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

JULIAN D. GROLLNEK, ET AL., TRADING AS G. & G. SPORTSWEAR CO., ETC.

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

Docket 7607. Complaint, Oct. 13, 1959—Decision, Feb. 13, 1960

Consent order requiring Los Angeles manufacturers to cease violating the Wool Products Labeling Act by labeling as "60% wool, 40% rayon," women's suits which contained substantially less than 60% wool, by failing to attach labels to the skirts of two-piece suits, and by failing in other respects to comply with labeling requirements.

Mr. Charles Donelan for the Commission.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated October 13, 1959, the respondents are charged with violating the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act and the Rules and Regulations made pursuant thereto.

On December 3, 1959, the respondents entered into an agreement with counsel in support of the complaint for a consent order.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of section 3.25(b) of the Rules of the Commission.

The hearing examiner being of the opinion that the agreement and the proposed order provide an appropriate basis for disposition of this proceeding as to all of the parties, the agreement is hereby accepted and it is ordered that the agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued.

1. Respondents Julian D. Grollnek and Mary H. Grollnek are individuals and co-partners trading as G. & G. Sportswear Co., G. & G. Coat Co. and Mary Hayes of California, with their office and place of business located at 127 East Ninth Street, Los Angeles, California.

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 the respondents, Julian D. Grollnek and Mary H. Grollnek, individually and as co-partners, trading as G. & G. Sportswear Co., G. & G. Coat Co. and Mary Hayes of California, or under any other name, directly or through any corporate or other device in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of women's suits or other wool products, as such products are defined in and subject to the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

A. Misbranding such products by:

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

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

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

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

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

3. Failing to attach a stamp, tag, or label, or other means of identification containing the information required under section 4(a)(2) of the Wool Products Labeling Act and the Rules and Regulations thereunder to each unit of multiple piece garments sold in combination, as required by Rule 12 of the aforesaid Rules and Regulations.

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 13th day of February, 1960, 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

KULIN WASTE CO. ET AL.

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

Docket 6983. Complaint, Dec. 13, 1957—Decision, Feb. 17, 1960

Order requiring the former vice president of a Worcester, Mass., corporate manufacturer to cease violating the Wool Products Labeling Act by identifying wool stock in invoices and shipping memoranda as "90% wool, 5% rayon and 5% other fibers" when the wool content was reprocessed wool and not "wool" as defined by the Act.

The corporate respondent and two other officials accepted a consent order on October 18, 1958, 55 F.T.C. 604.

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

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

Mr. Seymour Weinstein, of Worcester, Mass., for respondent.

FINDINGS AS TO THE FACTS, CONCLUSION AND ORDER

The complaint in this matter charged the respondents with violation of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder in connection with the sale of wool stock. Respondents Kulin Waste Co., Louis Kulin and Abraham Kulin elected to dispose of the proceeding as to them by means of an agreement for a consent order, and on August 27, 1958, an initial decision as to these respondents was issued by the hearing examiner, such decision, on October 18, 1958, having become the decision of the Commission. Thereafter, the case proceeded in regular course as to respondent Michael Silver, a number of hearings being held and a substantial volume of evidence received both in support of and in opposition to the complaint. In a second initial decision filed May 29, 1959, the hearing examiner held that, as to respondent Silver, the complaint should be dismissed for lack of public interest.

The Commission has considered cross-appeals from the initial decision filed by counsel supporting the complaint and by respondent Michael Silver, *pro se*, briefs submitted and the entire record, and has determined that the appeal of counsel supporting the complaint should be granted and that of respondent Michael Silver denied and that the initial decision should be vacated and set aside. The Commission further finds that this proceeding is in the public interest and now makes this its findings as to the facts, conclusion drawn therefrom and order to cease and desist, which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision:

FINDINGS AS TO THE FACTS

1. Respondent Michael Silver, hereinafter referred to as "respondent," is an individual residing at 15 Claridge Drive, Worcester, Massachusetts. During the period pertinent to this proceeding, he was vice president and general manager of Kulin Waste Co., 31 Mulberry Street, Worcester, Massachusetts. Respondent actively participated in the formulation, direction and control of the acts and practices of this company.

2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, Michael Silver, individually and as an officer of Kulin Waste Co., manufactured for introduction into commerce, offered for sale, and sold wool products in commerce, as "commerce" and "wool products" are defined in the Wool Products Labeling Act.

3. Certain of said wool products, namely wool stock, have been misbranded in violation of Section 4(a)(1) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder in that they were falsely or deceptively identified in invoices and shipping memoranda as "90% wool, 5% rayon and 5% other

fibers" when in fact the wool content of such stock was not "wool" as defined in said Act but was reprocessed wool.

4. Certain of said wool products, namely wool stock, have been misbranded in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder.

5. In the course and conduct of his business, respondent is in competition, in commerce, with firms and individuals likewise engaged in the sale of wool stock.

CONCLUSION

The acts and practices of respondent Michael Silver constituted misbranding of wool products and were in violation of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent, Michael Silver, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of wool stock or other "wool products," as such products are defined in and subject to the Wool Products Labeling Act of 1939, which products contain, purport to contain or in any way are represented as containing "wool," "reprocessed wool," or "reused wool," as those terms are defined in said Act, do forthwith cease and desist from misbranding such products by:

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

2. Falsely or deceptively identifying such products as to the character or amount of the constituent fibers contained or included therein on sales invoices or shipping memoranda applicable thereto;

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

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

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

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

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

OPINION OF THE COMMISSION

By TAIT, *Commissioner:*

The complaint in this case charges the corporate respondent, Kulin Waste Co., and Louis Kulin and Abraham Kulin, individually and as officers of said respondent, and Michael Silver, individually and as a former officer, with violation of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder. Specifically, the charge is that the respondents engaged in misbranding woolen stock sold by them by failing to affix to this product stamps, tags or labels showing the fiber contents as required by Section 4(a)(2) of the Act and by falsely representing the fiber contents of the product on invoices and shipping memoranda.

Respondents Kulin Waste Co., Louis Kulin and Abraham Kulin executed an agreement containing a consent order to cease and desist and, on August 27, 1958, an initial decision accepting that agreement was filed. That initial decision became the decision of the Commission on October 18, 1958.

Thereafter, extensive hearings were held as to respondent Michael Silver, culminating in a second initial decision filed May 29, 1959, which would dismiss the complaint as to him. Counsel supporting the complaint has appealed from that initial decision, as has respondent Silver. We have considered these cross-appeals separately on the basis of the whole record, including briefs of counsel supporting the complaint and Michael Silver, *pro se*.

The hearing examiner would dismiss the complaint on the grounds that respondent Silver's connection with Kulin Waste Co. terminated some six months prior to issuance of the complaint, and since there is nothing in the record to show Mr. Silver's present activities there is no public interest in issuing a cease and desist order against him.

That termination of illegal practices prior to issuance of a complaint does not in every case warrant dismissal of the proceeding is so well established that detailed consideration of the authorities therefor is not deemed warranted in this opinion. It suffices to note that in the circumstances obtaining here we regard as applicable the principles laid down in *Sheffield Merchandise, Inc.*, Docket 6627, decided July 7, 1958, and cases therein cited. And see *Ward Baking Company*, Docket 6833, decided June 23, 1958.

Respondent Silver, as the hearing examiner found, was more than a mere employee, being vice president and general manager of the corporate respondent, having a substantial financial interest in the company, and having a considerable measure of authority over the company's operations and practices, particularly in the absence of the president. Moreover, the record discloses that Mr. Silver was one of the individuals who actively participated in the formulation, direction and control of the acts and practices of Kulin Waste Co., including those practices alleged to be illegal in the complaint. There is no evidence as to Mr. Silver's present activities, nor does the record clearly disclose that he has disposed of his substantial financial interest in the corporation. Likewise, there are no assurances, formal or otherwise, that Mr. Silver surely will not engage in the questioned practices in the future. Finally, there is no showing here of "unusual circumstances which in the interests of justice require" dismissal of the proceeding upon the ground of abandonment or discontinuance. Thus, the appeal of counsel supporting the complaint should be granted.

As to the appeal of respondent, it essentially is from the unfavorable findings of the hearing examiner that Mr. Silver has violated the Wool Products Labeling Act, as charged in the complaint.

We consider first the argument that samples of wool stock tested and found to have been misbranded were obtained at the Franklin Woolen Mills, in Franklin, Massachusetts, from bales of stock shipped by Kulin Waste Co., from its place of business in Worcester, Massachusetts, the contention being that such samples were not shipped in commerce and, therefore, Commission jurisdiction was not established in this case.

It is true, as respondent asserts, that the tested samples were taken from bales of wool stock shipped from Worcester to Franklin, both in Massachusetts. It appears further, however, that the wool stock had been sold by Kulin Waste Co., of Worcester, Massachusetts, to Stamina Industries, Inc., of Forestdale, Rhode Island, with shipment being made to Franklin Woolen Mills, an associate corporation of Stamina, where the stock was to be processed. This is established by invoices and other sales memoranda in the record, and clearly subjects the products and the respondents to the Commission's jurisdiction. The fact that the original shipment was intrastate is wholly immaterial.

Respondent next urges that the wool stock involved is not a "wool product" within the meaning of the Wool Products Labeling Act. This is true, he says, because the Act does not mention wool stock as such, but, on the contrary, is limited in coverage to finished items such as gloves, hosiery, other wearing apparel and blankets. Furthermore, he argues, the contents of the material cannot, in any event, be "reprocessed wool," as urged by counsel in support of the complaint, because it is not the result of a reduction of a woven or felted wool product into a "fibrous state," within the meaning of the Act.

Kulin Waste Co. buys from fabric and garment manufacturers waste, clippings and unused fabrics which it picks and blends. The resultant product is baled and sold to spinning mills. There is no question but that the product when sold, in many instances, was not stamped, tagged or labeled in accordance with the requirements of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder; and the record establishes that the product was referred to in respondent's invoices and shipping memoranda as "90% wool, 5% rayon and 5% other fibers." Actually the wool content of respondent's stock was not "wool" as defined in the Act, but was "reprocessed wool."

Section 2(b) of the Act defines "wool" as follows:

(b) The term "wool" means the fiber from the fleece of the sheep or lamb or hair of the Angora or Cashmere goat (and may include the so-called specialty fibers from the hair of the camel, alpaca, llama, and vicuna) which has never been reclaimed from any woven or felted wool product.

The wool stock here involved, as we have found, was reclaimed from waste, clippings and unused fabrics which were woven and felted prior to processing and resale by Kulin Waste Co. The resultant product was not "fiber from fleece * * * which has never been reclaimed * * *." It is clear, therefore, that the designation "90% wool" appearing on invoices and shipping memoranda as descriptive of the fiber content of such product was false.

On the other hand, the wool stock or "waste" does come within the definition of a "wool product" as contained in Section 2(e) of the Act, which reads as follows:

(e) The term "wool product" means any product, or any portion of a product, which contains, purports to contain, or in any way is represented as containing wool, reprocessed wool, or reused wool.

The debates in both houses of the Congress leading up to enactment of the statute are replete with references supporting that conclusion. And, in fact, the bill under consideration at one time contained language specifically including "wool waste" within its coverage. The report of the Senate Committee on Interstate Commerce on S. 162 (76th Cong., 1st Sess.)—the original wool legislation—carries the following language which explains why those specific references were dropped:

Considerable controversy has arisen over the relative merits of the various wool wastes. It is agreed some superior wastes which have not gone through the garnetting process are as good as similar virgin wool. Other wastes are far inferior. By eliminating the specific provisions in the bill relative to wastes, it throws the distinction back on the definitions of virgin and reclaimed wools. The better wastes which have not been reclaimed may be classed as virgin wool, and those which have gone through the reclaiming process must be labeled as reclaimed wool.

Section 2(c) of the Act defines "reprocessed wool" in these terms:

(c) The term "reprocessed wool" means the resulting fiber when wool has been woven or felted into a wool product which, without ever having been utilized in any way by the ultimate consumer, subsequently has been made into a fibrous state.

The stock purchased by Kulin Waste Co., picked by it, and, in turn, sold to knitting mills, clearly comes within that definition. Counsel supporting the complaint called a well-qualified textile expert whose testimony is to the effect that "picked" stock such as we have here is in a "fibrous state"—that is, that the product has been reduced to fibers. Two members of the Commission's staff who also are qualified as experts by virtue of their experience in the textile field agreed with this view. While all of the experts appeared to recognize that through further processing the picked stock can be reduced to a finer or more fibrous state, they are firm in their opinion that the waste wool in question does in fact consist of fibers and is in a fibrous state. Respondent's expert, while testifying that the present product is yarn rather than fibers, stated that some fibers are present in the product. On balance, the expert testimony in this regard clearly was against respondent's contentions. We find, accordingly, that the picked stock was in a fibrous state and is "reprocessed wool." It should have been so designated on tags or labels attached thereto and in invoices and other sales memoranda.

In view of the foregoing, the appeal of counsel supporting the complaint is granted, and the appeal of respondent Silver is denied. The initial decision is set aside, and we are entering our own findings as to the facts, conclusions and order to cease and desist in conformity with this opinion.

IN THE MATTER OF

HUNTER MILLS CORPORATION ET AL.

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

Docket 7401. Complaint, Feb. 6, 1959—Decision, Feb. 17, 1960

Order requiring manufacturers in Woodside, Long Island, N.Y., to cease violating the Wool Products Labeling Act by labeling as "100% reprocessed wool" and "100% reused wool," woolen interlinings which contained a substantial quantity of non-woolen fibers, by failing to label certain of said wool products as required, and by furnishing false guaranties that some of such products were not misbranded.

Mr. Thomas F. Howder for the Commission.

Shipley, Akerman & Pickett, by *Mr. Alex Akerman, Jr.*, of Washington, D.C., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The respondents are charged with having violated the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and thus with having engaged in unfair and deceptive acts and practices and unfair methods of competition in violation of the Federal Trade Commission Act. The specific violations alleged are (1) that respondents have labeled certain wool products as "100% reprocessed wool" and "100% reused wool" when in fact such products contained a substantial quantity of non-woolen fiber, and (2) that respondents have furnished false guarantees that their wool products were not misbranded "when they knew, or had reason to believe, that the said wool products so falsely guaranteed might be introduced * * * in commerce."

In denying respondents' motion for a bill of particulars because to do otherwise might delay the proceeding, the Hearing Examiner ordered that the hearing proceed on the date designated in the complaint, and stated that for the purposes of the hearings the respondents would be considered to have filed a general denial. No formal answer was required of or filed by respondents. Hearings were thereafter held for the purpose of receiving evidence in support of the complaint, at the close of which respondents moved to dismiss the proceeding. This motion was denied and further hearings were held, at which evidence was received on behalf of respondents. At the close of the taking of evidence, respondents moved to dismiss as to respondents William Trakinski and Simon Trakinski as individuals, and to strike from the record Commission's Exhibit 5-D and the testimony of the witness Masterson, relating to tests performed by Better Fabrics Testing Bureau as shown in said exhibit, also the Commission's exhibits "purporting to be the results of tests" performed by the witness Molloy and the testimony of witness Molloy relating thereto. These motions are still pending and will be ruled upon in the order herein.

Proposed findings and conclusions have been submitted by counsel.

Upon consideration of the entire record, the following findings are made and conclusions reached:

1. Respondent Hunter Mills Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York. It was incorporated in 1955. It is a family-owned corporation with the majority of the stock held by the respondent William Trakinski, the president. The remaining shares are held by his brother, respondent Simon Trakinski, who is secretary-treasurer. In the management of the business, William Trakinski directs the manufacturing operation of the plant, while Simon Trakinski handles the finished wool batting product. There are no other stockholders, officers, directors, or officials. By stipulation it was agreed that "Said individual respondents cooperate in formulating, directing, and controlling the acts, policies and practices of the corporate respondent, including the acts and practices hereinafter referred to." All respondents have their offices and principal place of business at 60-01 27th Avenue, Woodside, Long Island, in the State of New York.

2. Hunter Mills Corporation is engaged in interstate commerce. It manufactures interlining materials, both plain and quilted, which are sold to jobbers who in turn sell to clothing manufacturers, many of whom are located in states other than that in which the Corporation's business or that of the jobber is operated. The merchandise as sold is frequently shipped by respondents, in the jobber's name, direct from respondent's factory to such clothing

manufacturers. For instance, respondent Corporation has sold its products to a jobber in New York, who then resold some of the merchandise to a garment manufacturer in Baltimore, Maryland, the materials sold being shipped by the respondent Corporation from New York to Baltimore in the jobber's name. The garments in which these interlining materials are used are distributed throughout the United States. The Corporation's business amounts to over $300,000 annually. There are many competitors.

3. For raw material Hunter Mills purchases and uses clippings which are obtained from old clothing or are cuttings from new cloth which are obtained from the garment-manufacturing industry. The interlining sold by Hunter Mills is composed of wool or wool mixed with other fibers. The clippings when they come to respondent's factory are in bales of approximately 300 pounds each, and are invoiced or tagged as all wool or all wool except of ornamentation.

4. Eight swatches or samples of respondents' interlining materials were received in evidence, as follows:

Exhibit No.	*Labeled and Invoiced*
CX 5	"100% Reprocessed Wool";
CXs 1, 2, and 4	"100% Reprocessed Wool Except of Ornamentation";
CXs 3, 6, 7 and 8	"100% Reused Wool Except of Ornamentation".

Of these, the fiber content was as follows:

Exhibit No.	*Wool*	*Other Fibers*
CX 5	85.9%	14.1%, including synthetics and cotton;
CX 1	87.2%	11.4% rayon, linen, nylon and cotton,
		1.4% acetate;
CX 2	85.5%	.5% acetate,
		14.0% rayon and miscellaneous;
CX 4	92.3%	.6% acetate,
		7.1% rayon, nylon, cotton, orlon and miscellaneous;
CX 3	91.2%	.8% acetate,
		8.0% nylon, rayon, and miscellaneous;
CX 6	82.0%	1.8% acetate,
		16.2% nylon, rayon, cotton, orlon and miscellaneous;
CX 7	82.3%	1.8% acetate,
		15.9% nylon, rayon, cotton, orlon and miscellaneous;
CX 8	84.9%	1.7% acetate,
		13.4% rayon, nylon, orlon, cotton and miscellaneous.

5. The tests which were conducted, which produced the percentage figures shown above, were standard procedures recognized and used by technical experts in the industry for determining wool and fiber content of woolen and part woolen materials. Seven of the exhibits were tested under recognized standard procedures by Mar-

jorie A. Molloy, who is employed by the Federal Trade Commission as a chemist. She was graduated from Seattle University in 1950 with a Bachelor of Science degree in chemistry, has had experience as an analytical chemist with the Department of the Interior, had quality control in a food-processing plant for four years, and since being with the Federal Trade Commission has performed between 700 and 800 tests similar to those involved in this proceeding. The other expert, William H. Masterson, supervised the testing of one sample (CX 5), using substantially the same method. He is a textile engineer employed by the Better Fabric Testing Bureau of New York. He was graduated from Bradford Durfee Technical Institute of Fall River, Massachusetts, and has worked with the Testing Bureau for approximately 27 years testing all yarns, fabrics and garments. He described the test procedures and stated that for the type of materials involved in this proceeding, the method used was the most satisfactory. Both of these witnesses were well qualified in the testing processes used, and respondents' motion to strike their testimony and the exhibits showing their test results will be denied.

6. Hunter Mills, on invoices, furnished to some of its purchasers a standard guarantee that its products were properly

"stamped, tagged, labeled or marked with the fibre content and other information as required by said act, and that none of such articles or products is misbranded."

