

Decision

IN THE MATTER OF
UNITED CIGAR-WHELAN STORES CORPORATION
CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 6808. Complaint, May 23, 1957—Decision, Sept. 28, 1957

Consent order requiring a corporation in Brooklyn, N.Y., operating a large number of company-owned retail stores and selling also to individually owned stores operating under franchise agreements, to cease representing falsely in advertising in newspapers and on display cards and circulars furnished its said dealers that its "Imported Precision-made Food Slicer" was of a value greatly in excess of the advertised selling price and was unexcelled for safety.

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

Mr. Alvah K. Parent, of Brooklyn, N.Y., and *Aranow, Brodsky, Bohlinger, Einhorn & Dann*, by *Mr. Herbert A. Einhorn*, of New York, N.Y., for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On May 23, 1957, complaint herein was issued, charging Respondent with the use of false, misleading and deceptive representations in connection with the distribution and sale in commerce of its "Imported Precision-made Food Slicer," which representations constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of the Federal Trade Commission Act.

On August 14, 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 is identified in the agreement as a Delaware corporation, with its office and principal place of business located at 82 39th Street, Brooklyn, New York.

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.

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 United Cigar-Whelan Stores Corporation and its officers, 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 food slicers, or other merchandise, do forthwith cease and desist from:

1. Representing, directly or by implication, that imported food slicers or other merchandise have a specific value when such stated value (a) is in excess of the price at which said imported food slicers or other merchandise are regularly and usually sold in the normal course of business at retail by other persons or firms; or (b) is in excess of the prevailing market price at the time of such representation;
2. Representing, directly or by implication, that a certain amount is Respondent's usual or regular retail price for its imported food slicers or any other merchandise when such amount is in excess of the price at which said merchandise is usually and regularly sold at retail by Respondent;
3. Representing, directly or by implication, that its said food slicer is safe, or misrepresenting in any manner, the safety with which any mechanical cutting device may be used.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 28th day of September, 1957, become the decision of the Commission; and, accordingly;

It is ordered, That respondent United Cigar-Whelan Stores Corporation, 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
ALLIED STORES OF OHIO, INC., TRADING AS THE
ROLLMAN SONS COMPANY

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

Docket 6805. Complaint, May 20, 1957—Decision, Oct. 1, 1957

Consent order requiring a furrier in Cincinnati, Ohio, to cease violating the Fur Products Labeling Act by failing to comply with the labeling and invoicing requirements; and by advertising which failed to disclose the names of animals producing the fur in certain products or that certain fur was artificially colored, and failed to set forth the description "dyed mouton processed lamb" as required.

Mr. S. F. House for the Commission.

Sullivan & Cromwell, by *Mr. Robert A. McDowell* of New York, N.Y., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, the Federal Trade Commission on May 20, 1957, issued and subsequently served its complaint in this proceeding against respondent Allied Stores of Ohio, Inc., a corporation, trading as The Rollman Sons Company, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at Fifth and Vine Streets, Cincinnati, Ohio.

On August 9, 1957, there was submitted to the undersigned hearing examiner an agreement between respondent and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, 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. By such agreement, respondent waives any further procedural steps before the hearing examiner and the Commission; waives the making of findings of fact and conclusions of law; and waives all of the rights it may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. Such agreement further provides that it disposes of all of this proceeding as to all parties; that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official

record unless and until it becomes a part of the decision of the Commission; that the agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint; and that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent, and, when so entered, it shall have the same force and effect as if entered after a full hearing, and may be altered, modified, or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

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

1. Respondent Allied Stores of Ohio, Inc., trading as The Rollman Sons Company, is a corporation existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at Fifth and Vine Streets, in the City of Cincinnati, State of Ohio.

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 Allied Stores of Ohio, Inc., a corporation, and its officers, whether trading as The Rollman Sons Company or any other trade name or in any other manner, and respondent's representatives, agents or 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 any fur product, or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which is 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. 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;

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(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 in violation of Rule 40 of the Rules and Regulations.

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

(1) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form;

(2) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder which is intermingled with non-required information;

(3) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in handwriting.

2. 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 invoices;

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

(7) The item number or mark assigned to the fur product in violation of Rule 40 of the Rules and Regulations.

(b) Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

3. 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:

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

(b) Fails to disclose that the fur products are bleached, dyed, or otherwise artificially colored, when such is the fact in violation of Section 5(a)(3) of the Fur Products Labeling Act.

(c) Fails to use the complete term "Mouton-processed Lamb" when an election is made to use the description provided for in Rule 9, instead of merely the animal name "Lamb."

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Sec. 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 1st day of October, 1957, 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

R. H. BEST, INC., ET AL.

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

Docket 6814. Complaint, June 3, 1957—Decision, Oct. 3, 1957

Consent order requiring a concern in Rockville, Md., engaged in selling pre-cut houses, building materials, home equipment, and supplies, and in contracting for the construction of houses and pre-cut houses, to cease representing falsely in newspapers and by circular letters and catalogs that it was making a bona fide offer to sell and construct complete houses of specific design and size, at a specific price and at a designated saving over the usual cost of a comparable home; among a variety of false claims as in the order below set forth.

Mr. Harry E. Middleton, Jr., for the Commission.
Respondents, *pro se*.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 3, 1957, issued and subsequently served its complaint in this proceeding against respondents R. H. Best, Inc., a corporation existing and doing business under and by virtue of the laws of the State of Maryland, and R. H. Best, individually and as an officer of the corporate respondent. The office and principal place of the business of said respondents is at 1545 Rockville Pike, in the City of Rockville, State of Maryland.

On August 16, 1957, there was submitted to the undersigned hearing examiner an agreement between respondents and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. By such agreement, respondents waive any further procedural steps before the hearing examiner and the Commission; waive the making of findings of fact and conclusions of law; and waive all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

Such agreement further provides that it disposes of all of this proceeding as to all parties and that there is no provision in the order respecting the charge relating to the use of the term "custom

built" as set out in Paragraph Four 7 of the complaint or relating to that part of Paragraph Four 8 of the complaint concerning the use of the statement that "other loaning agencies are in favor of our program and they make . . . conventional loans more willingly and in larger amounts than on houses built for sale."

Such agreement further provides that as to the matter referred to in Paragraph Four 7 of the complaint, counsel states that respondents have supplied him with evidence indicating that most or all of the houses built by them are actually "custom built" as that term is commonly understood. As to the matters referred to in Paragraph Four 8 of the complaint counsel states that there is evidence which he believes to be reliable, that loaning agencies do in fact favor programs of the type respondents have and do in fact make loans more willingly on such housing programs and in larger amounts than in the case of houses built for sale. A separate provision covering the use of the expression "predetermined price" is not included in the order as it is believed that the use of this expression is adequately covered in other provisions of the order.

Such agreement further provides that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents, and, when so entered, it shall have the same force and effect as if entered after a full hearing, and may be altered, modified, or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

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

1. Respondent R. H. Best, Inc., is a corporation 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 1545 Rockville Pike, Rockville, Maryland. The individual respondent R. H. Best is an officer and director of said corporate respondent and has as his principal place of business the same address as the corporate respondent.

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

ORDER

It is ordered, That respondents R. H. Best, Inc., a corporation, and its officers and R. H. Best, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale, or distribution of precut houses, building materials, home equipment, and supplies in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing:

1. That they are making a bona fide offer to sell, and construct complete houses of specific design and size, unless such be the fact.

2. That such houses are being offered for sale at a specific price, unless such be the fact.

3. That a designated amount of money will be saved from the normal and usual cost of buying and building a house of comparable size and design when purchasing one of their advertised houses.

4. That a customer may have a \$19,000 house (or equal) for as little as \$13,000.

5. That the customer can reduce the advertised price of the house if he does part of the work himself, unless such be the fact.

6. That only the finest grade of lumber is used in the construction and is guaranteed to be of the finest quality.

7. That the Government is in favor of respondents' program or that it makes FHA or VA loans more willingly and in larger amounts than on houses built for sale.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Sec. 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 3rd day of October, 1957, 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.

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IN THE MATTER OF
FEDERAL FIRE PROTECTION SERVICE, INC., ET AL.

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

Docket 6811. Complaint, June 3, 1957—Decision, Oct. 3, 1957

Order dismissing without prejudice, for failure to effect service, complaint charging a concern in Washington, D.C., with using scare tactics and false claims to sell home fire alarm systems.

Edward F. Downs and Garland S. Ferguson, Esqs., for the Commission.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

On June 3, 1957, the Federal Trade Commission issued its complaint stating its belief to be that respondents, Federal Fire Protection Service, Inc., a corporation organized and doing business under and by virtue of the laws of the District of Columbia, with its principal place of business located at No. 6230 Third Street, Northwest, Washington, D.C., and Richard O. Waterman, individually and as an officer of the corporate respondent and, in his latter capacity, formulating, directing and controlling the policies, acts and practices of such corporate respondent, have violated the provisions of the Federal Trade Commission Act by use of false and deceptive acts and practices, and the use of so-called "scare tactics" in the sale of fire alarm systems for use by the members of the public in their homes.

On August 7, 1957, the attorneys in support of the complaint filed in this proceeding a motion to dismiss the complaint without prejudice, stating, *inter alia*, that every effort, (including attempted personal service), had been made to effect service of said complaint, as required by law, upon the said respondents but without success, it appearing that the corporate respondent has ceased its business operations and that the individual respondent has left for parts unknown, wherefore service has been rendered unobtainable.

The Hearing Examiner has considered the said motion and, being of opinion that, under the circumstances delineated, such motion should be granted:

It is ordered, That the complaint in this matter be, and it is hereby, dismissed without prejudice, however, to the right of the

Federal Trade Commission to institute another proceeding or to take such other action at any time in the future as it may elect or as may be appropriate in the then existing circumstances.

DECISION OF THE COMMISSION

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner did, on the 3rd day of October, 1957, become the decision of the Commission.

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IN THE MATTER OF
DEXTER'S FURRIERS, INC., ET AL.

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

Docket 6821. Complaint, June 17, 1957—Decision, Oct. 3, 1957

Consent order requiring a furrier in Salem, Mass., to cease violating the Fur Products Labeling Act by failing to comply with the labeling and invoicing requirements; and by advertising in newspapers which failed to disclose the names of animals producing the fur in certain products and that certain furs were artificially colored, which contained the names of animals other than those producing certain furs, and which misrepresented prices and values and the source of their stock; and by failing in other respects to comply with requirements of the Act.

John T. Walker, Esq., for the Commission.

Respondents, pro se.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on June 17, 1957, charging them with having violated the Fur Products Labeling Act, the rules and regulations issued thereunder, and the Federal Trade Commission Act by misbranding, falsely advertising and falsely invoicing their fur products. Respondents entered into an agreement, dated July 29, 1957, containing a consent order to cease and desist, disposing of all the issues in this proceeding without hearing, which agreement has been duly approved by the Assistant Director and the Director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondents, pursuant to the aforesaid agreement, have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been made duly in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has also been agreed that the

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record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified, or set aside in the manner provided for other orders, and that the complaint may be used in constructing the terms of the order.

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

1. Respondent Dexter's Furriers, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business at 231 Washington Street, in the City of Salem, State of Massachusetts. Respondent Benjamin Allen is treasurer of said corporate respondent and he formulates, directs and controls the policies, acts and practices of said corporate respondent.

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

ORDER

It is ordered, That respondents, Dexter's Furriers, Inc., a corporation, and its officers, and Benjamin Allen, 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 manufacture for 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 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:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing:

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

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

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

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

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

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

2. Setting forth on labels attached to fur products:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder in abbreviated form.

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder mingled with non-required information.

(c) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder in handwriting.

B. Falsely or deceptively invoicing fur products by:

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

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

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

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

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

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

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

2. Setting forth on invoices the name or names of any animal or animals other than the name or names provided for in Paragraph B(1)(a) above.

3. Abbreviating on invoices information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations thereunder.

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.

2. Contains the name or names of any animal or animals other than the name or names provided for in Paragraph C(1)(a) above.

3. Contains information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations thereunder in print that is not of equal size and conspicuousness.

4. Represents that fur products offered for sale constitute, "A fantastic purchase of thousands of dollars of luxurious furs from a famous reputable New England Furrier," or words of similar import, when such is not the fact.

D. Makes pricing claims or representations in advertisements respecting reduced prices, comparative prices or percentage savings claims, value or quality of furs or fur products, unless there is maintained by respondents, 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 3rd day of October, 1957, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF
PARFUMERIE LIDO, INC., ET AL.

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

Docket 6688. Complaint, Dec. 11, 1956—Decision, Oct. 4, 1957

Consent order requiring a seller in New York City to cease, on labels and in advertising, representing fictitious prices as the customary prices of perfumes and colognes and representing falsely that such products were compounded in France.

Mr. Kent P. Kratz for the Commission.

Sherman & Citron, of New York, N.Y., by *Mr. Cecil A. Citron* for Parfumerie Lido, Inc., and Alexander S. Salz.

Mr. Berthold Dilloff, of New York, N.Y., pro se.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with violation of the Federal Trade Commission Act through the making of certain misrepresentations in connection with perfume products sold by them. Agreements have now been entered into by respondents and counsel supporting the complaint which provide, among other things, that respondents admit all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the respective agreements; 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 orders set forth in the agreements may be entered in disposition of the proceeding as to the respective respondents, such orders to have the same force and effect as if entered after a full hearing, respondents specifically waiving any and all rights to challenge or contest the validity of such orders; that the orders 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 orders; and that the agreements are for settlement purposes only and do not constitute an admission by respondents that they have violated the law as alleged in this complaint.

The hearing examiner having considered the agreements and proposed orders and being of the opinion that they provide an adequate basis for appropriate disposition of the proceeding, the agreements

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are hereby accepted, the following jurisdictional findings made, and the following order issued (the orders in the two agreements being identical except as to the respondents named therein, the orders are here consolidated into one order):

1. Respondent Parfumerie Lido, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 115 West 30th Street, New York, New York. Respondent Alexander S. Salz is founder and president of the corporation and formulates, directs and controls its policies, acts and practices. Respondent Salz and respondent Berthold Dilloff were formerly partners in a business known as Lido Products Company, such partnership having since been dissolved.

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

ORDER

It is ordered, That respondent Parfumerie Lido, Inc., a corporation, its officers, and respondent Alexander S. Salz, individually and as an officer of said corporation and formerly trading as Lido Products Company, or trading under any other name; and respondent Berthold Dilloff, individually and formerly trading as Lido Products Company, or trading under any other name; and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of perfumes, colognes, or any other related product do forthwith cease and desist from directly or indirectly:

1. Disseminating or causing to be disseminated any advertisement, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said products, which advertisement:

(a) Contains or lists prices or amounts when such prices or amounts are in excess of the prices at which the products are usually and customarily sold at retail;

(b) Uses the words "Design Created in Paris," "25 Rue Montgolfier, Paris," "Sole United States Distributor," "Originated in France," "Imported French Perfume," "French Perfume," "Famous French Perfume," "Imported From France," "Created in France," or "New York-Paris" in connection with any products not manufactured or compounded in France; or otherwise representing, directly

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or by implication, that such products are manufactured or compounded in France;

(c) Uses any French name or word as a corporate or trade name or as a part thereof or any name, word, term or depiction indicative of French origin in connection with products manufactured or compounded in the United States unless it is clearly and conspicuously revealed in immediate connection and conjunction therewith that such products are manufactured or compounded in the United States.

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 of said products in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations prohibited in Paragraph 1 of this order.

It is further ordered, That respondent Parfumerie Lido, Inc., a corporation, its officers, and respondent Alexander S. Salz, individually and as an officer of said corporation and formerly trading as Lido Products Company, or trading under any other name; and respondent Berthold Dilloff, individually and formerly trading as Lido Products Company, or trading under any other name; and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of perfumes, colognes or any other related product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Setting out prices or amounts on the labels or in the labeling of their products, when such prices or amounts are in excess of the prices at which such products are usually and customarily sold at retail.

2. Using the words "Design Created in Paris," "25 Rue Montgolfier, Paris," "Sole United States Distributor," "Originated in France," "Imported French Perfume," "French Perfume," "Famous French Perfume," "Imported From France," "Created in France," or "New York-Paris" on the labels or in the labeling in connection with any products not manufactured or compounded in France, or otherwise representing, directly or by implication, on the labels or in the labeling that such products are manufactured or compounded in France.

3. Using any French name or word as a corporate or trade name or as a part thereof or any name, word, term or depiction indicative of French origin, on the label or in the labeling of products manufactured or compounded in the United States unless it is clearly and conspicuously revealed in immediate connection and conjunction

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therewith that such products are manufactured or compounded in the United States.

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 4th day of October, 1957, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

RIT-ZIE NOVELTY COMPANY, INC., ET AL.

Docket 6354. Complaint, May 16, 1955—Decision, Oct. 7, 1957

VICTOR B. HANDAL & BRO., INC., ET AL.

Docket 6375. Complaint, June 27, 1955—Decision, Oct. 7, 1957

RELIANCE INTERCONTINENTAL CORPORATION ET AL.

*Docket 6520. Complaint, Feb. 28, 1956—Decision, Oct. 7, 1957*CONSENT ORDERS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

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

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

Mr. Brockman Horne for the Commission.

