directed that an order issue accordingly.

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

FINAL ORDER

This matter having been heard by the Commission upon respondent's 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 and adopting the initial decision as the decision of the Commission:

*It is ordered*, That the respondent, Gilbert S. Bishop, shall, within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist contained in the initial decision.

Commissioner Tait not participating.

Decision

IN THE MATTER OF

# DELL PUBLISHING CO., INC.

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

*Docket 6759. Complaint, Apr. 3, 1957—Decision, May 17, 1958*

Consent order requiring a publishing company in New York City to make adequate disclosure when books were abridgments or newly entitled reprints.

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

*Denning & Wohlstetter*, by *Mr. William I. Denning*, of Washington, D.C., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondent with failing to make adequate disclosure of abridgments and changes of title in their reprint books, which failure constitutes unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of the Federal Trade Commission Act.

After the issuance of the complaint, respondent, its counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director and an Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the hearing examiner for consideration.

The agreement identifies respondent Dell Publishing Co., Inc., as a New York corporation, with its office and principal place of business located at 261 Fifth Avenue, New York, N.Y.

The agreement provides, among other things, that respondent admits all the jurisdictional facts alleged in the complaint, and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint; and that the order

set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

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

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

*It is ordered*, That respondent Dell Publishing Co., Inc., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of books in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale or selling any abridged copy of a book unless one of the following words, "abridged," "abridgment," "condensed," or "condensation," or any other word or phrase stating with equal clarity that said book is abridged appears in clear conspicuous type upon the front cover and upon the title page of the book, either in immediate connection with the title or in another position adapted readily to attract the attention of a prospective purchaser;

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

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner shall, on the 17th day of May 1958, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

# AMERICAN CHICLE CO.

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

*Docket 6791. Complaint, May 13, 1957—Decision, May 17, 1958*

Consent order requiring a distributor in Long Island City, N.Y., to cease representing falsely in advertising by television that its drug preparation "Rolaids" was endorsed generally by the medical profession and that stomach acid is capable of burning a hole in a cloth napkin.

*Mr. Daniel J. Murphy* and *Mr. Thomas A. Sterner* supporting the complaint.

*Mr. H. Thomas Austern* and *Mr. Henry P. Sailer* of *Covington & Burling*, of Washington, D.C. and *Mr. E. V. Moore* of Long Island City, N.Y., for respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The complaint in this proceeding alleges that the American Chicle Co., a corporation, hereinafter referred to as respondent, violated the provisions of the Federal Trade Commission Act by the use of alleged false advertising in a film which was telecast over television broadcasting stations at the direction of respondent, advertising the merits of its preparation "Rolaids."

After issuance and service of the complaint the respondent filed an answer, admitting the jurisdictional allegations contained therein but denying the other allegations. Thereafter, hearings were held and the receipt of evidence and testimony in support of the complaint was completed.

Before beginning the presentation of testimony in behalf of respondent, respondent, its counsel, and counsel supporting the complaint entered into agreement for a consent order. The proposed order contains prohibitions with respect to all violations of the act specifically alleged in the complaint with the exception of the allegation contained in paragraph 6(2) thereof. As to this allegation, respondent, its counsel, and counsel supporting the complaint recommend that same be dismissed without prejudice for the reason that this allegation refers to an interpretation based upon the chemical neutralizing properties of the preparation and not to its therapeutic efficacy, and the prohibitions contained in the proposed order which

pertain to the remainder of the film complained about effectively achieve the purposes of the complaint with respect to that film.

The agreement has been approved by the Director and the Assistant Director of the Bureau of Litigation and, with the exception noted above, disposes of all issues in the proceeding. The pertinent provisions of the agreement are as follows: Respondent admits all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; the record herein shall consist solely of the complaint and the agreement; respondent waives the requirement that the decision must contain a statement of findings of fact and conclusion of law; respondent waives further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondent waives any right to challenge or contest the validity of the order entered in accordance with the agreement and the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

Upon consideration of the allegations of the complaint, the provisions of the agreement and the proposed order, the hearing examiner is of the opinion that said order constitutes a satisfactory settlement and disposition of the matters complained about in this proceeding and the acceptance thereof will be in the public interest.

Accordingly, the hearing examiner accepts such agreement, makes the following jurisdictional findings and issues the following order:

### JURISDICTIONAL FINDINGS

1. Respondent, American Chicle Co., is a corporation existing and doing business under the laws of the State of New Jersey, with its office and principal place of business located at 30–30 Thomson Avenue, Long Island City, N.Y.

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

### ORDER

*It is ordered*, That the respondent American Chicle Co., a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the

offering for sale, sale, or distribution of the preparation Rolaids, or any other preparation of similar composition or possessing substantially similar properties whether sold under the same name or under any other name, do forthwith cease and desist from:

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

(a) Stomach acid or concentrated stomach acid is capable of burning a hole in a cloth napkin;

(b) By the use of a white coat or any other object, device, or words indicative of the medical profession, that doctors or the medical profession recommend Rolaids, unless the representation is limited to numbers of doctors not greater than has been ascertained to be the fact.

