pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

5. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the term "Dyed Lamb".

6. Failing to set forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to each section of fur products composed of two or more sections containing different animal furs.

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 describe as natural fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

C. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

It is further 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 this order.

IN THE MATTER OF

KENTON LEATHER PRODUCTS, INC., ET AL.

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

Docket 7812. Complaint, Mar. 10, 1960—Decision, Nov. 13, 1962*

Order dismissing without prejudice, for failure of proof, complaint charging New York City manufacturers with attaching to their leather wallets and billfolds, tickets upon which a certain amount was printed along with the words "Comparable Billfolds", when in fact respondents' wallets or billfolds were inferior in grade and quality to products selling for the amount so printed.

*As amended October 26, 1960.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Kenton Leather Products, Inc., a corporation, and Murray Smallman and Michael Kaye, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Kenton Leather Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business at 101 West 31st Street, New York City, N.Y.

Individual respondents Murray Smallman and Michael Kaye are officers of the corporate body. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacture, offering for sale, sale and distribution of leather wallets and billfolds to retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said product, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents, for the purpose of inducing the purchase of their product, have engaged in the practice, in connection therewith, of attaching or causing to be attached, tickets to their wallets or billfolds, upon which a certain amount is printed, accompanied by the legend "Comparable Billfolds", thereby representing, directly or by implication, that their said wallets or billfolds were of like grade and quality in all material respects to other wallets or billfolds currently offered for sale and sold at this amount printed on the ticket. In truth and in fact, respondents' said wallets or billfolds were inferior in grade and quality in material respects to other wallets and billfolds currently selling for the amount printed on said tickets.

PAR. 5. By the aforesaid practice, respondents place in the hands of retailers means and instrumentalities by and through which they may mislead the public into the belief that the grade and quality of respondents' wallets or billfolds are comparable to the grade and quality of wallets or billfolds of competitors, selling or sold at the amounts printed on the aforesaid ticket.

PAR. 6. In the course and conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of wallets of the same general kind and nature as that sold by respondents.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practice 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.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Anthony J. Kennedy, Jr., for the Commission.

Howrey, Simon, Baker and Murchison, of Washington, D.C., for the respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

Respondents are charged in the Commission's complaint issued on March 10, 1960, with practices alleged to be misleading and deceptive in violation of the Federal Trade Commission Act. The crux of the charges are set forth in paragraphs 4 and 5 as follows:

"Respondents, for the purpose of inducing the purchase of their product, have engaged in the practice, in connection therewith, of attaching or causing to be attached, tickets to their wallets or billfolds, upon which a certain amount is printed, accompanied by the legend 'Comparable Billfolds', thereby representing, directly or by implication, that their said wallets or billfolds were of like grade and quality in all material respects to other wallets or billfolds currently offered for sale and sold at this amount printed on the ticket. In truth and in fact, respondents' said wallets or billfolds were inferior in grade and quality in material respects to other wallets and billfolds currently selling for the amount printed on said tickets."

"By the aforesaid practice, respondents place in the hands of retailers means and instrumentalities by and through which they may mislead the public into the belief that the grade and quality of respondents' wallets or billfolds are comparable to the grade and quality of wallets or billfolds of competitors, selling or sold at the amounts printed on the aforesaid ticket." (As amended October 26, 1960.)

Proposed findings of fact and conclusions of law were filed by counsel for the parties on March 16, 1962. Oral argument was had thereon on March 20, 1962. The hearing examiner has carefully reviewed and considered same. Proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case, the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent, Kenton Leather Products, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 101 West 31st Street, New York, New York.

2. Individual respondent Murray Smallman is an officer of the corporate respondent. Individual respondent Michael Kaye was an officer of the corporate respondent until the date of his death on February 11, 1960. Their address was the same as that of the corporate respondent.

3. Individual respondent Murray Smallman formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices set forth in the complaint in this matter.

Individual respondent Murray Smallman is the president of the corporate respondent and has been from the very incorporation of this business. This has been a corporation with the ownership equally divided between Murray Smallman and Michael Kaye until there was a new division of stock in August 1959, at which time certain stock was given to the children of Murray Smallman and Michael Kaye. However, at that time Murray Smallman and Michael Kaye reserved to themselves the majority shares of voting stock, i.e., Murray Smallman 60 shares of Class A Stock and Michael Kaye 60 shares of Class B Stock.[1] The Board of Directors of the corporate respondent consisted of Murray Smallman, Michael Kaye and their wives. After the death of Michael Kaye in February 1960, the Board consisted of Murray Smallman, Adele Smallman and Mrs. Michael Kaye. There is no evidence of record to indicate that Mrs. Adele Smallman and Mrs. Michael Kaye ever took an active interest in the business of the corporate respondent.

4. Respondents are now, and for some time last past have been, engaged in the manufacture, offering for sale, sale and distribution of leather wallets and billfolds to retailers for resale to the public.

5. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia and maintain, and at all times mentioned herein have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

6. Respondents, for the purpose of inducing the purchase of their product, have engaged in the practice, in connection therewith, of attaching or causing to be attached, tickets to their wallets and billfolds, upon which a certain amount is printed, accompanied by the legend "Comparable Billfolds", thereby representing directly or by implication that their said wallets or billfolds were of like grade and quality in all material respects to other wallets and billfolds currently offered for sale and sold at this amount printed on the ticket. In truth and in fact respondents' said wallets and billfolds were inferior in grade and quality in material respects to other wallets and billfolds currently selling for the amount printed on said tickets.

7. By the aforesaid practice, respondents place in the hands of retailers means and instrumentalities by and through which they may mislead the public into the belief that the grade and quality of respondents' wallets or billfolds are comparable to the grade and quality of wallets or billfolds of competitors, selling or sold at the amounts printed on the aforesaid ticket.

8. In the course and conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of wallets of the same general kind and nature as that sold by respondents.

[1] There is a total of 100 issuable shares of Class A Stock; also, the same number of issuable shares of Class B Stock.

CONCLUSIONS

It must be concluded from the evidence that during the period contemplated by the complaint respondents engaged in the deceptive practice of selling billfolds and wallets ticketed as being "Comparable Billfolds" to those of competitors, when in fact they were inferior. There can be no doubt that a reasonable inference can be drawn from the semantics used by respondents that the legend "Comparable Billfolds" means comparability in grade, quality and value to competitors' billfolds retailed at the same or higher price. In fact, the theory of respondents' defense does not contest this.

The Commission's first witness, Virgil E. Hickman, an attorney-examiner for the Commission described the manner in which he obtained the wallets and billfolds that became Commission Exhibits 3A, 4A, 8D and 9C. Commission Exhibit 3A was purchased by him on October 27, 1959, at Gilchrist's in Boston [2] at a price of $2.99. Commission Exhibit 4A was purchased at Snellenberg's in Philadelphia at a price of $2.99 on October 19, 1959.[3] Commission Exhibit 8D was obtained from the sales office of Prince Gardner in New York in November 1959. Mr. Hickman testified that he asked for a wallet that retailed at $7.50.[4] He also stated that he had seen the identical wallet in many stores.[5] Commission Exhibit 9C was obtained from the sales office of Buxton in New York on November 23, 1959. His testimony further indicates it was substantially identical to those he had seen in the stores that retail at $7.50.[6]

Since these last two wallets were not purchased in retail stores, the hearing examiner was reluctant to consider this latter evidence of much probative weight.[7] Accordingly, counsel supporting the complaint introduced evidence by stipulation and exhibits to establish that these identical models were actually retailed at the list price of $7.50.[8]

From the foregoing, therefore, it is evident that the Princess Gardner wallet, Commission Exhibit 8D, and the Buxton wallet, Commis-

[2] See Commission Exhibit 3H.

[3] See Commission Exhibit 4F.

[4] See Tr. p. 116.

[5] See Tr. p. 125.

[6] See Tr. p. 129.

[7] See Tr. pp. 127, 133.

[8] With respect to the Princess Gardner wallet see the stipulation at Tr. p. 256 and Commission Exhibits 14, 15, 16 and 17 which reflect that model 19R55T was received by Martin's Department Store, Brooklyn, New York, and placed on sale during the month of August 1959. This is the same model as Commission Exhibit 8D.

With respect to the Buxton wallet, a stipulation was entered in the record at Tr. p. 301 to the effect that on August 28, 1959, the Buxton Corporation shipped to Becker's Leather Goods in Washington, D.C., six wallets, Model 20BSD. These wallets were received on September 8, 1959, and shortly thereafter were put on sale at the price of $7.50. This model is the same model as Commission Exhibit 9C.

sion Exhibit 9C, were on sale in the retail stores, prior to the purchase of the Kenton wallets, Commission Exhibits 3A and 4A in October 1959.

An expert, Paul Sterne, made a comparison of the aforesaid wallets. He was eminently qualified to do so. He had been in the leather business for over thirty years. He first learned the leather business in a tannery in Offenbach, Germany, from 1926 to 1936. From 1941 to 1954 he was with Centra Leather Goods, a wallet manufacturer, and from 1954 to 1960 with two leather importers.[9] He compared the Kenton wallet, Commission Exhibit 4A, with the Buxton wallet, Commission Exhibit 9C. It was his opinion, based chiefly on the leather quality and the quality of workmanship that the Buxton wallet, Commission Exhibit 9C was superior.[10] He then compared the Kenton wallet, Commission Exhibit 3A to the Princess Gardner wallet, Commission Exhibit 8D. Again it was his opinion that the Princess Gardner wallet was superior to the Kenton wallet, principally with respect to the leather quality and the workmanship quality.[11]

Respondents' defense is essentially three-fold:

1. Commission Exhibits 3 and 4 (Kenton wallets) should not be compared with Commission Exhibits 8 and 9 (Prince Gardner and Buxton wallets) since the latter wallets were not purchased until one month after the Kenton wallets and were not on the retail market at the same time as Commission Exhibits 3 and 4.

2. The Kenton wallets (Commission Exhibits 3 and 4) were shopworn and therefore not representative of like models then on the market which were comparable to competitors' wallets and billfolds at the same or higher retail price.