From the facts set forth in Paragraph 4, above, it must be concluded that certain of respondents' interlining materials were not labeled or marked as required by the Wool Act, and therefore that respondents' guarantee was false. Respondents contend that the labels which they put on their products are the same as to content as the labels on the raw materials which they used. The truth of this contention is not disputed, but it has no saving grace in that §4(a)(2)(A) of the Wool Act provides that the percentage of the total fiber weight of wool, reprocessed wool, reused wool, and of each fiber other than wool if 5% or more, must be shown, "exclusive of ornamentation not exceeding 5 percentum of said total fiber weight." The statute further provides that deviation from the requirements of the Act shall not be misbranding if the person charged "proves such deviation resulted from unavoidable variations in manufacture, and despite the exercise of due care to make accurate" the statements appearing on the labels. Neither of these exculpatory conditions was met by respondents. In every sample tested the fibers other than wool exceeded 5 percentum substantially, and there was no showing that unavoidable variations in manufacture were the cause of respondents' mislabeling practices.

7. Respondent William Trakinski was subpoenaed by counsel supporting the complaint and, over objections of counsel, required to testify in this proceeding. It is urged in his behalf that on this account a cease-and-desist order should not be issued against him individually, because of the provision of §9 of the Federal Trade Commission Act, which provides that "no natural person" shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the Commission in obedience to a subpoena issued by it * * *." This section of the Federal Trade Commission Act is inapplicable to the instant proceeding and cannot be the basis for the non-issuance of a cease-and-desist order herein.

CONCLUSION

1. This proceeding is within the jurisdiction of the Federal Trade Commission and is in the public interest.

2. Through their total ownership of all of the stock of respondent corporation, through their formulation, direction and control of its acts, practices and policies, including those herein found to be in violation of the Wool Products Labeling Act of 1939 and the Federal Trade Commission Act, the respondents William and Simon Trakinski are individually, as well as officially, responsible for such acts and practices.

3. All of the respondents have violated the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and their acts and practices as herein found 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, in that they have

(a) misbranded certain of their wool products, and

(b) furnished false guarantees that certain of their wool products were not misbranded.

No other violation is shown.

4. Although the charge set forth in Paragraph Four of the complaint refers to §4(a)(2) of the Wool Products Labeling Act, no evidence was offered relating to §4(a)(2)(C), and from all the evidence it is concluded that the labels offered did conform to §4(a)(2)(C) of the Act. Therefore,

It is ordered, That respondents Hunter Mills Corporation, a corporation, and its officers, and William Trakinski and Simon Trakinski, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction into commerce, or the offering for sale, sale, transportation, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, and the Wool Products Labeling Act of 1939, of woolen interlinings or other "wool products" as such products are defined in said Wool Products Labeling Act, do forthwith cease and desist from:

A. Misbranding such products by:

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

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

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

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

3. Furnishing false guarantees that said woolen interlinings or other wool products are not misbranded under the provisions of said Wool Products Labeling Act, when there is reason to believe that the said wool products so guaranteed may be introduced, sold, transported, or distributed in commerce as "commerce" is defined in said Act.

It is further ordered, That respondents' pending Motion To Strike and Motion To Dismiss As To Certain Respondents be, and the same hereby are, denied.

OPINION OF THE COMMISSION

By TAIT, *Commissioner:*

This case is before the Commission on cross-appeals from the hearing examiner's initial decision holding that the respondents have misbranded certain wool products manufactured by them and have furnished to customers false guaranties that the products were not misbranded, all in violation of the Wool Products Labeling Act of 1939. The respondents attack the evidence tending to show misbranding, while counsel in support of the complaint seeks to enlarge the scope of the order to cease and desist included in the examiner's decision.

The product involved is plain and quilted batting which is manufactured from clippings obtained from old clothing and cuttings from new cloth and which is sold to the garment manufacturing trade for use as interlining material in coats and suits. The Commission's jurisdiction over the respondents and over the products they manufacture and sell is not contested.

The record consists in substantial part of reports of chemical analyses of samples or swatches taken from eight lots of the respondents' batting purporting to show that materials labeled and invoiced as "100% Reprocessed Wool," "100% Reprocessed Wool Except of Ornamentation" and "100% Reused Wool Except of Ornamentation," actually contained fibers other than wool in amounts ranging from 7.7 percent to 18 percent of the total fiber weight of the materials, and wool fibers of only 82.0 percent to 92.3 percent. It is the respondents' contention, however, that the results of these analyses were inadmissible or at least that they are wholly unreliable, leaving the record bare of any substantial evidence in support of the conclusion of misbranding.

One of the tests involved was performed at the Better Fabrics Testing Bureau, Inc., a private testing laboratory in New York City, on a sample of material drawn from a bolt labeled "100% Reprocessed Wool." The report (Commission Exhibit 5–D), signed by the Secretary of the company, purports to show that the fiber composition of the sample was not 100% reprocessed wool, as stated on the label, but was instead 85.9 percent wool, 14.1 percent "other fibers." The question raised is whether this report was properly received in evidence after having been identified by the witness William H. Masterson, a textile engineer in the employ of the laboratory, who did not personally perform the test but who was the supervisor of the technician who did.

Mr. Masterson, a graduate of Bradford Durfee Technical Institute, Fall River, Massachusetts, with 27 years' experience in the testing of yarns, fabrics and garments, obviously is an expert in his field. Had he participated personally in the test he would have been well qualified to testify as to the results. It appears, however, that the best he could do was to describe generally the procedure usually followed in the conduct of such tests and to identify the test report as having come from his organization. Since he did not perform the test, he, of course, could not testify as to the results on the basis of personal knowledge. Likewise, and for the same reason, he had no notes or memoranda from which he could refresh a recollection, either past or present, or which would tend to establish the correctness of the test report, and hence nothing which could be used by counsel for the respondents in attacking the methods employed or the accuracy of the results obtained in the test. In the circumstances, while it is recognized that "* * * technical rules for exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed" (*Opp Cotton Mills, Inc., et al.* v. *Administrator of the Wage and Hour Division of the Department of Labor*, 312 U.S. 126, 155 (1941)), the Commission does not feel that Commission Exhibit 5 qualifies as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (*Consolidated Edison Co.* v. *National Labor Relations Board et al.*, 305 U.S. 197, 229 (1938).)

The evidence concerning the other tests relied on by the hearing examiner is not subject to this infirmity. These tests were performed by Miss Marjorie A. Molloy, a chemist in the employ of the Federal Trade Commission, on samples taken from seven lots of the respondents' batting. Miss Molloy appeared as a witness in support of the complaint, and after describing the various steps taken in preparing and analyzing the materials, was subjected to full and complete cross-examination by counsel for the respondents. The attack here is on the technique employed by the witness in washing and rinsing by hand the samples to remove dirt and grease prior to the actual test, the contention being that this resulted in a loss of fibers from the materials and rendered unreliable the fiber content findings.

The Commission sees little merit in this contention. The witness performing these tests, a graduate chemist with some nine years' experience, clearly demonstrated her familiarity with the various fiber identification tests, including the standard "boil-out" test used here. She testified that she has performed this same type of test some 700 to 800 times and that she clearly recognizes the necessity for careful handling of the materials to be tested. She readily admitted the possibility of a loss of some of the shorter fibers in the cleansing and preparation of materials if the materials are carelessly handled, but had no doubt that as handled by her the loss would be insignificant. Nor was this contradicted by the witness Masterson who, while he testified that materials to be tested are not hand-rinsed in his organization, agreed that if the rinsing were carefully done there would be "very, very little loss" of fibers.

In the circumstances, the Commission is satisfied that any small loss of fibers which may have occurred here cannot reasonably account for the presence in these samples of fibers other than wool ranging up to 18 percent of the total fiber weight. Nor can the possible presence of "ornamentation," account for other fibers in such amounts. Section 4(a)(2)(A) of the statute provides for exclusion of "ornamentation" from the statement of fiber contents only when it does not exceed 5 percent of the total fiber weight of the product, and Rule 16 of the Rules and Regulations promulgated under the Act expressly requires disclosure of the percentage of fibers in the ornamentation when it exceeds the 5 percent limit.

The respondents' final point is that the hearing examiner was in error in directing the order to cease and desist against William Trakinski and Simon Trakinski, individually, as well as in their capacities as officers of the respondent corporation, citing the Commission's decision in *Kay Jewelry, Inc.*, Docket 6445 (decided November 12, 1957). They further contend that the complaint must, in any event, be dismissed as to William Trakinski because of the immunity granted by Section 9 of the Federal Trade Commission Act against a natural person being prosecuted or subjected to any penalty or forfeiture on account of anything concerning which he may testify in obedience to a Commission subpoena.

Kay Jewelry is not an authority for the respondents' position (see *Reliance Wool & Quilting Products, Inc.*, Docket 7165 (decided November 20, 1959)). The record discloses that Hunter Mills Corporation is a family-owned corporation, with the majority of its stock held by William Trakinski, its president. The remaining shares are held by his brother, Simon Trakinski, who is secretary-treasurer. In the management of the business, William Trakinski directs the manufacturing operations of the company's single manufacturing plant, while Simon Trakinski handles the sales of the finished products and, among other things, personally initials each guaranty that the products are not misbranded, which guaranty is printed on the sales invoices. There are no other stockholders, officers or directing officials. As pointed out by counsel in support of the complaint, the individual respondents are not only officers of the corporation—they are the corporation—engaged in the daily performance of the most intimate details of its operation; and in such a situation the necessity for joining them individually in the order to cease and desist is obvious.

And it is equally clear that Section 9 of the Federal Trade Commission Act does not provide Mr. Trakinski with any basis for arguing that the order should not run against him. "The statute does not immunize a witness from a cease and desist order, which is prospective only and has been aptly described as 'purely remedial and preventive.' *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission*, 13 F. 2d 673, 685 (8th Cir. 1926). * * * One is not prosecuted by being told to desist from illegal conduct, nor does he thereby suffer the imposition of a penalty or the forfeiture of any legally-protected right or property." (*Carl Drath, trading as Broadway Gift Company* v. *Federal Trade Commission*, 239 F. 2d 452, 454 (D.C. Cir. 1956).)

The single point raised by counsel in support of the complaint concerns the scope of paragraph A–2 of the order to cease and desist entered by the hearing examiner. Having found that the respondents have misbranded their woolen batting in violation of Section 4(a)(2) of the Wool Products Labeling Act, the examiner entered an order requiring attachment to their products of a stamp, tag or label showing the percentages of the fiber constituents, as required by subsections (A) and (B) of Section 4(a)(2), but not requiring disclosure of the name of the manufacturer or of another person designated in the Act, as required by subsection (C). This, he said in the initial decision, was because of his conclusion that the labels offered in evidence were not deficient in this respect and, hence, requirement of this additional information was not justified.

As the respondents in effect concede, the mere fact that the record evidence does not show an omission from labels of the name of the manufacturer or other persons mentioned in subsection (C) does not restrict the Commission in the exercise of its discretionary authority to expressly require a showing on labels of all of the information prescribed by Section 4(a)(2) (*Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385 (decided May 4, 1959)). Nor is it true that the scope of the order is to be determined in all cases solely by the number of instances of misbranding actually proved. It may be, for example, that in a case involving only one or two isolated instances, where it clearly appears that they were the result of a mistake and where the offending party has taken prompt action in good faith to correct the error, an order of limited scope would suffice. That, however, is not the situation in this case and need not now be decided. There is in this record evidence relating to 14 separate transactions in which the respondents sold woolen batting labeled and invoiced as 100% reprocessed or reused wool and in connection with most of which they gave their customers written guaranties that the batting was not misbranded. The dates of these transactions ranged over a two-year period from January 7, 1957, to January 14, 1959. Samples were taken from the batting involved in eight of the sales, and in the case of seven of them the evidence is that the materials contained fibers other than wool ranging from 7.7 percent to 18 percent of the product's total fiber weight. It thus appears reasonable to conclude that the incidents of misbranding have constituted integral parts of the respondents' over-all method of doing business, and an order directing full compliance with the labeling requirements of the statute in the future is fully justified.

Although not mentioned in the appeal, the Commission notes that the order contained in the initial decision is deficient also for the reason that it improperly characterizes the furnishing of false guaranties as misbranding. Under the terms of Section 9(b) of the Wool Products Labeling Act, the furnishing of a false guaranty that a wool product is not misbranded, with reason to believe the product may be introduced, sold, transported or distributed in commerce, is an offense separate and apart from the offense of misbranding, and should be prohibited as such.

The respondents' appeal is granted in part and denied in part, as indicated, and the appeal of counsel in support of the complaint is granted. The initial decision will be modified in conformity with the foregoing and, as so modified, adopted as the decision of the Commission.

Commissioner Anderson did not participate in the decision of this matter.

FINAL ORDER

This matter having been heard on cross-appeals from the hearing examiner's initial decision filed September 30, 1959, and the Commission, for the reasons set forth in the accompanying opinion, having granted in part and denied in part the respondents' appeal and having granted the appeal of counsel in support of the complaint:

It is ordered, That the initial decision be, and it hereby is, modified as follows:

1. By deleting from paragraphs 4 and 5 of the Findings all references to Commission Exhibit 5;

2. By deleting from the Conclusions all of paragraph 4;

3. By striking the order and substituting therefor the following:

"*IT IS ORDERED*, That the respondents, Hunter Mills Corporation, a corporation, and its officers, and William Trakinski and Simon Trakinski, individually and as officers of said corporation, and the respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the offering for sale, sale, transportation, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Wool Products Labeling Act of 1939, of woolen batting, or other "wool products," as such products are defined in and subject to said Wool Products Labeling Act, do forthwith cease and desist from misbranding such products by:

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

"2. Failing to affix labels to such products showing each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

"*It is further ordered*, That said respondents and their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of woolen batting, or other "wool products," as such products are defined in and subject to the Wool Products Labeling Act of 1939, do forthwith cease and desist from furnishing false guaranties that any such products are not misbranded under the provisions of the aforesaid Act, with reason to believe the wool product falsely guarantied may be introduced, sold, transported, or distributed in commerce.

"*It is further ordered*:

"1. That to the extent the respondents' motion to strike, filed July 10, 1959, requests the hearing examiner to strike from the record Commission Exhibit 5–D and the testimony of the witness Masterson, relating to the results of tests performed at the Better Fabrics Testing Bureau, Inc., as shown by said exhibit, the motion be granted; otherwise, it is denied;

"2. That the respondents' motion to dismiss the complaint as to the respondents, William Trakinski and Simon Trakinski, also filed July 10, 1959, be denied."

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

It is further ordered, That the respondents, Hunter Mills Corporation, a corporation, and William Trakinski and Simon Trakinski, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the foregoing order to cease and desist.

Commissioner Anderson not participating.

IN THE MATTER OF

AMERICAN REGISTRY OF DOCTOR'S NURSES, ET AL.

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

Docket 7526. Complaint, June 26, 1959—Decision, Feb. 17, 1960

Consent order requiring a Washington, D.C., concern engaged in selling memberships in its so-called "Registry," insurance policies, certificates, pins consisting of a caduceus with the letters "RDN" or "DN" superimposed, emblems and other insignia, to persons employed in doctors' offices, to cease representing falsely by use of its corporate name that its business was a non-profit organization of professional nurses, authorized to certify that applicants met the occupational requirements of doctor's nurses; and representing falsely through such trade name, certificates, pins, etc., that the purchaser would acquire thereby a recognized professional status.

Mr. Terral A. Jordan for the Commission.

Shipley, Akerman & Pickett, by *Mr. Alex Akerman, Jr.*, of Washington, D.C., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents with the use of false, misleading and deceptive representations, unfair and deceptive acts and practices, and unfair methods of competition in commerce in connection with their business of selling memberships in American Registry of Doctor's Nurses, policies of insurance, certificates, pins, emblems and other insignia and indicia to persons employed in doctors' offices, in violation of the Federal Trade Commission Act.

After the issuance of the complaint all respondents, except Phillip Sellers, their attorney, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director and an Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the Hearing Examiner for consideration.

In the agreement it is stipulated and agreed that the complaint should be dismissed as to respondent Phillip Sellers, for reasons set forth in affidavits by Robert L. S. Bickford and Phillip Sellers, which are attached to, made a part of and incorporated into said agreement.

The agreement states that respondent American Registry of Doctor's Nurses is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida; that respondents Robert L. S. Bickford and Evelyn W. Bickford are individuals, and acting president and vice president, and secretary, respectively, of the corporate respondent; that respondent Ralph Z. Bell is an individual, and was formerly president of the corporate respondent; that the office and principal place of business of the respondents is Liddon Building, Marianna, Florida; and that respondents' said office and principal place of business was formerly located at 1366 National Press Building, Washington, D.C.

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

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

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

It is ordered, That American Registry of Doctor's Nurses, a corporation, and its officers, and Ralph Z. Bell, individually and formerly an officer of said corporation, Robert L. S. Bickford and Evelyn W. Bickford, 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 operation of a membership organization of persons employed in doctors' offices or any other membership organization or in connection with the offering for sale, sale or distribution of memberships, certificates, pins, emblems or other insignia or indicia or policies of insurance or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the trade name of American Registry of Doctor's Nurses without clearly and conspicuously revealing in immediate connection therewith that it is a private business operated for a profit; or using any other trade name which implies, contrary to fact, that it is a non-profit organization, without clearly and conspicuously revealing in immediate connection therewith that it is a private business operated for a profit;

2. Representing that respondents are a certifying, accrediting or qualifying agency authorized or competent to establish the occupational requirements for doctors' nurses or to determine the qualifications of individuals as doctors' nurses; or representing that respondents are a certifying, accrediting or qualifying agency authorized or competent to establish the occupational requirements for any occupation or profession or to determine the qualifications of individuals as members of any occupation or profession, unless such is the fact;

3. Furnishing, supplying, or selling memberships, certificates, pins, emblems or other insignia or indicia to persons other than graduate, registered or licensed nurses, which represent that the wearer is a graduate, registered or licensed nurse; or furnishing, supplying or selling memberships, certificates, pins, emblems or other insignia or indicia to persons which represent, contrary to fact, that such person is a qualified member of an occupation or profession.

It is further ordered, That the complaint be, and same hereby is, dismissed as to respondent Phillip Sellers.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner did, on the 17th day of February, 1959, become the decision of the Commission; and, accordingly:

It is ordered, That respondents American Registry of Doctor's Nurses, a corporation, Ralph Z. Bell, individually, and Robert L. S. Bickford and Evelyn W. Bickford, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

MAIN LINE CLEVELAND, INC., ET AL.

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

Docket 7675. Complaint, Dec. 3, 1959—Decision, Feb. 17, 1960

Consent order requiring a Cleveland concern, the exclusive distributor of RCA phonograph records to retail outlets and jukebox operators in and around northeastern Ohio and eastern Indiana, to cease disbursing concealed "payola"—payment of money or other valuable consideration—to disc jockeys or other personnel of radio and television programs to induce "exposure"—playing day after day and several times a day—and promotion of records in which it had a financial interest.

Mr. John T. Walker and *Mr. James H. Kelley* supporting the complaint.

Rocker, Zeller and Kleinman by *Mr. Bennet Kleinman*, of Cleveland, Ohio, for respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on December 3, 1959, charging them with having violated the provisions of the Federal Trade Commission Act by unfairly paying money or other valuable consideration to induce the playing of phonograph records over radio and television stations in order to enhance the popularity of such records.