Weil, Gotshal & Manges, of New York City, for respondents.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

Upon the closing on the record of the case-in-chief in support of the complaint in each of the above-captioned proceedings, all of the parties thereto, moving through counsel supporting the complaint, on July 8, 1957, sought and obtained from the hearing examiner a deferment of the reception of evidence in opposition to the allegations of the complaint for the purpose of permitting negotiation of agreements containing cease and desist orders disposing of each of the proceedings. Thereafter, at a duly noticed hearing in New York on July 18, 1957, the record discloses agreements in each of the three cases had been negotiated and executed. Subsequently, on July 25, 1957, they were submitted to the hearing examiner under one memorandum of transmittal. The agreements were rejected by the hearing examiner. Counsel supporting the complaints and counsel for respondents in all three matters have filed joint appeal from that ruling as permitted under § 3.25 of the Commission's Rules of Practice.

The hearing examiner predicates his rejection of the consent agreements, first, upon the ground that respondents have "* * * availed themselves of delaying tactics and of every possible avenue of de-

fense and now, having forced counsel for the complaint to a full disclosure of his case and being apparently, at an end, seek approval of a consent settlement * * *." The Commission recognizes the hearing examiner's concern with the fact that two of these cases have been pending in the trial stage since 1955 and one since 1956 but, from its examination of the record, has concluded that not all, not even the majority, of the delay can be attributed to respondents' trial tactics. For example, in 1955 and 1956, as pointed out by respondents, there was pending in Congress proposed legislation which, if enacted, would have exempted silk scarves such as are involved in these proceedings from coverage by the Flammable Fabrics Act, and the complaints herein would have been subject to dismissal. All participants in the proceedings during that period appear to have been in agreement as to continuance of the hearings. The record, in any event, does not disclose otherwise.

On the point that respondents "forced counsel supporting the complaint to a full disclosure of his case," this is not the criterion by which to determine whether a consent order agreement should be accepted—or rejected. The record shows no evidence not previously known to respondents and counsel supporting the complaint was not subjected to an onerous burden in the presentation thereof. On the contrary, most of the physical exhibits, consisting of scarves sold by the respondents in commerce, were identified by respondents prior to hearing and were received in evidence pursuant to stipulation, as was much of the testimony, including some government expert testimony on flammability tests, thus effecting savings of time and money in making the case-in-chief.

Secondly, the hearing examiner, in his notice of rejection of the proposed agreements for settlement, refers to the Commission's policy of denying the privilege of informal stipulation procedures to respondents in certain types of cases, including those involving flammable fabrics; and states that, by analogy, the reasoning on which such policy is bottomed "should govern" the extension of the privilege of disposing of a proceeding through the entry of a consent order under § 3.25 of the Rules of Practice. We disagree that there is, or should be, any significant parallel between the policy behind informal stipulation procedures available prior to issuance of complaint and the policy embodied in the consent order method of disposing of cases after complaint has issued. Under the pertinent rule, the latter procedure is clearly available in all types of cases at any stage of a proceeding subsequent to the issuance of a complaint.

The hearing examiner next assigns as a reason for his rejection of the consent agreements the fact that respondents, in refusing an offer

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of settlement in a pretrial hearing, thereby gave themselves an unfair competitive advantage over their competitors who did execute consent agreements even though they had on hand considerable stocks of the scarves of the flammable type involved here. Whatever merit this argument may have, other considerations in the situation found here are persuasive for the acceptance of the agreements. The saving of time and money that will result will be more in the public interest than would the rejection of the agreements and the remand of the proceedings for the taking of further testimony and the reception of evidence in opposition to the complaints. Under the agreements, as a practical matter, everything is accomplished that would be achieved by entry of cease and desist orders after trial in each of the three cases, and, having in mind the statutory mandate contained in Section 6(a) of the Administrative Procedure Act, 5 U.S.C.A. 1005(b), that "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it * * *," we feel that the agreements should be accepted. In the light of the foregoing considerations, the Commission is of the opinion that the agreements constitute appropriate disposition of the issues in each case, and we direct their acceptance and the entry of an appropriate decision in each proceeding.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

On the dates noted in the above title the Federal Trade Commission issued and subsequently served its complaints in these proceedings charging that the named corporate and individual respondents, in their respective capacities, were and are engaging in acts and practices in violation of the Flammable Fabrics Act and of the rules and regulations promulgated thereunder which constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. After the issuance of said complaints, the filing of respondents' answers thereto and the closing on the record of the cases-in-chief in support of the complaints, at a duly noticed hearing on July 8, 1957, in New York, on the request of counsel supporting the complaints, a postponement was granted by the hearing examiner to permit negotiation of agreements for consent settlements. Thereafter, at a hearing convened July 18, 1957, before the hearing examiner, such Agreements, entered into between counsel supporting the complaints and respondents were submitted in disposition of all the issues presented in these proceedings. Under procedures provided in § 3.25(e) of the Commission's Rules of Prac-

tice, the agreements are now before the Commission for its consideration.

Pursuant to the agreements, respondents have admitted all the jurisdictional allegations of the complaints and agreed that the records herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with such allegations. The agreements further provide that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings as to the facts or conclusions of law and the right to challenge or to contest the validity of the orders to cease and desist entered in accordance with these agreements. The agreements further state that the records on which the decision of the Commission shall be based shall consist solely of the complaints and said agreements. Further, the agreements assert that they are for settlement purposes only and do not constitute admissions by respondents that they have violated the law as alleged in the complaints. Respondents additionally have agreed that the orders to cease and desist contained in the agreements may be entered in these proceedings without further notice to respondents and that, when so entered, they shall have the same force and effect as if entered after full hearing, and that they may be altered, modified or set aside in the manner provided by statute for other orders, and that the complaint may be used in construing the terms of the orders.

For the reasons assigned in its accompanying opinion, the Commission has determined that the aforesaid agreements containing the consent orders to cease and desist provide for an appropriate disposition of these proceedings in the public interest, and the same are hereby accepted and ordered filed; and

Having determined that these proceedings are in the public interest, the Commission hereby makes the following jurisdictional findings, and issues the following orders:

JURISDICTIONAL FINDINGS IN DOCKET 6354

1. The respondent Rit-Zie Novelty Company, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 234 Fifth Avenue, in the City of New York, State of New York.

2. Respondents Moe Liebowitz and Samuel Einhorn (the latter whose name is incorrectly spelled in the caption of the complaint herein) are president-secretary and vice-president-treasurer, respectively, of said corporate respondent, and they formulate, direct and

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control the policies, acts and practices of said corporation. Their address is the same as that of the corporate respondent.

JURISDICTIONAL FINDINGS IN DOCKET 6375

1. Respondent Victor B. Handal & Bro., Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New York, and with its principal place of business located at 277 Fifth Avenue, in the City of New York, State of New York.

2. Respondents Victor B. Handal and John Handal are individuals and are vice-president and secretary-treasurer, respectively, of said corporate respondent, and they formulate, direct and control the policies, acts and practices of said corporation. Their address is the same as that of said corporate respondent.

JURISDICTIONAL FINDINGS IN DOCKET 6520

1. The respondent Reliance Intercontinental Corporation is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 48 West 37th Street, in the City of New York, State of New York.

2. Respondents Adolph Meirowitz and Jerrold Kurtz are individuals and are president and secretary-treasurer, respectively, of said corporate respondent, and they formulate, direct and control the policies, acts and practices of said corporation. Their address is the same as that of said corporate respondent.

3. The Federal Trade Commission has jurisdiction of the subject matter of these proceedings and of the respondents, and the proceedings are in the public interest.

ORDER

It is ordered, That respondents Rit-Zie Novelty Company, Inc., a corporation, and its officers, and Moe Liebowitz and Samuel Einhorn, individually and as officers of said corporation; Victor B. Handal & Bro., Inc., a corporation, and its officers, and respondents Victor B. Handal and John Handal, individually and as officers of said corporation; and Reliance Intercontinental Corporation, a corporation, and its officers, and respondents Adolph Meirowitz and Jerrold Kurtz, individually and as officers of said corporation; and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

(a) Importing into the United States; or

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(b) Selling, offering for sale, introducing, delivering for introduction, transporting, or causing to be transported, in commerce, as "commerce" is defined in the Flammable Fabrics Act; or

(c) Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce; any article of wearing apparel, which, under the provisions of Section 4 of the said Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

It is further ordered, That above-named respondents shall, within sixty (60) days after service upon them of these orders, file with the Commission reports, 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
MAURICE BALL TRADING AS MAURICE BALL FURS

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

Docket 6631. Complaint, Sept. 12, 1956—Decision, Oct. 7, 1957

Order requiring a Los Angeles furrier to cease violating the Fur Products Labeling Act in advertising and labeling which falsely identified the animals producing the fur in certain products and carried fictitious prices; by failing to comply with the labeling and invoicing requirements of the Act; by advertisements in newspapers which failed to disclose that certain fur products were artificially colored, and misrepresented the geographic origin of certain furs, their values, and prices; and by failing to keep adequate records as a basis for such pricing claims.

Mr. Michael J. Vitale and Mr. Thomas A. Ziebarth for the Commission.

Tyre & Kamins, of Beverly Hills, Calif., by *Mr. Richard J. Kamins*, for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is before the undersigned hearing examiner for final consideration upon the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by both parties, and all findings of fact and conclusions of law proposed by the parties respectively not hereinafter specifically found or concluded are herewith rejected, and the hearing examiner having considered the record herein and being now fully advised in the premises makes the following findings as to the facts, conclusions drawn therefrom, and order:

1. Respondent Maurice Ball is an individual trading as Maurice Ball Furs with his place of business located at 521 West Seventh Street, Los Angeles 14, California. Respondent is a retail furrier and has been engaged in the purchase and distribution of fur products, including coats, jackets, stoles and related fur garments in the downtown Los Angeles area for over 35 years.

2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been engaged in the advertising and in the sale and distribution of fur products in interstate commerce. The evidence in this proceeding shows that respondent obtained substantial quantities of its fur products by means of pur-

chases made outside the State of California and that such fur products were shipped to him at his place of business in California. The evidence also shows that these fur products were thereafter advertised in newspapers having an interstate circulation, and in at least four instances respondent sold and transported fur garments to purchasers located outside the State of California. Respondent also purchases mink pelts or furs from a source in Los Angeles, California, for use in the manufacture, by him, of fur products. These pelts have their origin outside the State of California. The activities of the respondent in procuring fur products from sources outside the State of California, and thereafter advertising and offering for sale in newspapers having an interstate circulation, and thereafter selling, shipping, and delivering such fur products in commerce clearly brings its business activities within the concept of "commerce" under the Fur Products Labeling Act.

3. In the course and conduct of his business, certain of the fur products hereinabove described were misbranded as follows:

(a) Some of respondent's fur products were falsely and deceptively labeled or otherwise were falsely or deceptively identified with respect to the name or names of the animal or animals that produced the fur from which said fur products had been manufactured in violation of Section 4(1) of the Fur Products Labeling Act.

(b) Some of respondent's fur products were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act, or in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

(c) Some of respondent's fur products were misbranded in that required information was mingled with non-required information on labels, and in some instances information on labels was set forth in handwriting in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder.

(d) Respondent caused or participated in the removal of labels required under the Fur Products Labeling Act to be affixed to fur products prior to the time such fur products were sold and delivered to the ultimate consumer in violation of Section 3(d) of the Fur Products Labeling Act and Rule 27 of the Rules and Regulations promulgated thereunder.

(e) Respondent's fur products were falsely and deceptively invoiced in that such invoices in some instances did not contain the name or names of the animals that produced the fur; did not indicate that the fur products contained or were composed of bleached, dyed or otherwise artificially colored fur; did not show that the fur products were composed of paws, tails, bellies or waste fur; or did not give the correct country of origin of such fur; as required

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under the provisions of Section 5(b)(1) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

(f) Respondent's products in some instances were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in that required information was set forth in abbreviated form in violation of Rule 4 of the aforesaid Rules and Regulations.

(g) Respondent caused dissemination in commerce, as "commerce" is defined in the Fur Products Labeling Act, of certain advertisements concerning his said fur products, by means of newspapers and by various other means, which advertisements were not in accordance with the provisions of Section 5(a) of said Act and the Rules and Regulations promulgated thereunder.

(h) Respondent caused dissemination in commerce, as "commerce" is defined in the Fur Products Labeling Act of certain advertisements concerning his said fur products, which falsely and deceptively advertised said fur products, in that some of said advertisements:

(1) Failed to disclose the name or names of the animal or animals producing the fur or furs contained in the fur products.

(2) Failed to disclose that the fur products were bleached, dyed, or otherwise artificially colored.

(3) Falsely represented the geographical origin of the animal or animals which produced the fur contained in said fur products.

4. In the course and conduct of his business respondent held fur sales from time to time. On such occasions respondent placed advertisements in various newspapers having interstate circulation including Los Angeles Examiner, Los Angeles Times, and Los Angeles Herald and Express. In such advertisements respondent represented that he was holding store-wide sales, during which his fur products could be purchased at a substantial discount or saving off regular prices.

5. There is testimony in this proceeding that when a shipment of fur products was received, respondent's clerk wrote on the manufacturer's ticket attached to the garment the cost of said article as shown by the invoice. After the cost of the garment had been placed on the ticket, the garment was inspected by the respondent and two figures placed upon the manufacturer's tag designating the top or ticketed price and the sale price. This procedure was not denied by the respondent except that he testified that this was only done when garment was received to be included in a sale to be or

being held. The clerk then prepared a yellow ticket to be attached to the garment showing the fur and origin and the top or ticketed price in figures—and the cost price in code. In the event a sale was being conducted a sales ticket was also attached to the garment showing the sale price in figures. The manufacturer's tag was then removed and attached to the invoice.

6. While the evidence as a whole indicates that respondent does in fact place both the top and lower figure on the manufacturer's tag, even in non-sales periods, this is not material as the top or ticketed price was merely a bargaining price and did not represent the actual price at which the garment was required to be sold by any sales person. This is borne out by the testimony of the respondent:

Q. And don't several of your customers, or prospective customers, I should say, during your regular season periods offer to purchase the garments for less than is shown on the yellow tag?

A. Quite a number of them do.

Q. And also on those occasions where quite a number of them do, if you can make what you consider a fair profit, you sell it for less, don't you?

A. We do. (Tr. 230)

Even during a sale period, respondent's sales personnel are authorized, subject to approval of respondent or his store manager, to sell a garment for less than the sales ticket price.

7. In pricing his garments the respondent did not use any systematic mark-up from costs, and in fact the prices fixed by respondent to be placed on the yellow ticket had no systematic relation to cost and were not set up on a definite pattern of profit.

8. The representations contained in the advertisements issued by the respondent constitute a misrepresentation of prices in violation of the Fur Products Labeling Act and Rule 44(a) promulgated thereunder. Respondent's system of pricing was such that the representations in advertisements of the regular price were fictitious, and further the purported saving indicated by the advertisements was in fact fictitious since the designated regular price, or respondent's ticketed price, included Federal tax, while the sales price did not include tax.

CONCLUSION

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

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ORDER

It is ordered, That respondent Maurice Ball, an individual doing business as Maurice Ball Furs, or under any other name, 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 any fur product, or in connection with the sale, advertising, offering for sale, transportation, or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "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. Falsely or deceptively labeling or otherwise identifying any such product as to the name or names of the animal or animals that produced the fur from which such product was manufactured.

2. Falsely or deceptively labeling or otherwise identifying any such product as to the regular price or value of such product when such price is not that at which such product is regularly sold by respondent.

3. Failing to affix labels to fur products showing:

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

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

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

d. That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is a 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.

4. Setting forth on labels attached to fur products:

a. Non-required information mingled with required information;

b. Required information in handwriting.

B. Removing or participating in the removal of labels required by the Fur Products Labeling Act to be affixed to fur products, prior to

the time any fur product is sold and delivered to the ultimate consumer.

C. Falsely or deceptively invoicing fur products by:

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

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

2. Setting forth required information 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 producing the fur or furs contained in the fur products as set forth in the Fur Products Name Guide and as prescribed by the 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.

2. Represents, directly or by implication:

a. That the amount set forth on price tags attached to fur products represents the value or the usual price at which said fur products had been customarily sold by the respondent in the recent regular course of his said business, contrary to fact;

b. That the country of origin of any imported fur or furs used in said fur products sold by respondent is other or different than is the fact;

c. That any such product is of higher grade, quality, or value than is the fact;

d. 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, regular course of his business.

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

F. Making price claims and representations of the types referred to in Paragraphs D 2a, D 2c, D 2d, and E, unless there is 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

This matter having come on to be heard by the Commission upon its review of the hearing examiner's initial decision, filed August 2, 1957; and

The Commission having determined 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 respondent, Maurice Ball, shall, within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with the order contained in said initial decision.

IN THE MATTER OF
REYNOLDS METALS COMPANY AND LIFETIME
SALES, INC.

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

Docket 6650. Complaint, Oct. 12, 1956—Decision, Oct. 8, 1957

Order dismissing—for the reason that respondent sold all that part of its production herein concerned, along with trade-mark and good will—complaint charging a manufacturer of stainless steel cooking utensils at its factory in LaGrange, Ill., with falsely representing benefits to health and nutrition obtainable from use of its utensils and recommended "waterless" cooking methods, and dangers inherent in use of competitive products.

As to respondent sales company, the matter was disposed of on June 1, 1957 (53 F.T.C. 1108), by a consent order.