3. Commission Exhibits 3 and 4 were not otherwise typical or representative of respondents' wallets which were ticketed "Comparable Billfolds". Furthermore, respondents' wallets typically were comparable to the wallets of competitors sold at the same or higher price.

As regards respondents' point that Commission Exhibits 3 and 4 (Kenton wallets) should not be compared with Commission Exhibits 8 and 9 (Prince Gardner and Buxton wallets) since the latter wallets were not purchased until one month after the Kenton wallets and, therefore, were not on the retail market at the same time, there seems to be little merit. Assuming this contention is correct, it must reasonably be presumed, in the absence of evidence to the contrary, that wallets purchased one month after the Kenton wallets were purchased,

[9] See Tr. pp. 176–177.
[10] See Tr. p. 184.
[11] See Tr. p. 187.

were on the market at the same time as these Kenton wallets, and that, therefore, Commission Exhibits 8 and 9 were in competition with Commission Exhibits 3 and 4. Such an assumption need not be relied upon in this case, however, since the evidence offered by the Commission establishes that Commission Exhibits 3 and 4 and Commission Exhibits 8 and 9 were on the retail market at the same time.

Respondents' second point is equally without merit. Although Commission Exhibits 3 and 4 did have the appearance of being handled extensively, this was not a factor that was considered by the Commission's expert in determining comparability of those wallets with Commission Exhibits 8 and 9. In this connection, it might be added that respondents made no effort to introduce in evidence models which they did not consider shopworn, identical to Commission Exhibits 3 and 4.

The principal witness for the respondents was Stanley Phillips, plant manager, who testified that all of the respondents' wallets were comparable in grade and quality to competitors' wallets which sold at the same or higher retail price. The hearing examiner was impressed with the fact that Mr. Phillips was an expert for the purpose of making such comparisons both from the viewpoint of background and experience. Nevertheless, his testimony must be viewed as essentially self-serving [12] and, therefore, of minimal probative weight unless corroborated. Such corroboration, however, is notable by its absence in the respondents' case. Aside from the comparability of the wallets themselves, Mr. Phillips' testimony with regard to the efficient procedures of the respondent corporation in the manufacture of wallets, although impressive in some respects, is also self-serving and uncorroborated. Other respondents' witnesses who testified on the issue of comparability such as James Herrmann and Alex Roberts indicated they were not experts on leather. This is an essential element of proof in determining the quality of a leather wallet or billfold.

Also lacking as a part of respondents' case was any specific evidence having probative weight which would establish with unequivocal clarity the procedures adopted or criteria applied in deciding that respondents' wallets were comparable in like grade and quality to the wallets of their competitors retailed at the same or higher price during the period both were competing on the market.

Respondents' third point recited herein to the effect that Commis-

[12] As distinguished from self-serving declarations, see Ballentine, Law Dictionary, page 1182, to the effect that self-serving evidence is self-regarding evidence which is favorable to the party who offers it. Self-regarding evidence is evidence which results from the conduct or language of the party who offers it or from the conduct or the language of his own witness.

sion Exhibits 3 and 4 were not otherwise typical or representative of respondents' wallets which were ticketed as being of comparable value and that respondents' wallets typically were comparable to wallets of competitors sold at the same or higher price is similarly without merit since the self-serving evidence adduced, although substantial in volume, was uncorroborated. The respondents offered an array of numerous wallets which Mr. Phillips testified were typical of the wallets that respondents had on the market at the same time that Commission Exhibits 3 and 4 (Kenton wallets) were on the retail market. Some of these wallets (i.e., competitors' wallets) were purchased by respondents' investigator subsequent to the filing of the complaint. Others were Kenton wallets held in stock at the plant of the respondent corporation. These latter wallets, when compared, appeared to the examiner to be of about the same quality as the wallets sold by competitors at the same or higher retail price. However, such visual observation by one not an expert is not persuasive. The expert testimony as to leather comparability was essentially that of Mr. Phillips, general manager of the respondent corporation and uncorroborated.

In presenting the foregoing evidence, respondents relied upon the testimony of Mr. Phillips, that this array of typical Kenton wallets, some of which were manufactured by Kenton and some by its competitors, were on the retail market at the same time contemplated by the complaint. However, there is no corroborative proof in the nature of Kenton invoices or retailers' invoices that would establish such wallets were on the market at the time contemplated by the complaint and if so, when. Respondents' evidence is clearly defective in this respect.

Commission's counsel during the course of the proceedings requested invoices reflective of when the foregoing wallets were on the market for the purpose of cross-examining Mr. Phillips. Respondents indicated that they would make such invoices available and allegedly did so. However, counsel for the Commission did not use them for purposes of cross-examination. Respondents thereafter failed to offer these invoices in evidence, although the hearing examiner suggested they might be an element of proof in establishing that typical or representative wallets of the respondent corporation were in every way comparable in grade and quality to the wallets of its competitors retailed at the same or higher price during the period contemplated by the complaint.[13] Failure to adduce available corroborative evidence alleged by respondents to be available without doubt has the effect

[13] See Tr. 1788–1789.

of making self-serving evidence rather unpersuasive. It is also difficult to understand why respondents did not offer adequate expert testimony other than self-serving evidence on the comparability of the leather used in the wallets which is an essential element in proving comparable quality.[14]

There is a recognized legal presumption that a party will produce evidence which is favorable to him if such evidence exists and is available.[15] And the mere withholding or failing to produce material evidence which is available and would, in the circumstances of the case, be expected to be produced, gives rise to a natural inference—less forceful than that arising from the destruction, fabrication or suppression of evidence in which other parties have a legal interest but constantly acted upon by the courts—that such evidence is held back because it would be unfavorable or adverse to the party withholding it.[16]

Lord Mansfield observed: "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." It is pertinent to note that the inference in question has persuasive rather than probative value, and, as pointed out by many authorities that it is not ordinarily to be accorded weight as substantive proof.[17]

The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse.

[14] Respondents' Exhibit 86, a report on leather tests made by Foster D. Snell, Inc., was received in evidence purportedly to establish the comparable quality insofar as wearability and durability of 32 wallets are concerned. They are meaningless in the absence of explanatory testimony of an expert. Respondents' witness, Rocco P. Scalici, an employee of Foster D. Snell, Inc., supervised and conducted the leather tests and attempted to explain them, although he is not a leather expert, which he concedes (Tr. 1228). In fact, respondents' counsel appears to rely on the uncorroborated self-serving testimony of Mr. Phillips, general manager of respondent corporation, in order to identify the leather tested as the same leather that the wallets received in evidence are made of (Tr. 1229). Under the circumstances, such self-serving testimony is unpersuasive.

[15] See also *Lewis-Simas-Jones Co.* v. *Southern P. Co.*, 283 U.S. 654, 51 Sup. Ct. 592, 75 L.Ed. 1333; *Stocker* v. *Boston & M. R. Co.*, 84 N.H. 377, 151 Atl. 457, 70 A.L.R. 1320.

[16] See *Mammoth Oil Co.* v. *United States*, 275 U.S. 13, 48 Sup. Ct. 1, 72 L.Ed. 137; *Kirby* v. *Tallmadge*, 160 U.S. 379, 16 Sup. Ct. 349, 40 L.Ed. 463; *Wood* v. *Holley Mfg. Co.*, 100 Ala. 326, 13 So. 948, 46 Am. St. Rep. 56; *Stedman* v. *Stedman*, 179 Cal. 288, 176 Pac. 437; *Louisville etc. R. Co.* v. *Thompson*, 107 Ind. 442, 8 N.E. 18, 9 N.E. 357, 57 Am. Rep. 120; *Crescent City Ice Co.* v. *Erman*, 36 La. Ann. 841; *Hersey* v. *Hersey*, 271 Mass. 545, 171 N.E. 815, 70 A.L.R. 518; *Masonite Corp.* v. *Hill*, 170 Miss. 158, 154 So. 295, 95 A.L.R. 157; *Dencer* v. *Jory*, 131 Or. 653, 284 Pac. 163, 70 A.L.R. 855; *Williams* v. *Commercial Nat. Bank*, 49 Or. 492, 90 Pac. 1012, 91 Pac. 443, 11 L.R.A. (N.S.) 857; *Hall* v. *Vanderpool*, 156 Pa. St. 152, 26 Atl. 1069; Ex parte Hernlen, 156 S.C. 181, 153 S.E. 133, 69 A.L.R. 443; *Missouri etc. R. Co.* v. *Day*, 140 Tex. 237, 136 S.W. 435, 34 L.R.A. (N.S.) 111; *Miller* v. *Miller*, 111 W. Va. 338, 161 S.E. 566, reviewed 18 Virginia L.R. 554; *Studebaker Corp.* v. *Hanson*, 24 Wyo. 222, 157 Pac. 582, 160 Pac. 336, Ann. Cas. 1917E, 557; *Jones* v. *Wettlin*, 39 Wyo. 331, 271 Pac. 217, 69 A.L.R. 840.

[17] See Jones on Evidence, Sec. 19 at pp. 49 and 50.

Clifton v. *United States*, 4 How. 242, 247. Silence then becomes evidence of the most convincing character. *Runkle* v. *Burnham*, 153 U.S. 216, 225; *Kirby* v. *Tallmadge*, 160 U.S. 379, 383; *Bilokumsky* v. *Tod*, 263 U.S. 149, 153, 154; *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 111, 112; *Mammoth Oil Co.* v. *United States*, 275 U.S. 13, 52; *Local 167* v. *United States*, 291 U.S. 293, 298.[18]

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

The aforesaid acts and practices of respondents, as hereinabove found, 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. Accordingly, since the Federal Trade Commission has jurisdiction and this proceeding is in the public interest, the following order shall issue:

ORDER

It is ordered, That respondents, Kenton Leather Products, Inc., a corporation, its officers, and Murray Smallman, individually and as an officer of the said corporate respondent, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the manufacture, offering for sale, sale and distribution of wallets or billfolds or any other similar product in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using on tickets or in any other manner the words "Comparable Billfolds" or any words of similar import, in connection with any price, as descriptive of respondents' said products, when such products are not of like grade and quality in all material respects as the merchandise to which compared and which said merchandise is usually and regularly sold at retail at the purported price.