On January 14, 1960 there was submitted to the undersigned hearing examiner an agreement between the above-named respondents, their counsel, and counsel supporting the complaint providing for the entry of a consent order.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of Section 3.25(b) of the Rules of the Commission.

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, and it is ordered that said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued.

1. Respondent Main Line Cleveland, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 1260 East 38th Street, Cleveland, Ohio.

2. Respondents William M. Shipley and James J. Shipley are president and vice president, respectively, of the respondent corporation. Their address is the same as that of said corporate respondent.

3. 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 Main Line Cleveland, Inc., a corporation, and its officers, and William M. Shipley and James J. Shipley, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature.

2. Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record, when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly, received by him or his employer.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner did on the 17th day of February 1960, become the decision of the Commission; and, accordingly

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

IN THE MATTER OF

EDWIN LEASK DOING BUSINESS AT E. LEASK ET AL.

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

Docket 7426. Complaint, Feb. 26, 1959—Decision, Feb. 18, 1960

Order requiring a lumber dealer in Sydney, Australia, and his American sales representative in Palo Alto, Calif., to cease describing—in sales orders, letters, invoices, and by oral statements—as "Tasmanian Oak" or "Australian Oak," wood flooring which was not a species of oak, the most popular type of hardwood used for flooring in the United States, but was of the genus Eucalyptus which sold at a lower price than genuine oak.

Mr. Edward F. Downs supporting the complaint.

Mr. Arthur D. Nearon, of San Francisco, Calif., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The complaint in this proceeding alleges that Edwin Leask, an individual trading and doing business as E. Leask, and Charles A. Ferrari, an individual, hereinafter called respondents, violated the provisions of the Federal Trade Commission Act by misrepresenting the species of wood flooring which the respondents sell and distribute.

The respondents, through their attorney, answered the complaint, admitting some but denying most of the allegations. A hearing was held at which time counsel for the parties offered testimony in support of and against the allegations set forth in the complaint. Counsel supporting the complaint has filed proposed findings of fact, conclusions, and order. Respondents, although afforded an opportunity to do so, did not file proposed findings of fact, conclusions and order. All proposed findings of fact not specifically found herein are rejected. Upon the basis of the entire record, the undersigned hearing examiner makes the following findings of fact, conclusions of law, and issues the following order:

FINDINGS OF FACT

1. The respondent Edwin Leask, an individual, sometimes doing business under the name of E. Leask and resides in Sidney, Australia. His present address is 33 McQuarie Place, Sidney, Australia. Mr. Leask is in the business of offering for sale, selling and distributing wood flooring, some of which is sold and shipped to persons in the United States. Mr. Leask has a United States mailing address at Post Office Box 176, Palo Alto, California.

2. The respondent Charles A. Ferrari is an individual who resides at 1385 College Avenue, Palo Alto, California. Mr. Ferrari is an agent, sales representative, and lumber broker in the United States for Mr. Leask.

3. Mr. Ferrari, as representative or broker for the respondent Leask, obtains orders for wood flooring from contractors and distributors in the United States and forwards the orders to Mr. Leask in Australia. Mr. Leask then fills the orders by shipping the wood flooring directly from Australia to the purchaser in the United States. The complaint in this proceeding involves sales and shipments of wood flooring from Australia to the United States which is described in sales orders, letters, invoices, and oral statements originated by the respondents and addressed to the trade as "Tasmanian Oak."[1] Through the use of such statements, representations

[1] Some of the exhibits received in evidence describe the wood flooring as "Australian Oak" instead of "Tasmanian Oak." Tasmania is a part of Australia and the description of "Tasmanian Oak" and "Australian Oak" are used interchangeably.

and descriptions in their sales orders, invoices, letters and other written memoranda describing said wood flooring as "Tasmanian Oak" or "Australian Oak," the respondents have represented that said wood flooring is a species of oak imported from Tasmania. The evidence and testimony show conclusively that said wood products are not a species of oak but are of the genus Eucalyptus. Oak is of the genus Quercus. Indeed, this is admitted by respondents in their answer. The evidence shows that oak is the most popular type of hardwood used for flooring in the United States. Respondents' "Tasmanian Oak" sells at a lower price than genuine oak used for the same purpose in the United States. By the aforesaid practices, respondents place in the hands of distributors and purchasers of their wood flooring a means and instrumentality by and through which they may mislead the public as to the true species thereof. By reason of respondents' designation and description of their wood flooring as "Tasmanian Oak" or "Australian Oak" to their customer purchasers, said purchasers, in turn, have no other name by which to describe said products to their customer purchasers. Accordingly, such purchasers sell it under the same name to their customers.

4. In the course and conduct of their business, and at all times mentioned herein, the respondents have maintained a substantial course of trade in said wood flooring products and have been in substantial competition in commerce, with corporations, firms and individuals in the sale of wood flooring, including oak flooring. The use by the respondents of the above descriptions of their wood flooring as oak are false, misleading, and deceptive, and has had, and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being done, to competition in commerce.

CONCLUSIONS

The aforesaid acts and practices of respondents, as herein found, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now 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. The Commission has jurisdiction over the respondents and over their acts and practices as herein found, and this proceeding is in the public interest. Therefore,

It is ordered, That respondents Edwin Leask, an individual trading as E. Leask, or trading under any other name or names, and Charles A. Ferrari, an individual, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of lumber, wood or wood products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing through the use of the terms "Tsamanian Oak," "Australian Oak" or otherwise or placing in the hands of others the means of representing that lumber, wood or wood products which are not of the genus Quercus are a species of oak.

2. Misrepresenting or placing in the hands of others the means of misrepresenting in any manner the genus or species of any lumber, wood or wood 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 18th day of February, 1960, 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

CHIPS DISTRIBUTING CO., INC., ET AL.

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

Docket 7669. Complaint, Dec. 2, 1959—Decision, Feb. 20, 1960

Consent order requiring an independent Philadelphia distributor of phonograph records for several record manufacturers to retail outlets and jukebox operators in and around the area of eastern Pennsylvania, southern New Jersey, and Delaware, to cease disbursing concealed "payola"—payment of money or other valuable consideration to disc jockeys of radio and television programs—to induce the "exposure"—playing of a record day after day and several times a day—and promotion of its records.

Mr. John T. Walker and *Mr. James H. Kelley* supporting the complaint.

Blanc, Steinberg, Balder & Steinbrook by *Mr. Sigmund H. Steinberg* of Philadelphia, Pa., for respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on December 2, 1959 charging them with having violated the provisions of the Federal Trade Commission Act by unfairly paying money or other valuable consideration to induce the playing of phonograph records over radio and television stations in order to enhance the popularity of such records.

On January 13, 1960 there was submitted to the undersigned hearing examiner an agreement between the above-named respondents, their counsel, and counsel supporting the complaint providing for the entry of a consent order.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of Section 3.25(b) of the Rules of the Commission.

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, and it is ordered that said agreement shall not become a part of the official record unless and until it decomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued.

1. Respondent Chips Distributing Co., Inc. 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 1415 North Broad Street, Philadelphia, Pennsylvania.

Respondent Harry Chipetz is the president and treasurer of this corporate respondent and his address is the same as said 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 Chips Distributing Co., Inc., a corporation, and its officers, and Harry Chipetz, individually and as officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with phonagraph records which have been distributed in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature.

2. Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any mannr, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record, when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly, received by him or his employer.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall on the 20th day of February, 1960, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

LONDON RECORDS, INC.

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

Docket 7671. Complaint, Dec. 2, 1959—Decision, Feb. 24, 1960

Consent order requiring New York City manufacturer of phonograph records to cease disbursing concealed "payola"—payment of money or other valuable consideration to disk jockeys of radio and television programs—to induce the "exposure"—playing of a record day after day and several times a day—and sale of its records.

Mr. John T. Walker and *Mr. James H. Kelley* supporting the complaint.

Kaye, Scholer, Fierman, Hays & Handler, by *Mr. Sidney A. Diamond* of New York, N.Y., for respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on December 2, 1959, charging it with having violated the provisions of the Federal Trade Commission Act by unfairly paying money or other valuable consideration to induce the playing of phonograph records over radio and television stations in order to enhance the popularity of such records.

On February 2, 1960 there was submitted to the undersigned hearing examiner an agreement between the above-named respondent, its counsel, and counsel supporting the complaint providing for the entry of a consent order.

Under the foregoing agreement, the respondent admits the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondent of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondent that it has violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of Section 3.25(b) of the Rules of the Commission.

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, and it is ordered that said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued.

1. Respondent London Records, 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 521–39 West 25th Street, in the City of New York, State of New York.

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 London Records, Inc., a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed, in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and broadcasting of, any such records in which respondent has a financial interest of any nature.

2. Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondent has a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order, by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in coonsideration for compensation of some nature, directly or indirectly, received by him or his employer.

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 24th day of February, 1960, 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.

IN THE MATTER OF

SPARKS MUSIC DISTRIBUTORS, INC., ET AL.

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

Docket 7674. Complaint, Dec. 2, 1959—Decision, Feb. 24, 1960

Consent order requiring an independent Philadelphia distributor of phonograph records to retail outlets and jukebox operators in eastern Pennsylvania, southern New Jersey, and Delaware, to cease disbursing concealed "payola" payment of money or other valuable consideration to disc jockeys or other interested persons to obtain and insure the "exposure" and promotion on radio and television programs of records in which they had a financial interest.

Mr. John T. Walker and *Mr. James H. Kelley* supporting the complaint.

Mr. Fred B. Creamer of Philadelphia, Pa., for respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on December 2, 1959, charging them with having violated the provisions of the Federal Trade Commission Act by unfairly paying money or other valuable consideration to induce the playing of phonograph records over radio and television stations in order to enhance the popularity of such records.

On February 2, 1960 there was submitted to the undersigned hearing examiner an agreement between the above-named respondents, their counsel, and counsel supporting the complaint providing for the entry of a consent order.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agrement further recites that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of Section 3.25(b) of the Rules of the Commission.

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, and it is ordered that said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued.

1. Respondent Sparks Music Distributors, Inc., 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 1618 North Broad Street, in the City of Philadelphia, State of Pennsylvania.

2. Respondent Leonard Rakliff is the president of respondent corporation. The address of the individual respondent is the same as that of said corporate respondent.

3. 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 Sparks Music Distributors, Inc., a corporation, and its officers, and Leonard Rakliff (erroneously designated in the complaint as Leonad Bakliff), individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature.

2. Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record, when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly, received by him or his employer.

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 24th day of February, 1960, 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

BROWN & WILLIAMSON TOBACCO CORPORATION ET AL.

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

Docket 7688. Complaint, Dec. 11, 1959—Decision, Feb. 24, 1960

Consent order requiring a leading manufacturer of tobacco products and its advertising agency to cease representing falsely in advertising in magazines and newspapers and by radio and television that the filter of "Life" cigarettes retained more of the tar and nicotine in smoke than other cigarette filters, and removed all the tars and nicotine, as proved by an illustrated demonstration; and that "Life" cigarettes were endorsed and sanctioned by the United States Government, which found the smoke of the cigarettes to be lowest in tar and nicotine.

Mr. Morton Nesmith and *Mr. Berryman Davis* for the Commission.

White & Case, by *Mr. Thomas Kiernan*, of New York N.Y., for Brown & Williamson Tobacco Corporation.

Coudert Brothers, by *Mr. Joseph A. McManus*, of New York, N.Y., and *Coudert Brothers*, by *Mr. Percy A. Shay*, of Washington, D.C., for Ted Bates & Company, Inc.

Initial Decision by Edgar A. Buttle, Hearing Examiner

On December 11, 1959, the Federal Trade Commission issued its complaint against the above-named respondents charging them with violating the provisions of the Federal Trade Commission Act in connection with the manufacturing, selling and distributing of cigarettes and related products. On January 28, 1960, respondents Brown & Williamson Tobacco Corporation and Ted Bates & Company, Inc., corporations, entered into an agreement containing a consent order to cease and desist in accordance with Section 3.25(a) of the Rules of Practice and Procedure of the Commission.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint and agree, among other things, that the cease and desist order there set forth may be entered without further notice and shall have the same force and effect as if entered after a full hearing. The agreement includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith; and recites that the said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, and that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint. The agreement further provides that the complaint insofar as it concerns respondent David Loomis should be dismissed for the reasons set forth in an affidavit attached thereto to the effect that said respondent had no authority to direct or control the policies or practices of the corporate respondents referred to in the complaint. The hearing examiner finds that the content of the said agreement meets all the requirements of section 3.25(b) of the Rules of Practice.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid agreement for consent order, and it appearing that said agreement provides for an appropriate disposition of this proceeding, the aforesaid agreement is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with section 3.21 of the Rules of Practice; and in consonance with the terms of said agreement, the hearing examiner makes the following jurisdictional findings and order:

1. Respondent Brown & Williamson Tobacco Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1600 West Hill Street, in the City of Louisville, State of Kentucky.

Respondent Ted Bates & Company, 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 located at 666 Fifth Avenue, in the City of New York, State of New York. This corporate respondent is the advertising agency of respondent Brown & Williamson Tobacco Corporation.

Respondent David Loomis is an individual, Vice President and Account Executive of the corporate respondent Ted Bates & Company, Inc. The address of this individual respondent is the same as that of respondent Ted Bates & Company, Inc.

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

ORDER

It is ordered, That respondents Brown & Williamson Tobacco Corporation, a corporation, and its officers, and Ted Bates & Company, Inc., a corporation, and its officers, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of Life cigarettes, or any other filter cigarette, whether offered for sale or sold under the same or any other name, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using any pictorial presentation or demonstration purporting to prove that the filter used in said cigarettes absorbs or retains more of the tars or nicotine in cigarette smoke than the filter used

in other cigarettes, when such pictorial presentation or demonstration does not in fact so prove, or purporting to prove that the filter used in said cigarettes absorbs or retains all of the tars or nicotine in cigarette smoke.

2. Representing, directly or by implication, that Life cigarettes, or any other filter cigarette offered for sale or sold by respondents, have the sanction of or are approved by the United States Government, or any agency thereof.

3. Representing, directly or by implication, that the United States Government, or any agency thereof, has found that the smoke of Life cigarettes, or any other filter cigarette, is lower in tar or nicotine content when compared with the smoke of other filter cigarettes.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to respondent David Loomis.

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 24th day of February, 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Brown & Williamson Tobacco Corporation, a corporation, and Ted Bates and Company, Inc., a corporation, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

CLASS RECORD SALES ET AL.

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

Docket 7696. Complaint, Dec. 18, 1959—Decision, Feb. 24, 1960

Consent order requiring a Los Angeles manufacturer of phonograph records to cease disbursing concealed "payola"—payment of money or other valuable consideration—to disc jockeys of radio and television programs to induce "exposure"—playing of a record day after day, and several times a day—and promotion of certain of its records.

Mr. John T. Walker and *Mr. James H. Kelley* for the Commission.

Mr. Benjamin T. Goodman, of Los Angeles, Calif., for respondents.

Initial Decision by J. Earl Cox, Hearing Examiner

The complaint charges respondents, who are engaged in the manufacture, sale and distribution of phonograph records to independent distributors for resale to retail outlets and jukebox operators, with violation of the Federal Trade Commission Act, in that, alone or with certain unnamed record distributors, they have negotiated for and disbursed "payola," i.e., the payment of money or other valuable consideration to disk jockeys of musical programs on radio and television stations, to induce, stimulate or motivate the disk jockeys to select, broadcast, "expose" and promote certain records in which the respondents are financially interested, on the express or implied understanding that the disk jockeys will conceal, withhold or camouflage the fact of such payment from the listening public.

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

The agreement states that respondent Class Record Sales is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 3617 West Pico Boulevard, Los Angeles 19, California, and that individual respondent Leon Rene is the president of the corporate respondent, and formulates, directs and controls the acts and practices of said corporate respondent, his address being the same as that of the said corporate respondent.

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

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

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

It is ordered, That respondent Class Record Sales, a corporation, and its officers, and Leon Rene, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed, in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature;

2. Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order, by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly, received by him or his employer.

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 24th day of February, 1960, become the decision of the Commission; and, accordingly:

It is ordered, That the above-named 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.

IN THE MATTER OF

A & I RECORD DISTRIBUTING CO., INC., ET AL.

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

Docket 7746. Complaint, Jan. 12, 1960—Decision, Feb. 24, 1960

Consent order requiring a Cincinnati, Ohio, distributor of phonograph records to independent distributors for resale, to cease disbursing concealed "payola"—payment of money or other valuable consideration to disc jockeys of radio and television programs—to induce the "exposure"—playing of a record day after day and several times a day—and promotion of its records.

Mr. John T. Walker and *Mr. James H. Kelley* for the Commission.

Young & Young, by *Mr. H. W. Young*, of Cincinnati, Ohio, for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents, who are engaged in the offering for sale, sale and distribution of phonograph records to independent distributors for resale to retail outlets and jukebox operators in various states of the United States, with violation of the Federal Trade Commission Act, in that respondents, alone or with certain unnamed record manufacturers, have negotiated for and disbursed "payola," i.e., the payment of money or other valuable consideration to disk jockeys of musical programs on radio and television stations, to induce, stimulate or motivate the disk jockeys to select, broadcast, "expose" and promote certain records, in which respondents are financially interested, on the express or implied understanding that the disk jockeys will conceal, withhold or camouflage the fact of such payment from the listening public.

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

The agreement states that respondent A & I Record Distributing Co., Inc. 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 1000 Broadway, Cincinnati, Ohio, and that individual respondent Isadore Klayman is the president of the corporate respondent, and formulates, directs and controls the acts and practices of said corporate respondent, the address of the individual respondent being the same as that of said corporate respondent.

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

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

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

It is ordered, That respondents A & I Record Distributing Co., Inc., a corporation, and its officers, and Isadore Klayman, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature;

(2) Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or either of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order, by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly, received by him or his employer.

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 24th day of February, 1960, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

MORTON'S, INC., ET AL.

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

Docket 6976. Complaint, Dec. 11, 1957—Decision, Feb. 25, 1960

Order requiring retail furriers in Boston, Mass., to cease violating the Fur Products Labeling Act by failing to comply with labeling requirements; by advertising in newspapers which failed to disclose the names of animals producing certain furs and represented prices falsely as reduced from so-called reguar prices which were, in fact, fictitious; and by failing to keep adequate records as a basis for such pricing claims.

Before Mr. William L. Pack, hearing examiner.

Mr. Harry E. Middleton, Jr. and *Mr. Thomas A. Ziebarth* for the Commission.

Guterman, Horvitz & Rubin, of Boston, Mass., for respondents.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, the Federal Trade Commission on December 11, 1958, issued and subsequently served its complaint in this proceeding upon the respondents, charging them with violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and with engaging in unfair and deceptive acts and practices in violation of the Federal Trade Commission Act. Hearings were held before a hearing examiner of the Commission and testimony and other evidence in support of, and in opposition to, the allegations of the complaint were received into the record. In the initial decision filed March 17, 1959, the hearing examiner held that certain of the complaint's allegations were sustained and that others should be dismissed. The initial decision contained a provisional order to cease and desist.

The Commission having considered the cross-appeals filed from the initial decision and the entire record in this proceeding, and having ruled on said appeals and having determined that the initial decision should be vacated and set aside, the Commission further finds that this proceeding is in the interest of the public and now makes this its findings as to the facts, conclusions drawn therefrom and order, the same to be in lieu of those contained in said initial decision.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Morton's Inc., is a corporation organized and doing business under the laws of the State of Massachusetts, with its office and principal place of business at 89 Causeway Street, Boston, Massachusetts. Respondent Hyman Gondelman is Chairman of the Board and Treasurer of the corporation, and respondent Morton N. Gondelman is President of the corporation. These two individuals are in complete charge of the corporation's affairs and control its policies, acts and practices. The business operated by respondents is that of a retail fur goods store.