*Mr. Morton Nesmith and Mr. John Mathias for the Commission.
Mr. Gustav B. Margraf and Mr. W. Tobin Lennon, of Richmond, Va., and Mr. Fred R. Edney, of Louisville, Ky., for Reynolds Metals Co.*

INITIAL DECISION AS TO REYNOLDS METALS COMPANY BY
ABNER E. LIPSCOMB, HEARING EXAMINER

On October 12, 1956, the Commission issued its complaint in this proceeding, charging Respondents with the dissemination, in connection with advertising and selling their stainless steel cooking utensils, of false, misleading and disparaging representations, in violation of the Federal Trade Commission Act.

On April 26, 1957, the hearing examiner herein issued his initial decision accepting an agreement containing a consent cease-and-desist order disposing of this proceeding as to Respondent Lifetime Sales, Inc., which, on May 31, 1957, was adopted by the Commission.

Thereafter, on August 15, 1957, the

search
Consent

The affidavit further states that Respondent's decision to withdraw from the business of manufacturing stainless steel cooking utensils was made after the issuance of the complaint herein. The affidavit affirms that this Respondent does not now manufacture, sell or otherwise distribute cooking utensils except for replacement of utensils previously sold which prove to be defective or not as guaranteed, and that such replacement of utensils by the Respondent will be continued until September 10, 1957. Thereafter, the West Bend Aluminum Company will assume the obligation of such replacements, and the Respondent, Reynolds Metals Company, will be completely and wholly divorced from the manufacture, sale and distribution of cooking utensils.

The affidavit further states that Respondent Reynolds Metals Company has no intention of engaging in the manufacture, sale and distribution of cooking utensils in the future, and stipulates that if Respondent's motion for dismissal is granted, and it should resume the direct selling of utensils, this present action may at that time be reopened by the Commission.

On August 22, 1957, counsel supporting the complaint submitted an answer to Respondent's motion, stating that, in his opinion, public interest has been adequately protected, and that, by virtue of the policy of the Commission as set forth in the matter of *Bell & Howell Company*, Docket No. 6729, Respondent's motion to dismiss should be granted without prejudice.

After consideration of the entire record herein, the hearing examiner agrees with counsel supporting the complaint that Respondent's motion should be so granted, since public interest herein has already been adequately protected by the action of Respondent Reynolds Metals Company in selling its business, and that heretofore taken by the Commission with respect to Respondent Lifetime Sales, Inc.; and that this proceeding, insofar as it involves Respondent Reynolds Metals Company, should be dismissed without prejudice.

Order

IN THE MATTER OF
ADVANCE SPECTACLE COMPANY, INC., ET AL.

Docket 6285. Order reopening, etc., Oct. 11, 1957

Order reopening proceeding, vacating decision,¹ and remanding case to hearing examiner.

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

Mr. William A. Somers for the Commission.

Mr. Alfred B. Teton of *Froelich, Grossman, Teton and Tabin*, of Chicago, Ill., for respondents.

Whereas, the hearing examiner, on April 12, 1955, filed an initial decision in which he accepted an agreement containing an order to cease and desist theretofore executed by the respondents and counsel in support of the complaint, which decision, on May 22, 1955, became the decision of the Commission in disposition of this proceeding; and

Whereas, counsel in support of the complaint, by motion filed September 13, 1957, requested that the matter be reopened and that said decision be vacated and set aside and the case remanded to the hearing examiner for further proceedings, which motion was, on September 18, 1957, duly served upon the respondents; and

It appearing that the ground for said motion is that the respondents have asserted a misunderstanding on their part as to the scope of the order agreed to, stating that they understood that said order would relate only to advertising material packaged with their eye-testing device and not to their advertising generally; and

It further appearing to the Commission that while the order to cease and desist on its face admits of no ambiguity, clearly applying to all forms of advertising disseminated by the United States mail or by any means in commerce, the discussion on the record at the time of submittal of the agreement containing the order does indicate a possible basis for the respondents' misunderstanding; and

The Commission being of the opinion that, in the circumstances, the public interest will best be served by vacating the decision and directing that the case be tried:

It is ordered, That this proceeding be reopened and that the initial decision of the hearing examiner filed April 12, 1955, and the decision of the Commission and order to file report of compliance, issued May 20, 1955, be, and they hereby are, vacated and set aside.

It is further ordered, That the case be, and it hereby is, remanded to the hearing examiner for further proceedings in regular course.

¹ 51 F.T.C. 1216.

IN THE MATTER OF
LANOLIN PLUS, INC.

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

Docket 6827. Complaint, July 8, 1957—Decision, Oct. 15, 1957

Consent order requiring a seller in Chicago of "Lanolin Plus Shampoo" to cease representing falsely in advertisements in newspapers, by television, etc., that detergent shampoos burn the hair.

Mr. Daniel J. Murphy and Mr. Thomas Sterner for the Commission.

Frank E. and Arthur Gettleman, of Chicago, Ill., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes hereinafter referred to as the Commission), on July 8, 1957, issued its complaint herein under the Federal Trade Commission Act against the above-named respondent, Lanolin Plus, Inc., a corporation, charging said respondent with having violated the provisions of the Federal Trade Commission Act in certain particulars. The respondent was duly served with process.

On August 23, 1957, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order To Cease And Desist," which had been entered into by and between said respondent and by its attorneys and Daniel J. Murphy and Thomas Sterner, counsel supporting the complaint, under date of August 1, 1957, and subject to the approval of the Bureau of Litigation of the Commission. Such agreement had been thereafter duly approved by the Director of the Commission's Bureau of Litigation.

On due consideration of the said "Agreement Containing Consent Order To Cease and Desist," the hearing examiner finds that said agreement, both in form and in content, is in accord with Section 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings and that by said agreement the parties have specifically agreed that:

1. Respondent Lanolin Plus, Inc., is a corporation organized, existing and doing business under the laws of the State of Delaware, with its office and principal place of business located at 30 West Hubbard Street, Chicago 10, Illinois.

2. Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on July 8, 1957, issued its

complaint in this proceeding against respondent, and a true copy was thereafter duly served on respondent.

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

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

5. Respondent waives:

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

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

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

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

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

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

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

ORDER

It is ordered, That respondent Lanolin Plus, Inc., a corporation, 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 "Lanolin Plus Shampoo," or any preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same name or under any other name, do forthwith cease and desist from directly or indirectly:

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

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

It is further ordered, That the respondent Lanolin Plus, Inc., a corporation, 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 Lanolin Plus Shampoo or any other related product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, in audio-visual representation in television or otherwise, that detergent shampoos will burn hair, or otherwise utilizing such scare tactics to induce the purchase of respondent's preparation.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner did on the 15th day of October, 1957, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Lanolin Plus, 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 they have complied with the order to cease and desist.

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IN THE MATTER OF
GARY PHARMACAL COMPANY ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 6655. Complaint, Oct. 17, 1956—Decision, Oct. 18, 1957

Consent order requiring a seller in Chicago to cease representing falsely in advertising that its drug preparation "Dry-Tabs" was a new discovery that would correct the bed-wetting habit in all cases, and to reveal conspicuously that the preparation was of no value except in cases of functional bed-wetting not involving organic defects or diseases and should not be used by children under six except on a physician's advice.

Mr. William A. Somers for the Commission.

Frank E. & Arthur Gettleman, of Chicago, Ill., by *Mr. Frank E. Gettleman*, for respondent Gary Pharmacal Co.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with the dissemination of false advertisements in connection with a medicinal preparation sold by them, the preparation being for use in the prevention or correction of enuresis or bed-wetting. An agreement has now been entered into by counsel supporting the complaint, and the corporate respondent Gary Pharmacal Company which provides, among other things, that said respondent admits all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, said respondent 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 respondent that it has violated the law as alleged in the complaint.

The proposed order covers all of the issues raised in the complaint except that as to whether respondent's advertisements should con-

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tain an affirmative statement to the effect that most cases of bed-wetting occur in children under six years of age. Counsel supporting the complaint is of the view that this is a matter of such common knowledge that it is unnecessary that such a statement appear in the advertisements. The hearing examiner concurs in this view.

The individual respondent in the proceeding, Saul C. Korkin, has died since the issuance of the complaint, and the proposed order provides for the dismissal of the complaint as to him.

The hearing examiner being of the opinion 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 Gary Pharmacal Company is a corporation existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 7460 Exchange Avenue, Chicago, Illinois.

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 Gary Pharmacal Company, 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 "Dry-Tabs," or any other preparation of substantially similar composition or possessing substantially similar properties, do forthwith cease and desist from:

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

(a) That "Dry-Tabs" will be effective in stopping bed-wetting or correcting the bed-wetting habit in all cases.

(b) That "Dry-Tabs" is a new discovery for treatment of the bed-wetting habit.

2. Disseminating or causing to be disseminated any advertisement, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement fails to clearly and conspicuously reveal that said preparation is of no value in stopping bed-wetting or in correcting the bed-wetting habit, except in cases of functional bed-wetting not involving organic defects or diseases; and that the preparation should not be used by children less than six years of age except upon the advice of a physician.

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3. 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 of respondent's preparation, or similar products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the representations prohibited in Paragraph 1 of this order, or which fails to comply with the affirmative requirements set forth in Paragraph 2 hereof.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondent Saul C. Korkin.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner did, on the 18th day of October, 1957, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent Gary Pharmacal Company, 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
NULIFE PRODUCTS COMPANY ET AL.

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

Docket 6809. Complaint, May 28, 1957—Decision, Oct. 18, 1957

Consent order requiring mail order sellers in Philadelphia to cease representing falsely in advertising in newspapers, circulars, etc., that use of their eyeglasses would correct the defects in vision in all persons over 40 to the extent that they would be able to read fine print "with ease never before thought possible."

At respondents' request, the order to cease and desist was, on April 11, 1958, modified to exclude from operation thereof respondents' advertisements for their "Clip-on Magnifiers" to be worn over regulation prescription lenses.

Mr. Frederick McManus for the Commission.

Mr. Milton A. Bass, of New York, N.Y., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The complaint in this proceeding charges that the respondents have violated the provisions of the Federal Trade Commission Act by the use of false and misleading newspaper advertisements and other media in connection with the sale of eyeglasses.

After issuance and service of the complaint, the respondents, their 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 of the Bureau of Litigation.

The pertinent provisions of said agreement are as follows: Respondents admit 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; respondents waive the requirement that the decision must contain a statement of findings of fact and conclusion of law; respondents waive 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; respondents waive 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

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an admission by respondents that they have violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that 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. The respondent Nulife Products Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania with its office and principal place of business located at 1702 Pine Street, Philadelphia, Pennsylvania. Respondent corporation trades under its said name and as Clear Vision Products and Nulife Products.

Individual respondents Samuel Schimmel and Herbert Schimmel are officers of the corporate respondent. They formulate, direct, and control the acts, practices, and policies of the corporate respondent, including those hereinafter referred to. Their address is the same as that of the corporate respondent.

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

ORDER

It is ordered, That respondent, Nulife Products Company, a corporation trading under its said name or as Clear Vision Products or Nulife Products or under any other name, and its officers, and respondents Samuel Schimmel and Herbert Schimmel, 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 eyeglasses, do forthwith cease and desist from:

1. Disseminating, or causing to be disseminated, any advertisement by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication, that the eyeglasses sold by respondents will correct defects in the vision of persons over 40 years of age to the extent that they can read satisfactorily, unless expressly limited to those persons who do not have astigmatism or diseases of the eye and who require only simple magnifying lenses.

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 of their eyeglasses in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains the representations referred to in Paragraph One hereof unless expressly limited as provided therein.

[The following clause was added by Commission order of April 11, 1958]

Provided, however, That the aforesaid provisions and limitations shall not be construed as applying to advertisements for magnifying devices designed and advertised for use by clipping on or otherwise attaching to prescription eyeglasses;

it being understood that this action does not constitute approval by the Commission of the respondents' advertising representations for their "Clip-on Magnifiers" or other similar devices.

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 18th day of October 1957, 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
VIRGINIA EXCELSIOR MILLS, INC., ET AL.
ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6630. Complaint, Sept. 12, 1956—Decision, Oct. 25, 1957

Order requiring 12 manufacturers of excelsior in the State of Virginia to cease cooperatively maintaining any organization as their common selling agent; fixing or maintaining the selling price of excelsior; fixing or regulating production quotas; designating the party to whom a manufacturer could sell and the prices it could quote; and enforcing such restrictions on others, by imposition of penalties; classifying excelsior for pricing purposes; and designating conditions under which the mill stockholders could sell their mills or machines.

Mr. Floyd O. Collins for the Commission.

Mason & Stehl, by *Mr. Julien J. Mason*, of Bowling Green, Va., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

On September 12, 1956, the Federal Trade Commission issued its complaint in the above-entitled proceeding, charging the manufacturers named in the caption hereof with organizing Virginia Excelsior Mills, Inc., hereinafter referred to as Respondent Mills, for the purpose and with the effect of destroying competition among themselves by using that organization as a common selling agency and as a medium through which they have carried out, collusively and collectively, various acts and practices, as follows:

1. Formulated, managed and controlled the policies, practices and methods of Respondent Mills;
2. Fixed and maintained the selling price of excelsior;
3. Fixed a production quota for each manufacturer thereof;
4. Forbade the manufacturers owning stock in Respondent Mills to sell excelsior to anyone except Respondent Mills;
5. Forbade such stockholding manufacturers to quote prices to any prospective customer;
6. Established and maintained a uniform classification of excelsior, with a uniform price for each classification;
7. Fixed and maintained penalties to be imposed upon any manufacturer violating any provisions of his contract with Respondent Mills; and

8. Prohibited any stockholder manufacturer from selling his excelsior plant unless he also sold therewith his stock in Respondent Mills.

The complaint further alleges that such collusive acts and practices are all to the injury of the public and of competition, and have a dangerous tendency and capacity to, and do, unduly restrain and suppress competition in price and otherwise in the interstate sale and distribution of excelsior, and constitute unfair acts and practices and unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

THE ANSWERS

On October 23, 1956, four separate answers were submitted, each on behalf of a group of Respondents, and all denying any violation of the Federal Trade Commission Act. All answers are in agreement regarding the organization, policies and practices of Respondent Mills and the contracts made with and quotas received from that organization. The various other denials and affirmations contained in these answers will be considered hereinafter in detail in connection with the analysis of the issues to which they relate.

HEARINGS AND PROPOSED FINDINGS

Hearings were held in Richmond, Virginia, on January 22 and 23, 1957, at which evidence was presented in support of and in opposition to the allegations of the complaint. Thereafter, counsel rested their cases and submitted proposed findings as to the facts and proposed conclusions.

IDENTITY AND ORGANIZATION OF THE RESPONDENTS

Respondent Mills is a Virginia corporation organized in 1938. According to its charter, it was organized to engage in all branches of the lumber, timber, excelsior and wood products business; to buy and sell lumber, timber lands and other real estate; and to own, lease and operate excelsior mills, saw mills, planing mills and manufacturing plants of all kinds for the manufacture of trees, timber and lumber into any and all kinds of timber products and by-products.

Respondents W. H. Baker, T. Frank Flippo, H. L. Taylor, and F. C. Flippo are, respectively, president, vice president, secretary and treasurer, and assistant secretary and treasurer of Respondent Mills.

Respondents T. Frank Flippo, F. Carter Flippo and Arthur P. Flippo have been for a number of years, and are now, engaged in

the manufacture, sale and distribution of excelsior, under the name of T. Frank Flippo & Sons, with their place of business at Doswell, Virginia.

Respondents H. L. Taylor, H. Ashton Taylor, G. K. Coleman, Sr., and G. K. Coleman, Jr. have been for a number of years, and are now, engaged in the manufacturing and selling of excelsior, as a partnership, under the name of Ruther Glen Excelsior Company, with their place of business at Ruther Glen, Virginia.

Respondent Thomas H. Blanton was for several years engaged in the manufacture, sale and distribution of excelsior under the name of Thomas H. Blanton Excelsior Mill, but in July of 1956, prior to the issuance of the complaint herein, he sold his excelsior mill, and since that time has not been engaged in the manufacture or sale of excelsior.

Respondents T. Nelson Haley and Jesse C. Haley have been for a number of years, and are now, engaged as a partnership in manufacturing and selling excelsior, doing business under the name of Haley Excelsior Company, at Doswell, Virginia.

Respondent W. H. Baker has been for some time, and is now, engaged in the manufacture, sale and distribution of excelsior, operating an excelsior mill under the trade name of Hallsboro Manufacturing Company, at Hallsboro, Virginia.

Respondents S. D. Quarles and J. R. Gilman have been and are now engaged as copartners in the manufacture, sale and distribution of excelsior, with their principal place of business at Ashland, Virginia. Both of these Respondents also own stock in Respondent S. D. Quarles Lumber Company, Inc.

Respondent C. J. Haley has been for a number of years, and is now, engaged in the manufacture, sale and distribution of excelsior, and, under the name of Ashland Excelsior Company, owns and operates a mill at Ashland, Virginia.

Respondents H. L. Taylor and Thomas H. Chewning, from February 14, 1954, until 1955, were copartners operating two excelsior mills, known, respectively, as Carolina Excelsior Company and Chilesburg Excelsior Company. In December, 1955, they sold out the partnership and the Carolina Excelsior Company mill is now owned and operated by Respondent H. L. Taylor, while the Chilesburg Excelsior Company mill was taken over and is now being operated by Respondent Thomas H. Chewning and his niece and nephew. Both mills are located at Chilesburg, Virginia.

Respondent Benjamin Jeter is now, and for a number of years has been, manufacturing and selling excelsior and operating an excelsior mill located at Penola, Virginia.