[18] See *Interstate Circuit* v. *U.S.*, 306 U.S. 208, 226.

2. Furnishing any means or instrumentality to retailers or others whereby they may mislead the public as to the grade and quality of respondents' said products, and it is

Further ordered, That the complaint is dismissed as to Michael Kaye, individually and as an officer of the respondent corporation by reason of his demise.

Order Dismissing Complaint

This matter having been heard by the Commission on respondent's exceptions to the hearing examiner's initial decision and on briefs and oral argument in support thereof and in opposition thereto; and

The Commission having duly considered said exceptions and the record herein and having determined that the allegations of the complaint have not been sustained by the evidence and that the complaint should be dismissed, such disposition of the case rendering it unnecessary to rule specifically on each of the exceptions to the initial decision:

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

SPENCER GIFTS, INC., ET AL.

Docket 8281. Complaint, Jan. 27, 1961—Decision, Nov. 13, 1962

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

Order requiring mail order merchandisers in Atlantic City, N.J., to cease making such false claims in advertising as that their "Reduce-Eze" girdles would "Slim 4 Inches Without Diet", etc.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Spencer Gifts, Inc., a corporation, and Max Adler and Harry Adler, individually and as officers of the said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Spencer Gifts, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New Jersey. Its office and principal place of business is located at 1601 Albany Avenue Boulevard, Atlantic City, N.J.

Respondents Max Adler and Harry Adler are the officers and principal stockholders of the corporate respondent. They formulate, direct and control its acts and practices including those hereinafter set forth. The address of the individual respondents is the same as the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising and retail sale of various kinds of merchandise, including a device, as "device" is defined in the Federal Trade Commission Act, by and through the medium of the United States mails. Such device is a girdle sold under the brand name of "Reduce-Eze".

Respondents cause their said merchandise, including the "Reduce-Eze" girdles to be shipped from their place of business in Atlantic City, New Jersey, to the purchasers thereof located in various states of the United States and maintain, and have maintained, a substantial course of trade in said merchandise and devices, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their aforesaid business, respondents have disseminated and have caused the dissemination of, certain advertisements concerning the said device by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said device; and respondents have disseminated, and caused the dissemination of advertisements concerning said device by various means for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said device in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical, but not all inclusive, of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

Slim 4 Inches Without Diet
Slims You 2 Sizes

Trims 4 Inches Off Your Figure
To Reduce 4 Inches Without Diet

PAR. 4. Through the use of said advertisements and others of the same import but not specifically set out herein, respondents represented directly or by implication that the wearing of their girdles will reduce body weight without the necessity of dieting.

PAR. 5. The advertisements containing the aforesaid representations were and are misleading in a material respect and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, the wearing of respondents' girdle will not reduce body weight.

PAR. 6. The dissemination by the respondents of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Ames W. Williams for the Commission.

Mr. Saul W. Arkus of *Arkus & Cooper*, of Atlantic City, N.J., for respondents.

INITIAL DECISION BY RAYMOND J. LYNCH, HEARING EXAMINER

The complaint in this proceeding issued January 27, 1961, charges respondents, Spencer Gifts, Inc., a corporation and Max Adler and Harry Adler individually and as officers of said corporation with violating the provisions of the Federal Trade Commission Act by using false, misleading and deceptive statements and representations in advertisements of a device sold under the brand name of "Reduce-Eze" girdle. The complaint was duly served upon respondents, who filed answers thereto. Hearings were held in Atlantic City, New Jersey and New York City, New York. Respondents' counsel requested additional hearings in Washington, D.C., but after the matter was set, declined to produce any additional evidence and requested that the record be closed for the purpose of taking testimony. Proposed findings of fact and conclusions of law were filed by the parties. The examiner has given consideration to the proposed findings and conclusions, and all findings of fact and conclusions of law proposed by the parties not hereinafter found or concluded are herewith rejected. Based upon the entire record, the undersigned examiner makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. Respondent, Spencer Gifts, Inc., is a corporation, organized and existing under and by virtue of the laws of the state of New Jersey

with its office and principal place of business located at 1601 Albany Avenue, Atlantic City, New Jersey. Respondent, Max Adler is the principal officer and stockholder of the corporate respondent and formulates, directs and controls its acts and practices including the practices set forth in the complaint.

2. Respondents are now, and for some time last past have been, engaged in the advertising and retail sale of various kinds of merchandise, including devices as "devices" are defined in the Federal Trade Commission Act, by and through the medium of the United States mails. One of such devices is a girdle sold under the brand name of "Reduce-Eze". Respondents cause their said merchandise including the "Reduce-Eze" girdles to be shipped from their place of business in Atlantic City, New Jersey to purchasers thereof throughout the various states of the United States.

3. In the course and conduct of their business, respondents have disseminated and have caused dissemination of certain advertisements concerning their said devices by the United States mails and by various means in commerce as "commerce" is defined in the Federal Trade Commission Act for the purpose of inducing and which were likely to induce directly or indirectly the purchase of said devices and respondents have also disseminated and have caused the dissemination of advertisements concerning their said devices, for the purpose of inducing or were likely to induce directly or indirectly the purchase of their said devices in interstate commerce.

Among and typical of the representations and statements in such advertisements are the following:

Slim 4 Inches Without Diet
Slims You 2 Sizes
Trims 4 Inches Off Your Figure
To Reduce 4 Inches Without Diet

In addition to the girdle referred to as "Reduce-Eze", the respondents also advertised and sold girdles called "Deduce-Eze" and "Hip-Eze" which according to the testimony of Dr. Coyne, a witness for the Commission, are for all practical purposes one and the same type device as the girdle referred to as "Reduce-Eze". The uncontradicted testimony of Dr. Coyne, a specialist in physical medicine, was that there are only two ways (in the absence of pathological conditions) to reduce weight, (a) by increasing daily activity to burn up more fuel than you take in; and (b) to decrease the dietary intake each day so that less than the amount of energy required for daily activity is taken. Dr. Coyne stated that the respondents' girdles will not alter caloric intake or increase energy output. The only effect of the wearing of a girdle is to change the configuration of the body by moving soft tissues up or down.

4. Through the use of said advertisements and others of the same import, respondents represented directly or by implication that the wearing of their girdles will reduce body weight without the necessity of dieting when such is not the fact.

5. The advertisements containing the representations and statements referred to in Finding Number 3 were and are misleading in a material respect and therefore, constitute "false advertising" as that term is defined in the Federal Trade Commission Act. In truth and in fact, the wearing of respondents' girdles will not reduce body weight.

6. Respondent Harry Adler by affidavit states that he sold his capital stock in the respondent corporation on June 18, 1960, and that his relationship with the corporate respondent was terminated on that date. Furthermore that his former duties were limited to the supervision of personnel and that he did not participate in the formulation of policy or exercise direction or control over corporate activities, including advertising. Counsel supporting the complaint has no objection to the dismissal of the complaint as to Harry Adler.

CONCLUSION

The dissemination by the respondents of the false advertisements as herein found, constituted and now constitutes unfair and deceptive acts and practices, in "commerce", within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent Spencer Gifts, Inc., a corporation, and its officers and respondent Max Adler individually and as an officer of the said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of devices designated as "Reduce-Eze", "Deduce-Eze" or "Hip-Eze" girdles, or any other device of similar design, nature, purpose or operation, whether sold under the same name or any other name, do forthwith cease and desist from:

(1) Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication that the wearing of a girdle will cause any reduction in body weight.

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

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

Decision of the Commission and Order to File Report of Compliance

This matter having been heard by the Commission on the respondents' exceptions to the hearing examiner's initial decision; and

The Commission having considered the entire record, including the briefs and oral arguments of counsel for respondents and counsel in support of the complaint, and having determined that the hearing examiner's findings and conclusions are fully substantiated on the record and that the order contained in the initial decision is appropriate in all respects to dispose of this matter:

It is ordered, That respondents' exceptions be, and they hereby are, denied.

It is further ordered, That the hearing examiner's initial decision, filed May 1, 1962, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the respondents, Spencer Gifts, Inc., a corporation, and Max Adler, 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.

By the Commission, Commissioner Higginbotham not participating.

In the Matter of

J. A. FOLGER & COMPANY

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

Docket 8094. Complaint, Aug. 24, 1960—Decision, Nov. 14, 1962

Order requiring a large manufacturer of coffee—which it distributed to wholesalers and retailers, including voluntary retail groups, retail chains, independents, and the restaurant trade, with sales in 1958 and 1959 approximating $100,000,000—to cease violating Sec. 2(d) of the Clayton Act by such practices as paying $150 in 1958 and again in 1959 to Benner Tea Company, a retail grocery chain, in connection with the latter's "Foodarama" anniversary sale promotions, while not making comparable payments available to Benner's competitors.

Complaint

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

Paragraph 1. Respondent J. A. Folger & Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 330 West 8th Street, Kansas City, Mo.

Par. 2. Respondent is now and has been engaged in the manufacture, sale and distribution of coffee. Respondent sells and distributes its products to wholesalers and retailers, including voluntary retail groups and retail chain store organizations. Respondent's sales of its products are substantial, exceeding $1,000,000 annually.

Par. 3. Respondent sells and causes its products to be transported from its principal place of business in the State of Missouri to customers located in other States of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

Par. 4. In the course and conduct of its business in commerce, and particularly since 1958, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

Par. 5. For example, in the year 1959, respondent contracted to pay and did pay to Benner Tea Company, a retail grocery chain with headquarters in Burlington, Iowa, the amount of $150.00 as compensation or as an allowance for advertising or other services or facilities furnished by or through Benner Tea Company in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not made available on proportionally equal terms to all other customers competing with Benner Tea Company in the sale and distribution of products of like grade and quality purchased from respondent.

PAR. 6. The acts and practices of respondent, as alleged, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. John Perry for the Commission.

Caldwell, Blackwell, Oliver & Sanders, by *Mr. Edward T. Matheny, Jr.*, and *Mr. Cornelius E. Lombardi, Jr.*, for respondent.