PAR. 2. Subsequent to August 9, 1952, the effective date of the Fur Products Labeling Act, respondents have advertised their fur products in commerce, as "commerce" and "fur products" are defined in the Fur Products Labeling Act. Certain of such fur products have been misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

PAR. 3. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder was mingled with non-required information in violation of Rule 29(a) of the aforesaid rules and regulations;

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations thereunder was not completely set forth on one side of the labels in violation of Rule 29(a) of the aforesaid rules and regulations;

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

PAR. 4. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that respondents caused the dissemination in commerce, as "commerce" is defined in said Act, of certain newspaper advertisements concerning such fur products which were not in accordance with the provisions of Section 5(a) of the said Act and the Rules and Regulations promulgated thereunder. Such advertisements were intended to and did aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products. The aforesaid advertisements appeared in the Boston Traveler and Boston Sunday Globe, which were newspapers published in the City of Boston, Commonwealth of Massachusetts, and having a substantial circulation in said Commonwealth and other States of the United States.

PAR. 5. By means of said advertisements, respondents falsely and deceptively:

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

(b) Represented prices of fur products as having been reduced from regular or usual prices, which so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was offered or usually sold by respondents in the recent regular course of their business, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the aforesaid Rules and Regulations.

PAR. 6. Respondents, in making the pricing claims and representations referred to in Paragraph 5(b) hereof, failed to maintain full and adequate records disclosing the facts on which such claims and representations were based, in violation of Rule 44(e) of the aforesaid Rules and Regulations.

CONCLUSIONS

The aforesaid acts and practices of the respondents have been in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and, as specified under the provisions of the aforesaid Act, constitute unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

Evidence also was submitted at the hearings relevant to the charges of Paragraph 5 of the complaint which alleged false and deceptive invoicing, to the charges of Paragraph 4(a) which alleged violations of Rule 27, and to the charges of Paragraphs 7(b) and (d) which alleged violations of Rules 44(a) and 44(b). These charges are not sustained by the record and provision for their dismissal accordingly is included in the order appearing hereafter.

ORDER

It is ordered, That the respondents, Morton's Inc., a corporation, and its officers, and Hyman Gondelman and Morton N. Gondelman, individually and as officers of said corporation, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce of any fur product, or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which has been made in whole or part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

(1) Failing to affix labels to fur products showing in words and figures plainly legible all information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

(2) Setting forth on labels affixed to fur products:

(a) Non-required information mingled with required information;

(b) Required information in handwriting.

(3) Failing to set forth all the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder on one side of the labels.

B. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement, or notice, which is intended to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of fur products, and which 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 Rules and Regulations.

C. Falsely or deceptively advertising fur products through 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 represents directly or by implication that the regular or usual price of any fur product is any amount which is in excess of the price at which respondents have usually sold such products in the recent regular course of their business.

D. Making pricing claims or representations of the type referred to in Paragraph C above, unless there is maintained by respondents full and adequate records disclosing the facts upon which such claims or representations are based.

It is further ordered, That the charges of Paragraphs 4(a), 5, 7(b) and 7(d) of the complaint be, and they hereby are, dismissed.

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

Commissioner Kern dissenting in part.

OPINION OF THE COMMISSION

By KINTNER, *Chairman:*

Respondents operate a store in Boston for the retailing of fur garments, some of which are manufactured on the premises. In the initial decision, the hearing examiner dismissed for lack of jurisdiction the complaint's charges that respondents had advertised or offered for sale fur products which were misbranded and falsely invoiced in violation of Sections 3(a) and 3(b) of the Fur Products Labeling Act. He further ruled that one of the charges of false and deceptive advertising in commerce was supported by the evidence, but held a failure of proof as to other related charges.

In their cross-appeals, respondents except to the holding sustaining the above charge and counsel supporting the complaint challenges certain of the dismissal rulings. Because it primarily concerns jurisdictional questions, the appeal of counsel supporting the complaint will be discussed first. Section 3(a) of the Act[1] makes unlawful "the * * * advertising * * * in commerce of any fur product which is misbranded or deceptively advertised or invoiced." Although there is no evidence that the respondents ship or sell their fur products to purchasers in states other than Massachusetts, the record shows that respondents placed advertisements for certain of their merchandise which appeared January 4, January 6 and Feb-

[1] The subsection reads:

"The introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product which is misbranded or falsely or deceptively advertised or invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8(b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act."

ruary 3, 1957. The circulations of the two Boston newspapers used included subscribers outside the State of Massachusetts. Hence, respondents' advertisements were disseminated in interstate channels.

The advertisements stated, among other things, that Morton's had bought the fur and mink stocks of Russeks, a New York manufacturer; that the collection included "superb mink, fabulous chinchilla, gleaming broadtail" and that the particular garments there listed represented only a partial listing of that stock. Each garment listed was designated in the advertisements with a former price and a reduced sale price. The representative of the Commission who investigated the respondents' merchandising practices on February 20, 1957, was called as a witness in the hearings. The labels which he testified were improper labels were labels affixed by Morton's rather than by its suppliers and none were articles bought in the collection. Stating that the advertisements disseminated were unrelated to any of the deficiently labeled fur products, the hearing examiner held that such products had not been advertised in commerce within the meaning of the Act.

Determinations of whether the mission of the advertisements was thus narrowly confined to advertising the special purchase garments should be made, however, in the light of all record matters relating to respondents' promotional activities. The twenty-two fur garments contended by staff counsel as shown to be misbranded included six derived from mink and two broadtail lamb garments. Though acquired from other sources, these articles clearly were in the same merchandise categories as those listed in the advertisements. The tags for three of the mink items and for the broadtail lamb jackets also featured prices purporting to be marked down from stated higher prices. Out of the group of twenty-two garments, seventeen were thus marked as reduced in price. Hence, the sale was nowise limited to merchandise bought from the manufacturer whose name was being featured, but essentially represented a store-wide fur promotion.

The term "advertising in commerce" is not specifically defined in Section 3(a) of the Act. However, Section 5(a) prescribes that a fur product shall be considered to be falsely or deceptively advertised if any advertisement or notice intended to aid, promote, or assist directly or indirectly, in the product's sale or offering for sale does not show the information specified in the Act. Respondents' advertisements directed the public's attention to their store, its location and its status as New England's largest furrier and invited everyone "considering owning a fur at all" to come to their salon. As previously noted, the garments referred to in the advertisements included mink, chinchilla and "broadtail." A list of the special purchase merchandise was received in evidence and shows that mink garments predominated, only two broadtail lamb garments being included.

That the advertisements emphasized the prestige source of the garments, therefore, is not controlling. It is controlling that the advertisements were keyed to directly assisting the sale of all of respondents' lamb and mink garments and to attracting potential buyers for other types of furs similarly available at reduced prices. In these circumstances, the hearing examiner clearly erred in concluding that the advertisements bore no relation to the deficiently labeled fur products included in respondents' special promotion. We think that the fur products which counsel supporting the complaint contends were misbranded, were advertised in commerce within the meaning of Section 3(a) of the Act. They, accordingly, were products subject to the Act.

Furthermore, the record fully supports counsel's contentions of misbranding. Among the labels affixed by the respondents which omitted the information required by Section 4(2)(F) of the Act were those for three Persian lamb garments which made no disclosure as to the foreign origin of the skins. They contained skins produced in Southwest Africa and such garments were so invoiced to respondents by the respective suppliers. Contrary to the provisions of Section 4(2)(A) of the Act, two dyed broadtail lamb garments were identified on respondents' labels as dyed broadtail.

In addition to misbranding through failure to furnish statutorily prescribed information, the record shows that the respondents failed to supply such required information in the manner prescribed by the rules and regulations promulgated by the Commission. Thus, required information was mingled with non-required information in many instances and in another the items of required information were not set forth on one side of the label, both practices being violative of Rule 29(a) of the regulations. Also, such information was handwritten in instances instead of printed as prescribed by Rule 29(b).

Counsel supporting the complaint excepts to the hearing examiner's characterization of these rule departures as technical or minor violations and matters to be regarded as *de minimis*. Respondents' violations were nowise limited to activities proscribed by the rules; instead, the statute's mandate that material facts be supplied respecting the products also was ignored. Nor does the Act differentiate between minor and serious violations. On the contrary, the statute contemplates that the products' labels set forth all the information specified in such Act and in the manner prescribed by the rules. When violations are proved, assurances against their continuance or resumption ordinarily are best afforded by issuance of an order to cease and desist. Under the circumstances of this case, we deem counsel's exceptions to the *de minimis* concepts applied in the initial decision to be well taken.

Because also related to the rules and regulations, we comment at this point on respondents' contentions during the hearings that the rules are arbitrary and legally invalid. Such argument focused on the fact that no record showing was made that respondents' failures to observe the requirements of the rules had resulted in consumer deception. The authority conferred under Section 8(2)(b) of the Act is, among other things, to prescribe rules governing the manner and form for disclosing information required by the Act. Hence, it is not necessary that requirements imposed by the regulations be solely directed against forms of disclosure which would engender deception in every marketing situation or instance of use. Respondents' contentions as to the rules and regulations being improper or invalid are rejected.

We also have considered the evidence relevant to the complaint's charges of misbranding through use of labels allegedly smaller than those prescribed by Rule 27. The labels exceeded the minimum dimensions stipulated in the rule, though each contained two perforated lines whereby duplicate segments could be detached. Only if both segments were removed attendant to a second sale of a garment after return by its original purchaser, would the label fall below the rule's prescribed size minima. Respondents enlarged their labels shortly after being contacted in the investigation. Our findings and order, accordingly, provide for dismissal of this charge.

Counsel supporting the complaint contends in his appeal that the evidence shows false and deceptive invoicing by the respondents of fur products subject to Section 3(a) of the Act. The record, however, only suggests possible invoicing failures to show the origin of the furs in respondents' products. In the invoices where the fur named included the name of a country in adjective form, Persian lamb for example, no evidence was presented to show that those particular skins did not in fact originate in such country. The evidence bearing on invoicing practices is plainly inconclusive and this aspect of the appeal is denied.

Section 3(b) of the Act makes unlawful, among other things, the local or intrastate sale of misbranded products made in whole or in part of fur which has been shipped and received in commerce.

Counsel claims error by the hearing examiner in failing to find respondents' deficiently labeled garments additionally subject to that section of the Act inasmuch as they were shipped to respondents in commerce by out-of-state -suppliers which necessarily entailed shipment and receipt of the component skins. The answer to this is that the Act undertakes to rest jurisdiction over a marketer due to movement of fur products to him in commerce only as expressly provided by Section 3(e) of the Act. Assuming, but not however deciding, that respondents' acts are within the purview of Section 3(e), the complaint includes no charges of unfair and deceptive acts in violation of that section. In our decision here, we have determined that the respondents' misbranded fur products were advertised in commerce within the meaning of Section 3(a) of the Act and, therefore, were garments subject to the Act. In view of this disposition, we deem it unnecessary to rule on counsel's further contentions that Morton's garments were subject to the Act as fur products made in whole or in part of skins previously shipped to and received by respondents' manufacturing suppliers in commerce.

As previously noted, the charges relating to false and deceptive advertising in commerce in violation of the Act were sustained in part and dismissed in part by the hearing examiner. The circulation of the Boston newspaper in which two of respondents' advertisements were published and disseminated was approximately 476,000, of which 740 copies went outside the State of Massachusetts. The remaining advertisement received into the record was published in another Boston newspaper having a daily circulation of 212,000, of which approximately 6500 copies went outside Massachusetts. Thus, a substantial number of respondents' advertisements were disseminated in interstate commerce.

Each advertisement contained two columns of prices, the first column of higher prices being captioned "were" or "usually," and the second or lower as "now" prices. The only prices at which the garments were ever offered by respondents were the advertised "now" prices and the higher prices were, therefore, fictitious. Respondents urge that any capacity to deceive inhering in such pricing misrepresentations was removed by another advertising statement to the effect that the garments had just been purchased. While some members of the public might note that statement and perhaps infer no prior offering by Morton's of that or like merchandise, others would not. Moreover, two of the advertisements did not contain such a statement. In our view, the hearing examiner's findings that the respondents had disseminated pricing misrepresentations in commerce had sound record basis and he correctly held that issuance of an order was warranted in the public interest. The respondents' appeal is, therefore, denied.

The exceptions of counsel supporting the complaint to the hearing examiner's dismissal of other deceptive advertising charges contained in paragraph 7(b) of the complaint also are denied. These allegations challenged use in the advertisements of the expression "Below original wholesale" to designate the prices for the promotion. At the time of purchase, a listing or memorandum of prices was furnished by respondents' supplier. The supplier represented that such merchandise had been previously offered or like garments sold by it at wholesale at the higher levels listed. The prices named as current prices in the respondents' advertising were below those represented by the manufacturer as prior prices.

Although the hearing examiner properly ruled that the foregoing charges of paragraph 7(b) of the complaint should be dismissed, his like disposition of the allegations of paragraph 7(a) was erroneous. The latter charged failure in advertising to disclose the names of the animals producing the furs or the fur products as set forth in the Fur Products Name Guide and as required by Section 5(a)(1) of the Act. The advertisement dated February 3, 1957, stressed that chinchilla and "broadtail" were included in the liquidation. Twenty-six mink articles were listed, ten of which, though made of mink, were not so expressly identified. The law, however, requires that all fur products, including mink and lamb products, be accurately identified as to their zoological origin. Under the Act and rules, the purported broadtail stocks were "lamb" or "broadtail lamb." Two other advertisements of the respondents when listing specific garments properly designated them as broadtail lamb, but elsewhere referred to their merchandise category as broadtail. We think that the record amply establishes that the respondents failed to comply with the Act's mandate that names of animals producing the furs be disclosed in the advertising for fur products.

The complaint also charged that respondents in violation of Rule 44(e) had failed to maintain full and adequate records disclosing the facts upon which their pricing claims were based. The rule contemplates that the records of marketers subject to the Act disclose all facts relied upon as basis for pricing representations and that they be kept in sufficient detail and in such form as affirmatively to disclose the accuracy of the representations. The evidence establishes that the respondents have engaged in fictitious pricing. Respondents obviously did not maintain the full and adequate records required by Rule 44(e) and the hearing examiner therefore erred in dismissing this charge.

The Commission's accompanying findings as to the facts, conclusions and order provide for disposition of the charges of the complaint in conformity with the views expressed above. The appeal of respondents is denied, the appeal of counsel supporting the complaint is granted in part and denied in part, and the initial decision is vacated and set aside.

Commissioner Kern dissented in part to the decision herein.

OPINION OF COMMISSIONER KERN DISSENTING IN PART

I find myself unable to agree with some of the views of my colleagues as expressed in Chairman Kintner's opinion. The area of my disagreement is confined to the action of the majority in overruling the hearing examiner's determination that the charge of misbranding of a fur product advertised in commerce in violation of Section 3(a) of the Fur Products Labeling Act had not been sustained. In my judgment the hearing examiner correctly concluded that the advertisements disseminated were unrelated to the deficiently labeled products and that such products had not been advertised in commerce within the meaning of the Act.

The problem is a simple one. It concerns three advertisements respondents placed in two Boston newspapers in January and February of 1957.[1] The statutory language now in issue requires the misbranded fur product to be advertised in commerce. The three advertisements in question, which are the only evidence adduced on this issue, are completely concerned with the sale of furs purchased from Russeks, a New York manufacturer, and stated that the particular garments listed represented only a partial listing of that stock. No mention was made of the fact that this was a store-wide sale or that other garments than the Russeks furs might be included. It is conceded that the articles misbranded were not specifically mentioned in the foregoing advertisements. Moreover, there is no question that the misbranded garments were not part of the Russeks fur stock with which these advertisements were concerned. Not only the main, but the entire thrust of these advertisements was related to the sale of the Russeks stock purchased. As much as I deplore my own iconoclasm, I find it necessary to conclude that the image created by the majority opinion as to the substance of the advertisements is completely misleading.

The rationale of the majority opinion is contained in the following language:

"The term 'advertising in commerce' is not specifically defined in Section 3(a) of the Act. However, Section 5(a) prescribes that a

[1] Commission Exhibits 5A, 5B and 5C.

fur product shall be considered to be falsely or deceptively advertised if any advertisement or notice intended to aid, promote, or assist directly or indirectly, in the product's sale or offering for sale does not show the information specified in the Act. Respondents' advertisements directed the public's attention to their store, its location and its status as New England's largest furrier and invited everyone 'considering owning a fur at all' to come to their salon."

The short and simple answer to the problem involved is that a statute as clear and unambiguous as this one means exactly what it says. To me it requires the misbranded fur product to be advertised in commerce. Moreover, I am willing to accept, at least by way of argument, the conclusion of the majority that the particular misbranded garment need not be advertised, but that the requirement of the statute is met by a store-wide or general advertisement based on a store-wide or general fur promotion. The majority's conclusion, however, does not follow from that premise. Deluded by the discovery that this was a store-wide sale and that the articles misbranded were included in such sale along with the Russeks garments that were the subject of the advertisements, the majority concludes: "Hence, the sale was nowise limited to merchandise bought from the manufacturer whose name was being featured, but essentially represented a store-wide fur promotion." The vice of this reasoning is that the statute is concerned with the advertising and not with the character of the promotion.

The majority further seeks support from the fact that "Respondents' advertisements directed the public's attention to their store, its location and its status as New England's largest furrier." Should this satisfy the requirements of the statute, then a classified listing in a telephone directory—and directories cross state lines in many metropolitan areas—would suffice. Even if a store-wide or general advertisement meets the requirements of the statute, the advertisements in question, when dispassionately evaluated, simply do not measure up.

The majority's attempted interpretation of Section 3(a) by resort to Section 5(a) of the Act does not impress me. Section 5(a) deals with false or deceptive advertising, whereas Section 3(a) deals with advertising, whether true or false, of misbranded fur products. The question under Section 5(a) is whether the advertisement "is intended to aid, promote, or assist directly or indirectly in the sale or offering for sale" of a deceptively advertised fur product. Under Section 3(a), insofar as here relevant, the question is whether the misbranded fur product is the subject matter of the advertisement. On the face of the statute, the latter is a narrower provision than the former. In any event, the two sections deal with different problems and there is no warrant for reading one into the other. Indeed there is no need to resort to construction at all. I had considered it fundamental that "when the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion." *Caminetti* v. *U.S.*, 242 U.S. 485 (1917). See also *U.S.* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 277 (1929); *Marmon* v. *Railroad Retirement Board*, 218 F. 2d 716, 718 (3d Cir., 1955).

In my view the majority has indulged in statutory interpretation where none was warranted and then has incorrectly concluded that the advertisements in question embraced the misbranded garments, even though the misbranded garments were not in any way the subject of the advertisements. I see no justification in legislative history or otherwise for the construction accorded this section of the Act by the majority. Likewise, I find in the record no factual basis for the majority's conclusion. For these reasons I dissent.

IN THE MATTER OF

COMMERCIAL DISTRIBUTORS OF AMERICA, INC., ET AL.