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

*It is further ordered*, That subparagraphs 6(2) and 7(2) of the complaint be, and the same hereby are, dismissed, without prejudice.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner shall, on the 17th day of May 1958, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

# FEDERAL-MOGUL CORP.

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

*Docket 5769. Complaint, May 1, 1950—Decision, May 20, 1958*

Consent order requiring a Detroit manufacturer of automotive products and supplies, to cease discriminating in price in violation of section 2(a) of the Clayton Act by selling its products at higher and less favorable prices to numerous small businessmen than to various larger purchasers competing with them and with purchasers from its competitors.

*Mr. Eldon P. Schrup* for the Commission.

*Dickinson, Wright, Davis, McKean & Cudlip*, of Detroit, Mich., for respondent.

## COMPLAINT

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

PARAGRAPH 1. Respondent Federal-Mogul Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with principal office and place of business located at 11031 Shoemaker Avenue, Detroit, Mich.

PAR. 2. Respondent is now and for several years last past has been engaged in the business of the manufacture, sale, and distribution of automotive products and supplies to different purchasers of the same located in the various States of the United States and in the District of Columbia. Said products and supplies are sold by the respondent for use, consumption or resale within the United States and the District of Columbia, and respondent causes said products and supplies so sold to be shipped and transported from the State or States of location of its places of business to the purchasers thereof located in States other than the State or States wherein said shipment or transportation originated. Respondent maintains, and at all times mentioned herein has maintained, a course of trade and commerce in said products and supplies among and between the States of the United States and in the District of Columbia.

PAR. 3. Respondent, in the course and conduct of its business as

aforesaid, is now, and since June 19, 1936, has been, engaged in active and substantial competition with other corporations, partnerships, firms, and individuals manufacturing, selling, and distributing comparable automotive products and supplies in commerce to purchasers of the same in manner and method and for purposes as aforestated. Many of said purchasers and many of the aforesaid purchasers from the respondent are competitively engaged each with the other.

PAR. 4. Respondent, in the course and conduct of its business as aforesaid, is now, and since June 19, 1936, has been, directly or indirectly discriminating in price between the aforesaid different purchasers of its said automotive products and supplies of like grade and quality sold and distributed in manner and method and for purposes as aforestated, by selling said products and supplies at higher and less favorable prices to numerous small businessmen purchasers than said products and supplies are sold to various larger purchasers some of which are competitively engaged with some of said less favored purchasers and with some of said purchasers from respondent's competitors.

PAR. 5. The effect of respondent's aforesaid discriminations in price between the said different purchasers of its said automotive products and supplies of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and the aforesaid favored purchasers are engaged, or to injure, destroy, or prevent competition with said respondent, said favored purchasers, or with customers of either of them.

PAR. 6. The aforesaid acts and practices of respondent constitute violations of the provisions of subsection (a) of section 2 of the Clayton Act (U.S.C., Title 15, sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

The complaint in this proceeding issued May 1, 1950, charges the respondent Federal-Mogul Corp., now known as Federal-Mogul-Bower Bearings, Inc., a corporation, located at 11031 Shoemaker Avenue, Detroit, Mich., with violation of the provisions of subsection (a) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

After the issuance of the complaint, the Federal-Mogul-Bower Bearings, Inc., formerly Federal-Mogul Corp., respondent herein, entered into an agreement containing consent order to cease and desist with counsel supporting the complaint, disposing of all the

issues in this proceeding, which agreement was duly approved by the Director and Assistant Director of the Bureau of Litigation.

By the terms of this agreement, the parties agreed that the respondent Federal-Mogul-Bower Bearings, Inc., formerly Federal-Mogul Corp., is a corporation organized and existing under the laws of the State of Michigan and is primarily engaged in the manufacture and sale of sleeve bearings and other parts for both original installation and replacement use in automotive vehicles.

It was further agreed in said agreement that Federal-Mogul Corp., on December 31, 1953, acquired all the property and assets of the Bearing Co. of America, a Delaware corporation, located at Lancaster, Pa., and engaged in the manufacture of ball bearings; that Bower Roller Bearing Co., a Michigan corporation, located at Detroit, Mich., and engaged in the manufacture of roller bearings, was merged into Federal-Mogul Corp. on July 29, 1955, and the name of Federal-Mogul Corp. as the surviving corporation was changed to Federal-Mogul-Bower Bearings, Inc.; that National Motor Bearing Co., Inc., a California corporation, located at Redwood City, Calif., and engaged in the manufacture of oil seals, on July 27, 1956, was merged into Federal-Mogul-Bower Bearings, Inc., as the surviving corporation; and that in 1956 the net sales of Federal-Mogul-Bower Bearings, Inc., combined facilities totaled $100,642,000.

By the terms of said agreement, Federal-Mogul-Bower Bearings, Inc., formally Federal-Mogul Corp., admitted all the jurisdictional facts alleged in the complaint and agreed that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations.