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

The issues herein are as follows. (1) Do two payments of $150.00 each made by the respondent J. A. Folger Company to one of its customers, Benner Tea Company (hereinafter sometimes called Benner), in the years 1958 and 1959, respectively, under the facts stated below, constitute violations of Section 2(d) of the Clayton Act, as amended? [1] (2) Is the good faith meeting of competition defense expressly set forth in Section 2(b) of the Clayton Act, as amended,[2] also available to sellers charged with violations of Section 2(d) of that Act although Section 2(d) does not contain a similar defense provision? Assuming that the answer to the above is in the affirmative, the third issue is as follows. (3) Were the two aforementioned payments of $150.00 each made by respondent to Benner (in the words of Section 2(b)) "made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor"?

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

[2] Section 2(b) reads: "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

The complaint herein was issued on August 24, 1960, and the answer thereto was filed on October 5, 1960. An amended answer filed on October 17, 1961, raises the issues shown as two and three above with respect to the payment made in 1959 only. The same defenses will be deemed raised with respect to the 1958 payment as this appears from the record to be respondent's intent and as there is no statutory requirement for the filing of an answer to a complaint issued by the Federal Trade Commission. Hearing was held on October 17 and 18, 1961, at Kansas City, Missouri. Thereafter proposed findings of fact, conclusions of law, and arguments in support thereof were filed by the parties. These have been carefully reviewed and considered and such proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance are rejected as not supported by the record or as involving immaterial matters. The facts hereinatfer set forth are based on the entire record.

FINDINGS OF FACT

Respondent J. A. Folger & Company is a corporation, existing and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 330 West 8th Street, Kansas City, Missouri. It has been engaged for many years in the manufacture, sale and distribution of coffee, including both the instant coffee and the regular vacuum pack coffee. It sells and distributes its coffee primarily to wholesalers, retailers, including voluntary retail groups, retail chain store organizations and independents. It also sells its products to restaurants.

Respondent as presently constituted is a merged entity. Sometime after the issuance of the complaint herein, it merged with a California corporation of the same name and became the surviving corporation. From the date of the merger, respondent's operations have been divided into two autonomous divisions. The former California corporation now functions as a division of respondent in the Western States which it previously served, and its headquarters and principal place of business continues to be in San Francisco, California. The territory served by the respondent prior to the merger is served by the second division. This area includes the States of Illinois, Indiana, Kentucky, Mississippi, Arkansas, Missouri, Iowa, Minnesota, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, New Mexico, Colorado, and portions of the States of West Virginia, Ohio, Wisconsin, Michigan, Florida, Tennessee, Alabama, Georgia, Louisiana and Wyoming. Each of the two divisions, hereinafter called the San Francisco and Kansas City Divisions, respectively, has its own executive heads, sales executives and organization and advertising executives, organization, and agency.

The "Folger" brand of coffee manufactured by respondent is the second largest selling brand of coffee in the United States. For the first nine months of 1961, respondent's net dollar sales of "Folger" coffee were $118,675,830. In 1958 and 1959, respondent's sales, prior to the merger with the California corporation of the same name, were approximately $100,000,000. Its Kansas City Division has about 25,000 accounts. In the course of its business, respondent sells and causes its products to be transported from its principal places of business in the States of Missouri and California to customers located in other States of the United States. There has been at all times mentioned herein a continuous course of trade in respondent's coffee products in commerce, as "commerce" is defined in the Act.

Respondent expends large sums of money for the advertisement and the promotion of the sales of its products. Its current annual expenditures for these purposes is $22,000,000 of which $16,000,000 is spent by the Kansas City Division and $6,000,000 by the San Francisco Division. Of the $16,000,000 disbursed by the Kansas City Division, about $6,000,000 thereof is spent in brand-name advertising and about $7,000,000 in specific sales promotions. For the first ten months of 1961, the Kansas City Division scheduled 152 promotions in various areas involving about 100,000 retail grocery stores operated by some 25,000 of respondent's direct customers. Respondent uses various in-store promotions for which it furnishes display materials and mats for reproduction in newspapers and handbill advertising. These in-store promotions are variously designated as "Big Top" and "Talk of the Town" sales and "Folger Guessing" and "Ribbon-Guessing" contests. A number of respondent's ribbon guessing contests were held in the trade territory of the Benner Tea Company.

It has been a company policy with respondent for many years to have all requests received from customers for respondent's participation in promotional plans proposed by such customers, reviewed by one of its top executives for the purpose of ascertaining whether the proposal involves something that respondent can offer equally to all competitors of the proposing customer, as required by the provisions of Section 2(d) of the Act. In case of doubt, the executive consults with counsel. Prior to the issuance of the complaint in the present proceeding, respondent had never been cited for a violation of the Robinson-Patman Act.

One of respondent's customers in its Kansas City Division is the aforementioned Benner Tea Company. Benner at all times herein material was a retail grocery chain with headquarters in Burlington, Iowa and operated one or more stores in 14 towns in Iowa, 9 towns in Illinois, and 2 towns in Missouri. During the year 1958 and 1959, respondent sold a substantial amount of both "Folger" regular coffee and "Folger" instant coffee to Benner. Benner stocked the "Folger" coffees in all of its retail stores but also stocked and sold in the same stores other nationally advertised brands, including a brand called "Butternut" manufactured by Paxton & Gallagher to which further reference will be made below. In addition, Benner featured and sold at each of its stores its own private brand of vacuum packed regular coffee under the private labels of "Benner" and "Cascade Inn" which it imported through brokers and processed for sale by blending, roasting, sampling and bagging. The Benner retail stores in 1958 and 1959 allotted one-third of their total shelf space to its own private brands of coffees and the remaining shelf space to all of the competing national brands. In the same period more than one-half of its total coffee sales were of its private brands of "Benner" and "Cascade Inn" coffees. Since about 1957, Benner in its advertisements has advertised some of the national brand coffees it sells in its stores as well as its own private brands, with somewhat greater emphasis on its own branded coffee than on national brands. Prior to about 1957, Benner's advertisements in newspapers and handbills advertised only its private brand coffees.

Respondent ships the "Folger" coffee it sells to Benner primarily to the Benner warehouse in Burlington from which it is distributed by Benner to its individual retail stores and also to some of the independent retail grocery stores to which Benner sells as a broker or wholesaler. During the years 1958 and 1959, respondent also sold a substantial amount of the same regular and instant "Folger" coffee it sells to Benner to other customers located in the same towns or cities in the heretofore indicated States in which Benner has retail stores.

Benner has been a vigorous advertiser for many years. At the times herein material, it ran advertisements in newspapers each week of the year which were at times supplemented by the distribution of handbills known as "Tabloid Mailers" bearing such titles as "King Size Bargains", "Springarama" and "Foodarama".

In June of 1958 and 1959, Benner staged an anniversary sales promotion called a "Foodarama". It solicited a large number of its suppliers and others to participate in such "Foodaramas". It also sent a brochure to such persons describing the advertising and promotional activities which were to take place during the "Foodaramas".

These Benner brochures contained statements of the anticipated advertising and promotion activities as follows:

Tabloid mailing to 135,000 homes! To every home in the Benner trade area featuring your product PLUS a special section in 19 leading local newspapers [names of cities are listed] plus big space ads in seven smaller towns [names of these towns are also listed] PLUS a big super foodarama display booth * * * AND the whole promotion will be backed up by * * * signs and displays * * * special bulletins * * * special meetings * * * radio spots.

The Benner brochures also offered participants in the Benner "Foodaramas" a choice of six different advertising and promotional "deals" as follows:

SUPER FOODARAMA DEAL #1
8′ x 10′ Display Booth *plus* mention in Tabloid and Ad______________ $150
SUPER FOODARAMA DEAL #2
8′ x 10′ Display Booth *plus* 1/16 page in Tabloid and mention in Ad____ $250
SUPER FOODARAMA DEAL #3
8′ x 10′ Display Booth *plus* 1/8 page in Tabloid and mention in Ad____ $350
SUPER FOODARAMA DEAL #4
8′ x 10′ Display Booth *plus* 1/4 page in Tabloid and mention in Ad____ $450
SUPER FOODARAMA DEAL #5
8′ x 10′ Display Booth *plus* 1/2 page in Tabloid and mention in AD____ $550
SUPER FOODARAMA DEAL #6
8′ x 10′ Display Booth *plus* 1/2 page in Tabloid, prominent position in coupon Ad (2nd week) and Giant 2 week Display in every store______ $650

Included with each of the Benner "Foodarama" brochures was a "Reservation Form". The form set forth each of the above-described "deals" and provided a place for the recipient to indicate his choice of "deals" and a place for an "Authorized Signature". The reservation form at the bottom thereof contained the following note: "We will want to work with you in tailor-making this promotion for *maximum presentation and sales of your products*. A follow up questionnaire will follow, and we will be glad to work out any special problems or details. (For example, you may want to reserve extra booth space or larger size booth *or* you may want to use only booth space *or* only newspaper or tabloid space, etc.)" (The italic shown is as in the reservation form.)

The "Foodarama" was a sales promotion device used by Benner to increase the volume of sales of all products, including respondent's, handled in its retail stores. Included in the "Foodarama" was a Sunday afternoon event called an "Open House" at the Burlington warehouse of Benner where various suppliers who participated in the "Foodarama" displayed and advertised their respective products in the booths assigned to them by Benner. The booths were used by supplier-participants for the advancement of the sale of their products in the Benner retail stores and more generally for the advertisement of their products to all persons who attended the "Foodaramas". The "Open House" for both years was publicized by newspaper articles, handbills and cards. The 1958 open house attracted between 12,000 and 15,000 people and the one in 1959 was attended by some 15,000 to 20,000 persons. Included in the attendance, predominantly of consumers, were customers of respondent, some of which were wholesale and retail competitors of Benner. Although the open house events were used to advertise various products of supplier-participants, none of these products were offered for sale at the two open houses. There were a few exhibits at the open houses which were unrelated to the Benner retail food business such as an exhibit of a certain model car and of farm equipment. Entertainment features and attractions at the open houses included a welcoming address by the mayor of Burlington, music by a high school band, a display of a rail locomotive and mail car, and a demonstration of outdoor barbecuing of meat.