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

Docket 7582. Complaint, Sept. 8, 1959—Decision, Mar. 1, 1960

Consent order requiring Newark, N.J., distributors of vending machines and supplies therefor, to cease making false offers of employment in the classified advertisement section of newspapers and periodicals and follow-ups by their salesmen displaying a variety of promotional literature, along with false representations of exaggerated profits, assistance to purchasers, etc., as in the order below set forth.

Mr. Berryman Davis for the Commission.
Mr. William David Webb, of Wyncote, Pa., for respondents.

INITIAL DECISSION BY EDGAR A. BUTTLE, HEARING EXAMINER

On September 8, 1959, the Federal Trade Commission issued its complaint against the above-named respondents charging them with violating the provisions of the Federal Trade Commission Act in connection with the advertising, selling and distributing of vending machines and vending machine supplies. On December 10, 1959, the respondents and counsel supporting the complaint entered into an agreement containing a consent order to cease and desist in accordance with Section 3.25(a) of the Rules of Practice and Procedure of the Commission.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint and agree, among other things, that the cease and desist order there set forth may be entered without further notice and shall have the same force and effect as if entered after a full hearing. The agreement includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith; and recites that the said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, and that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint. The hearing examiner finds that the content of said agreement meets all the requirements of Section 3.25(b) of the Rules of Practice.

This proceeding having now come on for final consideration by the hearing examiner on the complaint and the aforesaid agreement for consent order, and it appearing that said agreement provides for an appropriate disposition of this proceeding, the aforesaid agreement is hereby accepted and is ordered filed upon becoming part of the Commission's decision in accordance with Section 3.21 of the Rules of Practice; and in consonance with the terms of said agreement, the hearing examiner makes the following jurisdictional findings and order:

1. Respondent Commercial Distributors of America, Inc., is a corporation, existing and doing business under and by virtue of the laws of the State of New York. Respondent National Placement and Distribution Agency, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of New Jersey. Respondent Gene J. Davidson is an officer of both of said corporations. Respondent William J. Stockton is an officer of National Placement and Distribution Agency, Inc. Both individual respondents formulate, direct, and control the policies, acts, and practices of the National Placement and Distribution Agency, Inc. Gene J. Davidson formulates, directs, and controls the policies, acts, and practices of Commercial Distributors of America, Inc. The principal office and place of business of each of the respondents is located at 1507 National Newark Building, 42 Commerce Street, Newark, New Jersey.

2. The Federal Trade Commission has jurisdiction of the sub-

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

ORDER

It is ordered, That respondents Commercial Distributors of America, Inc., a corporation, and its officers, and National Placement and Distribution Agency, Inc., a corporation, and its officers, and Gene J. Davidson, individually and as an officer of each of said corporations, and William J. Stockton, individually and as an officer of said National Placement and Distribution Agency, Inc., and their agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of machines or devices which vend or dispense merchandise, or which are accessory to the vending or dispensing of merchandise, or the supplies and equipment used in connection therewith, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly, that:

1. Employment is offered either by respondents or by any other person, firm, or corporation;

2. Respondents have established routes of their vending machines or devices at the time the offer of sale is made;

3. The earnings or profits derived from the operation of respondents' said machines or devices are any amount greater than that usually and customarily earned by operators of respondents' said machines or devices or similar machines or devices dispensing similar merchandise;

4. Surveys or any other kind of investigations have been conducted to ascertain the feasibility of establishing a route of said machines or devices in any locality or that arrangements have been completed to establish a route of said machines or devices or that said machines or devices will be located so as to return profits in any amount greater than will be in fact returned by such machines;

5. Respondents will repurchase, resell, or relocate said machines or devices sold by them;

6. The cash investment required to purchase respondents' said machines or devices is secured;

7. Selling or soliciting is not required to establish, operate, or maintain a route of said machines and devices;

8. Respondents will supervise the operation of or assist in the maintenance of a route of said machines or devices;

9. Respondents' business operation is seventy years old or one of the largest of its kind or that respondents are the agents or representatives of or affiliated with the A. L. Bazzini Co., Inc., of New York, New York, or the Newark Packing Co., of Newark, New Jersey; or that respondents' business operation is older or larger than it is in fact or is associated or affiliated with any person, firm, or corporation, unless such is the fact;

10. Respondents will forward on consignment to the buyer additional machines or devices to be operated by the buyer in conjunction with those purchased; or that said machines or devices are available on any terms or conditions other than those on which they are in fact available.

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 1st day of March, 1960, 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

MAIN LINE DISTRIBUTORS, INC., ET AL.

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

Docket 7693. Complaint, Dec. 18, 1959—Decision, Mar. 1, 1960

Consent order requiring an independent Philadelphia distributor of phonograph records to retail outlets in the area of southern Pennsylvania, southern New Jersey, and Delaware, to cease disbursing concealed "payola" payment of money and other valuable consideration—to disc jockeys of radio and television programs to induce "exposure"—playing of a record day after day and several times a day—and promotion of their records.

Mr. John T. Walker and *Mr. James H. Kelley* for the Commission.
Mr. Haskell Golder, of Philadelphia, Pa., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents, who are engaged in the offering for sale, sale and distribution of phonograph records as independent distributors for several record manufacturers, with violation of the Federal Trade Commission Act, in that respondents, alone or with certain unnamed record manufacturers, have negotiated for and disbursed "Payola," i.e., the payment of money or other valuable consideration to disk jockeys of musical programs on radio and television stations, to induce, stimulate or motivate the disk jockeys to select, broadcast, "expose" and promote certain records, in which respondents are financially interested, on the express or implied understanding that the disk jockeys will conceal, withhold or camouflage the fact of such payment from the listening public.

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

The agreement states that respondent Main Line Distributors, Inc., 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 1510 Fairmount Avenue, Philadelphia, Pennsylvania, and that individual respondents Haskell Golder and Barry Golder are president and secretary, respectively, of the respondent corporation, their address being the same as that of said corporate respondent.

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

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

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

It is ordered, That respondents Main Line Distributors, Inc., a corporation, and its officers, and Haskell Golder, and Barry Golder, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature;
2. Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record, when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly, received by him or his employer.

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 1st day of March, 1960, become the decision of the Commission; and, accordingly:

It is ordered, That the above-named 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.

IN THE MATTER OF

RAYMOND ROSEN & CO., INC., ET AL.

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

Docket 7762. Complaint, Jan. 27, 1960—Decision, Mar. 1, 1960

Consent order requiring Philadelphia distributors of phonograph records to cease disbursing concealed "payola"—payment of money or other valuable consideration—to disc jockeys of radio and television programs to induce "exposure"—playing of a record day after day and several times daily—and promotion of records in which they had a financial interest.

Mr. John T. Walker and *Mr. James H. Kelley* for the Commission.

Schnader, Harrison, Segal & Lewis, by *Mr. Edward W. Mullinix*, of Philadelphia, Pa., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents with violation of the Federal Trade Commission Act in connection with the offering for sale, sale and distribution of phonograph records in various states of the United States, in that respondents, alone or with certain unnamed record manufacturers, have negotiated for and disbursed "payola," i.e., the payment of money or other valuable considerations to disk jockeys of musical programs on radio and television stations to induce, stimulate or motivate the disk jockey to select, broadcast, "expose" and promote certain records in which respondents have a financial interest, on the express or implied understanding that the disk jockey will conceal, withhold or camouflage the fact of such payment from the listening public.

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

The agreement states that respondent Raymond Rosen & Co., Inc. 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 Parkside Avenue at 51st Street, Philadelphia, Pennsylvania, and that individual respondents Thomas F. Joyce, Joseph B. Elliott, Jack S. Rosen, Edward H. Rosen and George M. Minter are president, executive vice president, vice president, secretary and treasurer, respectively, of the corporate respondent, and formulate, direct and control the acts and practices of said corporate respondent, their address being the same as that of said corporate respondent.

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

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

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

It is ordered, That respondents Raymond Rosen & Co., Inc., a corporation, and its officers, and Thomas F. Joyce, Joseph B. Elliott, Jack S. Rosen, Edward H. Rosen, and George M. Minter, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature;

(2) Giving or offering to give, without requiring public disclosure, any sum of money, or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order, by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly, received by him or his employer.

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 1st day of March, 1960, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Raymond Rosen & Co., Inc., a corporation, and Thomas F. Joyce, Joseph B. Elliott, Jack S. Rosen, Edward H. Rosen and George M. Minter, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

A. PLACK CARR DOING BUSINESS AS MICRO-LUBE SALES

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

Docket 7581. Complaint, Sept. 8, 1959—Decision, Mar. 2, 1960

Consent order requiring a Dallas, Tex., distributor of an oil and gas additive designated "Micro-Lube," to cease advertising falsely that the United States Air Force officially approved of, endorsed, and recommended the product.

Mr. Thomas F. Howder supporting the complaint.
Mr. Frank C. Erwin, Jr. of Austin, Tex., for respondent.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

On September 8, 1959 the Federal Trade Commission, pursuant to the provisions of the Federal Trade Commission Act, issued its complaint against A. Plack Carr, an individual doing business as Micro-Lube Sales (hereinafter referred to as respondent) charging said respondent with violating the Federal Trade Commission Act by making false, deceptive and misleading statements in selling, offering for sale and distributing an oil and gas additive under the brand name of "Micro-Lube," by giving or attempting to give the impression that the United States Air Force and/or other agencies or branches of the United States Government officially approve, endorse or recommend such products. A true and correct copy of said complaint was served upon respondent as required by law. After being served with the complaint, respondent appeared by counsel and entered into an agreement dated December 7, 1959, which purports to dispose of all of this proceeding as to all parties without the necessity of conducting a hearing. The agreement has been signed by the respondent, his counsel, and by counsel supporting the complaint; and has been approved by the Director and the Assistant Director of the Bureau of Litigation of this Commission. Said agreement contains the form of a consent cease and desist order which the parties have agreed is dispositive of the issues involved in this proceeding. On December 16, 1959 the said agreement was submitted to the above-named hearing examiner for his consideration, in accordance with Section 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings.

Respondent, pursuant to the aforesaid agreement, has admitted all the jurisdictional facts alleged in the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondent waives any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights he may have to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. The parties have, *inter alia*, by such agreement agreed: (1) the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing; (2) the complaint may be used in construing the terms of said order; (3) the record herein shall consist solely of the complaint and said agreement; (4) and that said agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement of December 7, 1959, containing consent order, and it appearing that the order provided for in said agreement covers all of the allegations of the complaint and provides for an appropriate disposition of this proceeding as to all parties; the agreement of December 7, 1959 is hereby accepted and ordered filed at the same time that this decision becomes the decision of the Federal Trade Commission pursuant to Sections 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings; and

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

JURISDICTIONAL FINDINGS

1. That the Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding;

2. Respondent A. Plack Carr is an individual doing business as Micro-Lube Sales whose office and principal place of business is located at 8505 Directors Row in the City of Dallas, State of Texas.

3. Respondent is engaged in commerce as "commerce" is defined in the Federal Trade Commission Act;

4. The complaint herein states a cause of action against said respondent under the Federal Trade Commission Act, and this proceeding is in the public interest.

ORDER

It is ordered, That respondent A. Plack Carr, individually and doing business as Micro-Lube Sales, or under any other name, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of oil and gasoline additives or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That the United States Air Force, or any other agency or branch of the United States Government officially approves of, endorses, or recommends such products.

2. Nothing in paragraph one of this order shall prevent respondent from truthfully representing the use, if any, which the United States Air Force, or any other agency or branch of the United States Government, makes of any ingredient of said products, provided that such representation does not violate the provisions of paragraph one herein.

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 2nd day of March, 1960, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

UNIVERSAL RECORD DISTRIBUTING CORPORATION ET AL.

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

Docket 7672. Complaint, Dec. 2, 1959—Decision, Mar. 3, 1960

Consent order requiring an independent Philadelphia distributor for several record manufacturer to retail outlets and jukebox operators in the area of eastern Pennsylvania, southern New Jersey, and Delaware, to cease disbursing concealed "payola"—payment of money or other valuable consideration—to disc jockeys of radio and television programs to induce the "exposure"—playing of a record day after day and several times a day—and promotion of its records.

Mr. John T. Walker and *Mr. James H. Kelley* counsel supporting the complaint.

Mr. Charles R. Weiner, of Philadelphia, Pa. for respondents.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on December 2, 1959, charging them with having violated the provisions of the Federal Trade Commission Act by unfairly paying money or other valuable consideration to induce the playing of phonograph records over radio and television stations in order to enhance the popularity of such records.

On February 11, 1960 there was submitted to the undersigned hearing examiner an agreement between the above-named respondents, and counsel supporting the complaint providing for the entry of a consent order.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged in the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of Section 3.25(b) of the Rules of the Commission.

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 and it is ordered that said agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued.

1. Respondent Universal Record Distributing Corporation 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 1330 West Girard Avenue, Philadelphia, Pennsylvania.

2. Respondents Harold B. Lipsius, Harry Finfer and Clara B. Lipsius are president, vice president and secretary treasurer, respec-

tively, of the respondent corporation. The address of the individual respondents is the same as that of said corporate respondent.

3. 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 Universal Record Distributing Corporation, a corporation, and its officers, and Harold B. Lipsius, Harry Finfer, and Clara B. Lipsius, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with phonograph records which have been distributed, in commerce, or which are used by radio or television stations in broadcasting programs in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, to induce that person to select, or participate in the selection of, and broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature.

2. Giving or offering to give, without requiring public disclosure, any sum of money or other material consideration, to any person, directly or indirectly, as an inducement to influence any employee of a radio or television broadcasting station, or any other person, in any manner, to select, or participate in the selection of, and the broadcasting of, any such records in which respondents, or any of them, have a financial interest of any nature.

There shall be "public disclosure" within the meaning of this order by any employee of a radio or television broadcasting station, or any other person, who selects or participates in the selection and broadcasting of a record, when he shall disclose, or cause to have disclosed, to the listening public at the time the record is played, that his selection and broadcasting of such record are in consideration for compensation of some nature, directly or indirectly, received by him or his employer.

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 March, 1960, 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

SHEFFIELD MERCHANDISE, INC., ET AL.

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

Docket 6627. Complaint, Sept. 11, 1956—Decision, Mar. 4, 1960

Order dismissing—because of industry-wide discontinuance of the challenged practices—complaint charging a distributor with falsely advertising and marking one-jewel watches as "jeweled," and failing to disclose limitations of the advertised guarantee.

Mr. Frederick McManus supporting the complaint.

Mr. William Simon, and *Mr. Robert Wald*, of *Howrey & Simon*, of Washington, D.C. and *Mr. Bernard B. Smith* and *Mr. Leonard H. Steibel* of New York, N.Y., for respondents.

INITIAL DECISION OF JOHN B. POINDEXTER, HEARING EXAMINER

PRELIMINARY STATEMENT

The complaint in this proceeding charges that the respondents named in the caption hereof violated the provisions of the Federal Trade Commission Act in operating their businesses of selling and distributing watches to jobbers and dealers for resale to the purchasing public. The complaint was issued on September 11, 1956 and respondents filed an answer on March 5, 1957. Respondents denied some of the allegations of the complaint and also filed a motion to dismiss on the grounds that (1) respondents had voluntarily abandoned the practices complained about in March and April, 1956, respectively, approximately five months prior to the issuance of the complaint, (2) that they have not been resumed, (3) there is no reasonable likelihood that respondents will resume such practices, and (4) everything which could be accomplished by a cease and desist order has already been accomplished by the voluntary action of respondents, under the doctrine announced by the Commission in *Bell & Howell Co.*, (D. 6729), *Argus Cameras, Inc.,* (D. 6199), and *Wildroot Company, Inc.*, (D. 5928). On May 5, 1958, after receiving in evidence an agreed stipulation as to the testimony of the individual respondents, the undersigned hearing examiner issued an initial decision dismissing the complaint based upon findings that the practices complained about had been voluntarily discontinued by the voluntary acts of respondents and there was no reasonable likelihood of their resumption. Counsel supporting the complaint did not appeal from this initial decision. However, the Commission, under the authority of Section 3.21(a) 3 of the Rules of Practice for Adjudicative Proceedings, ordered the case placed on its own docket for review. Thereafter, on July 5, 1958, the Commission issued an opinion which reversed the hearing examiner in dismissing the complaint and remanded the case to the hearing examiner for further proceedings.

Further hearings have been held and completed before the undersigned hearing examiner at which oral testimony and documentary evidence were received in support of and in opposition to the allegations of the complaint. Proposed findings of fact, conclusions of law and order have been filed and submitted by respective counsel. All findings of fact and conclusions of law not specifically found or concluded herein are rejected. Upon the basis of the entire record, the hearing examiner makes the following findings of fact, conclusions of law drawn therefrom, and order:

FINDINGS OF FACT

1. The respondent Sheffield Merchandise, Inc., is a corporation, incorporated under the laws of the State of New York, with its office and place of business located at 663–5th Avenue, New York, New York. Henry A. Federman and Else Jedwabnick, individuals, are officers of said corporation and also co-partners trading and doing business under the name of Saxony Watch Company at the same location as that listed above.

2. Each of the respondents named herein are engaged in the sale and distribution of watches to jobbers and retailers for resale to the purchasing public. The watches sold by respondent Sheffield Merchandise, Inc., a corporation, are sold direct to department and retail jewelry stores under the trade name "Sheffield" and are what respondents designate as their "prestige" watches. The watches sold by the individual respondents Henry A. Federman and Else Jedwabnick, doing business as Saxony Watch Company, are sold under the trade name "Saxony" to jobbers, who in turn sell to chain stores, etc.

3. The respondents are engaged in the sale and shipment of Sheffield and Saxony watches in interstate commerce and their activities in connection therewith are subject to the jurisdiction of the Federal

Trade Commission. The complaint alleges two violations of the Federal Trade Commission Act. The first concerns respondents' admitted former use of the word "jeweled" imprinted on the faces of their Sheffield and Saxony one-jewel watches, it being alleged that, as generally understood in the *industry*, [emphasis supplied] a jeweled watch is one which contains at least 7 jewels, each of which serves a mechanical purpose as a frictional bearing. In support of this allegation counsel supporting the complaint offered the testimony of four District of Columbia watchmakers or watch repairmen, Messrs. Burk, Kahn, Lisenbee, and Myerson. This examiner has carefully considered their testimony and demeanor while testifying. Upon the basis of their testimony as a whole, this examiner is not able, in good conscience, to make a finding of fact that, as generally understood in the industry, a jeweled watch is one which contains at least 7 jewels, each of which serves a mechanical purpose as a frictional bearing. These witnesses did not testify as to what the understanding in the watch industry a "jeweled" watch is. Mr. Kahn was frank enough to say he did not know, but he, together with the other three witnesses mentioned above, testified that they personally preferred a watch with seven or more functioning jewels. This preference is based on economics. They do not repair watches with less than 7 jewels. It would not be profitable to repair watches with less than 7 jewels. The retail selling price of a one-jewel watch ranges from approximately $5.00 to $6.00. The watchmaker or repairman cannot afford to charge the usual price of $5.00 to $10.00 for repairing a watch which originally cost only $5.00 or $6.00 because the customer would be outraged. On the other hand, the watchmaker or repairman would lose money if he charged less than the usual price of $5.00 to $10.00 for repairing the one-jewel watch. Consequently, they do not repair one-jewel watches. Generally, the greater the number of jewels the watch contains, the higher the original cost of the watch; the higher the original cost of the watch, the higher the charge the watchmaker or repairman may demand for repairing the watch.