Respondent Noah Markey, until October, 1955, owned and operated an excelsior mill known as Markey Excelsior Company, and was engaged in the manufacture, sale and distribution of excelsior at Beaverdam, Virginia. In October, 1955, Respondent Markey ceased doing business or operating a mill, and in June, 1956, sold his mill to the Tate Wood Products of Elizabeth City, North Carolina. Respondent Markey is not now engaged in the excelsior business.

Respondent S. D. Quarles Lumber Company, Inc., a Virginia corporation, for a number of years has been, and is now, engaged in the manufacture, sale and distribution of excelsior, with its principal place of business at Ashland, Virginia.

Respondent C. T. Smith has been for a number of years, and is now, engaged in the manufacture, sale and distribution of excelsior, operating a mill located at Hanover, Virginia.

Respondents Catherine C. Wright and Dorothy E. Campbell, as trustees of the estates of D. E. Campbell and T. E. Campbell, and as copartners with Respondents Bessie S. Campbell, Ray S. Campbell, Addie C. Doswell, Elliot Campbell and E. May Campbell, for a number of years operated an excelsior mill at Doswell, Virginia, under the name of Old Dominion Excelsior Company. In July, 1956, Respondents Wright and Dorothy E. Campbell, as such trustees, sold the Old Dominion Excelsior Company mill, and have not, since that time, been engaged in any respect in the excelsior business. In July, 1956, Respondents Bessie S. Campbell, E. May Campbell and Addie C. Doswell, copartners trading as Melford Excelsior Company, at Doswell, Virginia, purchased from Respondent Blanton the Thomas H. Blanton Excelsior Company, including land, buildings, machinery and inventory.

All Respondent manufacturers herein named own stock in Respondent Mills, and participate as stockholders in the operation thereof.

RESPONDENTS' PRODUCT

Excelsior, the product here involved, is a shredded wood fiber made from various kinds of wood in different parts of the country. In Virginia it is manufactured from loblolly pine by a machine which splits and shaves off thin fibrous strips of wood. These wood fibers are made in three grades, depending upon the length of the fiber and the fineness of the shaving. The finest grade is called "wood wool." An average machine will produce about four or five tons of excelsior in a ten-hour day. Excelsior is used largely for packing fragile articles, and also for stuffing cushions, as an ab-

sorbent material in filtering processes, and for the manufacture of insulating board.

HISTORY OF THE EXCELSIOR INDUSTRY

Prior to the organization of Respondent Mills in 1938, and to an increasing degree since that time, Respondents have characterized the manufacture and sale of excelsior as a dying industry. This condition, they explained, resulted from the advent upon the market of various other products, such as shredded newspaper, corrugated wrapping material and corrugated boxes with fillers, which serve the same purposes as excelsior. For instance, many of the large department stores, which formerly bought excelsior as a packing material, now shred their own paper for that purpose. As a consequence of these circumstances, competition to supply the dwindling demand for excelsior became, by 1938, very keen, and was described as "cut-throat" competition. Also, prior to 1938, Respondents had no standard grades for excelsior, and therefore no established standard for setting prices. Witnesses also described the condition of the industry at that time as threatening ruin to all the Virginia excelsior manufacturers. In October, 1938, the various manufacturers of excelsior in Virginia, in recognition of the deplorable condition of their industry, employed one of their members, who was both a manufacturer of excelsior and an attorney, to develop a plan for the purpose of:

1. Establishing standardized grades for excelsior;
2. Stabilizing the market; and
3. Providing a means to facilitate collection by the small mills of moneys owing to them for excelsior.

The plan so developed was the organization of Respondent Mills.

ORGANIZATION AND BUSINESS PRACTICES OF RESPONDENT MILLS

Respondent Mills was incorporated in 1938 as a Virginia corporation, with fifteen Virginia manufacturers of excelsior as stockholders, and certain of their number were elected to act as members of the Board of Directors and as officials of the corporation. Respondent Franklin C. Flippo was employed as the business manager of the corporation, and still holds that position.

Immediately upon its organization, Respondent Mills entered into contracts with its manufacturing stockholders, whereby Respondent Mills agreed to buy, and the manufacturer stockholders agreed to sell, all the excelsior of every grade and kind manufactured or to be manufactured by the latter, and Respondent Mills agreed to pay the manufacturer-stockholders the net wholesale price therefor, less

an amount per ton, to be determined from time to time by the Board of Directors of Respondent Mills. The stockholder-manufacturers agreed to refer all inquiries for excelsior to Respondent Mills, and not to make any direct quotations or sales to any other party without the written consent of Respondent Mills. Respondent Mills was to designate, classify and standardize the several grades of excelsior. If the excelsior furnished failed to meet these grades, Respondent Mills was authorized to make adjustments in price therefor, at the expense of the manufacturer-stockholder.

Respondent Mills agreed to purchase from each manufacturer-stockholder a certain quota or quantity of excelsior, to be determined by Respondent Mills in proportion to the capacities of the various mills of all the manufacturer-stockholders. The contract also contained a provision that any manufacturer-stockholder failing to fulfill his quota by reason of running out of wood or because of mechanical breakdown necessitating shutting down his mill for repairs should not be assigned any quota during such period; and a further provision that no manufacturer-stockholder should increase his or its present productive capacity other than by installation of machines owned by him or it, or by another manufacturer-stockholder, at the time such contract was entered into. A penalty of \$500.00 was also provided as liquidated damages, recoverable by Respondent Mills, for any breach or violation of such contract.

This contract was automatically renewable for five additional years, unless either party thereto should give written notice to the other of intended termination at least thirty days prior to expiration of the first five-year period. All the manufacturer-stockholders entered into such a contract with Respondent Mills, and until 1954 operated thereunder.

The Board of Directors, from time to time, have held meetings whereat prices have been discussed and agreed upon. They have received requests from their manufacturer-stockholders to raise such prices. Sometimes such requests were granted; at other times they were denied.

Acting in accord with its contracts, Respondent Mills has received, and still does receive, orders for excelsior from customers located in Virginia, New York, Connecticut, Pennsylvania, New Jersey, Maryland, Delaware, the District of Columbia, North Carolina and South Carolina. Because of increased cost of transportation, it has been found unprofitable to ship excelsior beyond those areas. When such orders are received by Respondent Mills, it allocates them among its stockholder-manufacturers. Thereafter the manufacturers ship the excelsior directly to the customers, who are then billed by Respondent Mills therefor, and thereafter remit to Respondent Mills.

In due course Respondent Mills forwards such remittances to the supplying manufacturers, less the percentage agreed upon as a fee for this service. In this manner Respondents have, for a number of years, carried on a constant course of trade in interstate commerce.

About 22,000 to 26,000 tons of excelsior have been thus shipped annually, representing a gross return of about one million dollars. Such product represents from 20% to 25% of the excelsior sold in the United States, and is substantially all the excelsior manufactured in the State of Virginia north of Richmond. Although the business of Respondents has been characterized by them as declining for a number of years, they admit that the production of short-fiber excelsior since 1954 has resulted in a slight increase in business since that time.

In the sale of their product the Respondents have been in competition in commerce with other manufacturers of excelsior. The manager of Respondent Mills has described this competition as follows:

Our greatest competition has come through two mills here in Virginia which have been erected since our corporation was formed and a mill in the State of Delaware which is considerably closer to the main market than we are, and there is another mill in the lower end of the State of New Jersey which is giving us some competition. Then we sell in New York and Connecticut where we run into the competition of excelsior made in the New England states. We sell some around the Pittsburgh area even as far west as Detroit in a few instances. We run into competition with excelsior used in the midwest, mainly around the—I would call it the midwest—around the lake regions, Arkansas.

In October, 1954, a new contract was drawn between Respondent Mills and the various manufacturer-stockholders, which was to remain in effect for another five-year period. This contract was signed by all the individual manufacturers except Respondent T. Frank Flippo & Sons. As a result of that Respondent's failure to sign, the contracts were never signed by the president of Respondent Mills, and the unsigned contracts are still retained in the office of Respondent Mills. Although a number of the Respondent manufacturers testified that because the contracts had not been executed on behalf of Respondent Mills, they felt free now to quote prices or to sell to customers other than Respondent Mills, the fact remains that, except for one Respondent, they have all continued to sell their entire production of excelsior through Respondent Mills, and to observe the other provisions of the contracts as though they had been duly signed by Respondent Mills; and Respondent Mills has continued to function in the same manner as before 1954. The one Respondent who has deviated from the practice of selling to Respondent Mills, to the extent of selling to one customer direct, has

nevertheless sold at the price established by Respondent Mills, and has reported all such sales to Respondent Mills; and the tonnage so sold has been deducted from the manufacturer's quota. Thus, in fact, the acts and practices of Respondents subsequent to 1954 have not differed substantially from their acts and practices prior to that date. In fact, counsel for Respondents admits in his proposed findings that "The method of operation of Virginia Excelsior Mills, Inc., is the same today as it was when the contract which expired in October, 1954, was in force."

RESPONDENTS' CONTENTIONS

Counsel for the Respondents admits that the price at which Respondent manufacturer-stockholders sell their excelsior is determined by Respondent Mills. He contends, however, that Respondent Mills does not actually establish such prices, but that it merely followed the trend of the market and the prices set by other manufacturers and sellers of excelsior and competing products, which are not members of Respondent Mills. Such contention overlooks the history of the Respondents' "cutthroat competition" prior to 1938, and the complete absence of such competition, or any competition, among the Respondents subsequent to that year. Furthermore, this contention fails as a defense because it does not explain or justify the facts that the Respondent manufacturers are meeting competition from other areas, not as individual manufacturers, but as a marketing unit; and that their quotations for excelsior are, without exception, the same, and all emanate, not from the manufacturers individually, as in free competition, but from Respondent Mills. We must conclude, therefore, that by contractual agreement prior to 1954, and by tacit agreement and a common course of action since that time, Respondents have, through Respondent Mills, effectively established among themselves a common selling price of excelsior.

Counsel for the Respondents also contends that because counsel supporting the complaint has failed to prove that the Respondents, through such price maintenance, have dominated or controlled the marketing of excelsior on the eastern seaboard of the United States, he has failed to establish that the public interest is affected by their acts and practices. This contention overlooks the authoritative pronouncement of the Supreme Court of the United States in the case of *U.S. v. Socony Vacuum Oil Company*, 310 U.S. 150 (1940), wherein the Court stated that:

* * * Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price fixing group were in no position to control the market, to the extent that they raised, lowered,

or stabilized prices they would be directly interfering with the free play of market forces (310 U.S. 221).

Accordingly, since the Respondents in the present instance have not only combined together to determine prices, but have stabilized such prices to the extent that they all sell at a common price, coupled with the fact that the extent of Respondents' business, both geographically and financially, is substantial, we must conclude that public interest in this proceeding exists, and is also substantial.

Although counsel for Respondents has admitted that all Respondent manufacturers sell at a common price, yet he further contends that they are in competition with each other in the purchase of raw material and the procuring of labor. Even admitting this to be true, counsel's contention defeats its own purpose, because the prices paid for labor and raw material are properly elements to be taken into account in a proper determination of a competitive selling price. In free competition, the difference in labor and raw-material costs between one manufacturer and another would tend to result in a proportionate difference in the selling prices quoted by such manufacturers. No such difference is apparent in the Respondents' selling prices, which are all identical.

Another contention of counsel for Respondents is that while a quota was provided for in the original contract, it was never abided by. This contention presents no valid defense because, aside from the quota provision of the contract, which was based on potential productive capacity, the Respondents were otherwise circumscribed in the production of excelsior by the clause which forbade their acquisition of any new machinery, thus limiting their productive capacity to that afforded by the machines that they already owned or could buy from or consolidate with other contracting manufacturers. This effectively limited their productivity without the necessity of establishing any stated amount or "quota" of excelsior to be produced.

The contention of counsel for the Respondents relating to the absence of any contract since 1954 has been hereinabove sufficiently discussed to show that such contention has no practical or legal merit herein.

Finally, counsel for the Respondents complains of the use of the word "collusion" in the complaint because it denotes a secret, underhanded understanding, contrary to the facts. In justice to the Respondents, we must find that the organization of Respondent Mills, and the acts and practices consequent thereto, cannot be characterized as secret or underhanded. Respondents' conduct, however, constituted collusion in the sense that they entered into an agreement to obtain an object forbidden by law.

DISCONTINUED BUSINESSES

The record shows that Respondents Thomas L. Blanton, Noah Markey, Catherine C. Wright and Dorothy E. Campbell have all, prior to the issuance of the complaint herein, ceased to engage in the manufacture and sale of excelsior. Furthermore, such Respondents have stated in their answers to the complaint herein that they do not expect to engage in that business in the future. It appears, therefore, that there is no public interest in the issuance of a cease and desist order at this time against such Respondents. Accordingly, the complaint, insofar as it relates to them, should be dismissed without prejudice as to the right of the Commission to take such further action as future facts may warrant.

CONCLUSIONS

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

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

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

3. That such acts and practices of the Respondents as herein found are and have been to the injury of the public and to competition in the sale and distribution of excelsior; have unduly restricted and restrained competition in price and otherwise in the production and interstate sale and distribution of excelsior; have completely destroyed competition among themselves in such sale and distribution; and constitute unfair acts and practices and unfair methods of competition within the intent and meaning of the Federal Trade Commission Act.

Accordingly,

It is ordered, That Respondents Virginia Excelsior Mills, Inc., a corporation, W. H. Baker, T. Frank Flippo, H. L. Taylor and F. C. Flippo, individuals and officers of Respondent Virginia Excelsior Mills, Inc., T. Frank Flippo, F. Carter Flippo, and Arthur P. Flippo, individuals and copartners trading as T. Frank Flippo & Sons, H. L. Taylor, H. Ashton Taylor, G. K. Coleman, Sr., and G. K. Coleman, Jr., individuals and copartners trading as Ruther Glen Excelsior Company, T. Nelson Haley and Jesse C. Haley, individuals and copartners trading as Haley Excelsior Company, W. H. Baker, an individual trading as Hallsboro Manufacturing Company, S. D. Quarles and J. R. Gilman, individuals and co-

partners trading as Penola Excelsior Company, C. J. Haley, an individual trading as Ashland Excelsior Company, H. L. Taylor and Thomas H. Chewning, individuals and copartners trading as Carolina Excelsior Company, and as Chilesburg Excelsior Company, Benjamin Jeter, an individual trading as Benjamin Jeter, S. D. Quarles Lumber Company, Inc., a corporation, C. T. Smith, an individual trading as C. T. Smith, Ray S. Campbell, Addie C. Doswell, Elliot Campbell, E. May Campbell, and Bessie S. Campbell, individuals and copartners trading and doing business as Mel-ford Excelsior Company, and said respective Respondents' officers, agents, representatives and employees, in or in connection with the production, offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of excelsior, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any combination, agreement, understanding, or planned common course of action between any two or more of said Respondents, or between or among any one or more of said Respondents and others not parties hereto, to do or perform any of the following acts or practices:

1. Operating or maintaining the Respondent Virginia Excelsior Mills, Inc., or any other corporation or organization as a common selling agent;
2. Fixing the selling price of excelsior or maintaining any prices so fixed;
3. Fixing or in any wise regulating production quotas;
4. Restricting manufacturers in selling and offering excelsior for sale by
 - a. designating the party to whom they or either of them can sell;
 - b. designating the party to whom they or either of them can offer to sell;
 - c. designating the party to whom they or either of them can quote prices;
 - d. designating the prices which they or either of them can quote;or
 - e. imposing any other restriction, or enforcing any such restriction by the imposition of penalties, or otherwise;
5. Classifying excelsior for pricing purposes;
6. Designating conditions under which mill owners who own stock in Respondent Virginia Excelsior Mills, Inc., may sell their mills or machines.

It is further ordered, That the complaint herein, insofar as it relates to Respondents Thomas L. Blanton, Noah Markey, Catherine C. Wright and Dorothy E. Campbell, be, and the same hereby is,

dismissed without prejudice to the right of the Commission to take such action in the future as the facts may then warrant.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The complaint, filed under Section 5 of the Federal Trade Commission Act, alleges the creation and operation of respondent Virginia Excelsior Mills, Inc. by the remaining respondents as a common selling agent to sell their product, excelsior, with the purpose and effect of interfering with competition as hereinafter referred to. After a hearing, the hearing examiner dismissed the complaint as to respondents Thomas L. Blanton, Noah Markey, Catherine C. Wright and Dorothy E. Campbell, on the ground that said respondents had, prior to the issuance of the complaint, ceased to manufacture or sell excelsior, and had made a sufficient showing of intention not to engage in such business in the future. As to the remaining respondents (hereinafter referred to as respondents), an order was entered, from which this appeal is taken.

During the times in question, respondents, except Virginia Excelsior Mills, Inc., have been engaged in the production of excelsior in Virginia. Excelsior is a shredded wood fiber made by respondents from loblolly pine. Its principal use is for packing purposes, although it is also used for stuffing cushions, for filtering purposes, and for the manufacture of insulating board.

Prior to 1938, certain difficulties had arisen particularly in the sale and distribution of excelsior. Competition was keen not only from other producers of the same product but also from producers of other products, such as shredded newspapers, corrugated wrapping material, and others. Respondents were small and without the financing to carry on effective advertising and sales campaigns. Furthermore, many buyers of their product were not strong financially and collections were a problem. Some witnesses described the condition of the industry as such as to threaten ruin to the Virginia manufacturers.

In 1938, certain of these manufacturers, including some of respondents, employed an attorney (who was also at that time a producer of excelsior) to develop a plan to aid the industry. The general objectives, as described by various witnesses, were:

- (1) To establish standardized grades for excelsior;
- (2) To stabilize the market; and
- (3) To provide means for facilitating collection for product sold.