Between 70 and 80 Benner suppliers participated in the "Foodaramas" of 1958 and 1959. Proceeds in the amount of about $20,000 were received by Benner from participants in the "Foodaramas" in each year for "deals" as described above offered by Benner and accepted by the participants or variations thereof as agreed upon by Benner and participants, but the bulk of the individual payments from suppliers were for "deals" as shown above. A few of the participants in the "Foodaramas" did not have booths at the "Open Houses" in the Benner warehouse, but participated in other features of the "Foodaramas".

To advertise its "Foodaramas", Benner mailed to some 135,000 homes in its trade area its handbills, described as "Tabloid Mailers" by the parties, in the indicated years. The handbills advertised the various products being promoted at the "Foodaramas". In the same years, Benner ran advertisements in 16 Iowa, 10 Illinois and 2 Missouri local newspapers featuring its "Foodarama" sales and the products of the suppliers it was promoting. Respondent's coffees received space in both the Benner handbills and the Benner newspaper advertisements.

Respondent was one of the supplier-participants in the Benner "Foodarama" for the years 1958 and 1959. The precise degree of respondent's participation in each of these "Foodaramas" is in dispute. Respondent contends that it participated only to the extent of renting a booth at the open house conducted by Benner at its warehouse in connection with the "Foodarama" for each year. Counsel supporting the complaint contends that respondent was a participant in both the 1958 and 1959 "Foodarama" to the full extent involved in the Benner proposed "Deal No. 1" which, as heretofore shown, entailed the renting of an "8′ x 10′ Display Booth *plus* 1/16 page in Tabloid and mention in Ad". Certain facts however, hereinafter set forth, with respect to respondent's participation in the involved "Foodaramas" are not in dispute. Respondent in each of the years 1958 and 1959 paid Benner $150 in connection with its participation in the "Foodaramas" for those years. The parties are agreed that the $150 "Foodarama" payments were separate and distinct from the regular cooperative advertising and promotional allowances granted by respondent to Benner and all its competitors in connection with the sale or offering for sale of respondent's regular and instant coffee. Although respondent in 1958 and 1959 received from Benner announcements of its forthcoming "Foodaramas" and reservation forms, it never returned the latter to Benner. The reservation form for the year 1958 retained by respondent in its files is marked with an "X" along the line on the form reading "SUPER-FOODARAMA DEAL NO. 1" and a penned arrow leading down from that line to the unprinted space at the bottom of the form leads to a penned note reading: "Draw up a contract including Ribbon Game. No mention of ad." The written contract referred to was never prepared.

Respondent in connection with Benner's 1958 "Foodarama" under date of June 5, 1958, wrote the following letter to Benner: "At the request of our representative, Mr. L. C. Dodge, we are enclosing our check in the amount of $150.00 for the booth at your Foodarama Promotion. We know that this will be a splendid production and send along our best wishes for every success."

In connection with Benner's 1959 "Foodarama," a district representative of respondent addressed an interoffice memorandum, dated May 25, 1959, to persons in respondent's advertising and sales departments, reading as follows: "Here is the deal that I worked out with Benner, on that promotion that we discussed on the phone. Benner will feature Folger's 6 oz. instant coffee in the Tabloid and newspaper advertising the week of June 15th thru June 21. We will rent a booth from them at their food a rama open house to be held Sunday June 21, at a cost to us of $150.00. This is for the booth rent and not an advertising allowance. I did not sign anything to this effect. I told Mr. Clark their Vice President in charge of sales that Folger's word was as good as their signature and therefore I would not sign anything that could be taken to mean an advertising allowance. That all we would buy is booth space and we were not buying any advertising. He said it was ok and that they would feature our 6 oz. instant coffee on their tabloid and newspaper. Also they will run a chain wide ribbon contest the weeks of July 9th thru July 18. Giving Folger's Coffee the big feature in their ad and playing up the ribbon contest. We will furnish to them at this time the following premiums. (For each of their stores, or a total of 10 prizes per store, making a grand total of 340 prizes to be given away by them [there follows a list of the prizes]. Total cost per store $35.20. Also I am returning to you with this letter Benner's brochure on their Food A. Rama for your records, also last years Folger Way telling of the promotion. If there is any questions concerning this please let me know."

The 1959 payment of $150 by respondent to Benner in connection with Benner's 1959 "Foodarama" is shown on one of respondent's interoffice "memo" invoices, dated May 28, 1959, as being: "For booth at annual Foodarama."

Benner maintained in its records lists of the participants in its 1958 and 1959 "Foodaramas" and the amounts contributed by each, with some indications of variations from its proffered "deals," such as "No booth" in its 1958 list, the contribution in such instances being sometimes $150 and sometimes a lesser amount. The 1959 list does not go into this type of detail but lists simply the contribution of each participant. Respondent's name is listed in the list for each year as a contributor in the amount of $150, with no indication on the lists as to the precise consideration it was to receive from Benner for its contributions.

In each of the involved "Foodarama" years, respondent was the recipient of advertising space for its coffee products in both the Benner "Tabloid Mailers" and in the Benner newspaper advertisements featuring the "Foodarama" sales.

Respondent for a number of years has offered to its customers an in-store promotion called a "ribbon-guessing contest." The promotion was offered to all of respondent's customers in the Benner trade area in the years 1957 through 1959. In connection with such promotions, respondent supplies to the retailer a kit with materials for holding the contest, display material, and prizes. Benner participated in respondent's in-store ribbon-guessing contest promotions in each of the years 1957 to 1959, inclusive, and featured Folger coffee advertisements in either their handbills or newspaper advertising or both, but in this period only one advertisement specifically mentioned the Folger ribbon contest. The 1957 in-store ribbon contest featured by Folger in the Benner stores was not related to a Benner "Foodarama" sale as Benner did not have a "Foodarama" in 1957. Similarly the Folger 1959 ribbon contest in Benner stores was unrelated to the 1959 "Foodarama" as it was held subsequent to the 1959 "Foodarama." But in 1958, respondent sponsored a ribbon-guessing contest in the Benner stores at a time which by prearrangement with Benner coincided with Benner's 1958 "Foodarama." The examiner finds that respondent's participation in Benner's 1958 "Foodarama" advertisements was solely in connection with respondent's ribbon-guessing promotion contests in the Benner stores and is unrelated to the aforementioned payment of $150 made by respondent to Benner in connection with respondent's participation in the Benner 1958 "Foodarama."

Respondent in the period between May 27 and July 6, 1959, which includes the June week of 1959 in which the Benner 1959 "Foodarama" took place, conducted a special promotion of its six ounce Instant Folger Coffee. Under the promotion, respondent offered to all of its customers in Iowa, including Benner, an allowance of $1.20 per case on six ounce Instant Folger Coffee purchased between May 27 and July 6, 1959, "providing the grocer places a retail advertisement on six ounce Instant Folger's Coffee in his regular media of newspapers, handbills or shopping papers within 30-days after date of purchase". The offer further provides that: "To qualify, advertisement must: 1. Be a week end ad. 2. Feature six ounce Instant Folger's Coffee exclusively, excepting only retailer's own brands. 3. Cover all of customer's stores in states of Iowa and Nebraska." (Nebraska is not pertinent here because in the involved years Benner did not operate any stores in Nebraska.) Respondent's offer did not apply to the stores of its customers located in the States of Illinois and Missouri in which Benner also operated retail grocery stores. Benner, by meeting the conditions of the described offer as related to its stores in Iowa received a cash advertising allowance of $120 from respondent. Benner met the advertising requirements of respondent's offer through the media of handbills distributed in Iowa and advertisements inserted in Iowa newspapers as part of its 1959 "Foodarama" advertising. The examiner finds that respondent's participation in the Benner 1959 "Foodarama" advertising was due solely to Benner's desire to receive the described advertising allowance from respondent which the latter made available to all of its customers operating stores in Iowa. (The examiner does not deem it significant that the Benner handbills besides being distributed in Iowa were also distributed in Illinois and Missouri because the printing of separate handbills for the latter States would have entailed additional printing costs not otherwise warranted and for the further reason that more than one-half of the Benner stores in 1959 were located in Iowa.)

From all evidence of record, it is found that respondent's payments of $150 each to Benner in the years 1958 and 1959, respectively, were made solely as payments for the rental of a booth for the display and advertisement of respondent's coffee at the "Open House" held at the Benner warehouse in each of the said years and that respondent's primary purpose in renting the booths was to advance the sale of its coffee in the Benner retail grocery stores. It is further found that respondent in the involved years did not offer to make similar payments available to Benner's competitors on proportionally equal terms. The evidence on this latter finding is uncontroverted.

Other coffee manufacturing participants at the two "Foodaramas" were the aforementioned Paxton & Gallagher, manufacturers of Butternut coffee, and Benner, itself, which as seen manufactured and sold its own private brand coffees under the names of "Benner" and "Cascade Inn". In addition to selling its private label coffees in its own stores, Benner also supplied the same private label coffees to independent grocers located at 16 towns in Iowa and 4 towns in Illinois. These independent grocers also handled nationally advertised brands of coffee which they generally bought directly from the coffee manufacturer, including the respondent. At each of the "Foodaramas", Benner maintained a booth about twice the size of the booths rented to others where Benner displayed various products and served its own private brand coffees, either hot or cold, to all desiring to be served. Paxton & Gallagher also maintained a booth at each of the "Foodaramas" for the display of Butternut coffee under Benner's above-described "Deal No. 1". Both Butternut and Benner coffees were advertised (as was the Folger coffee) in Benner's "Tabloid Mailers" and in Benner's newspaper advertisements in connection with its "Foodarama" sales. Benner's private brand coffee and Butternut coffee were in the years here involved in competition with the coffee sold by respondent. Respondent had advance notice that both the Benner and Butternut coffees would be displayed and advertised at the "Open House" feature of the "Foodaramas". From the record as a whole it is found that this advance knowledge played an incidental and subordinate part in inducing respondent to rent a booth at each of the "Foodaramas" for the display and advertisement of its coffee.