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

It was specifically agreed that this agreement does not preclude a further investigation and the issuance of complaint against respondent's sales of replacement parts to original equipment manufacturers if such be indicated.

Respondents further agreed that the order to cease and desist, issued in accordance with said agreement, shall have the same force and effect as if made after a full hearing.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued

pursuant to said agreement; and that said order may be altered, modified or set aside in the manner prescribed by the statute for orders of the Commission.

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

ORDER

*It is ordered*, That the respondent Federal-Mogul-Bower Bearings, Inc., a corporation, formerly known as Federal-Mogul Corp., and said respondent's officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale to the jobbing trade for replacement purposes of automotive replacement parts, principally consisting of sleeve type bearings, roller bearings, ball bearings, oil seals, and other related items in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating in the price of such products of like grade and quality:

1. By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of respondent's products.

*It is further ordered*, That the term "purchaser" as used in this order shall include any purchaser buying directly or indirectly from respondent by means of group buying or any related device, but shall not be construed in this proceeding to include original equipment manufacturers purchasing automotive parts from respondent for replacement use or sale.

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 20th day of May 1958, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

# NEDERLANDSCHE WEVERIJ, N.V., ET AL.

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

*Docket 6953. Complaint, Nov. 25, 1957—Decision, May 20, 1958*

Consent order requiring a Dutch manufacturer and its American agents, with place of business in New York City, to cease violating the Wool Products Labeling Act by tagging as "100% Cashmere," fabrics which contained substantial amounts of fibers other than Cashmere; by misrepresenting such products on invoices and shipping memoranda; and by failing in other respects to comply with the labeling requirements of the act.

*Mr. Thomas A. Ziebarth* for the Commission.

*Covington & Burling*, of Washington, D.C., by *Mr. Harry L. Shniderman* for respondent Nederlandsche Weverij, N.V.

*Augenblick & Frost*, of New York, N.Y., by, *Mr. Robert L. Augenblick* for all other respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with misbranding certain wool products in violation of the Wool Products Labeling Act and the rules and regulations promulgated thereunder, and the Federal Trade Commission Act. An agreement has now been entered into by counsel supporting the complaint and all of the respondents, except John Filbert, which provides, among other things, that all of said respondents admit all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, said 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 purposes only and does not constitute an admission by said respondents that they have violated the law as alleged in the complaint.

With respect to respondent John Filbert, it appears that while he has been a nominal officer and director of respondent Kordin, Inc., he has at no time participated in the formulation, direction or control of any of the acts, policies or practices of the corporation. The agreement and proposed order therefore provide for the dismissal of the complaint as to this respondent.

As to respondents Gerard V. Korda and Sam Sherman, who are joined in the proceeding both individually and as copartners trading as Gerard V. Korda Co., the agreement shows that the partnership was terminated on January 31, 1958. For this reason the two individuals are not included in the proposed order as copartners.

In view of the circumstances set forth above, the provisions of the agreement and proposed order with respect to respondents John Filbert, Gerard V. Korda, and Sam Sherman appear to be appropriate.

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

1. Respondent Nederlandsche Weverij, N.V., is a corporation organized and existing under and by virtue of the laws of Holland and doing business in the United States.

Respondents Gerard V. Korda and Sam Sherman are individuals and were copartners trading as Gerard V. Korda Co. until January 31, 1958.

Respondent Kordin, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Respondent Gerard V. Korda is president-treasurer thereof. He formulates, directs, and controls the acts, policies, and practices of corporate respondent, Kordin, Inc.

The office and principal place of business in the United States of all respondents is located at 40 East 34th Street, New York, N.Y.

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

ORDER

*It is ordered*, That respondent Nederlandsche Weverij, N.V., a corporation, and its officers, and respondents Gerard V. Korda and Sam Sherman, individually, and respondent Kordin, Inc., a corporation, and its officers, and respondent Gerard V. Korda, individually

and as an officer of said Kordin, Inc., and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce or the offering for sale, sale, or transportation or distribution in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, of fabrics or other "wool products," as such products are defined in and subject to the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

(1) Falsely or deceptively stamping, tagging, labeling, or otherwise falsely identifying such products as to the character or amount of the constituent fibers contained therein;

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

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

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

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

*It is further ordered*, That respondent Nederlandsche Weverij, N.V., a corporation, and its officers, and respondents Gerard V. Korda and Sam Sherman, individually, and respondent Kordin, Inc., a corporation, and its officers, and respondent Gerard V. Korda, individually and as an officer of said Kordin, Inc., and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale or distribution of fabrics or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly:

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

*It is further ordered*, That the complaint herein be, and the same hereby is, dismissed as to respondent John Filbert.

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 20th day of May 1958, become the decision of the Commission; and, accordingly:

*It is ordered*, That respondents Nederlandsche Weverij, N.V., a corporation, and Gerard V. Korda and Sam Sherman, individually, and Kordin, Inc., a corporation, and Gerard V. Korda, individually and as an officer of said Kordin, 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.