In pursuance of this plan, respondent Virginia Excelsior Mills, Inc. was incorporated on or about October 10, 1938. Among other

things, one purpose of the corporation was to buy and sell excelsior (including sales on commission) and to buy and sell lumber, cord wood, railroad ties and every kind of manufactured timber product and by-product. Authorized capital stock was from \$500 to \$15,000 divided into shares of common stock with a par value of \$5.00. Fifteen Virginia manufacturers of excelsior were stockholders and the Board of Directors and officers were chosen from such group.

Immediately thereafter, the corporation entered into separate contracts with its stockholders by which, in effect, Excelsior Mills undertook the sale of the excelsior manufactured by its manufacturing stockholders in accordance with the terms laid down in the contract. For example, orders received by Mills were to be allocated among the stockholders in the same ratio as the manufacturing capacity of that stockholder bore to the total capacity of all stockholders. Individual shipments were to be made to the customers in the name of Mills as consignor and Mills was to remit to the stockholder net price received less a flat charge not to exceed 50¢ a ton, such payment to be made whether or not Mills made collection from the customer. The quota so fixed to the stockholder was not transferable and if for any reason it could not be filled, it was not to accumulate. The contract also contained provisions for standardization of product and for the assessment of liquidated damages in the amount of \$500 for breach of contract. The contract also prohibited any stockholder manufacturer from increasing his productive capacity other than by interchange of machinery or consolidation with other stockholders who had entered into like contracts with Mills. The stockholders agreed to refer all inquiries for excelsior to Mills and not to make quotations of prices or direct sales to parties other than Mills without the written consent of the latter.

Performance under the contract was substantially in accordance with its terms, although there was difficulty in the quota arrangement because of the inability of individual producers to always make shipment in accordance with transportation or other requirements. Individual stockholders testified that they did not look for independent business and did not quote prices. In fact, they were not asked to do so. Prices were set by Mills. Requests of stockholders for changes were granted or refused depending upon the state of the market. The contracts were automatically renewable for additional periods and were so renewed until October, 1954, when a new contract was drawn for a five-year period and signed by all of the stockholders except respondent T. Frank Flippo and

Sons. The reason for this failure to sign was that this respondent had readjusted its manufacturing process for the making of short fiber excelsior and wished certain changes made in the contract because of that fact. Because of the failure of T. Frank Flippo and Sons to sign, respondent Mills did not sign or return any of the contracts and, at the time of the hearing, they were being held in the office of Mills. However, performance continued substantially as before.

It is obvious that the purpose and result of the agreements was to fix the price at which the product of the manufacturing respondents was sold. That such conduct is unlawful *per se* under the Sherman Act and is an unfair method of competition under the Federal Trade Commission Act is well settled.

Respondents in this connection cite *Appalachian Coals, Inc. v. U.S.* (1933), 288 U.S. 344. Some of the language in this case is difficult to reconcile with previous and subsequent cases. Nevertheless, the actual decision is a somewhat narrow one. The Supreme Court (with one Justice dissenting) reversed the decision of the lower court which had issued an injunction restraining the putting into operation of a plan for concerted action which the Government claimed would violate the Sherman Act. There were many unusual circumstances in the case. Due principally to the depression, many factors were at work which were bringing chaos into the coal industry. It should be noted, too, that the Supreme Court directed that the lower court should retain jurisdiction of the cause and might set aside the decree and take further proceedings if future developments justified that course in appropriate enforcement of the antitrust act.

The law with reference to actual price fixing is more accurately stated in cases such as *U.S. v. Socony-Vacuum Oil Company* (1940) 310 U.S. 150, and *U.S. v. Trenton Potteries*, 273 U.S. 392.

The law now seems well settled that, while in many activities, the planned common course of action of members of an industry will be subjected to the test of reasonableness, nevertheless, agreements to fix prices are unlawful *per se*. No showing of competitive abuses or evils which the price fixing plan is designed to remove may be set up as a defense.

Respondents also contend that there is not sufficient proof to show that they control the price of excelsior which they sell in the market.

On this point, the hearing examiner found:

About 22,000 to 26,000 tons of excelsior have been thus shipped annually, representing a gross return of about one million dollars. Such product represents from 20% to 25% of the excelsior sold in the United States, and is substantially all the excelsior manufactured in the State of Virginia north of

Richmond. Although the business of respondents has been characterized by them as declining for a number of years, they admit that the production of short-fiber excelsior since 1954 has resulted in a slight increase in business since that time.

The cases cited and others have disposed of this argument. As pointed out in *Socony-Vacuum, supra*, at page 225:

It is the "contract, combination . . . or conspiracy in restraint of trade or commerce" which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other. See *United States v. Trenton Potteries Co.*, 273 U.S. 392, 402. Cf. *Retail Lumber Dealers' Assn. v. State*, 95 Miss. 337; 48 So. 1021. And the amount of interstate or foreign trade involved is not material (*Montague & Co. v. Lowry*, 193 U.S. 38), since § 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected. *Steers v. United States*, 192 Fed. 1, 5; *Patterson v. United States*, 222 Fed. 599, 618-619.

See also *Truck Drivers' Local No. 421 v. U.S.*, 128 F. 2d 227.

The order of the hearing examiner requires the respondents to:

* * * forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any combination, agreement, understanding, or planned common course of action between any two or more of said Respondents, or between or among any one or more of said Respondents and others not parties hereto, to do or perform any of the following acts or practices:

1. Operating or maintaining the Respondent Virginia Excelsior Mills, Inc., or any other corporation or organization as a common selling agent;
2. Fixing the selling price of excelsior or maintaining any prices so fixed;
3. Fixing or in any wise regulating production quotas;
4. Restricting manufacturers in selling and offering excelsior for sale by
 - a. designating the party to whom they or either of them can sell;
 - b. designating the party to whom they or either of them can offer to sell;
 - c. designating the party to whom they or either of them can quote prices;
 - d. designating the prices which they or either of them can quote; or
 - e. imposing any other restriction, or enforcing any such restriction by the imposition of penalties, or otherwise;
5. Classifying excelsior for pricing purposes;
6. Designating conditions under which mill owners who own stock in Respondent Virginia Excelsior Mills, Inc. may sell their mills or machines.

Respondents argue that: "The order would require each and every one of the respondents and others *not parties* to the proceeding from quoting prices to anybody, from fixing their own individual selling prices, from the respondents separately classifying excelsior for pricing purposes and from using a common selling agent." The order, however, is not subject to this objection. Its prohibition is directed against "combination, agreement, understanding, or planned common course of action" in regard to certain matters. See *Milk and Ice Cream Institute v. FTC*, 152 F. 2d 478.

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

Order

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The appeal of respondents is denied and it is directed that an order issue accordingly.

FINAL ORDER

Counsel for the respondents having filed appeal from the initial decision of the hearing examiner and the matter having been heard on briefs and oral argument; and the Commission having rendered its decision denying the appeal of the respondents and adopting the initial decision as the decision of the Commission:

It is ordered, That respondents, Virginia Excelsior Mills, Inc., a corporation, W. H. Baker, T. Frank Flippo, H. L. Taylor and F. C. Flippo, individuals and officers of said corporation, F. Carter Flippo, Arthur P. Flippo, H. Ashton Taylor, G. K. Coleman, Sr., G. K. Coleman, Jr., T. Nelson Haley, Jesse C. Haley, S. D. Quarles, J. R. Gilman, C. J. Haley, Thomas H. Chewing, Benjamin Jeter, S. D. Quarles Lumber Company, Inc., a corporation, C. T. Smith, Ray S. Campbell, Addie C. Doswell, Elliott Campbell, E. May Campbell, Bessie S. Campbell, 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
WOLVERINE LABORATORIES, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 6829. Complaint, July 8, 1957—Decision, Oct. 25, 1957

Consent order requiring distributors in Detroit, Mich., to cease representing falsely through advertising mats furnished to dealer-purchasers—in payment for use of which in advertising they participated—and through display cards and circulars also furnished for dealers' use, that their preparation "Alpha Tablets" constituted an effective treatment for all kinds of arthritis, rheumatism, neuritis, and neuralgia, and afforded complete and permanent relief from the pains and discomforts thereof; that it was a new discovery and a new medicine; that the alfalfa ingredient was of value in such treatment; and through use of the words "Manufacturers" and "Laboratories" on stationery and in advertising literature, that they manufactured the product.

Harold A. Kennedy, Esq., for the Commission.
Respondents, *pro se*.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on July 8, 1957, charging them with having violated the Federal Trade Commission Act as set forth in said complaint. After issuance and service of the complaint, all respondents entered into an agreement, dated August 5, 1957, containing a consent order to cease and desist, disposing of all the issues in this proceeding without hearing, which agreement has been duly approved by the Director and the Assistant Director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondents, pursuant to the aforesaid agreement, have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been made duly in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to

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challenge or contest the validity of the order to cease and desist entered in accordance with the agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified or set aside in the manner provided for other orders of the Commission and that the complaint may be used in construing the terms of the order.

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

1. Respondent Wolverine Laboratories, Inc. is a corporation existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 2454 Fenkel Street, in the City of Detroit, State of Michigan. The individual respondents, Lawrence R. O'Connor and Elaine J. O'Connor, are respectively president-treasurer and vice-president-secretary of said corporate respondent and their address is the same as that of the corporate respondent.

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

ORDER

It is ordered, That respondents Wolverine Laboratories, Inc., a corporation, and its officers, and Lawrence R. O'Connor and Elaine J. O'Connor, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the preparation "Alpha Tablets,"

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Order

or any preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same name or under any other name, do forthwith cease and desist from, directly or indirectly:

I. 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 said preparation:

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

(b) Is an adequate, effective or reliable treatment for, or will afford complete or permanent relief of, the aches, pains or discomforts of any kind of arthritis, rheumatism, neuritis or neuralgia, or has any beneficial effect in any of such conditions or disorders in excess of affording temporary relief of the minor aches and pains thereof.

(c) Is a new discovery or a new medicine.

(d) Possesses any value in the treatment of any kind of arthritis, rheumatism, neuritis or neuralgia, or in the relief of the aches, pains and discomforts thereof, by virtue of the alfalfa ingredient therein.

II. Disseminating or causing to be disseminated any advertisements 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 such preparation which contain any of the representations prohibited in Paragraph 1 of this order.

It is further ordered, That respondents Wolverine Laboratories, Inc., a corporation, and its officers, and Lawrence R. O'Connor and Elaine J. O'Connor, individually and as officers of said corporation, their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of Alpha Tablets or any other preparation or product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(a) Using the word "Laboratories," or any other word of similar import or meaning, in respondents' corporate name, or representing in any other manner, that respondents own, operate or control a laboratory.

(b) Representing, directly or by implication, through the use of words "Manufacturers" or "Manufactured," alone or in conjunction with other words, or in any other manner, that respondents manufacture the products which they sell or distribute.

Decision

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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 25th day of October, 1957, become the decision of the Commission; and, accordingly:

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

Complaint

IN THE MATTER OF
TOPPS CHEWING GUM, INC.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SECS. 2(a) AND 2(d) OF THE CLAYTON ACT

Docket 6747. Complaint, Mar. 26, 1957—Decision, Oct. 26, 1957

Consent order requiring a Brooklyn, N.Y., manufacturer of bubble gum and "Clor-Aid" chiclet type of gum containing chlorophyll, to cease discriminating in price in violation of Secs. 2(a) and 2(d) of the Clayton Act by such practices as (a) selling its "Bazooka" brand bubble gum and picture card bubble gum to some jobbers at a 5% discount from the prices charged others; and (b) paying a chain of food stores \$2,200 as compensation for advertising, etc., in connection with its products, while not making comparable offers to the chain's retail competitors.

COMPLAINT

The Federal Trade Commission, having reason to believe that Topps Chewing Gum, Inc., is violating and has violated the provisions of subsections (a) and (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

Charging violation of subsection (a) of Section 2 of the Clayton Act, as amended, the Commission alleges:

PARAGRAPH 1. Respondent, Topps Chewing Gum, Inc., hereinafter referred to as respondent, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 254 36th Street, Brooklyn, New York.

PAR. 2. Respondent is now, and since 1947 has been, engaged in the manufacture and sale of chewing gum products, including gum commonly referred to as "bubble gum," and a chiclet type of gum containing chlorophyll sold under the trade name "Clor-Aid." Respondent sells said chewing gum products to different purchasers, including jobbers and retailers, located in the various states of the United States and the District of Columbia.

PAR. 3. In the course and conduct of its business respondent has engaged in commerce, as "commerce" is defined in the Clayton Act, as amended in that Respondent ships its products, or causes them

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to be shipped, from its place of business to said purchasers so located in States other than the State of origin of such shipments.

PAR. 4. In the course and conduct of its said business in commerce, respondent is now and has been in competition with other corporations, partnerships, individuals, and firms engaged in manufacturing, selling, and distributing chewing gum products.

PAR. 5. In the course and conduct of its business as above described, respondent has sold and now sells chewing gum products to some purchasers at substantially higher prices than the prices charged competing purchasers for such products of like grade and quality.

For example, respondent sells "Bazooka" brand bubble gum and picture card bubble gum to some jobbers for 70¢ and 72¢ per 120 count box, respectively. Respondent sells said products to other competing jobbers at said prices less a discount of 5%.

PAR. 6. The effect of such discriminations in price made by respondent, as set forth in Paragraph Five hereof, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and its purchasers are respectively engaged; or to injure, destroy, or prevent competition with respondent and with purchasers of respondent who receive the benefit of such discriminations.

PAR. 7. The acts and practices of the respondent as alleged above, violate subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

Charging violation of subsection (d) of Section 2 of the Clayton Act, as amended, the Commission alleges:

PAR. 8. Paragraphs 1 and 2 of Count I hereof are hereby repeated and made a part of this count as fully and with the same force and effect as though here again set forth in full.

PAR. 9. In the course and conduct of its business respondent has engaged in commerce as "commerce" is defined in the Clayton Act, as amended in that respondent ships its products, or causes said products to be shipped, from its place of business to said purchasers so located, some of whom are in competition with each other in the sale and distribution of said products.

PAR. 10. In the course and conduct of its business in commerce, as herein described, respondent paid, or contracted to pay, something of value to or for the benefit of some of its customers as compensa-

tion or in consideration for services and facilities furnished or contracted to be furnished, by or through such customers, in connection with their offering for sale or sale of products sold to them by said respondent, and such payments were not made available on proportionally equal terms by respondent to all customers competing in the sale and distribution of its products.

During the past several years, and continuing to the present time, respondent has made such payments to many of its retailer customers in consideration of their advertising and otherwise promoting the resale of its chewing gum products.

For example, during the year 1953, respondent contracted to pay and did pay to Food Fair Stores, Inc. of Philadelphia, Pennsylvania, \$2,200 as compensation or as allowances for advertising or other service or facility furnished by or through Food Fair Stores, Inc., in connection with its offering for sale or sale of products sold to it by respondent. Said payments were not offered or otherwise made available by respondent on proportionally equal terms to all other retailer customers competing in the sale and distribution of respondent's products with said favored customers.

PAR. 11. The acts and practices of the respondent, as alleged above, violate subsection (d) of Section 2 of the Clayton Act, as amended.

Mr. Fredric T. Suss for the Commission.

Rosenman, Goldmark, Colin & Kaye, of New York, N.Y., by *Mr. Seymour D. Lewis*, for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondent with violation of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, in connection with the sale of chewing gum products. An agreement has now been entered into by counsel supporting the complaint and respondent which provides, among other things, that respondent admits all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the

Order

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same force and effect as if entered after a full hearing, respondent 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 respondent that it has violated the law as alleged in the complaint.

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

1. Respondent, Topps Chewing Gum, Inc., is a corporation, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 254 - 36th Street, Brooklyn, New York.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent, Topps Chewing Gum, Inc., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in, or in connection with the sale of chewing gum products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

1. Discriminating, directly or indirectly, in the price of said chewing gum products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser, which purchasers, in fact, compete in the resale or distribution of such products.
2. Making or contracting to make, to or for the benefit of any customer, any payment or allowance 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 products sold to him by respondent, unless such payment or allowance is affirmatively offered or otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 26th day of October, 1957, become the decision of the Commission; and, accordingly:

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

Complaint

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IN THE MATTER OF
PHILADELPHIA CHEWING GUM CORPORATION
CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2 (a) OF THE CLAYTON ACT

Docket 6748. Complaint, Mar. 26, 1957—Decision, Oct. 26, 1957

Consent order requiring a manufacturer of bubble gum in Havertown, Pa., to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act by granting certain jobbers a 5% "supply house" discount in addition to the 5% discount or its equivalent in premiums granted all its jobbers and dealers.

COMPLAINT

The Federal Trade Commission, having reason to believe that Philadelphia Chewing Gum Corporation is violating and has violated the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C. Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Philadelphia Chewing Gum Corporation, hereinafter referred to as respondent, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at Eagle and Lawrence Roads, Havertown, Pennsylvania.

PAR. 2. Respondent is now and since 1947 has been engaged in the manufacture and sale of chewing gum products commonly referred to as "bubble gum." Respondent sells said chewing gum products to different purchasers, including jobbers and retailers, located in the various States of the United States and the District of Columbia.

PAR. 3. In the course and conduct of its business respondent has engaged in commerce as "commerce" is defined in the Clayton Act, as amended in that respondent ships its products, or causes them to be shipped, from its place of business to said purchasers located in States other than the State of origin of such shipments.