DISCUSSION AND CONCLUSION

The facts as to the consideration respondent bargained for and received from Benner for its two payments of $150 each have been set forth in considerable detail above. No particular purpose would be served by an attempt to rationalize or to set forth the reasons, not already apparent from the findings of fact, for the conclusion reached from these facts that the payments were made exclusively for booth rentals as contended by respondent and not for a combination of booth rental and advertisement as contended by counsel supporting the complaint inasmuch as the examiner is of the opinion that the respondent must in any event be deemed in violation of the provisions of Section 2(d) of the Act, even under the finding that the payments in question were made exclusively for booth rentals, there being no dispute that similar payments on proportionately even terms were not made available by respondent to Benner's competitors. This legal conclusion appears to be controlled by *State Wholesale Grocers* v. *The Great Atlantic & Pacific Tea Company*, 258 F. 2d 831 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959). That case will hereinafter be referred to as the A&P case and The Great Atlantic & Pacific Tea Company, one of the named defendants therein, will be called the A&P in the discussion below. The matter was a private suit by the plaintiffs therein against A&P, operator of chain grocery stores, and certain grocery suppliers of A&P, arising out of alleged violations of Section 2(d).

The Court of Appeals in the A&P case held that grocery suppliers who placed advertising in a magazine known as "Woman's Day" published by an A&P subsidiary corporation solely for the competitive advantage of A&P retail stores but otherwise operated basically the same way as any other nationally distributed woman's magazine, except for distribution, violated the provisions of Section 2(d) proscribing payment for services or facilities for processing or sale unless they made similar payments available on proportionately equal terms to other grocery companies, even though such companies did not publish magazines, because the suppliers had failed to make such payments available to other grocery companies in competition with A&P. The Court emphasizes that Section 2(d) contains a rigid definition of acts constituting "unlawfulness." In that connection the Court stated: "The *fact* of paying or contracting for the payment for the services or facilities referred to is proscribed, subject to the exception contained in the clause commencing 'unless'. (The underscoring is the Court's.) It is apparent that Congress has not made relevant the motive or intent of him who thus pays or contracts to pay. * * * We believe that the district court erred in relying upon the fact that it found that there was no evidence of any ulterior *motive* on the part of defendant suppliers in advertising in Woman's

Day nor that said suppliers had *intended* to favor A&P over other customers." (The emphasis is the Court's.)

The evidentiary facts in the A&P case, although of course different than those in the instant case, fall into categories which closely parallel those present in the instant case. In the A&P case the instrumentality used by the suppliers was the customer's magazine (although operated by a subsidiary corporation); the magazine was identified in the public mind as the A&P magazine; all of the foods advertised in the magazine were products sold in A&P stores; the magazine is the promotional operation of A&P. In the instant case, the instrumentality used by the supplier-respondent was the "Open House" conducted by the customer (Benner) at its own warehouse; the "Open House" was identified in the consumer's mind as a Benner attraction through advertisements by Benner; all or most of the foods displayed by suppliers at booths at the "Open House" were sold at the Benner grocery stores; and the "Open House" at the Benner warehouse was a promotional operation of Benner.

The Court of Appeals in the A&P case deemed it immaterial that any of the plaintiffs or wholesalers in that case owned or published a magazine of any kind, quoting with approval the following statements from the Report of the Attorney General's National Committee to Study the Anti-trust Laws, of March 31, 1955, at page 189: "The [Federal Trade] Commission's recent clarification of 2(d) and 2(e) also recognizes that not all customers entitled to participation in a seller's promotional plan can effectively utilize each type of promotional service tendered, or perform that form of service which the seller desires to reward with an allowance under his plan. However, to ensure appropriate benefits to all qualified customers, the Commission expects the seller to offer *bona fide* alternative means enabling all buyers to participate in some form."

In the instant matter the record does not disclose whether Benner's competitors had warehouses in which to conduct "Open Houses" such as the Benner affairs or whether the holding of such "Open Houses" in their warehouses, if they had them, was feasible. Under the holding in the A&P case this is immaterial as it was incumbent upon respondent to make a similar offer of a payment for booth space to Benner's competitors or a feasible alternative and this was not done in the instant case.

Our analysis compels the conclusion under the holding of the Court of Appeals in the A&P case that the acts of respondent in making the two payments here in question to Benner without offering similar payments to Benner's competitors on proportionately equal terms are acts in violation of Section 2(d) unless respondent has established its defense plea of meeting competition in good faith, described in Section 2(b) of the Act. This raises the preliminary question of whether such a defense is available in response to a charge of violating Section 2(d). The Court in the A&P case has indicated that "the motive of him who thus pays or contracts to pay" is immaterial. But since the precise question here under consideration was not before the Court in the A&P case, the quoted statement must be regarded as being in the nature of *obiter dictum* in the present context of the question.

The question, however, was recently directly decided in *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission*, 30 U.S.L. Week 2238 (D.C. Cir. Nov. 22, 1961) [7 S.&D. 259], where in a carefully considered opinion it was held that the defense of meeting competition in good faith as described in the proviso of Section 2(b) is available in response to a charge of violating Section 2(d). Pursuant to that opinion, the examiner concludes that the Section 2(b) defense proviso is available to respondent as a response to the charge made in the complaint of the Section 2(d) violation. Since respondent was not precluded at the hearing from introducing any evidence it desired under the Section 2(b) proviso, such evidence as the respondent introduced thereunder into the record is now available for analysis.

The examiner is of the opinion that respondent has not established on the merits a defense under the Section 2(b) proviso. In arriving at this opinion, the examiner's inquiry has been limited to that portion of the proviso which relates to "the furnishing of services or facilities to any purchaser or purchasers * * * made in good faith to meet the services or facilities furnished by a competitor" as it does not appear from the evidence and the respondent's memorandum thereon that respondent is asserting or can assert a defense under that portion of the proviso which pertains to lowering prices "to meet an equally low price of a competitor".

The specific "service or facility" here involved is the booth rented by respondent from Benner at the latter's warehouse for the advertisement of its coffee products at the Benner "Foodarama" open houses held in 1958 and 1959 at the said warehouse. Benner also had a booth at each of the open houses which it used in part at least for the advertisement of its private label coffees. Similarly the manufacturer of Butternut coffee also had a rented booth at the same open house events for the advertisement of its coffee. It is respondent's contention that its booth rentals from Benner "was made in good faith to meet * * * the services or facilities furnished by a competitor", namely, Benner itself, and the manufacturer of Butternut. This contention poses an issue of fact as to what the respondent's "good faith" intention was in renting the booths in question.

The examiner has concluded from all of the evidence in the record that respondent's advance knowledge that both Benner and the Butternut coffee manufacturer would have booth space at the two open houses played only an incidental and subordinate part in its decision to rent booths at the Benner open houses.

The examiner has also found from all of the evidence of record that respondent's primary purpose in renting the booths was to advance the sale of its coffee in the many Benner retail stores. The evidence makes it quite clear that the Benner open houses presented respondent with an opportunity to advertise its coffees which it could not miss, irrespective of competition at the open houses from other coffee suppliers, including Benner in its coffee manufacturing capacity. The Benner open house in each of the indicated years was widely advertised by Benner. It partook in part the nature of a civic event. The mayor of Burlington spoke at one or both of the open houses. A high school band played at the open houses. Between 12,000 and 20,000 people attended each of the events. Respondent regardless of the fact that there would be other coffees than their own advertised at the open houses, could hardly afford to miss the opportunity to be represented at the events. The aim of the Benner open houses was to advance the sale of the products of participating suppliers at the many Benner retail grocery stores and thereby to increase the volume of sales in the Benner stores. There can be but little doubt that respondent participated in the events for the principal purpose of advancing the sale of their products at the Benner stores. It is likewise clear that respondent insofar as it benefited from participation in the Benner open houses received such benefits primarily through the advertising of their products to actual or potential Benner consumer purchasers in attendance at the open houses. Any additional benefits that respondent may have received from its participation in the open houses, such as the advertisement of its products to non-Benner consumer purchasers, in attendance at the events or the meeting of competition, must be regarded as purely incidental.

Under these circumstances, the examiner is of the opinion that there is a failure of the "good faith" showing required by the Section 2(b) proviso for the establishment of respondent's contention that it rented the booth facilities of its customer Benner for the purpose of meeting "the services or facilities furnished by a competitor".

Two other matters require consideration. Respondent urges as an alternative, in the event it is found that it is in violation of Section

2(d), that a cease and desist order is "not warranted in this case because the illegal $150 payments in 1958 and 1959 were inconsequential when related to the magnitude of respondent's business volume, and sales and advertising program, and to the effect on competition * * *". While it is true that the two $150 payments are insignificant in size compared to the millions of dollars respondent expends annually on advertising, that is not the proper measurement of a *de minimus* infraction of the law. The true measure of a *de minimus* infraction is the scope of its effect on competition. When looked at from that aspect, it is readily apparent that the two payments cannot be considered "inconsequential", as argued by respondent, "on the effect on competition". For proper perspective, the trade area in which Benner and its competitors operate should be noted. This area consists of some 25 relatively small towns, none of which from cursory examination of population indices, seem to have a population as great as 50,000. It is at once evident that $150 would buy a not insignificant amount of newspaper advertising space in the local or county wide newspapers in the trade area in which Benner and its competitors advertise and accordingly, cannot be regarded as *de minimus*. Such an amount had it been offered by respondent to Benner's competitors on proportionally equal terms would have offered "a *bona fide* alternative means enabling all buyers to participate in some form", to again quote from the Report of the Attorney General's National Committee to Study the Anti-trust Laws, *supra*.

The other matter requiring consideration is the scope of the order to be entered in this proceeding. Counsel supporting the complaint requests a broad, sweeping order couched generally in the language of Section 2(d) to reach each and every conceivable type of act prohibited by the statute. Respondent, on the other hand, requests an order, in the event it is found in violation, limited "to a violation of Section 2(d) by payment for a facility furnished by a customer in connection with a special event organized by that customer and taking place at a location other than its regular place of retail business". (The further request by respondent that the order be limited to its Kansas City Division on the ground that its San Francisco Division was a separate corporation at the time of the violations here under consideration is dismissed from consideration as being palpably untenable.) Respondent argues that any broader order would go beyond what is necessary to bring an end to the practices in question, and would bear no reasonable relation thereto.