4. To rebut the testimony of these four witnesses, respondents offered the testimony of two witnesses, Messrs. Paul and Balmages, both watchmakers by trade. Mr. Paul testified that any watch which contains a functional bearing jewel may properly be called a "jeweled" watch; he had never heard of any understanding in the watch industry that a "jeweled" watch must contain at least 7 jewels. The other witness, Mr. Balmages, is the United States Customs Examiner of watches at the Port of New York, a graduate of the Elgin Watchmaker's College and watchmaker for many years

prior to entering Government service. Mr. Balmages has been employed by the United States Government as an expert in the appraising of watches in the Bureau of Customs for approximately 18 years. In the opinion of this examiner, Mr. Balmages was free from any taint of prejudice or bias in his testimony. Mr. Balmages testified that, during the course of his duties, he has observed one, two, three, four, five, six, seven or more jewel watches imported into the United States and that, in his opinion, any watch with one jewel or more which serves as a frictional bearing may properly be designated as "jeweled." This opinion comports with reason and logic. This examiner gives considerable weight to the testimony of Mr. Balmages. He is a disinterested witness and unlike the four witnesses who testified in support of the complaint, was candid and forthright in his testimony. Counsel supporting the complaint has the burden of proof in establishing the allegations of the complaint by a preponderance of the reliable, probative, and substantial evidence. Certainly this burden has not been met. It is found, therefore, that the allegation of the complaint with respect to the understanding in the watch industry as to what may properly be called a jeweled watch has not been met.

5. The second violation of the Act alleged in the complaint concerns respondents' representation in advertisements that their "Saxony" watches were guaranteed for one year without disclosing the terms, conditions and limitations of the guarantee. The evidence shows, and respondents admit that, prior to April, 1956, respondents advertised on counter cards in stores that their Saxony watches were "guaranteed for one year," whereas such advertising did not disclose that respondents made a $1.00 charge for servicing said watches. (Sheffield has never advertised any guarantee and has not used counter display cards.) It is found, therefore, that the allegations of the complaint with respect to respondents' guarantee of their Saxony watches have been established.

6. (a) The respondents have renewed their motion to dismiss the complaint on the grounds set forth in their original motion. As stated by then Chairman Gwynne, speaking for the Commission in *Argus Cameras, Inc., supra*, it is not the usual procedure for the Commission to dismiss a complaint and should not be done unless there is a clear showing of unusual circumstances which in the interest of justice require it. What are the unusual circumstances, if any, present in this case? With respect to respondents' abandonment of the practices complained about, whether they have been resumed, the likelihood of their being resumed, and the unusual circumstances, if any, which exist in this case, the examiner finds as follows:

(b) During the entire period of the Commission's investigation of this matter from September, 1953 to September, 1956, the only question raised by the Commission with respect to the use of the word "jeweled" by respondents occurred in an exchange of letters between the Commission's Division of Trade Practice Conferences and respondent Federman in the latter part of 1953. In a letter from the Trade Practice Conferences dated February 15, 1953, respondent Federman was questioned concerning a number of practices then prevalent in the watch industry. Along those was a request to advise the Commission as to whether respondents' "jeweled" watches contained only one jewel. On October 20, 1953, Federman replied, pointing out that with the exception of the use of the word "jeweled," none of the practices were followed by respondents. On October 28, 1953, the Division of Trade Practice Conferences acknowledged that respondents did not engage in the bulk of the practices listed in its original letter and again noted respondents' use of the word "jeweled," suggesting that the designation of one-jewel watches "may lead the purchasing public to believe that these watches have the conventional number of jewels, i.e., seven or more." On November 9, 1953, Federman replied, pointing out that the use of the term "jeweled" was an industry-wide practice and that his views were, if its use was to be eliminated, it ought to be approached on an industry-wide basis.

(c) On December 3, 1953, the Division of Trade Practice Conferences acknowledged Federman's letter and advised that the matter would receive the Commission's *further consideration.* [Emphasis supplied.] From that date until the issuance of the complaint herein no further inquiry was ever made by a representative of the Commission with reference to respondents' use of the term "jeweled" nor was such practice at any time thereafter questioned, although, from time to time, during the next two and one-half years, a representative of the Federal Trade Commission sought and obtained additional information.

(d) During the latter part of 1955 watch trade journals reported that the Federal Trade Commission had questioned the use of the term "jeweled" in connection with the sale of one-jewel watches and advertisements containing the words "one year guarantee" or "fully guaranteed" without revealing the limitations upon such guarantees. Since respondents' use of the term "jeweled" had been the subject of correspondence with the Division of Trade Practice Conferences and the use of the words "guaranteed for one year" had been the subject matter of an affidavit by respondents' attorney and conferences in Washington with representatives of the Commission, respondents instructed their attorney to ascertain whether respondents should seek further conferences with representatives of the Commission as to their use of the terms. Respondents' attorney then advised respondents that he had conferred with a representative of the Commission on January 3, 1956, as to whether conferences with representatives of the Commission in Washington would be appropriate but said representative informed respondents' attorney that such a conference was not necessary and nothing further should be done unless respondents received further word from the Commission. During January, 1956, respondents received several communications from their suppliers in Switzerland advising respondents that the Federal Trade Commission had disapproved the use of the term "jeweled" on one-jewel watches. Accordingly, in February, 1956, respondents decided to abandon and, in March 1956, completely abandoned the use of the words "jeweled" on their one-jewel watches and instructed their Swiss manufacturers to discontinue such designations. Respondents' Swiss manufacturers complied with such instructions. In April, 1956, respondents also eliminated the words "one year guarantee," "fully guaranteed," or similar terms from all of their advertising and printed material, including counter display cards. To summarize, it is undisputed that respondents unqualifiedly abandoned the practice of designating the word "jeweled" on the faces of their one-jewel watches in March, 1956, and discontinued advertising their guarantee in the manner complained about in April, 1956, approximately six and five months, respectively, prior to the issuance of the complaint herein. The record contains the affidavits of the individual respondents Federman and Jedwabnick, officers of the corporate respondent Sheffield and partners in Saxony attesting to the facts found above and giving their respective promises that the practices complained about will not be resumed in the future. At the hearings, counsel supporting the complaint did not dispute the facts which have been found in Paragraph 6 herein nor the facts stated in said affidavits.

7. In the opinion issued by the Commission on July 7, 1958, reversing the hearing examiner in dismissing the complaint, the following reasons were listed for reversing the examiner:

(a) "The respondents have never unequivocally receded from their position that use of the practices involved did not result in deception of confiding buyers."

(b) There is no assurance other than respondents' promise, even though made in good faith, that they will not resume the practices complained about in the future for competitive reasons, because of the "continued existence in the industry of the practices that led respondents initially to employ the questioned representations. In such setting, respondents for compelling competitive reasons would be free again to adopt the same or similar practices, absent some effective legal restraint."

At hearings held subsequent to the remand, the respondents also offered undisputed testimony that the practices complained about do not now exist in the industry and have not existed for the past two years. With respect to the first reason given by the Commission for reversing the examiner, quoted above, that "respondents have never unequivocally receded from their position that use of the practices involved did not result in deception of confiding buyers," respondents contend that (1) they could not recede from the position since they never assumed such a position, having, in their answer, neither admitted nor denied that the representations resulted in deception of the purchasing public, stating that they had no knowledge of fact or information sufficient to form a belief as to the effect of the practices alleged, and up to that time, the question of the lawfulness of the practices had not been litigated, and (2), such a standard is contrary to the decision of the Court of Appeals for the Seventh Circuit in *Stokely-VanCamp* v. *F.T.C.*, 246 F. 2d 458 (1957), where the court held that the unwillingness of a respondent to concede illegality was, as a matter of law, irrelevant, and that to penalize a respondent for such a stand would be a policy abhorrent to our sense of justice.

8. The examiner will not discuss in detail the evidence which shows that the practices complained about do not continue in the watch industry. Suffice it to say that the Commission has obtained cease and desist orders or stipulations against most of respondents' competitors with respect to one or both of the practices complained about. In July, 1956, the members of the Roskopf Association, which consists of all Swiss manufacturers of one-jewel watches, discontinued the practice of imprinting the word "jeweled" on the faces of all watches containing less than 7 jewels manufactured by members of said Association, and respondents purchase all of their one-jewel watches from members of said Association. The practice of advertising the guarantee complained about was discontinued by the watch industry approximately two years ago. Accordingly, the examiner finds that the practices complained about have not been engaged in by the watch industry for approximately two years and there is no reason, competitive or otherwise, for respondents to resume such practices.

9. To recapitulate, the examiner finds (1) that respondents voluntarily abandoned the practices complained about in March and April,

1956, respectively, some five or six months prior to the issuance of the complaint herein on September 11, 1956, and they have not been resumed during such three year period, (2) that there is no reasonable likelihood that respondents will resume such practices, and (3) that everything which could be accomplished by a cease and desist order has already been accomplished by the voluntary act of respondents.

CONCLUSIONS

The examiner concludes that the facts and unusual circumstances of this case bring it within the doctrine pronounced by the Commission in *Argus Cameras*, supra, *Wildroot Company, Inc.*, supra, and *Bell & Howell*, supra, of dismissing complaints where the practice has been voluntarily discontinued by the act of respondent and there is no reasonable likelihood of its resumption. This also comports with the latest decision of the U.S. Court of Appeals for the Seventh Circuit on the subject, *Stokely Van-Camp, Inc., et al*, v. *F.T.C., supra.* Everything which could reasonably be accomplished by a cease and desist order has already been accomplished by the voluntary act of respondents. Accordingly,

It is ordered, That the complaint herein be, and the same hereby is, dismissed, without prejudice to the right of the Commission to take such action in the future as the facts and circumstances may warrant.

OPINION OF THE COMMISSION

By the COMMISSION:

This matter is before the Commission upon appeal of counsel supporting the complaint from the hearing examiner's initial decision. The complaint which issued September 11, 1956, charges respondents with misrepresentation through the use of the word "jeweled" in the marking and advertising of one-jewel watches and with deception through failure to adequately disclose the full terms, conditions and limitations of the advertised guarantee on these watches. Appeal is taken from the order dismissing both allegations on the ground of abandonment and from the finding that the evidence fails to sustain the allegation with respect to the use of the word "jeweled."

We have previously considered an appeal from the hearing examiner's action granting respondents' motion to dismiss on the ground of abandonment. Although we had written assurances by the respondents that the practices had been discontinued, we were not satisfied from the record then before us that the practices would not be resumed. One of the points mentioned in our decision to remand was the absence of a showing that industry-wide business conditions had so changed as to warrant a conclusion that respondents for competitive reasons would not engage again in the alleged practices. We think the record now fully supports such a conclusion. Of particular significance is the evidence before us that members of a Swiss association of watch manufacturers make the only one-jewel watch movements sold in this country and that in July, 1956, all members of this organization discontinued their practice of marking the word "jeweled" on such watches. This is supported by the testimony of a United States Customs examiner of watches who testified in January, 1959, that it had been over two years since the word "jeweled" had appeared on these imported one-jeweled watches.

Also of importance is the testimony of the manager of the merchandising division of a trade organization representing a substantial number of department and specialty stores throughout the nation. He stated that he is familiar with the merchandising practices and with the stock of these stores and that he has not seen one-jewel watches marked or advertised as "jeweled" in the last several years. He further testified that he has not seen any unqualified advertising of guarantees in the watch industry for a corresponding period of time.

This evidence as to existing conditions in the watch industry is uncontradicted. Considering this evidence together with the other facts of record as to respondents' discontinuance of the practices, we conclude that the appeal of counsel supporting the complaint from the hearing examiner's order must be denied. In reaching this conclusion, we make no determination on the merits of this case.

The order in the initial decision and those findings and conclusions on which the order is based are adopted as the decision of the Commission. An appropriate order will be entered.

ORDER DISMISSING COMPLAINT

This matter having come before the Commission upon the appeal of counsel in support of the complaint from the hearing examiner's initial decision dismissing the complaint; and

The Commission, for the reasons stated in the accompanying opinion, having denied the aforesaid appeal:

It is ordered, That the complaint in this proceeding be, and it hereby is, dismissed, without prejudice, however, to the right of the Commission to issue a new complaint or to take such further or other action against the respondents at any time in the future as may be warranted by the then existing circumstances.

IN THE MATTER OF

MICHAEL Z. BERGER ET AL. DOING BUSINESS AS M. Z. BERGER & COMPANY, ETC.

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

Docket 6894. Complaint, Sept. 26, 1957—Decision, Mar. 7, 1960

Order requiring New York City distributors of a variety of merchandise, to cease representing falsely in leaflets, presentation boxes, and on the articles themselves that certain watches were guaranteed for a year, when actually payment of a service charge was required; that fabric coverings of the presentation boxes were "Alligator Grain," "Ostrich Grain," and "Pin Leather Grain"; that greatly exaggerated price figures on tags attached to their merchandise or furnished to their purchasers for attachment were the usual retail prices; that wallets made of split leather with a cardboard filler were "genuine leather"; that rayon linings of tops and trays of presentation boxes were "satin" or "velour"; and that glass insets of necklaces and earrings were "jewel stones"; and to disclose clearly when gold-appearing watch cases were actually base metal treated to simulate gold.

Charges were dismissed that certain pin lever watches were "17 jewel watches," that others containing one jewel were "jeweled watches," and that certain of their merchandise contained "gold" or had a "gold finish."

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

Lewis Singer, *Singer & Levittan*, of New York, N.Y., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

PRELIMINARY STATEMENT

The complaint in this proceeding alleges that Michael Z. Berger and Joseph Mermelstein, individually and as co-partners doing business as M. Z. Berger & Company and The Berger Watch Company, hereinafter referred to as respondents, have violated the provisions of the Federal Trade Commission Act by misrepresenting the quality, price and guarantees of the merchandise they sell. Respondents deny the violations alleged.

The complaint sets out numerous representations made by respondents in pamphlets, leaflets, on boxes containing merchandise and on some of the merchandise itself which are alleged to be false, misleading and deceptive. Among these are representations that a particular watch is a "17 jewel watch" whereas, the complaint alleges, such watch is not properly described as a "17 jewel watch" because it does not contain two "jewels" in the pallet or lever. To state it another way, the complaint alleges that, as generally understood in the industry, a watch, even though it may contain 17 "jewels," is not properly described as a "17 jewel" watch unless it contains a jeweled lever. Another count in the complaint charges respondents with representing that certain of their watches containing one jewel are "jeweled" watches, whereas, as generally understood in the industry, a watch, in order to be properly described as a "jeweled" watch, must contain at least 7 jewels, each of which serves a mechanical purpose as a frictional bearing. Other counts in the complaint allege that certain of respondents' watches are guaranteed for one year, whereas, respondents do not guarantee their watches for one year in every respect since their guarantee requires the payment of a service charge which fact is not disclosed in their advertisements; certain of their merchandise contains "gold" or has a "gold finish," whereas they contain no gold; certain of their wallets are made of "genuine leather," whereas such wallets are actually split leather with a cardboard filler; through the use of the terms "Alligator Grain," "Ostrich Grain" and "Pin Leather Grain" as descriptive of the coverings of certain of the boxes containing respondents' products, such coverings are composed of leather made from the hides of alligators, ostriches and seals, respectively, whereas, the coverings of such boxes are not leather but are a fabric material; the linings of the top and the tray of the interior of certain other boxes are "satin" and "velour" or "satin," whereas, the linings of the tops of such boxes are not satin but are rayon and the linings of the trays are not satin or velour but are rayon and treated paper, respectively; and, through the use of the terms "jewel stones" in describing some of respondents' necklaces and earrings, that the insets are precious stones, whereas, the insets of necklaces and earrings are not precious stones but are glass.

The complaint further alleges that respondents attach or cause to be attached to their merchandise, or furnish to their purchasers for attachment to said merchandise, tickets or tags upon which prices are printed, thereby representing, directly and by implication, that such prices are the regular and usual retail prices for said merchandise, whereas, in truth and in fact, said prices are not the regular and usual retail prices but are fictitious and greatly exaggerated prices. It is further alleged that the cases of watches offered for sale and sold by respondents are composed of a base metal which has been treated and processed so as to closely simulate gold or gold alloy in color, feel and appearance, and, since there is nothing on or about said watch cases to indicate that they are composed of material other than gold or gold alloy, some members of the purchasing public are likely to accept such watch cases as gold or gold alloy.

Oral hearings have been held and the matter is now before the undersigned hearing examiner for decision upon the complaint, motion to dismiss, reply in opposition thereto, proposed findings of fact, conclusions of law, and order filed by respective counsel. All findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded, are herewith rejected. Accordingly, upon the basis of the entire record, the hearing examiner makes the following findings of fact, conclusions of law therefrom, and order:

FINDINGS OF FACT

1. Respondents Michael Z. Berger and Joseph Mermelstein are individuals and co-partners doing business as M. Z. Berger & Company and The Berger Watch Company, with their office and principal place of business located at 30 W. 22d Street, New York 10, New York. In such business, respondents are now and for more than two years last past, have been engaged in the sale and distribution from their place of business in New York, of merchandise, including men's and ladies' watches, watch sets, pens and pencils, cuff links, tie clasps, money clips, key chains, necklaces, compacts, lipstick containers and wallets, to jobbers and dealers located in various other states of the United States, including the District of Columbia, for resale to the general public. Said trade by respondents with jobbers and dealers in commerce between and among the various states of the United States, including the District of Columbia, has been substantial.

2. We will first pass on the allegations contained in Subparagraphs 1 of Paragraphs Three and Four of the complaint that a watch, even though it may contain 17 jewels, is not properly described as a 17 jewel[1] watch unless it contains a jeweled lever. Considerable testimony was received from expert witnesses on this issue. Most of the expert witnesses offered in support of the complaint testified that, even though a watch may contain 17 jewels, it may not properly be described as a 17 jewel watch unless it contains two jewels in the lever. However, the expert witnesses offered by respondents, including one of the Commission witnesses, testified, in effect, that "you have to call a watch by the number

[1] A preponderance of the evidence shows that the term "jewel" as applied to a watch, is a misnomer. As a matter of fact, it is not a jewel, but is merely a synthetic stone, usually made to resemble a ruby or sapphire.

of jewels it has. If the watch has 12 jewels, it is a 12 jewel watch. If it has 17, it has to be called a 17 jewel watch." In other words, the expert witnesses offered on behalf of respondents testified that, in the watch industry, the definition of a so-called "jeweled" watch has no relationship whatsoever to the type of escapement [2] in the watch. In the history of the watch trade, the word "jewel" is synonymous with the function of the "jewel" in the watch rather than the type of movement or escapement.

3. Counsel supporting the complaint has not cited a decision by the Commission in a contested case in support of his contention that, in order to be called a 17 jewel watch, a watch must contain two "jewels" on the lever.[3] Nor have we been able to find a decision of the Commission passing on this question. Therefore, we will look solely to the testimony and evidence of record to determine the question. The complaint does not raise any issue as to the quality of respondents' pin lever watch as contrasted to a "jeweled" lever watch. However, some of the witnesses offered by the Commission testified that a "jeweled" lever watch is of higher quality than a pin lever watch. Other Commission and all of respondents' expert witnesses testified that a "jeweled" lever watch is not an absolute assurance of good quality. Other factors must be considered, such as material, workmanship, and the purpose of the manufacturer, whether to produce a high quality and expensive watch for the higher priced market or a reasonably serviceable watch at a cheap price for the lower price market. Therefore, in this decision we will not pass on the quality of respondents' watch but only on the question whether respondents' 17 jewel pin lever watch may properly be called a "17 jewel watch."