PAR. 4. In the course and conduct of its said business in commerce, respondent is now and has been in competition with other corporations, partnerships, individuals, and firms engaged in manufacturing, selling, and distributing chewing gum products.

PAR. 5. In the course and conduct of its business as above described, respondent has sold and now sells chewing gum products to some purchasers at substantially higher prices than the prices

charged competing purchasers for such products of like grade and quality.

For example, respondent sells its chewing gum products to its jobbers and retailers granting them either a five percent discount or its equivalent in premiums, but the respondent grants an additional five percent discount, sometimes called a "supply house" discount, to several of its jobbers who are in competition with other jobbers in the resale and distribution of said products.

PAR. 6. The effect of such discriminations in price made by respondent, as set forth in Paragraph Five hereof, may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which respondent and its purchasers are respectively engaged; or to injure, destroy, or prevent competition with respondent and with purchasers of respondent who receive the benefit of such discriminations.

PAR. 7. The acts and practices of the respondent, as alleged above, violate subsection (a) of Section 2 of the Clayton Act, as amended.

Mr. Fredric T. Suss for the Commission.

Blank, Rudenko & Klaus, of Philadelphia, Pa., by *Mr. Edwin S. Rome*, for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondent with violation of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, in connection with the sale of chewing gum products. An Agreement has now been entered into by counsel supporting the complaint and respondent which provides, among other things, that respondent admits all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondent 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 respondent that it has violated the law as alleged in the complaint.

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

1. Respondent, Philadelphia Chewing Gum Corporation, is a corporation existing and doing business under and by virtue of the laws of the State of Pennsylvania with its principal office and place of business located at Eagle and Lawrence Roads, Havertown, Pennsylvania.

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

ORDER

It is ordered, That respondent, Philadelphia Chewing Gum Corporation, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in, or in connection with the sale of chewing gum products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of said chewing gum products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser, which purchasers, in fact, compete in the resale or distribution of such products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 26th day of October, 1957, become the decision of the Commission; and, accordingly:

It is ordered, That 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.

Decision

IN THE MATTER OF
SURF SALES COMPANY, INC., ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6612. Complaint, Aug. 20, 1956—Decision, Oct. 28, 1957*

Order requiring Chicago sellers of cameras, electric appliances, and other merchandise, to cease furnishing to operators and members of the public various plans of merchandising—including push cards and instructions for their use—which involved the operation of games of chance or lottery schemes in the sale of the goods to the consuming public.

Mr. William A. Somers for the Commission.

Mr. Horace J. Donnelly, Jr., of Washington, D.C., for respondents.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

On August 20, 1956, complaint herein was issued against respondents charging them with unfair acts and practices in commerce in violation of the Federal Trade Commission Act in the sale of merchandise in commerce by games of chance, gift enterprises and lottery schemes. Individual respondent Thomas F. Marsh was charged with being president of corporate respondent and individual respondent Samuel Specter was charged with being manager thereof, and they were alleged to direct and have dominant control of the sales activities of the corporate respondent. Respondents' answer admits corporate existence, address of corporate respondent, and that the respondent Marsh was president thereof, and generally denies all other allegations of the complaint, except that the corporation respondent was engaged in the business of selling merchandise to the public, and for that purpose it distributes literature describing such merchandise, with sales prices, and inviting orders therefor. As separate additional affirmative defenses respondents allege that the complaint fails to state a cause of action, that the Federal Trade Commission lacks jurisdiction, that the transactions were intrastate rather than interstate, that the Federal Trade Commission Act is unconstitutional and void, and that the present action denies the constitutional right to due process of law.

Three hearings were held resulting in 99 pages of transcript and six exhibits. At the first hearing, both individual respondents appeared in response to subpoenas, but declined to answer any questions after stating their names and addresses because their answers might tend to incriminate them—in other words, both took the Fifth Amendment. Taking of evidence closed March 26, 1957, and there-

after proposed findings and conclusions were filed by all counsel on consideration of which, and the entire record herein, the hearing examiner finds that this proceeding is brought in clear and substantial public interest and makes the following findings of fact.

FINDINGS OF FACT

1. Respondent Surf Sales Company, Inc., is a corporation organized January 25, 1956, and since doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 4309 West Lake Street, in the City of Chicago, Illinois. Respondent Thomas F. Marsh is an individual and president of respondent corporation. Answer to the complaint denies that respondent Samuel Specter is manager of the corporate respondent and that the policies and sales activities of the latter are directed and controlled by these individual respondents. There being no evidence to the contrary, it is concluded that Thomas F. Marsh, as president, exercises the direction and control of the corporate respondent which that office ordinarily connotes. As to Samuel Specter, the record shows that he several times represented himself to be the manager to a representative of Dun and Bradstreet, although to a Federal Trade Commission investigator he said he was a part-time bookkeeper. However, he was the man to whom the investigator was referred when on a visit the latter asked to speak to an official of the corporate respondent. Furthermore, when these gentlemen called at the corporate respondent's office and asked the receptionist or switchboard operator to speak to someone in authority, they were referred to Samuel Specter. From this it is concluded that he was either the manager of the corporate respondent or had authority and responsibility and did exercise the authority and direction of its affairs which that office connotes.

2. Respondents are now engaged in the sale and distribution of cameras, electric appliances and other articles of merchandise and have caused said merchandise when sold to be transported from their place of business in Chicago, Illinois, to purchasers thereof located in the various states of the United States other than Illinois and in the District of Columbia. There is now and has been for more than one year last past a course of trade by respondents in such merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, between and among the various states of the United States and in the District of Columbia. The record does not show the extent of this commerce.

3. In the course and conduct of their business as described in Paragraph 2 hereof, respondents in soliciting the sale of and in sell-

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ing and distributing their merchandise furnish and have furnished various plans of merchandising which involve the operation of games of chance, gift enterprises or lottery schemes when said merchandise is sold and distributed to the purchasing and consuming public. Among the methods and sales plans adopted and used by respondents, and which is typical of the practices of respondents, is the following:

Respondents distribute, and have distributed, to operators and to members of the public certain literature and instructions including, among other things, push cards, order blanks, circulars including thereon illustrations and descriptions of said merchandise, and circulars explaining respondents' plan of selling and distributing their merchandise and of allotting it as premiums or prizes to the operators of said push cards; and as prizes to members of the purchasing and consuming public who purchase chances or pushes on said cards. One of respondents' said push cards bears 75 feminine names with ruled columns on the back of said card for writing in the name of the purchaser of the push corresponding to the feminine name selected. Said push card has 75 partially perforated discs. Each of said discs bears one of the feminine names corresponding to those on the list. Concealed within each disc is the number which is disclosed only when the customer pushes or separates a disc from the card. The push card also has a larger master seal and concealed within the master seal is one of the feminine names appearing on the disc. The person selecting the name corresponding with the one under the master seal receives a camera. The push card bears the following legend or instructions:

Lucky Name Under Seal Received

CAMFIELD'S New

(Picture of Pan)

(Picture of Pens)

ELECTRIC-FRI PAN

Nos. 7 and 19
each receive a
beautiful NEW

BALL POINT

TYPE pen.

No. 1 pays 1¢

No. 7 pays 7¢

No. 12 pays 12¢

No. 19 pays 19¢

No. 26 pays 26¢

All others pay

39¢

NONE HIGHER

(Master Seal)

Write Your Name on Reverse Side Opposite Name You Select

No more burnt bacon or eggs! Balanced heat means crisp, even frying at all times. Cooks and serves right at the table . . . an ideal servant for every home. A.C. operation, 110 Volts. French Fry Dome Cover and new recipe book included. Comes with 6-foot heavy duty cord.

PUSH OUT WITH PENCIL

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Another of respondents' push cards:

Lucky Name Under Seal Receives This

ALUMINUM ELECTRIC Coffee Set For the perfect hostess an exquisite matched gleaming Coffee Service. Stunning Electric Percolator in beautiful urn design. Sparkling in its new modern-design and highly polished finish. Special heating element insures quick percolating and keeps coffee hot. Makes up to 8 cups. Includes cord set, beautiful sugar and creamer and lustrous 12-in. handy utility tray. Highly polished for long-lasting brilliance. Guaranteed fully. 110-120-volt, AC or DC.

(Picture of coffee set)

UL by

Enterprise Manufacturers of the World Famous Drip-O-lator
The Better Drip Coffee Maker
Made in USA Guaranteed Pure Aluminum Reg US Pat Off

(Picture of pens)

(Master Seal)

PUSH OUT WITH PENCIL

Nos. 1 and 6 receive a handsome retractible Ball Point Pen.

No. 1 pays 1c No. 12 pays 12c

No. 6 pays 6c No. 19 pays 19c

ALL OTHERS PAY 39c

NONE HIGHER

(Panel bearing feminine names)

Write Your Name on Reverse Side Opposite Name You Select

Sales of respondents' merchandise by means of said push cards are made in accordance with the above-described legend or instructions, and said prizes or premiums are allotted to the customers or purchasers from said cards in accordance with the above legend or instructions. Whether a purchaser receives an article of merchandise or nothing for the amount of money paid, and the amount to be paid for the merchandise, or the chance to receive said merchandise, are thus determined wholly by lot or chance. The articles of merchandise have a value substantially greater than the price paid for each chance or push.

4. The persons to whom respondents furnish and have furnished said push cards use the same in selling and distributing respondents' merchandise in accordance with the aforesaid sales plans. Respondents thus supply to and place in the hands of others the means of

conducting games of chance, gift enterprises or lottery schemes in the sale of their merchandise in accordance with the sales plan hereinabove set forth. The use by respondents of said sales plans or methods in the sale of their merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plans or methods is a practice which is contrary to an established public policy of the Government of the United States.

5. The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance or the sale of a chance to procure one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plans or methods used by respondents and the element of chance involved therein and thereby are induced to buy and sell respondents' merchandise.

The use by respondents of a sales plan or method involving distribution of merchandise by means of chance, lottery or gift enterprise is contrary to the public interest and constitutes an unfair act and practice in commerce within the intent and meaning of the Federal Trade Commission Act.

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

ORDER

It is ordered, That respondent Surf Sales Company, Inc., a corporation, and its officers, and respondents Thomas F. Marsh and Samuel Specter individually, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches, electric coffee sets, fry-pan, or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others push cards or any other lottery devices, either with merchandise or separately, which are designed or intended to be used in the sale or distribution of respondents' merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

The complaint, filed under the Federal Trade Commission Act, charges respondents with selling merchandise in commerce by means of games of chance, gift enterprises or lottery schemes. After a hearing, the initial decision was filed directing respondents to cease and desist from:

1. Supplying to or placing in the hands of others push cards or any other lottery devices, either with merchandise or separately, which are designed or intended to be used in the sale or distribution of respondents' merchandise to the public by means of chance, gift enterprise or lottery scheme.

2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

The appeal of respondents was presented by written briefs and oral argument.

Respondent, Surf Sales Company, Inc., is a corporation located in Chicago, Illinois, and engaged in the sale and distribution of cameras, electric appliances and other articles of merchandise. A part, if not all, of the merchandise is distributed by means of push cards. The description of such cards and the method of operation is set out in Paragraph 3 of the initial decision as follows:

Respondents distribute, and have distributed, to operators and to members of the public certain literature and instructions including, among other things, push cards, order blanks, circulars including thereon illustrations and descriptions of said merchandise, and circulars explaining respondents' plan of selling and distributing their merchandise and of allotting it as premiums or prizes to the operators of said push cards; and as prizes to members of the purchasing and consuming public who purchases chances or pushes on said cards. One of respondents' said push cards bears 75 feminine names with ruled columns on the back of said card for writing in the name of the purchaser of the push corresponding to the feminine name selected. Said push card has 75 partially perforated discs. Each of said discs bears one of the feminine names corresponding to those on the list. Concealed within each disc is the number which is disclosed only when the customer pushes or separates a disc from the card. The push card also has a larger master seal and concealed within the master seal is one of the feminine names appearing on the disc. The person selecting the name corresponding with the one under the master seal receives a camera. The push card bears the following legend or instructions:

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Lucky Name Under Seal Received
 CAMFIELD'S New
 (Picture of Pan)
 (Picture of Pens)
 ELECTRI-FRI PAN

Nos. 7 and 19 each receive a beautiful NEW BALL POINT TYPE pen.

No more burnt bacon or eggs! Balanced heat means crisp, even frying at all times. Cooks and serves right at the table . . . an ideal servant for every home. A.C. operation, 110 Volts. French Fry Dome Cover and new recipe book included. Comes with 6-foot heavy duty cord.

No. 1 pays 1¢
 No. 7 pays 7¢
 No. 12 pays 12¢
 No. 19 pays 19¢
 No. 26 pays 26¢
 All others pay 39¢
 NONE HIGHER
 (Master Seal)

PUSH OUT WITH PENCIL

Write Your Name on Reverse Side Opposite Name You Select

Respondent, Thomas F. Marsh, is president of the respondent corporation. This is admitted by respondents' answer. The answer denies, however, that respondent Thomas F. Marsh has dominant control of the policies and sales activities of the respondent corporation. The hearing examiner found that there being no evidence to the contrary, "Thomas F. Marsh, as president, exercises the direction and control of the corporate respondent which that office ordinarily connotes." We see no reason to upset that finding. The respondent corporation was engaged in the business of selling merchandise. The record shows that it distributed punch cards, utilized the services of mailing brokers to distribute their punch card literature, received money in the amount stated on the card, and distributed merchandise to the persons who sent in the required money. This activity is not *ultra vires*. It appears to be an integral part of the respondent corporation's scheme of doing business. Where the corporation is shown to have violated public policy, the officer who is normally in charge of the corporation may be inferred to have managed and instituted the violation. The court in *Modernistic Candies, Inc., et al. v. F.T.C.*, 145 F. 2d 454, said "We have also held that those who aid and abet such a method of merchandising, those *participes criminis* with gamblers and their schemes, are likewise engaged in unfair trade practices contrary to public policy." And while this is not a criminal action, certain prin-

ciples there applicable also apply here. The court in *Carolene Products Co., et al. v. United States*, 140 F. 2d 61, said "There is ample authority in support of the principle that the directing head of a corporation which is engaged in an unlawful business may be held criminally liable for the acts of subordinates done in the normal course of business, regardless of whether or not these directing heads personally supervised the particular acts done or were personally present at the time and place of the commission of these acts." See *United States v. Dotterweich*, 64 S. Ct. 134, decided by the Supreme Court on November 22, 1943; *Wood v. United States*, 4 Cir., 204 Fed. 55; *Anstess v. United States*, 7 Cir., 22 F. 2d 594; *Johnson v. United States*, 9 Cir., 62 F. 2d 32; *Reid v. United States*, 7 Cir., 44 F. 2d 51; *Crall & Ostrander v. Commonwealth*, 1905, 103 Va. 855, 49 S.E. 638; *People v. Detroit White Lead Works*, 1890, 82 Mich. 471, 46 N.W. 735, 9 L.R.A. 722; *State v. Gilbert*, 1933, 213 Wis. 196, 251 N.W. 478; *State v. Burnam*, 1912, 71 Wash. 199, 128 P. 218.

Respondent, Thomas F. Marsh, having elected not to testify in response to a subpoena and the hearing examiner not requiring him to testify, did not overcome such inferences that would follow his admission as to his holding the office of president of a corporation that in the normal course of business sold merchandise through means of punch cards.

Respondent, Samuel Specter, is an employee of the respondent corporation. Both the respondents' answer and the brief on appeal emphatically deny that Samuel Specter is more than a part time bookkeeper. And at the hearing, he utilized the Fifth Amendment and refused to testify on the grounds of self-incrimination. The hearing examiner found from the evidence that Samuel Specter "was either the manager of the corporate respondent or had the authority and responsibility and did exercise the authority and direction of its affairs which that office connotes." There is evidence in the record that on more than two occasions, Samuel Specter represented himself to be the manager of the respondent corporation to a representative from Dun and Bradstreet. In addition, when an investigator from the Commission went to the office of the corporate respondent and asked the receptionist or switchboard operator to see an official of the corporation, the girl returned with Samuel Specter. During the course of the interview, Samuel Specter authorized the investigator to consult with the attorney for the corporate respondent. He thus represented himself as manager, was represented as an official by the receptionist or switchboard operator, and authorized consultation with the attorney for the corporation. This must be weighed against a statement

by Samuel Specter to the Commission investigator claiming that he was only a part time bookkeeper. At the hearing, Specter, having elected not to testify, did not offer any evidence as to his capacity. The hearing examiner had the benefit of hearing the testimony and observing the demeanor of the witnesses. We see no reason to upset his findings.

Respondents argue that there is no substantial, credible or convincing evidence establishing proof of the allegations of the complaint. They claim that the testimony of the public witnesses is hearsay. With this, we cannot agree. The record discloses that the respondent corporation sent push cards bearing its name, together with sales literature, to the witnesses who reside in Indiana. The witnesses testified they received the mailings, sold the chances on the push cards, collected the money from such sales, sent the money in to the respondent corporation and received the merchandise from the respondent corporation. We feel that counsel in support of the complaint has fully sustained the burden of proof and that the finding of the hearing examiner should not be disturbed.