The scope of an order for an infraction of a statute within the jurisdiction of the Commission is largely a matter of discretion to be exercised within the general objective of bringing an end to the unfair practices or price discrimination found to exist. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428 [6 S. & D. 193] (1957); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 54, [4 S. & D. 716, 729] (1948).

There are many factors in the instant case which indicate that the type of order requested by respondent would be adequate to bring the type of infraction here involved to an end. As the second largest coffee manufacturer in the United States, respondent sells its products to about 100,000 retail grocery stores, has sales in excess of 100 million dollars a year and expends 22 million dollars annually on advertising and promotional expenses. Notwithstanding this volume of sales and expenditures for advertising and sales promotion, respondent has never been cited for a violation of any of the provisions of the Robinson-Patman Act, until the present proceeding.

This record is due to respondent's constant policy over the years to have all customer requests for respondent's participation in a customer advertising or promotion scheme checked by one of its top executives for clearance of possible infraction of the provisions of the Robinson-Patman Act before the customer plan may be approved for respondent's participation therein. The likelihood of future violations of any kind by respondent seems unlikely. Geographically the present infractions involved a relatively small part of respondent's trading area as the second largest coffee selling company in the United States. The two described $150 payments represent a minute fraction of the 22 million dollars respondent expends annually for advertising and promotional expenditures. Under these circumstances, the examiner is of the opinion that the narrower type of order requested by respondent, with some adjustments, is warranted, particularly in view of the fact that a broad order in statutory language would unnecessarily subject the manifold advertising and promotional activities of respondent to the possible severe penalties in the recently enacted Section 11 of the Clayton Act for inadvertent or unwitting violations of the Act. The Commission has very recently indicated its preference in the way of orders for "a more narrow and specific prohibition" to a "broad and indefinite command" in a violation involving Section 5 of the Federal Trade Commission Act which is indicative of the Commission's current thinking on the subject. *Colgate Palmolive Company*, No. 7736, FTC, Dec. 29, 1961 [59 F.T.C. 1452].

From the findings of the evidentiary facts as heretofore set forth, the examiner reaches the following ultimate findings of fact and law:

1. That respondent in 1958 and 1959 contracted to pay and did pay to one of its customers something of value as compensation or in consideration for services or facilities furnished by such customer, consisting of booth space for the advertisement of respondent's products at a public exhibition controlled by the customer, in connection with the customer's offering for sale or sale of products sold to the customer by respondent.

2. The above-described payments were not made available on proportionally equal terms to all other customers competing in the sale or distribution of such products purchased from respondent.

3. The said payments by respondent to the said customer for the furnishing of services or facilities were not made in good faith to meet the services or facilities furnished by a competitor.

4. The said payments by respondent to the said customer are practices in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That respondent J. A. Folger & Company, a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of any of its products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

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

OPINION OF THE COMMISSION

By MacIntyre, *Commissioner:*

The complaint charges respondent with violating Section 2(d) of the Robinson-Patman Act. The hearing examiner in his initial decision filed January 10, 1962, as amended by his order filed January 18, 1962, found that respondent had engaged in practices violating Section 2(d), as charged, and ordered respondent to cease and desist such practices.

Respondent and counsel supporting the complaint have filed cross-appeals. Respondent contends (a) that it was not violating Section 2(d) because the challenged payments were made in connection with respondent's sale of its own products, a contention expressed in several different ways; (b) that respondent was acting in good faith to meet competition; (c) that an order should not issue because of the alleged smallness of the payments; and (d) that the order should not extend to respondent's San Francisco division. Complaint counsel, in his appeal, argues that the examiner erred (a) in entering a "limited" Section 2(d) order, and (b) in holding that the Section 2(b) defense is available in a Section 2(d) matter.

Respondent is engaged solely in the manufacture, sale and distribution of coffee. It sells and distributes Folger's brand coffee to wholesalers and retailers, including voluntary retail groups, retail chain store organizations, independents, and to the restaurant trade. Its sales of coffee in 1958 and 1959 were approximately $100,000,000.

The case concerns payments made in 1958 and 1959 to Benner Tea Company (Benner) in connection with such company's anniversary sale promotions. In those years, Benner staged events called the "Foodarama", and it solicited a large number of persons to participate therein, sending them "Foodarama" brochures. The brochures for 1958 and 1959 are similar. Those distributed in 1959 contain statements as to the anticipated advertising and promotional activity in connection with the "Foodarama" in part as follows:

> Tabloid mailing to 135,000 homes! To every home in the Benner trade area featuring your product PLUS a special section in 19 leading local newspapers (names of cities given) plus big space ads in seven smaller towns (names of cities given). . . . AND the whole promotion will be backed up by . . . signs and displays . . . special bulletins . . . special meetings . . . radio spots . . . PLUS a big anniversary foodarama Display Booth during the open house party at Benners giant food distribution center . . . Over 16,000 Benner customers and friends will have the opportunity to view your products.

In addition, the brochures offered, for the varying costs given, six different advertising and promotional deals for participants (i.e., combinations of advertising and display booth arrangements).

At the end of each of Benner's "Foodarama" brochures was a "Reservation Form" which a person signed and returned to Benner if he wanted to participate in the "Foodarama". Such person also designated on the "Reservation Form" the "deal" in which he wanted to participate.

In 1958, a large number of persons, including some eighty Benner suppliers, participated in Benner Company's "Foodarama". That year proceeds to Benner from booth rentals, advertising, and "deals" (as described above) totaled $20,327.50. Again in 1959, there were a large number of Foodarama participants, including some seventy Benner suppliers. That year proceeds to Benner from booth rentals, advertising, and "deals" totaled $19,500.

In 1958 and 1959, respondent rented a booth at the "Foodarama open house" in the Benner warehouse in Burlington, Iowa. The product which respondent promoted at its booth in 1958 was the 2 pound can of regular Folger's coffee. In 1959, respondent promoted both regular and instant coffee at its booth. In 1958, and again in 1959, respondent paid Benner $150.00 in connection with "Foodarama". The hearing examiner has found that this was solely for booth rental at the "open house".

During the years 1958 and 1959, respondent also offered to Benner and all its competitors regular cooperative advertising and promotional allowances in connection with the sale or offering for sale of respondent's regular and instant coffee. The $150.00 "Foodarama" payments were separate and distinct from the regular cooperative advertising and promotional allowances granted to Benner and its competitors. Respondent did not make the "Foodarama" payments available to Benner's competitors on proportionally equal terms, a fact about which there appears to be no controversy.

Respondent's payments of $150.00 both in 1958 and 1959 were but part of the total of approximately $20,000 contributed in each of these years by various Benner suppliers and others toward the "Foodarama" promotions. Such payments, while only $150.00, were significant and substantial when viewed in the light of the whole Benner activity because it was these amounts plus the contributions of others which permitted Benner to engage in its large "Foodarama" promotional efforts. It is this type of favoritism to a customer such as a chain organization, even in relatively small individual contributions, which the law exactly proscribes. Respondent's argument, therefore, that no order to cease and desist should be entered because the amounts paid by respondent were each $150.00 is rejected.

Respondent's contention that it was solely promoting its own products in connection with the "open house" at the Benner warehouse in Burlington, Iowa, is not persuasive in the circumstances shown. Paul H. Kuenzle, former president of Benner Tea Company, testified that the "Foodarama" was "merely a sales gimmick that the company would use to obtain more retail sales." This was a Benner promotion, in which different media were used to promote and encourage greater sales at its retail stores, and the "open house", conducted in the Benner warehouse, was a part of the general scheme. The "tabloid mailer" advertising food sales at Benner retail stores (Commission Exhibit 3–A), distributed in connection with the 1958 "Foodarama", states in part:

What is Foodarama! It's our big annual week long sale that ends with a giant open house party at our Food Distribution Center in Burlington.

The nub of respondent's argument on this score seems to be, as expressed in its brief, that its payments were made to "Benner the food show promoter" rather than "Benner the grocer". That is an artificial distinction which we do not accept. The payments were made to the retailer, and they were made in connection with the retailer's sales promotion activity. The mere fact that sales were not made on the day of the "open house" is of little significance. The purpose of the "open house" was to whet the appetites of prospective purchasers so that they would go later to Benner stores to make their purchases. In this respect, the promotion is little different from a newspaper advertisement which also solicits the patronage of the consumer at some time in the future. In the circumstances, we reject the argument that the respondent was solely promoting its own products at the Benner "open house". It is clear that the payments were compensation or consideration for services or facilities furnished by the customer, i.e., the warehouse space, "in connection with the . . . handling, sale or offering for sale" of the product manufactured and sold by respondent.

The argument that respondent, in this instance, acted in good faith to meet competition is based on the alleged showing that Benner Tea Company, as a producer of its own brand of coffee, and Paxton & Gallagher, manufacturer of Butternut Coffee, are in competition with respondent, and that respondent had knowledge of their participation in the "open house" in advance of its own decision to participate.

The question of whether the Section 2(b), meeting competition, defense is available in a Section 2(d) matter had been decided in the affirmative in the recent decisions. *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission*, 301 F. 2d 499 [7 S. & D. 259] (D.C. Cir. 1961); *Shulton, Inc.* v. *Federal Trade Commission*, 305 F. 2d 36 [7 S. & D. 472] (7th Cir. 1962). The Commission's petition for certiorari in the *Exquisite Form Brassiere* matter was denied by the United States Supreme Court. *Federal Trade Commission* v. *Exquisite Form Brassiere, Inc.*, 369 U.S. 888 [7 S. & D. 259, footnote] (1962).

The examiner, having received evidence on the question of respondent's asserted defense under Section 2(b) and having concluded in his initial decision that the defense was available to respondent, found and concluded that respondent's advance knowledge of the participation of Benner and Paxton and Gallagher Co. played only an incidental and subordinate part in its decision to rent booths at the "open houses," that the primary purpose was to advance the sale of respondent's coffee in the Benner stores and that, in all the circumstances, the respondent had not met in "good faith" the promotional payments of a competitor. He treated the contention on meeting competition as an issue of fact on what the respondent's "good faith" intention was in renting the booths. We concur in the examiner's holding that respondent has not sustained its burden under the statute.