4. The evidence shows that the mechanical principle and function of a pin lever and so-called "jewel" lever escapement is the same. Pin lever watches have been manufactured for many years but it has only been since approximately 1939 or 1940 that pin lever watches have been imported and sold in the United States. They are mostly of Swiss manufacture. In recent years they have become

[2] The "escapement" is the lever in a watch which transfers the power of the mainspring to the balance wheel, whether the watch has a pin lever or jewel lever. The lever is sometimes called the "pallet." The pins or "jewels" in this lever contact the teeth of the escape or balance wheel.

[3] However, in support of one of the other charges in the complaint, Subparagraphs 2 of Paragraphs Three and Four, that a watch, in order to be properly described as a "jeweled" watch, must contain 7 jewels in the escapement, two of which must be on the lever. Counsel supporting the complaint cites the following Commission cases: *World Wide Watch Co., Inc., et al*, Docket 7076; *Cimier Watch Corp.*, Docket 6703; *Windsor Pin Corporation*, Docket 6356; and *Edward Roseman, et al*, Docket 6358. The orders issued in each of these cases were based on consent agreements. Consequently, they cannot be considered as legal precedents for the proposition advanced by counsel supporting the complaint.

a strong competitor in sales with so-called "jewel" lever watches, although selling at a lower price than watches with jewel levers. The pin lever watch is better adapted to mass production than the so-called "jewel" lever watch. The lever is blanked out from a band or roll of hard metal or brass on a press tool.[4] Each lever blanked out by the press tool is of uniform shape, size and thickness. In the same operation, two holes are made in the lever for insertion of the pins. Each hole in each lever is in the same relative position. The pins are made of hardened, tempered, polished steel and are turned out on automatic machines so that they are of uniform diameter, length and size. The pins are then pressed into the holes in the lever by special tools in a semi-automatic production line operation. Thus, the watchmaker, in assembling the watch, cannot change the position of the pins. Their position is controlled by the accurateness and precision of the press tool on which the lever was blanked out.

5. On the other hand, in the "jewel" lever watch, there are two synthetic stones on the lever instead of the two steel pins, as in the pin lever watch. The stones are set in notches in the lever. In assembling the watch at the factory, the watchmaker must check to see if these stones are in correct position on the lever so as to make proper contact with the teeth of the escapement wheel. If they do not, the watchmaker must adjust their position. This operation is called the afchevaje and requires a skilled watchmaker. Thus, the cost of assembling a so-called "jewel" lever watch is higher than the cost for assembling a pin lever watch. Therefore, the retail price or cost of the pin lever watch is less than the price or cost of the "jewel" lever watch. The difference in price or cost of the two types of watches is not attributable to the cost of the synthetic stones or "jewels." The evidence shows that the customs duty on "jewel" lever watches is 13½¢ per "jewel" and the customs duty on a 17 jewel pin lever watch is the same as the duty on a 17 jewel lever watch of the same size.

6. As previously stated, the complaint does not bring into issue in this case the comparative quality of respondents' 17 jewel pin lever watch as compared to a 17 jewel watch with a "jewel" lever. However, most of the witnesses who testified in support of the complaint stressed the superior quality of the "jewel" lever watch. In his proposed findings of fact, counsel supporting the complaint argues that the escapement (lever) is the most important part of a

[4] The evidence shows that the press tool for the pin lever watch is carefully manufactured for accuracy. The press tool is used in many industries, from the heavy automobile industry to the very fine and delicate watch industry.

watch and the "quality" is determined by this part of the watch. He argues as follows: "Jewels are placed in the movement of a watch for the purpose of reducing friction; the escapement is the most important part of a watch and, since there are no "jewels" on the lever of a pin lever watch, respondents' 17 jewel pin lever watch cannot properly be called a "17 jewel watch." There is no factual nor legal basis in this record for such a contention. A preponderance of the reliable, probative and substantial evidence establishes the fact that the watch industry does not associate a watch marked "17 jewels" with any particular type of escapement.

7. Counsel supporting the complaint contends that respondents have added two "extra" jewels, one cap "jewel" on the top of the escape wheel and one hole "jewel" on the bottom of the center wheel, and, with no "jewels" on the lever, respondents are misrepresenting their 17 jewel pin lever watches as "17 jewel watches." There is no legal nor factual basis for such a contention. The evidence is undisputed that each of the 17 "jewels" in respondents' 17 jewel pin lever watch serves a mechanical purpose as a frictional bearing. Even counsel supporting the complaint does not dispute this fact. The evidence establishes that the fact that the watch does not have "jewels" in the lever does not rob it of its character as a 17 jewel watch.

8. Counsel supporting the complaint also contends that the definition of a "17 jewel watch" as understood by the American consumer has crystallized as a quality mark for a type of movement and this definition has been developed by the advertising practices of manufacturers of "jewel" lever watches. On the contrary, a preponderance of the evidence shows that the American consumer does not associate a watch marked "17 jewels" with any particular type of escapement. The evidence further shows that the American consumer is not aware of any distinction between a pin lever and a jewel lever watch. Furthermore, the question of "quality" of watches is not in issue in this case. In this connection, counsel supporting the complaint refers to the testimony of Mr. Van Busch, a witness for the Commission, and Rose Bock, a witness for respondents, as demonstrating the inferior quality of respondents' 17 jewel pin lever watches and their deceptiveness. This hearing examiner does not consider the testimony of Mr. Van Busch worthy of belief. At a hearing held on April 23, 1959, in New York, Mr. Busch appeared as a witness for the Commission, and Mr. Van Busch testified, among other things, on both direct and cross examination, that his 54 retail jewelry stores had not ever imported, bought, sold, carried nor stocked 17 jewel pin lever watches. Re-

called at a subsequent hearing on June 9, 1959, in New York City, for further cross examination by respondents under a subpoena *duces tecum* and confronted with copies of purchase invoices for 17 jewel pin lever watches by Busch Jewelry Stores, Mr. Van Busch repudiated his testimony given at the former hearing and testified that his stores do buy, import, stock and sell 17 jewel pin lever watches and that as far back as 1944 his company stocked and sold 1 jewel, 7 jewel and 15 jewel pin lever watches; and as far back as 1948 has sold 17 jewel pin lever watches which they advertised as "17 jewel watches." He further testified that, for about ten years, his company has been selling 17 jewel pin lever and also 17 jewel lever watches under the designation "17 jewels." With respect to the testimony of Mrs. Rose Bock, respondents' employee and a witness for respondents, counsel supporting the complaint contends that her testimony supports his contention of the deceptiveness and inferior quality of respondents' 17 jewel pin lever watches. Even if the quality of respondents' watches were in issue, Mrs. Bock's testimony does not support the interpretation suggested by counsel supporting the complaint. Mrs. Bock testified concerning her purchase of a particular model 17 jewel pin lever watch at a Busch Jewelry Store on 14th Street in New York City on June 3, 1959. Mrs. Bock's employer, Mr. Berger, one of the respondents, had instructed her to attempt the purchase of a particular model 17 jewel pin lever watch at one of the stores of Busch Jewelry Company. Mrs. Bock tesified that she went to the Busch Jewelry Store on 14th Street and pointed out the particular watch which was in the window to the clerk, the store clerk asked her why she did not apply the purchase price she was paying for that particular watch [5] and apply it on a higher priced watch, but that finally the salesman "reluctantly" sold her the watch which she had been instructed to purchase. In other words, the clerk attempted to induce her to purchase a higher priced watch.

9. Finally, counsel supporting the complaint states that Mr. John Ciana, an expert watch technician from Switzerland who testified for respondents was prejudiced, made contradictory statements, was guilty of hedging, and refused to make forthright replies, as shown by "the very speech habits he uses." The last criticism is explainable due to the fact that Mr. Ciana does not speak English fluently. Mr. Ciana testified that his native language is French and he has some difficulty with English. This examiner carefully observed

[5] One of Mrs. Bock's employers, the respondent Berger, had shown her a watch (which was a 17 jewel pin lever watch) and instructed her to attempt the purchase of an identical watch from the Busch Jewelry Store.

Mr. Ciana during his testimony, as well as every other witness who testified, and this examiner was favorably impressed with the apparent forthrightness, candor, integrity, knowledge of watches, and independence of Mr. Ciana. The circumstance that Mr. Ciana was present in the hearing room during several days of testimony by other witnesses is no reason for disqualifying his testimony. If Mr. Ciana should be disqualified for this reason, then the testimony of practically all of the witnesses who testified for the Commission would likewise be disqualified because, like Mr. Ciana, many of them were present in the hearing room during the testimony of other witnesses. Counsel also criticizes Mr. Ciana for his testimony that the oscillatory system, which he characterized as the balance wheel and hairspring, are the most important part of a watch, and, in drawing a distinction between the balance wheel and the escapement.[6] There is no merit in this contention. Mr. Ciana was not alone in his testimony that the balance wheel and hairspring are the most important parts of a watch. Other witnesses for the respondents corroborated Mr. Ciana's testimony in this respect. Experts do not always agree on all technical matters. It does not follow that because Mr. Ciana did not agree with Mr. Chaipis that the escapement is the most important part of a watch, Mr. Ciana was thereby attempting to discredit Mr. Chaipis' testimony. These are not valid nor legal grounds on which to disqualify the witness Ciana. Accordingly, the examiner finds that the allegations contained in subparagraphs 1 of paragraphs 3 and 4 of the complaint have not been sustained by a preponderance of the reliable, probative, and substantial evidence.

10. We will now pass to the allegations contained in subparagraphs 2 of paragraphs 3 and 4 of the Complaint where it is alleged that respondents have represented that certain of their watches containing one jewel are "jeweled watches," whereas, as generally understood in the industry, a watch, in order to be properly described as a "jeweled" watch, must contain at least 7 jewels, each of which serves a mechanical purpose as a frictional bearing and, therefore, respondents' watches containing one jewel cannot properly be described as "jeweled." As stated in paragraph 3 hereof, the cases cited by counsel supporting the complaint in his proposed findings of fact as supporting this contention are *World Wide Watch Co., Inc., et al*, *Cimier Watch Corp.*, *Windsor Pen Corporation*, and *Edward Roseman*, *supra*, all issued on the basis of consent agree-

[6] Counsel supporting the complaint argues that, in drawing a distinction between the balance wheel and the escapement, (lever), Mr. Ciana was attempting to discredit Mr. Chaipis, a watchmaker who testified as a witness for the Commission. Mr. Chaipis testified that the escapement is the most import part of a watch.

ments. Therefore, the orders issued in these cases cannot be considered as legal precedents for the proposition advanced. However, there is evidence in the record to sustain the allegation that, as generally understood in the industry, a watch, in order to be properly described as a "jeweled" watch, must contain at least 7 jewels, each of which serves a mechanical purpose as a frictional bearing. However, the only evidence offered in support of this allegation is a one jewel Rosskoff watch, (Commission Ex. 10A), and a box (Commission Ex. 10B) containing the watch, which were obtained by Mr. Needelman, attorney-investigator for the Commission, from a showcase in respondents' place of business in April, 1957. The evidence further shows that at the time the attorney-investigator obtained this watch and the box from the showcase, the watch, a one jewel Rosskoff, had been in the showcase for some two years and was no longer being imported or sold by respondents. Respondents further contend that, since they had discontinued the sale of one jewel watches for more than two years prior to issuance of the complaint and did not intend to resume their sale in the future, there is no public interest in continuing this allegation of the complaint. Upon consideration of the entire record, the examiner finds that respondents had discontinued the importation and sale of one jewel watches more than two years prior to the filing of the complaint herein and respondents do not intend to resume their sale at any time in the future. Furthermore, the record shows that the Swiss watch manufacturers have discontinued labeling any watch as a "jeweled" watch which contains less than 7 jewels. Accordingly, the hearing examiner finds that the public interest does not require the further prosecution of the complaint with respect to Subparagraphs 2 of Paragraphs Three and Four of the complaint.

11. The hearing examiner finds that the allegations contained in subparagraphs 3 of paragraphs 3 and 4 of the Complaint to the effect that respondents guarantee certain of their watches for one year whereas respondents do not guarantee their watches in every respect as their guarantee requires the payment of a service charge which fact is not disclosed in their advertisements have been established by a preponderance of the reliable, probative, and substantial evidence. The evidence shows that the guarantee requires that the purchaser pay the sum of $1.00 if the repair is requested within one year from date of purchase and $2.00 if more than one year and less than two years.

12. Subparagraphs 4 of paragraphs 3 and 4 of the complaint allege that certain of respondents' merchandise contains "gold" or has a "gold finish," whereas the articles described as "gold" and

"gold finish" contain no gold. The only evidence offered to support this allegation are Commission's Exhibit No. 6, which is a photostatic copy of an invoice from George Grodin Pens, Inc. to respondents, dated August 31, 1956, for the purchase of pens and pencils; Commission Exhibit No. 7, which is a photostatic copy of an advertisement by respondents in Life Magazine, which advertised, among other things, "gold finish" retractable ball point pens; Commission Exhibits Nos. 2A–F, which are, respectively, a box, watch, money clip, tie bar, and a set of men's cuff links. Mr. Mitchell Lachow, a ball point pen manufacturer identified Commission Ex. No. 6 as being an invoice issued to cover shipment of metal ball pens and pencils of polished brass to respondents, but did not identify such pens and pencils as being the "gold finish" retractable ball point pens described in Commission Exhibit No. 7, the photostatic copy of the Life Magazine advertisement. Accordingly, the hearing examiner finds that the allegations contained in subparagraphs 4 of paragraphs 3 and 4 of the complaint have not been established.

13. Subparagraphs 5 of paragraphs 3 and 4 of the complaint allege that certain of respondents' wallets are made of "genuine leather" whereas they are actually split leather with a cardboard filler. In support of this allegation, counsel supporting the complaint offered the testimony of Irving R. Glass, executive vice-president of the Tanner's Council of America, which is the national trade association of the leather industry. Mr. Glass qualified as an expert on leather and leather goods. One of respondents' wallets, with the gold letters "Genuine Leather" stamped thereon, (Commission Exhibit No. 8) was exhibited to Mr. Glass. With a knife, Mr. Glass cut into the surface of the wallet. After examining the wallet, Mr. Glass testified that the material in the wallet is technically known as split leather with a hair cell plate; a finish imprinted on the split leather to simulate the characteristic hair cell appearance of top grain cowhide leather. The partition in the wallet he described as pigmented or coated paper or some other cellulose material held together with a binder to simulate cowhide. The hearing examiner finds, therefore, that the allegations contained in subparagraphs 5 of paragraphs 3 and 4 of the complaint have been established.

14. Subparagraphs 6 of paragraphs 3 and 4 of the complaint allege that respondents have represented, through the use of the terms "Alligator Grain," "Ostrich Grain" and "Pin Leather Grain" as descriptive of the coverings of certain presentation boxes, that such coverings are composed of leather made from the hides of

alligators, ostriches and seals, respectively, whereas they are not leather of any kind but are a fabric material. In support of these allegations, counsel supporting the complaint offered the testimony of Mr. Glass, who testified that Commission Exhibit No. 9 (a box) has a covering of fabric with some kind of impregnated finish printed simulated grain, imitating seal or walrus. Mr. Glass also testified that the material on the outside of the box, Commission Exhibit No. 10B, is a printed fabric, coated with pyroxilin mixture printed to resemble alligator lizard and may not properly be called "Alligator grain," as referred to by respondents in their advertising. Accordingly, the allegations made in subparagraphs 6 of paragraphs 3 and 4 of the complaint have been established with respect to respondents' use of the terms "Alligator Grain."

15. Subparagraphs 7 of paragraphs 3 and 4 of the complaint allege that respondents represented that the linings of the top and tray of the interior of certain presentation boxes are "satin" and "velour" or "satin" respectively, whereas the linings of the tops of said boxes are not satin but are rayon and the linings of the trays are not satin or velour but are rayon and treated paper, respectively. Mr. Leon Levinstein, operator of Drema Manufacturing Company and Alma Box Company, New York, New York, testified that the bottom lining of the box identified as Commission Exhibit No. 9 is paper, called velour. It may be called a velour, rayon coated paper. He further testified that the lining in the top of the box is an acetate rayon, known in the trade as satin. Accordingly, it is found that the allegations contained in subparagraphs 7 of paragraphs 3 and 4 of the complaint have been established.

16. Subparagraphs 8 of paragraphs 3 and 4 of the complaint allege that the respondents represented, through use of the terms "jewel stones" in describing some of their necklaces and earrings, that the insets are precious stones, whereas such insets are not precious stones but are glass. Mr. George Robert Crowningshield, who is associated with the Gemological Institute of America, an educational organization for the study of precious stones, examined and testified concerning the material in Commission Exhibits No. 5A, B, and C, which is a necklace, earring, and matching earring, respectively. Mr. Crowningshield examined the exhibits under a gem microscope and testified that the so-called center stone in the necklace was plastic with metallic foil to give it sparkle and the other stones appeared to be of glass. In other words, the drop in the necklace is an imitation pearl and the insets appeared to be foil-backed glass cemented into their settings. He testified that Exhibit No. 5B is an earring with a yellow metal ear screw and an ornament

consisting of a center cabochon of plastic with a metal insert and a pink and purple stone inset of cut glass, foil backed, cemented into their settings. Exhibit No. 5C is a matching earring similar to Exhibit No. 5B, of plastic and glass. He testified that they are not precious stones. He testified that the term "precious stone" refers to a naturally occurring material used for ornamental purposes. He further testified that the exhibits are not synthetic in the strict gemological sense because a synthetic has to reproduce precisely the chemical, optical and physical properties of the stone it imitates. The exhibits in evidence merely reproduce the color so they are considered imitation. Upon the basis of this testimony, it is found that the allegations set out in subparagraphs 8 of paragraphs 3 and 4 of the complaint have been established.

17. Paragraph 5 of the complaint alleges that respondents attach to their merchandise or furnish to their purchasers for attachment to said merchandise, tickets or tags upon which prices are printed, thereby representing, directly and by implication, that such prices are the regular and usual retail prices for said merchandise, whereas said price figures are not the regular and retail prices but are fictitious and greatly exaggerated prices. A preponderance of the evidence shows and it is found, that the prices shown on such tags were not the regular and usual retail prices for said merchandise but were in excess of the usual and regular retail prices. The evidence shows that, prior to August, 1956, respondents pre-ticketed the merchandise which they sold. After August, 1956, respondents did not pre-tag any merchandise and furnished price tags only upon the request of their customers. This practice continued until about April, 1957, when after a conference with Mr. Needelman, attorney-investigator for the Commission, respondents discontinued supplying price tags to their customers, even though such customers might have requested price tags. It is found, therefore, that respondents discontinued the furnishing of price tags to their customers for merchandise purchased on and after April 1957.

18. Paragraph 6 of the complaint alleges: That respondents' watch cases are composed of a base metal which has been treated so as to simulate gold or gold alloy and there is nothing on the case to indicate they are not gold or gold alloy; many members of the purchasing public are unable to distinguish between such base metal watch cases and cases which are composed of gold or gold alloy; consequently, such base metal cases are likely to be accepted by some of the purchasing public as gold or gold alloy; watch cases composed of gold or gold alloy are superior to base metal in value, quality and durability, and are preferred by the public over base

metal watch cases. Mr. Charles A. Jedlicka, Chief Spectrochemist with Lucius Pitkin, Inc., consulting chemists, New York, New York, testified that he had made an analysis of the surface of the case of respondents' watch, Commission Exhibit No. 25B and found it to be anodized aluminum, and contained no gold whatsoever.