Respondents argue that, since the record does not show the extent of commerce, there is "no proof that there is now and has been for more than one year last past a substantial course of trade by respondents in commerce . . ." Although the specific instances of sales are not great in number, they are taken to be merely illustrative of the commerce engaged in by respondents. The record shows two interstate transactions in Indiana and Samuel Specter gave the Commission investigator a typical mailing originally sent to an individual in California which was returned because of misdirection. The record as a whole justifies the examiner's finding.

The statute does not require that sales in commerce be substantial before the Commission can proceed; substantiality of sales is merely one of the elements considered by the Commission in determining whether a matter involves sufficient public interest to warrant attention. Docket 5672, *William S. La Rue*, 47 F.T.C. 1472.

The respondents are engaged in the business of selling merchandise in interstate commerce by means of push cards. "One is engaged in a business when he has such article for sale to any person who may apply for it for the seller's profit. The question is not determined by the number of sales that may be made." *State v. Jewett Market Co.*, 228 N.W. 288. It is not the amount of commerce which provides the criteria, but whether the practices in which the respondents engage violate the Act. The court in *Fox Film Corporation v. F.T.C.*, 296 Fed. 353, held "While the findings of the Commission embraced but three pictures where the unfair methods were practiced, that is sufficient to support the order to

cease and desist . . . One act that constitutes an unfair practice may of itself be offensive to the Act.”

In “determining whether a proceeding is in the public interest, the Commission exercises a broad discretion,” *Dr. W. B. Caldwell v. F.T.C.*, 11 F. 2d 891; *F.T.C. v. Klesner*, 280 U.S. 28, and “the use of a game of chance for the distribution of merchandise is an unfair act or practice in commerce . . . and a proceeding to prevent its further use is in the public interest.” *Wolf v. F.T.C.*, 135 F. 2d 564; *Kritzik v. F.T.C.*, 125 F. 2d 351.

Respondents next contend “the proposed order to cease and desist is not within the jurisdiction and authority of the Federal Trade Commission” in that “the mailing of material advertising goods for sale in which is included a push card which may be independently used by the recipient as a means of awarding an article of merchandise as a prize is not against the public policy of the United States . . .” Respondents argue that since there are four specific statutes of the United States with respect to lotteries, that these specific statutes remove that specific subject from a statute which speaks only in general terms.

While this rule generally prevails, we do not believe it is applicable here. As the court stated in *United States v. Windle*, 158 F. 2d 196, “We recognize the rule that generally special terms of a statute prevail over general terms in the same or another statute which otherwise might control. . . . But the purpose of this rule is to give effect to the presumed intention of the law-making body. The primary rule of statutory construction requires us to ascertain and give effect to the legislative intention. *Flippin v. United States*, 8 Cir., 121 F. 2d 742; *United States v. Hartwell*, 73 U.S. 385 . . .”

As we said in *F.T.C. v. R. B. James, Patrick Zurla, trading as Chicago Board Company*, Docket No. 6482:

U.S.C.A. Title 15, Chapter 24 forbids the transportation in inter state commerce of “gambling devices” as defined in said law. An exception is made, however, in the case of shipments to any place in any state which has enacted a law providing for exemption from this law. The law further provides in Section 2 that:

Nothing in this act shall be construed to interfere with or reduce the authority or existing interpretations of the authority of the Federal Trade Commission under the Federal Trade Commission Act as amended (15 U.S.C. 41-58).

Report No. 2769, 81st Congress, 2d Sess., pages 9-10, filed by the House Committee on Interstate and Foreign Commerce states:

Section 2 further provides that nothing in this act shall be construed to interfere with or reduce the authority of the Federal Trade Commission under the Federal Trade Commission Act as amended. It is the purpose of this provision to leave unaffected the powers of the Federal Trade Commission with respect to the use of lotteries, games of chance, or other gambling devices for the pur-

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pose of merchandising. Such use has been held to be an unfair trade practice in violation of the Federal Trade Commission Act as amended.

It thus clearly appears that both the Congress and the Federal Courts have concluded that it is contrary to the public policy of the United States to permit the shipment in commerce of punchboards and pushboards which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

Respondents next argue that the proceeding does not satisfy the requirements of due process of law, assigning as their reasons that the hearing examiner was biased and that the hearing examiner allowed the hearing to continue without their counsel of record. We cannot agree with this contention. The use of the language that both individual respondents "took the Fifth Amendment" is a statement of fact and does not show prejudice or bias. The record further discloses that the attorney of record agreed to the date for the continuation of the hearing. After the subpoena had been served calling a witness for the specified day, the attorney for the respondents, on the day before the hearing was scheduled, protested that certain other matters required his presence elsewhere and asked for a continuance. This was denied by the hearing examiner. The time for the beginning of the hearing was then advanced one hour in order to allow the attorney for the respondents to secure the attendance of his associate counsel. The associate counsel had been identified in the hearings as attorney for the respondents who "knew all the details of the company's operation." The associate counsel appeared and represented the respondents. We believe the respondents were adequately represented by counsel at all of the hearings.

The findings, conclusion and order of the hearing examiner are adopted as the findings, conclusion and order of the Commission. The appeal of respondents is denied and it is directed that an order issue accordingly.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of the above-named respondents from the initial decision of the hearing examiner and upon the briefs filed in support of and in opposition to the appeal and oral argument of counsel; and

The Commission having rendered its decision denying the appeal and adopting the findings and conclusions and order contained in the initial decision:

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

IN THE MATTER OF
POSTAL LIFE AND CASUALTY INSURANCE COMPANY

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

Docket 6276. Complaint, Dec. 28, 1954—Order, Oct. 31, 1957

Order dismissing for failure of proof complaint charging false advertising of accident and health insurance policies.

Mr. John W. Brookfield and *Mr. Donald K. King* for the Commission.

Mr. Kenneth Teasdale, of St. Louis, Mo.; *Mr. Harold Knight*, of Kansas City, Mo.; and *Mr. A. Alvis Layne*, of Washington, D.C., for respondent.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges that respondent has disseminated false, misleading and deceptive advertisements relating to its accident and health insurance policies and, by so doing, has engaged in unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act, as that Act is applicable to the business of insurance under the provisions of Public Law 15, 79th Congress (Title 15, U.S. Code, Sections 1011 to 1015), hereinafter referred to as the McCarran Act.

Respondent's answer admits the allegations of the complaint as to its existence and business, but denies Federal Trade Commission jurisdiction and the allegations as to violation of the Federal Trade Commission Act. The answer states as an affirmative defense that the respondent has engaged in a long course of cooperative dealing with the Federal Trade Commission in connection with and under trade practice rules promulgated by the Commission, during which the Commission's staff found respondent's advertising material, including the advertising circulars which are at issue in this proceeding, to be in accord with the trade practice rules and not objectionable or subject to criticism.

In connection with its answer respondent moved that the complaint be dismissed on the ground that the Federal Trade Commission Act has no application to the business of respondent, and, because the Commission's pleading "does not state a complaint upon which relief can or should be granted as a matter of law, [or], in the alternative, that the complaint be dismissed and the matter referred to the Bureau of Consultation of the Commission for han-

dling and disposition, under the cooperative procedures of that Bureau." This motion was denied by the Hearing Examiner. A motion to make the complaint more definite and certain was likewise denied following a statement by counsel supporting the complaint "that only those advertisements from which the quotations set out in PARAGRAPH FIVE of the complaint were taken would be relied on for proof of the Commission's case."

Thereafter hearings were held at which evidence in support of and in opposition to the allegations of the complaint was presented, duly recorded and later filed in the office of the Commission. Proposed findings of fact and conclusions of law, with supporting memoranda of law, have been submitted by counsel.

Upon the entire record, the following findings of fact and conclusions of law are made:

1. Respondent, Postal Life and Casualty Insurance Company, is a corporation organized July 29, 1927, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business at 612 West 47th Street, Kansas City, Missouri.

2. Respondent is now and for more than two years preceding the filing of the complaint had been engaged in the accident and health insurance business in commerce, as "commerce" is defined in the Federal Trade Commission Act, by entering into accident and health insurance contracts with insureds located in various states of the United States other than the State of Missouri. Respondent's business in commerce has been and is substantial; in 1953 its total accident and health premiums for insurance written or renewed during the year, exclusive of premiums from within the State of Missouri, amounted to approximately \$984,610, and in 1954 to approximately \$1,008,000. Some proportion of this represented business carried on with customers in each of the several states and in Alaska, Hawaii and the District of Columbia. A negligible amount of business receipts came from Puerto Rico, Canada, Mexico, the Philippine Islands, and other foreign countries. Practically all the premiums came from holders of individual policies—in 1953 respondent's receipts from group accident and health policies amounted to approximately one-half of one percent of its total premium receipts; in 1954, the proportion was approximately 1.26%.

3. Respondent is licensed to engage in insurance business in Missouri and in seven other states—Colorado, Illinois, Iowa, Kansas, Nebraska, Texas and Virginia. Of its total premium receipts from states and areas other than Missouri, the premiums from the states in which respondent is licensed amounted approximately, in 1953,

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to 28.9%, and in 1954, to 30.2%. Respondent's business in states other than those in which it is licensed is therefore substantial.

4. In determining jurisdiction this distinction is not vital in view of the Commission's decision in the matter of *The American Hospital and Life Insurance Company*, Docket No. 6237, nor is it necessary to examine the laws of the various states as they relate to false and deceptive advertising practices such as those which constitute the aggregate of the charges in the complaint in this proceeding. The Commission, in deciding that case, said:

Under the Federal Trade Commission Act, which the McCarran-Ferguson Act made applicable to the business of insurance, there must remain an irreducible area of Commission jurisdiction over the interstate activities of insurance companies which cannot be reached by State law and as to which the limitation "to the extent that such business is not regulated by State law" is inoperative. * * * Our proceeding to abate deceptive practices by such (insurance) companies does not impinge on those¹ State functions * * *. By executing its statutory mandate to prevent deceptive practices in the interstate business of insurance, the Commission in no wise usurps State laws prohibiting false advertising. The Federal Trade Commission Act and the State laws are both designed to suppress deception in advertising. The Commission's action in the instant matter aids the States in their own local procedures to protect their citizenry from such excesses.

The Commission's assertion of jurisdiction in the *American Hospital* case and in the other insurance cases² that have been before it is still controlling precedent in this proceeding, and upon that precedent it must be found that the Federal Trade Commission has jurisdiction of the respondent and over the issues herein raised.

5. The foregoing conclusion is applicable to all phases of this proceeding, even though the complaint, in its allegations, seems to envision three areas in which different conclusions might be reached as to jurisdiction. There is, first of all, the solicitation by mail of insurance sales in states other than those in which respondent is licensed to do business; in the second place there is the area of operation in states in which respondent is licensed, in which, by inference at least, the complaint admits that respondent's insurance activities are regulated, since all such states have applicable regulatory statutes; thirdly, there is that business which was originally transacted with insureds living in states in which respondent is licensed, who later, in substantial numbers, moved to states in which respondent is not licensed, but who continued doing business with

¹ Referring to the States' power to revoke charters of insurance corporations organized under their laws, to regulate, tax, and fix rates for insurance companies doing business within their borders.

² In the Matter of *National Casualty Company*, a corporation, Docket 6311; in the Matter of *Federal Life & Casualty Company*, a corporation, Docket 6312, order granting appeal from Hearing Examiner's order limiting scope of proceeding.

respondent in the renewal and servicing of such policies. The amount of business falling within this third category was infinitesimal in comparison with respondent's total business, and may be disregarded as *de minimis*. The business falling into the second category is specifically within the finding in the *American Hospital* case, supra, and in *National Casualty Company*, Docket 6311; while that in the first category is clearly embraced by the broad implications of those decisions, and is specifically made the subject of conclusive findings of jurisdiction in several initial decisions in cases similar to the instant proceeding.³

6. In the course of its business during the years 1953 and 1954, respondent sold the following policies:

(1) A Twenty-Fifth Anniversary Accident Policy bearing the identification G-68-5-52;

(2) A Series E Accident and Sickness Policy bearing identification ES-1-7-53;

(3) An Individual Hospital Expense Policy identified as IH-1-7-53; and

(4) A Family Group Hospital Expense Policy covering losses resulting from accidental bodily injury or sickness, identified as FH-1-7-53.

7. Policy ES-1-7-53 is no further involved in this case for two reasons: the extent of respondent's business during 1953 and 1954 in connection with this policy was inconsequential, and no advertising material relating to it or its coverage is contained in the record or shown to have been disseminated. Policy IH-1-7-53 may be disregarded herein because the complaint contains no charge that any of its provisions were misrepresented in any of respondent's advertising.

8. Policy FH-1-7-53, respondent claims, should be excluded from consideration because it was sold by agents only in states in which respondent was licensed, and, during the years 1953 and 1954, only eight purchasers of that policy moved to states in which respondent was not licensed, and thereafter only one semi-annual premium of \$11.40 was received applicable to such a policy. Under respondent's interpretation of the theory of jurisdiction upon which the complaint was based, this claim would be valid, but since that interpretation is rejected, the claim is likewise rejected.

9. The record contains only one piece of advertising relating to the FH-1-7-53 policy, which, like other of respondent's policies,

³ See *American Life and Accident Insurance Company*, Docket 6238; *Automobile Owners Safety Insurance Company*, Docket 6239; *Travelers Health Association*, Docket 6252; *Educators Mutual Insurance Company*, Docket 6308. Conclusion of Law No. 5; and *North American Accident Insurance Company*, Docket 6456.

is renewable at the option of the company only. This is a four-page folder, the first two pages of which contain descriptive material relating to the policy. The third page is an application form, and the last page is a blank form for home-office use. This folder was not circulated generally to the public, but was distributed by respondent to its agents with instructions that it be used, along with a sample policy with which they were also supplied, in explaining to prospective purchasers the provisions of the policy. After taking an application, the agent, according to his instructions, was to tear the sheet containing pages 1 and 2 from the application part of the folder, and give it to the policy-purchaser, so that he could later assure himself that the delivered policy was as represented. At the bottom of the first column on page 2 of this folder appears the following:

ARE BENEFITS REDUCED WHEN YOU REACH 60 OR 65? NO! Adult benefits never reduce after the policy is issued.

This is the only bit of advertising relied upon to support the charge that respondent has disseminated false, misleading and deceptive advertising relating to this policy. It is alleged that the foregoing language constitutes a representation that respondent's said policy may be continued to age 65 or indefinitely at the option of the insured. The bottom half of the second column on page 2 of the folder contains a tabulation showing benefits and premium rates for various types of coverage provided by the FH-1-7-53 policy.

10. Read in context, the statement relied upon means only what it says: that benefits never diminish after the policy is once issued. Taken literally or with reasonable inference, the statement cannot be interpreted as applicable to policy termination, whether by action of the insured or by action of the insurer. The concept of termination is neither expressed nor implicit in the language, which is no broader in scope, nor more susceptible of misinterpretation, than the language contained in respondent's advertising in the matter of *The American Hospital and Life Insurance Company*, Docket 6237, as to which, on review, the Commission said:

The Commission does not construe these statements as having the meaning ascribed to them. Said statements can be reasonably read to mean only that the policies contain no provisions terminating or reducing benefits on account of increasing age * * *: and the evidence is that the statements as so construed are both true. On this phase of the case the allegations of the complaint have not been sustained.

Accordingly, it is found that respondent's statement above quoted does not have the meaning ascribed to it in the complaint. It is

further found that the statement is true, there being no evidence in this case that benefits under respondent's policy are ever reduced because of the increasing age of the insured. On this phase of this proceeding, the allegations of the complaint as they relate to the advertising of policy FH-1-7-53 have not been sustained.

11. The G-68-5-52 policy was sold by mail throughout the United States. Mailing lists were purchased for use by respondent under an arrangement whereby the respondent was entitled to use each name but one time. Therefore, except by pure accident, no prospective customer ever received more than one of the four pieces of advertising literature which the record shows were used to promote the sale of this policy. Three of these were two-page form letters; the other was a four-page combined form letter and advertising circular. The impression made upon a prospect would result from his having received and read a single one of these documents, not from having received or considered them as a cumulative series, as the complaint alleges. All of these documents and the policy to which they relate had been submitted to the Commission and discussed with the Commission's staff in 1953, at which time respondent was advised that all were in compliance with the trade practice rules then in effect. A previous examination of this same advertising material, or material containing identical statements, and the same or similar policies had been made by a member of the Commission's staff in 1951, and the same conclusion stated to respondent.

12. With respect to the G-68-5-52 policy, the complaint contains two charges. The first relates to renewability and is the same charge as that made with respect to policy FH-1-7-53, to wit, that respondent has represented that the policy "may be continued to age 65 or indefinitely at the option of the insured," and that this is false, misleading and deceptive because the policy is renewable at the option of respondent only, and that the use of such false and misleading representations "has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public * * * and to induce said portion of the purchasing public to purchase insurance coverage from the respondent * * *." The provision that the policy is renewable at the option of the respondent only is clearly and conspicuously displayed on the front page of the policy in 18-point bold-face type. If respondent's advertising statements can be interpreted to mean that the policy "may be continued to age 65 or indefinitely at the option of the insured," then respondent is guilty, as charged, of having disseminated deceptive and misleading advertising in violation of the Federal Trade Commission Act.

13. Excerpts from the advertising alleged to embody this representation are set forth in the complaint, Paragraph 5 1.(a), as follows:

THIS POSTAL POLICY COVERS MANY DANGEROUS ACCIDENTS

For Men, Women and Children—Ages 7 to 65 Years

You receive insurance protection under this improved low cost plan regardless of your age between 7 and 65 * * * and benefits are PAID DIRECT TO YOU or to your beneficiary.

You are protected if you are killed or injured (wholly disabled and confined and under medical attention) from any of these common accidents that happen everyday!

This extract is from the middle of the inside double page of the four-page letter-circular. It appears in no other advertising material relating to this policy, and is the sole statement upon which this charge is founded. It differs from the statement quoted and discussed in paragraphs 9 and 10, above, referring to the FH-1-7-53 policy, but, like that statement, embodies no concept referable to policy continuation or termination. In the *National Casualty Company* proceeding, Docket 6311, the Hearing Examiner and the Commission found misrepresentation as to policy duration based on the over-all impression created by numerous advertising statements, including phrases such as "Life indemnity accident coverage," "Security plan with lifetime benefits," "Lifetime accident benefits," "I understand this peace of mind and security will be mine from the first day—even for life," and other phrases of similar import contained in many of the forty-five separate pieces of advertising material introduced into evidence in that case, twenty-eight of which were still being used at the time of the issuance of the complaint therein. The voluminous advertising propaganda inducing the cumulative effect which results from the continued repetition of phrases of similar import does not exist in this proceeding.

14. If the representation charged is read into the advertising language used by respondent in this case, it must be by inference and not by accepting the plain meaning of the language used. One witness, a man with several years' experience in the Insurance Department of the State of Missouri, having, during the course of his duties in this department, discussed insurance problems and insurance advertising with many members of the public, and therefore being familiar with their interpretation of language used in such advertising, stated that it was his opinion that persons who read the statements above quoted would take them to mean "that anybody between the ages of 7 years and 65 years could purchase the policy being advertised." There is no evidence that the statements

would be interpreted otherwise. Accordingly, it is found that respondent's statements do not have the meaning ascribed to them, but can be reasonably read to mean only that the policies contain no provisions terminating or reducing benefits on account of increasing age, and that applicants for such policies must be within the age limits specified. That being the natural meaning of the language in the context in which it is found, and respondent's G-68-5-52 policy being available to purchasers between the ages stated, the conclusion as to this charge is the same as that reached with respect to the similar charge relating to policy FH-1-7-53, and for the same reasons, that the allegations of the complaint as they relate to this charge have not been sustained.

15. Actual deception need not be shown in a proceeding under Section 5 of the Federal Trade Commission Act. The Commission, through the exercise of its "expertise," may find that an advertisement has a tendency or capacity to deceive, and may issue an appropriate order to stop such deception. It has been said that "The 'expertise' of a commission usefully serves it in evaluating the evidence, but that expertise can not supply evidence and can not, without findings made upon the critical issues before it, guide a commission to a rational and lawful decision"; and that the ultimate decision reached by the Commission must follow as a matter of law from the facts found as its basis, and such facts must have substantial support in the evidence.⁴ Two courts have indicated that "the exercise of discretion, the making of judgments, and the issuance of sanctions, on basis of administrative expertise are precisely the matters which Congress intended should be under and not exempt from the Administrative Procedure Act," and that there must be basic findings of facts.⁵

16. If a cosmetic manufacturer states that its product has rejuvenescent qualities, the conclusion is justified that the statement is deceptive, since restoration of youth to the old has never been accomplished. In such a case, the basic fact of representation is established. If the respondent, in the instant case, had printed in its advertising the representations with which it is charged in the complaint, we might, upon examination of the policy to which the advertising refers, readily conclude, through exercise of the Commission's expertise, that the capacity and tendency to deceive are inherent in the advertisements. The respondent, however, did not print the representations as charged, but used other language which

⁴ *Capital Transit Co. v. Public Utilities Com'n.*, C.A.D.C., 12/10/53. 213 F. 2d 176.

⁵ *Amarillo-Borger Express v. U.S.*, 139 F. Supp. 411 @ 418; D.C.N.D. of Texas, Dallas Div., 1/24/56; *Automobile Sales Co., Inc. v. Bowles, Adm'r.*, 58 F. Supp. 469, D.C.N.D. Ohio, E.D., 4/27/44.

the complaint alleges imports the same thing. The respondent contends that the language it used does not constitute the alleged representations. It produced a witness, who, as an expert in insurance advertising and its meaning to the public, testified in support of respondent's contention. The record contains no evidence on this issue contradicting that testimony. Thus, to support a finding that the respondent made the representations charged, all the evidence of record relative to this issue would have to be disregarded, and a conclusion as to the meaning of the language would have to be reached, based wholly on implication, inference and Commission expertise. The issuance of a cease-and-desist order in this proceeding with respect to this charge cannot be justified except by reliance upon the doctrine of expertise to support a factual finding, contrary to the evidence of record, that respondent's advertising language constitutes the alleged representations. Such a substitution of the doctrine of expertise for uncontradicted evidence is not warranted.

17. The second charge of the complaint relating to policy G-68-5-52 is that respondent has represented "that *adequate* benefits are payable for losses resulting from accidents of the type covered by the policy," whereas "in truth and in fact * * * respondent's policy G-68-5-52 * * * does not provide *broad and adequate* insurance for the type of accidents named in the policies" (underscoring supplied). Assuming, *arguendo*, that respondent has made the representation alleged, yet it is a fact that "broad" and "adequate" are not synonyms; hence proof that respondent's policies do not provide "broad and adequate" coverage would not necessarily establish that such policies do not provide "adequate benefits * * for losses resulting from accidents of the type covered by the policy." A basic rule of pleading and practice is that proof must conform to the charge. Passing over this deviation as being inadvertent, and interpreting the charge to be that respondent's policies do not provide adequate insurance, as allegedly represented, the facts will be examined.

18. This second representation alleged to be false is based upon the following advertising statements used by respondent and quoted in the complaint:

- FIVE. 3. (a) One serious accident could wipe out your life savings or put you in debt. Be *sure* * * * have adequate insurance when accidents happen.
- (b) The policy covers many dangerous accidents that happen every-day!
- (c) It pays you \$100.00 A MONTH while under medical attention for as long as TWELVE MONTHS if you are wholly disabled and confined from *any accident* covered by this policy.

The foregoing statements are completely out of context. They do not appear adjacent or contiguous to each other anywhere in any of respondent's advertising material. The expression "One serious accident could wipe out your life savings or put you in debt. Be *sure* * * * have adequate insurance when accidents happen" (3.(a) above) appears only once in respondent's advertising. It is in a two-page letter of solicitation identified in the record as Commission's Exhibit No. 13. This also is the only bit of advertising containing the three excerpts, (a), (b) and (c) above, even disjunctively. The letter is on respondent's letterhead; in the upper right corner, just below the printed letterhead, in the similitude of an attached, hand-written note, appears the following:

Special Note—

30 days

Accident Insurance for only 25¢—Now, be protected *while* you examine the actual policy on a money back guaranteed Special ½ price Introductory Offer!

J.W.W.

The letter is addressed, "Dear Friend: "; following this is a sentence in red type, "Here Is Wonderful Good News." Then come three short paragraphs in black type, of which 3.(a) above is the third; following this is a centered heading in red, "Special Introductory Offer," under which there are two paragraphs, the second one in red, the last sentence of which reads: "I honestly believe you will like it so well, you will want to keep it in force." Then comes another centered statement, this time in black, "Here's why:," followed, on page 1, continuing over to page 2 of the letter, by a paragraph containing, in variant form, the quotation 3.(c) above. Following this is a short paragraph, then, as a sort of sub-heading, in red, the statement, 3.(b) above, "The policy covers many dangerous accidents that happen every day." Immediately thereafter, in black, are the following two paragraphs, not quoted in the complaint:

It pays \$2,000.00 if you are killed—or the \$100.00 a month disability benefit if you are injured—in accidents to a *railroad train, street car, elevated or subway train, public or school bus, licensed taxicab or licensed commercial airplane* on which you are a passenger.

It pays \$1,000.00 if you are killed—or the \$100.00 a month disability benefit if you are injured—in accidents to a *motor car or truck* in which you are riding or driving * * * by *being struck* by a moving vehicle on any public street or highway * * * or by accidents to a *tractor or tractor-drawn vehicle* on which you are riding or driving or to *power-propelled farm implement* on which you are riding or driving * * * and other specified types of accidents.

After this are five other paragraphs, the first and third in red the others in black; then the printed facsimile signature of J.W.

Walker, Vice President. The two paragraphs last quoted also appear in every letter used to promote the sale of the G-68-5-52 policy. In addition, the four-page letter-brochure lists four classes and sixteen specific kinds of accidents that are covered by this policy.

19. The expression "Be sure * * * have adequate insurance when accidents happen" must be interpreted in this context. It is not a statement that respondent's G-68-5-52 policy is adequate for everyone, but rather a suggestion or urging that each prospective purchaser examine his own circumstances, his own needs, then look at respondent's offering at 25¢ for thirty days, \$3.60 for six months, or \$6.95 by the year, and determine whether that would be adequate for his needs for the type of coverage provided. Asked by counsel supporting the complaint, "What insurance would the average member of the public need to have * * * adequate insurance?", the witness hereinbefore mentioned, from the Department of Insurance of the State of Missouri, replied:

I think that is a question impossible to answer, sir. I could not plan an insurance program for anybody without knowing all of the details of his particular situation, including his family situation, his income situation, his occupation situation.

Prior to this answer, in response to another question put by counsel supporting the complaint as to the meaning of the phrase here under discussion as used in respondent's solicitation letter, he said:

I think that means, have the insurance you need for your protection. You know your needs, get the insurance you need to fill them in the event of incapacity from accident.

There is no evidence in the record to contradict this witness' interpretation of this advertising, and it is the obvious and reasonable meaning of the language as used.

20. "Adequate" is a relative term. What is adequate for one person may not be adequate for another. It is such a term as "amazing distance" or "perfect lubrication," under consideration in the *Kidder* case,⁶ or "easy" as discussed in the recent *Washington Mushroom* case.⁷ In those cases it is pointed out that such terms, being relative, "are largely a matter of personal opinion," and in the absence of direct evidence to establish that they have been used deceptively, do not support a specific inhibition against their use,—this in cases where the words, without question, were used to describe respondent's products or operations. In this proceeding a finding that the term "adequate" is used descriptively of respondent's policy would

⁶ *Kidder Oil Co. v. F.T.C.* (C.A. 7, 1941), 117 F. 2d 892.

⁷ In the Matter of *Washington Mushroom Industries, Inc., et al.*, Docket 6273, issued by the Commission October 24, 1956.

be reading into language an unwarranted implication, and would be founded upon an unjustified inference and contrary to positive evidence of record. Clearly, under the facts and circumstances disclosed in this proceeding, this charge of the complaint has not been sustained and should be dismissed.

21. Respondent contends that, in any event, its record of cooperation with the Commission, and its willingness, in the future, to conform in all respects to the law as interpreted by the Commission or its staff would justify a dismissal of this proceeding without prejudice. In view of the findings hereinabove made, this contention of the respondent need not be discussed further.

22. Upon consideration of all the facts of record, the conclusion is reached, as hereinabove indicated, that the charges of the complaint have not been established by reliable, substantial, probative evidence, and that the complaint should be dismissed. Accordingly,

It is ordered, That the Complaint herein be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

By KERN, Commissioner:

Respondent, Postal Life and Casualty Insurance Company, is charged in the complaint in this proceeding with having disseminated false, misleading and deceptive representations in connection with the advertising and sale of certain of its accident and health insurance policies. Respondent is licensed by Missouri and seven other states, where it has agents, to conduct an insurance business. It operates a mail-order insurance business in each of the several other states and in Alaska, Hawaii, and the District of Columbia. About 70% of the volume of its business is conducted by mail outside the State of Missouri and the seven other states where respondent is licensed.

Two groups of statements were attacked in the complaint. The first category allegedly misrepresented the renewable features of respondent's policies. The second group, it is charged, misleadingly presented the extent of coverage, or adequacy of benefits, secured through respondent's policies.

As to the first group of statements wherein the complaint charges misrepresentation as to renewability, the following are typical statements which are the subject of this allegation:

(a) ARE BENEFITS REDUCED WHEN YOU REACH 60 OR 65? NO!
Adult benefits never reduce after the policy is issued.

(b) For men, women and children—Ages 7 to 65 Years. You receive insurance protection under this improved low-cost plan regardless of your age between 7 and 65 * * *.

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The complaint ascribes to the quoted statements the meaning that respondent's policies can be continued to age 65 or indefinitely at the option of the insured and alleges such representations to be false and misleading since respondent's policies are renewable only at the option of respondent company.

The hearing examiner found as to (a) above that the statement read in context means only that benefits never diminish after the policy is once issued and stated that the concept of termination by either the insured or the insurer is neither expressed in, nor inferable from, the statement.

As to statement (b) quoted above, the hearing examiner, after noting that it differed somewhat from statement (a), concluded that if the representation charged is read into the advertising language, it must be by inference and not by accepting the plain meaning of the language used. He found accordingly that respondent's statements do not have the meaning ascribed to them, but can be reasonably read to mean only that the policies contain no provisions terminating or reducing benefits on account of increasing age, and that applicants for such policies must be within the age limits specified.

In other insurance cases which have been before the Commission wherein representations as to duration of coverage have been prohibited, the contexture in which the representations appeared and the circumstances surrounding them were entirely different than we find here. In the instant case but one circular containing the questioned statement was sent to a prospect. In other cases mentioned there was a definite series of representations, a pattern, or continuity, and reiteration of the representations in many subtle and repetitive forms. In fact, in one case the record showed that as many as thirty letters might be sent to one individual.¹ Moreover, in the cases mentioned the representation was tied in with others which emphasized, for example, that security is afforded for older people, together with certainty of cash assistance when needed most. Here there is no voluminous advertising of a definitely deceptive pattern producing the "setting" present in other similar proceedings.

No persuasive argument to the contrary having been advanced by counsel supporting the complaint, the Commission is of the opinion that the hearing examiner correctly concluded that the allegations of the complaint as they relate to the charge as to "renewability" have not been sustained.

¹ *Travelers Health Association*, Docket No. 6252, decided December 20, 1956 (pending on petition for review, C.A. 8). See also *North American Accident Insurance Company*, Docket No. 6456, decided February 20, 1957.

The second group of statements alleged in the complaint to be misleading are quoted therein as follows:

- Five. 3.(a) One serious accident could wipe out your life savings or put you in debt. Be sure . . . have adequate insurance when accidents happen.
- (b) The policy covers many dangerous accidents that happen every day.
- (c) It pays you \$100.00 A MONTH while under medical attention for as long as TWELVE MONTHS if you are wholly disabled and confined from *any accident* covered by this policy.

The complaint alleges that the policy involved does not provide "broad and adequate" insurance for the type of accidents named in the policies and asserts that under the terms of the policies no indemnification is provided for loss of life, vision or dismemberment unless such loss occurs within thirty days of the date of the accident; no indemnification for total disability unless such disability exists from the date of the accident or is preceded by total disability, and no indemnification for hospital expenses unless the injury involved is one which entitles the insured to total disability or elective benefits (loss of limb or vision) and no indemnity unless the insured is continually under the care of a physician.

The representations in question were noted by the hearing examiner to have been lifted completely out of context. After reviewing the statements in their whole setting and interpreting the statements in that context, the hearing examiner characterizes the statement as to "adequacy" not to be a representation that the policy involved is adequate for everyone, but rather a suggestion, or admonition, that each prospective purchaser should examine his own circumstances and then determine whether the various programs offered by respondent would be adequate for his needs. Indeed, there is uncontradicted testimony of record to the effect that "adequate insurance" means simply the insurance one needs for his own protection, having in mind his own particular circumstances, including his family situation, his income and his occupation.

Counsel for respondent argues in effect that the statements pleaded are not representations and are not in themselves deceptive. Counsel asserts, "They are admonitions, cautionary statements. They have nothing to do with the realm of representation or promise, and hence cannot be deceptive." We think there is merit to this contention and agree with the hearing examiner's disposition of the argument of counsel supporting the complaint on this phase of the case. As the hearing examiner correctly recognized, "adequate" is a relative term, and what is adequate for one may not be adequate for another.

Order

54 F.T.C.

Where terms similar to "adequate" have been considered by the courts or by the Commission in other cases, it has consistently been held that in the absence of direct evidence of their actual deceptive use, no inhibition will be entered against them.² In the instant case the Commission has concluded that it would be unwarranted in finding that respondent's use of the term "adequate" is deceptive. In fact, record evidence to the contrary is uncontroverted.

Counsel for respondent in the answering brief on appeal invites the Commission to give further consideration to a motion of respondent, earlier denied by the Commission, to strike and delete portions of the appeal brief of counsel supporting the complaint. Because of the foregoing considerations leading to disposition of this proceeding on the merits, the Commission deems it unnecessary to express itself further on this and other matters urged in the appeal brief and the answer in opposition thereto filed on behalf of respondent.

The appeal of counsel supporting the complaint is denied. An appropriate order will be entered.

ORDER DENYING APPEAL FROM INITIAL DECISION

Counsel supporting the complaint having filed an appeal from the hearing examiner's initial decision containing an order dismissing the complaint in this proceeding; and the matter having been considered upon the whole record, including the briefs and oral arguments of counsel; and

The Commission, for the reasons stated in its accompanying opinion, having concluded that the hearing examiner's dismissal of the complaint was appropriate:

It is ordered, That the appeal of counsel supporting the complaint be, and the same hereby is, denied.

² *Kidder Oil Co. v. Federal Trade Commission*, 117 F. 2d 892 (C.A. 7, 1941); *Washington Mushroom Industrials, Inc., et al.*, Docket No. 6273, decided October 24, 1956.