CONCLUSIONS

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

2. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had and now has the tendency to induce members of the purchasing public into the erroneous and mistaken belief that all of such statements, representations, acts and practices are true and proper and into the purchase of a substantial number of products as a result of such erroneous and mistaken belief. As a consequence thereof substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

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

ORDER

It is ordered, That respondents Michael Z. Berger and Joseph Mermelstein, individually and as co-partners doing business as M. Z. Berger & Company and The Berger Watch Company, or under any other name, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) that merchandise is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed;

(b) that an article containing no leather is composed of leather, or otherwise misrepresenting the leather content of any article;

(c) that certain amounts are the usual or regular retail prices of merchandise, when such amounts are in excess of the prices at which such merchandise is usually and regularly sold at retail.

2. Requiring the payment of a service charge in connection with a guarantee unless the fact that a service charge is required and the amount thereof is clearly disclosed.

3. Using the word "leather" alone or in connection with other words to designate, describe or refer to articles made of split leather unless such fact is clearly disclosed.

4. Using the word "satin" to describe or refer to rayon and satin or velour to refer to treated paper or otherwise misrepresenting the composition of the materials used in connection with or as a part of their merchandise.

5. Using the words "jewel stones" or any other words of similar import to designate or describe insets made of glass or materials other than precious stones.

6. Putting into operation any plan whereby retailers or others may misrepresent the regular and usual retail price of merchandise.

7. Offering for sale or selling watches, the cases of which are composed of base metal manufactured or otherwise processed to simulate or have the appearance of precious metal, without marking such cases so as to disclose clearly the true metal composition thereof.

It is further ordered, That the allegations contained in subparagraphs 1, 2, and 4 of paragraphs 3 and 4 of the complaint be, and the same hereby are, dismissed.

OPINION OF THE COMMISSION

By KINTNER, *Chairman:*

The complaint in this matter charges respondents with violation of Section 5 of the Federal Trade Commission Act. Counsel supporting the complaint has appealed from the hearing examiner's ruling dismissing two of the allegations of the complaint and from the findings and conclusions upon which these rulings were based.

The first point raised on this appeal concerns the hearing examiner's dismissal of the allegation that respondents falsely and deceptively represented their pin lever watches as "17 Jewel Watches." The complaint states in this connection that, as generally understood in the industry, a watch, even though it may contain 17 jewels, is not properly described as a 17 jewel watch unless it contains a jeweled lever. Although respondents' watch contains 17 jewels, each of which serves a mechanical purpose as a frictional bearing, it contains a pin lever escapement, as distinguished from a jeweled lever escapement. The hearing examiner held that the evidence failed to show that the industry associates the term "17 Jewel" with a particular type of movement or escapement and dismissed the allegation. Counsel supporting the complaint has taken exception to this ruling.

The sole issue presented on this part of the appeal is whether the record establishes that in trade usage the term "17 Jewel" refers only to a 17 jewel watch having a jeweled lever escapement. It is unnecessary to describe in detail the mechanisms of the jeweled lever watch and the pin lever watch since there is no dispute that respondents' watch does not have a jeweled lever escapement. Nor is it necessary to consider the argument of counsel supporting the complaint with respect to the comparative quality of the jeweled lever and pin lever watches since this issue is not raised by the aforementioned allegation.

The evidence offered in support of and in opposition to the allegation in question consists almost entirely of testimony of persons engaged in the manufacture, repair or distribution of watches and others closely connected with the watch industry.

Certain of these witnesses testified that the term "17 Jewel" as used in the watch trade, always has reference to a jeweled lever escapement. There is also testimony to the effect that certain watch manufacturers have used the term "17 Jewel" in advertising over a period of many years to designate jeweled lever watches. It is principally upon this evidence that counsel supporting the complaint relies to support his argument that the term "17 Jewel" has become a "term of art applying to 17 jewel watches with jeweled levers, and not pin levers."

The witnesses called by respondents were at least as well qualified by experience and training to testify on this subject as those called by counsel supporting the complaint. All of them testified to the effect that the term "17 Jewel," as used in the trade, denotes only the number of functioning jewels in a watch and does not indicate a type of movement or escapement. Of particular significance is the testimony of two completely disinterested and impartial witnesses, a United States Customs Examiner and an Assistant to the United States Appraiser at the Port of New York. Both of these men testified categorically that the term "17 Jewel" can properly be used to designate a 17 jewel pin lever watch.

An examination of the testomony of certain of the witnesses who appeared in behalf of the complaint discloses certain statements which are not entirely consistent with the position advocated by counsel supporting the complaint. Mr. John Chaipis was shown one of respondents' pin lever watches marked "Lord Nelson 17 Jewels" and was asked whether he would classify the watch as a true 17 jewel watch. He testified as follows:

The WITNESS. May I think this over for a second, your Honor?

Hearing EXAMINER. Can you answer that question yes or no?

The WITNESS. That's what I was trying to figure out. I don't believe that question can be answered with a yes or no. * * *

He then stated that there is a difference between a watch containing a pin lever and one containing a jeweled lever but did not state that the 17 jewel pin lever is not a true 17 jewel watch.

Mr. Jean Louis Roehrich, a watchmaker and jeweler, stated on cross-examination "I just repeat, you have to call the watch by the number of jewels it has. You can't call it anything else. If there is 12 jewels, it is a 12 jewel watch. If it is 17, you have to say it is 17." He also gave the following testimony:

Q. I hand you Commission's Exhibit No. 3B and request that you open it and describe the works in that watch.

A. This is a wrist watch movement with a non-jewel escapement called a pin pallet escapement.

* * * * * * *

Q. Do you find it confusing that the label on the face of that watch refers to 17 jewels?

A. I don't find it confusing because it is marked on the movement, it is marked on the dial. I don't find it confusing.

Mr. Jean R. Graef, president of John R. Graef, Inc., a watch importer, testified that if he opened a watch having the legend "17 Jewel" on the dial, he would expect to find either a jeweled lever escapement or a detent escapement.

While it is apparently true that most of the jeweled watches (having at least 7 jewels) sold in this country during the past 50 years have contained jeweled levers, it does not necessarily follow that the industry associates the term "17 Jewel" with this particular type of escapement. There is testimony by witnesses on both sides that during the same period 17 jewel watches containing other types of escapements have been manufactured, imported and sold in this country. Considering all of the testimony, we are not convinced that the term "17 Jewel" is understood by the industry to mean only watches having 17 functioning jewels, two of which are on the lever.

Moreover, there has been no showing that the public associates the term "17 Jewel" with this particular type of movement. Counsel supporting the complaint contends, in this connection, that the advertising of the 17 jewel, jeweled lever watch in this country over a period of years has caused the public to associate the term

"17 Jewel" with watches having this specific type of movement. While the evidence may tend to establish that the public would expect certain brands of watches so advertised to have a particular type of movement, it does not constitute proof that the public would believe that all watches designated "17 Jewel" would be similarly constructed. Counsel supporting the complaint apparently concedes and the record shows that 17 jewel pin lever watches have been imported and sold in this country for many years. The evidence also shows that these watches have been marked and advertised as "17 Jewel."

We are of the opinion, therefore, that the evidence fails to sustain the allegation pertaining to respondents' use of the term "17 Jewel." For this reason, the appeal of counsel supporting the complaint from the hearing examiner's ruling dismissing this allegation is denied.

The second point presented for our consideration is whether the hearing examiner erred in dismissing on the ground of abandonment the allegation that respondents have misrepresented as "jeweled" certain watches containing only one jewel. The complaint alleges in substance that respondents' use of the term "jeweled" to describe watches containing only one jewel is false and deceptive in that a "jeweled" watch, as generally understood in the industry, is one which contains at least seven jewels, each of which serves a mechanical purpose as a frictional bearing. Although the hearing examiner found that this allegation had been sustained by the evidence, he further held that respondents had discontinued the importation and sale of one-jewel watches more than two years prior to the filing of the complaint and that they did not intend to resume the sale of such watches in the future. He ruled, therefore, that the public interest does not require the further prosecution of the complaint with respect to this particular allegation.

There is no evidence in the record that respondents have sold one-jewel watches during the two-year period prior to the issuance of the complaint and counsel supporting the complaint does not take issue with the finding that the sale of these watches by respondents had been discontinued. He contends, however, that there is no reason to believe that respondents will not resume the practice of selling one-jewel watches as "jeweled."

In arriving at the conclusion that there had been an abandonment of the practice, the hearing examiner was influenced by evidence that Swiss watchmakers had discontinued labeling watches containing less than seven jewels as "jeweled" watches.

We have considered this same point in another case, In the Matter of *Sheffield Merchandise, Inc., et al.*, Docket 6627, wherein the respondents raised the defense of abandonment. According to the record in that proceeding, members of a Swiss association of watch manufacturers make the only one-jewel watch movements sold in this country and in July, 1956, all of these manufacturers discontinued the practice of marking the word "jeweled" on such watches. There is also testimony in that case to the effect that no one-jewel watches, designated as "jeweled," have been imported into this country within the past several years. This information indicates not only a change in competitive conditions in the industry insofar as the practice in question is concerned but also an abandonment of the practice at its source.

We believe that the public interest will best be served by allowing the hearing examiner's ruling on this question to go undisturbed and by maintaining a close scrutiny of respondents' future operations. In so deciding, we do not reach the merits of the charge challenging resopndents' use of the word "jeweled" to designate one-jewel watches and, consequently, we do not adopt as the decision of the Commission the hearing examiner's holding that this allegation has been sustained by the evidence.

The appeal of counsel supporting the complaint is denied and the initial decision, as modified, will be adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision; and the Commission, for the reasons stated in the accompanying opinion, having denied the appeal, and having modified the initial decision in part:

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

It is further ordered, That the respondents, Michael Z. Berger and Joseph Mermelstein, 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

GLOBE READERS SERVICE, INC., ET AL.

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

Docket 7490. Complaint, May 15, 1959—Decision, Mar. 7, 1960

Order requiring a Michigan City, Ind., seller of magazine subscriptions through door-to-door salesmen, to cease selling subscriptions for unauthorized and undeliverable magazines, refusing to make refunds therefor, and requiring customers to accept substitutes.

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

Mr. John J. Mathias and *Mr. Harry E. Middleton, Jr.*, for the Commission.

Mr. William N. Kenefick and *Mr. Donald D. Martin*, of Michigan City, Ind., for respondents.

FINDINGS AS TO THE FACTS, CONCLUSIONS, AND ORDER

The Federal Trade Commission issued its complaint against the above-named respondents on May 15, 1959, charging them with violation of the Federal Trade Commission Act by selling, through solicitors, subscriptions for magazines which were not on their authorized list and were undeliverable and thereafter, in such instances, refusing to refund customers' money and requiring said customers to accept a substitute magazine they would not otherwise have ordered or accepted. By answer, respondents denied the charges. Respondent, Arthur Bradley, by separate answer, alleged that he is no longer an officer of respondent corporation and has no interest in the outcome of this action. He asked that the complaint be dismissed as to him, individually.

Hearings were held before a duly designated hearing examiner of the Commission and testimony and other evidence in support of, and in opposition to, the allegations of the complaint were received into the record. In an initial decision filed September 15, 1959, the hearing examiner found that neither the charge that Arthur Bradley, individually, had violated the Federal Trade Commission Act nor the charge that respondents refused to refund customers' money and required such customers to accept a substitute magazine, had been established by the evidence. He therefore ordered that the complaint be dismissed.

Counsel supporting the complaint filed an appeal from said initial decision and the Commission, after considering said appeal, respondents' brief in opposition thereto and the entire record, has determined that the appeal should be granted and that the initial decision should be vacated and set aside. The Commission further finds that the proceeding is in the public interest and now makes its findings as to the facts, conclusions drawn therefrom and order to cease and desist, which, together with the accompanying opinion, shall be in lieu of the findings, conclusion and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent Globe Readers Service, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 2601 Michigan Street, Michigan City, Indiana.

2. Respondents Warren E. Brubaker, William P. Barry and James Riley are officers of the corporate respondent. They formulate, direct and control its acts and practices, including those alleged to be unlawful. Their address is the same as that of the corporate respondent. Respondent Arthur Bradley, between May 1957 and August 1958, was treasurer of the respondent corporation, but has not been associated with the respondent corporation since the latter date. While employed by Globe Readers Service, Inc., his duties were to see that the company's subscription orders were properly filled. He was the contact man between Globe and the publishers, and did not participate in the formulation, direction or control of the company's activities. The proceeding will be dismissed as to him, and as hereinafter used the term "respondents" will refer to the remaining named respondents.

3. In the course and conduct of their business respondents are now and have been engaged in interstate commerce through the solicitation and sale of magazine subscriptions throughout the various states and by causing such subscriptions to be forwarded to magazine publishers and distributors located in various states other than those in which the magazine subscribers live, and other than that in which respondents' business offices are located.

4. Respondents are now, and at all times mentioned herein have been, in substantial competition in commerce with other corporations, firms and individuals in the solicitation and sale of magazine subscriptions.

5. In the conduct of their business respondents employ certain individuals known generally as crew managers, who enroll and supervise solicitors whose duties are to contact and sell prospective customers in their homes or offices. Respondents, through said crew

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managers, supply the solicitors with credentials in the form of a certificate of authorization, and with order and receipt forms, authorized lists of magazines, and other material. The solicitor collects in full for each subscription taken by him and transmits the subscription order and the full amount collected to the crew manager, who remits to him the amount due as commission, and transmits the order and the remainder of the money to respondents, after first deducting his own commission. The subscription sales made in the course and as a result of the representations of said solicitors inure to the benefit of respondents.

6. The Commission finds that for the purposes of this proceeding, the respondents are responsible for the acts and practices of these solicitors in their solicitation and sale of magazine subscriptions.

7. On many occasions, respondents' solicitors take subscriptions for magazines which are not on their authorized list and which cannot be delivered. On all such occasions coming to their attention, it is respondents' practice to accept payment for the unauthorized magazine and then correspond with the customer solely for the purpose of obtaining a substitute subscription from the authorized list. As a result, many such customers do not receive the refund to which they are entitled but are led to accept a substitute magazine. Respondents have carried this practice one step further in many instances by advising customers that a refund is not available since commissions and allowances had been deducted at the time of sale which could not be recovered.

8. Through use of the aforesaid practice, respondents have refused to refund money for subscriptions to magazines they could not deliver and thus have required customers to select substitute magazines.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents. The aforesaid acts and practices of respondents, as herein found, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, Globe Readers Service, Inc., a corporation, and its officers, and Warren E. Brubaker, William P. Barry, and James Riley, 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 subscriptions for magazines in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Soliciting and accepting magazine subscriptions which respondents are not authorized to solicit.

B. Refusing to refund payments received for subscriptions for magazines which are undeliverable.

C. Requiring customers to accept the substitution of magazines other than those subscribed and paid for.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to Arthur Bradley in his individual capacity and as an officer of the corporation.

It is further ordered, That respondents, Globe Readers Service, Inc., a corporation, and its officers, and Warren E. Brubaker, William P. Barry, and James Riley, individually and as officers of said corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Commissioner Tait not participating.

OPINION OF THE COMMISSION

By KERN, *Commissioner:*

Respondents in this matter are charged with violation of Section 5 of the Federal Trade Commission Act in the solicitation and sale of magazine subscriptions. After hearings in due course, the hearing examiner entered an initial decision dismissing the complaint. Counsel supporting the complaint has appealed from that ruling.

The complaint alleges, among other things, that:

> In many instances respondents' solicitors sell subscriptions for magazines which are not on respondents' authorized list of magazines and are undeliverable. In these instances, respondents refuse to refund the customers' money and, in order to obtain some benefit for the money expended, such customers are required to accept a substitute magazine from the authorized list which they would not have otherwise ordered or accepted.

The facts disclose that respondents furnished certificates to their solicitors identifying these individuals as their representatives; that the order forms used by the solicitors were those of Globe Readers Service, Inc.; that respondents were well aware that these solicitors were obtaining subscriptions for unauthorized magazines and that respondents profited from this practice. On the basis of this evidence, it is apparent that so far as the public was concerned, the solicitors were acting for and in behalf of the respondents in the solicitation and sale of magazine subscriptions. Under the authority of *International Art Co.* v. *Federal Trade Commission*, 109 F. 2d 393, there can be no doubt that respondents are responsible for the acts and practices of these solicitors.

The only issue raised on the appeal is whether the record shows that respondents have refused to refund the customers' money in instances where such customers have subscribed for unauthorized magazines. We think the record fully supports such a finding.

The evidence adduced with respect to this issue establishes that there were many instances in which solicitors sold subscriptions for magazines not on the respondents' authorized list. These unauthorized magazines could not be delivered by the respondents. However, rather than offering to refund the money accepted as a result of their solicitors' misrepresentations, respondents sent all customers who had ordered unauthorized magazines a form "selection letter" (Commission Exhibit 2) for the sole purpose of obtaining a substitute subscription from the authorized list. The record clearly establishes that as a result of this practice, many customers subscribed for magazines other than those they had ordered. In our view, these facts establish a method of doing business whereby respondents refused to refund customers' money and thus required the selection of a substitute magazine, within the intent and meaning of the complaint. Moreover, the record shows that this method of doing business was implemented for a substantial period of time by a letter to customers who requested a refund, advising them that respondents were not in a position to give a refund since commissions and allowances were deducted at the time of sale which could not be recovered (Commission Exhibit 3). The fact that some customers persisted in their efforts to obtain a refund and eventually were successful does not alter the fact that such refund had been refused. We think the hearing examiner in holding to the contrary was too restrictive in his interpretation of the charge.

The hearing examiner also held that the only charge in the complaint is that respondents refuse to refund the customers' money for an unauthorized subscription and require such customers to accept a substitute magazine. We do not construe the complaint as being so limited. In our opinion, the complaint relates to two different practices which are closely related. One is that stated by the hearing examiner. The other is that respondents, through solicitors, sell and accept payment for subscriptions for unauthorized magazines which are undeliverable, thus leading to the substitution of other magazines by the respondents. As previously stated, both allegations are sustained by the evidence.

In view of the foregoing, the appeal of counsel supporting the complaint is granted. The initial decision is set aside, and we are entering our own findings as to the facts, conclusions and order to cease and desist in conformity with this opinion.

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

IN THE MATTER OF

REICHART FURNITURE COMPANY ET AL.

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

Docket 7535. Complaint, July 13, 1959—Decision, Mar. 8, 1960

Consent order requiring retailers of furniture, home furnishings, electrical appliances, etc., in Wheeling, W. Va., to cease making deceptive pricing and savings claims for their merchandise by such advertisements as "Regularly $16.95 BASE CABINET $8.88 * * *"; "5-Pc. Day-O-Niter Outfit! Usually $129.95! Save $41.95 * * * At Reichart's Only $88," in which the prices following the words "Regularly," "Usually," and, "List" were greatly in excess of the usual prices, and the purported savings were fictitious.

Mr. Morton Nesmith for the Commission.

Mr. J. T. McCamic of *McCamic & Tinker*, of Wheeling, W. Va., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes hereinafter referred to as the Commission) on July 13, 1959, issued its complaint herein, charging respondents with having violated the provisions of the Federal Trade Commission Act by the use of false, misleading and deceptive advertisements by mail and otherwise in interstate commerce in connection with the prices of furniture, home furnishings and electrical and other household appliances sold by them to the public. Respondents were duly served with process and thereafter on October 26, 1959, agreed to a motion to amend the complaint made by counsel supporting the complaint. This motion was found to be without prejudice to the public interest or to the rights of the parties, and it was sustained by an order of the hearing examiner