The United States Supreme Court in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 242 [5 S. & D. 221, 228] (1951), stated that the core of the Section 2(b) defense "consists of a provision that wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price." The Commission's views as to a respondent's burden in proving its defense under Section 2(b) are expressed in the following recent Commission decisions: *Tri-Valley Packing Association*, Docket No. 7225 and Docket No. 7496 [60 F.T.C. 1134] (May 10, 1962); *American Oil Company*, Docket No. 8183 [60 F.T.C. 1786] (June 27, 1962).

In this case, respondent has shown that it had advance knowledge of the participation of competition in the "open house", but this is far from sufficient to establish that it was meeting in "good faith" the promotional payments of a competitor.[1] The examiner found, in effect, that respondent would have rented the "Foodarama" booths irrespective of competition at the open houses from other coffee suppliers. The fact that respondent participated to the same extent as Paxton and Gallagher Co. was simply accidental. Here the showing is that the primary purpose of the discriminatory allowance was not to meet competition, but to advance the respondent's sales through the buyer's retail stores. In view of this, we do not believe that the examiner erred in finding that respondent failed to make out a defense under Section 2(b) of the statute. Accordingly, we reject respondent's appeal as well as the appeal of complaint counsel on this question.

Respondent's final argument is that a cease and desist order, if one is entered, should not extend to its San Francisco division. The claim is that respondent operates two autonomous divisions, each covering the territory served by it prior to the merger (which took place after

[1] Respondent had knowledge of the participation of Benner itself, as a coffee producer, as well as the participation of Paxton and Gallagher Co. It appears doubtful that a seller would be found to be meeting competition in good faith where the competitor, such as Benner in this case, is also a customer of the seller, but we need not decide this point.

the complaint issued with a California corporation of the same name), and each with its own executive heads, sales executives and organizations, and advertising executives, organization and agency.

This matter deals with a single corporate entity, i.e., J. A. Folger & Company, a Nevada corporation. We believe the order should apply to all the divisions of that company. The alleged "autonomous" nature of the several divisions at this time, if true, is no assurance that such will be continued in the future. The two divisions are dealing with the same product, and, no doubt, will engage in similar methods of sale and distribution. Accordingly, there is no sound basis for excluding from the order one of the company's divisions. If the order is to be effective in preventing future violations, it must include the whole of respondent's organization.

We will lastly consider the contention of counsel in support of the complaint in his appeal that the examiner erred in limiting the order by inserting the phrase "at a public exhibition controlled by the customer." We believe that such limitation in the order is inappropriate and unduly restricts the order as to the prevention of violations in the future. See the Commission's opinions in *Vanity Fair Paper Mills, Inc.*, Docket No. 7720 (1962) [60 F.T.C. 568, 573]; and *The Quaker Oats Company*, Docket No. 8119 (1962) [60 F.T.C. 798, 807], for our general views on the scope of a Section 2(d) order.

The appeal of the respondent is denied and the appeal of counsel supporting the complaint is denied in part and granted in part. It is directed that the initial decision be modified in accordance with the views expressed in this opinion and that it be adopted, as so modified, as the decision of the Commission. An appropriate order will be entered.

Commissioner Elman dissented from the decision herein.

Dissenting Opinion

By Elman, *Commissioner*:

As the Commission has again been recently reminded, its "wide discretion" in framing orders "does not permit an injunction of all violations of the statute just because a single violation has been found." *Grand Union Company* v. *Federal Trade Commission*, 300 F. 2d 92, 100 [7 S. & D. 329] (C.A. 2, 1962). An agency, like a court, is bound by the rule that the finding of a single violation "does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged." *NLRB* v. *Express Publishing Company*, 312

U.S. 426, 435 (1941). The order issued by the Commission here has the effect, so far as respondent is concerned, of making Section 2(d) of the Clayton Act, as amended, a criminal statute—for any violation of which it may be fined up to $5,000 a day. Yet, if there were any violations here, they were marginal, isolated, and in an uncertain area of the law.

There is no claim that respondent has not complied fully with Section 2(d) in its general promotional and advertising activities, in which it expends about $22,000,000 a year. The order is based solely upon payments of $150 made by respondent to Benner Tea Company in 1958, and again in 1959, as rental for booth space at a Sunday afternoon "Foodarama" open house sponsored by Benner at its warehouse in Burlington, Iowa. No merchandise was offered for sale at each of these two exhibitions which, as the hearing examiner found, were in "the nature of a civic event." Participants in the "open house", which in 1958 attracted over 12,000 people and in 1959 over 15,000 people, included the United States Department of Agriculture, state and local agencies, the Red Cross, Iowa State College, the Iowa Dairy Association, and numerous other individuals and organizations which were not Benner's suppliers. The general atmosphere was that of a county fair. "Entertainment features and attractions at the open houses", the examiner found, "included a welcoming address by the mayor of Burlington, music by a high school band, a display of a rail locomotive and mail car, and a demonstration of outdoor barbecuing of meat."

As Commission counsel conceded at the oral argument,[1] Section 2(d) requires a showing not only that payments have been made by a supplier to a customer, but that they were made "as compensation or in consideration for any services or facilities furnished by or through such customer in connection with" the resale of the supplier's products by such customer. In other words, if, as respondent contends, its $150 payments merely compensated Benner for furnishing booth space at the public exhibitions, and were not made to Benner as a *customer* and not in connection with the *resale* by Benner of merchandise bought by it from respondent, Section 2(d) was not violated. *General Foods Corporation*, 52 F.T.C. 798, 828. The question of fact thus raised is a close one, which both the hearing examiner and the Commission have resolved against respondent.

[1] "COMMISSIONER ELMAN: Do you think these $150 payments were illegal simply because they were made to the customer?

MR. PERRY: No.

COMMISSIONER ELMAN: The statute requires more than that, doesn't it?

MR. PERRY: Sure it does."

(Transcript of oral argument, pp. 19–20.)

Assuming that these payments constituted violations of Section 2(d), they certainly do not justify the broad order now being entered, covering any and all violations of Section 2(d) no matter how unrelated to the acts here found. If there has been any transgression of the law by respondent, it was not within the general area of promotional and advertising allowances. Rather, it was in connection with a clearly separate and distinct type of activity—namely, payment for a facility furnished at a public exhibition controlled by a customer. If an order is to issue, it certainly should be limited, in the manner provided by the hearing examiner in the initial decision, to that distinct kind of payment.

My views on the general questions raised by this type of case have previously been stated by me, and need not be repeated here. See dissenting opinions in *Shulton, Inc.*, Docket 7721, July 25, 1961 [59 F.T.C. 106, 114]; *Vanity Fair Paper Mills, Inc.*, Docket 7720, March 21, 1962 [60 F.T.C. 568, 579]; *Quaker Oats Company*, Docket 8119, April 25, 1962 [60 F.T.C. 798, 812]; *Tri-Valley Packing Association*, Dockets 7225, 7496, May 10, 1962 [60 F.T.C. 1134, 1175]; *American Oil Co.*, Docket 8183, June 27, 1962 [60 F.T.C. 1786, 1814]; and *Nuarc Company*, Docket 7848, August 7, 1962 [pp. 375, 394 herein]

Final Order

Respondent having filed, under Section 4.22(c) of the Commission's Rules of Practice, exceptions to the proposed final order, reasons in support thereof and a proposed alternative form of order, and counsel supporting the complaint having filed a reply in opposition thereto; and

The Commission having determined that respondent's objections to the proposed final order are without merit and that said order should be entered as the final order of the Commission:

It is ordered, That respondent's objections to the proposed final order be, and they hereby are, denied.

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

> *It is ordered*, That respondent J. A. Folger & Company, a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of any of its products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:
>
> Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation

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

It is further 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 respondent J. A. Folger & Company 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 as set forth herein.

By the Commission, Commissioner Elman dissenting and Commissioner Higginbotham not participating.

IN THE MATTER OF

JOAN DELL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket C-266. Complaint, Nov. 15, 1962—Decision, Nov. 15, 1962

Consent order requiring New York City manufacturers to cease violating the Flammable Fabrics Act by selling ladies' dresses made of fabric which was so highly flammable as to be dangerous when worn, and furnishing their customers a false guaranty to the effect that tests made under the required procedures showed the fabrics not to be dangerously flammable.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Joan Dell, Inc., a corporation, and Saul Field and Nathan Block, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Flammable Fabrics Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Joan Dell, Inc., is a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of New York. Respondents Saul Field and Nathan Block are officers of the corporate respondent and formulate, direct, and control its policies, acts and practices. Respondents are manufacturers of articles of wearing apparel, including ladies' dresses, and have their office and principal place of business at 501 Seventh Avenue, New York, N.Y.

PAR. 2. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have manufactured for sale, sold and offered for sale, in commerce; have imported into the United States; and have introduced, delivered for introduction, transported and caused to be transported, in commerce; and have transported and caused to be transported, for the purpose of sale after sale and delivery in commerce; as "commerce" is defined in the Flammable Fabrics Act, articles of wearing apparel, as the term "articles of wearing apparel" is defined therein, which articles of wearing apparel were, under Section 4 of the Flammable Fabrics Act, as amended, so highly flammable as to be dangerous when worn by individuals.

Among the articles of wearing apparel mentioned above were ladies' dresses.

PAR. 3. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have manufactured for sale, sold, and offered for sale, articles of wearing apparel made of fabric which was, under Section 4 of the Flammable Fabrics Act, as amended, so highly flammable as to be dangerous when worn by individuals, and which fabric had been shipped or received in commerce, as the terms "article of wearing apparel", "fabric", and "commerce" are defined in the Flammable Fabrics Act.

Among the articles of wearing apparel mentioned above were ladies' dresses.

PAR. 4. Respondents, subsequent to July 1, 1954, have furnished their customers with a guaranty with respect to the articles of wearing apparel, mentioned in paragraphs 2 and 3 hereof, to the effect, based upon a guaranty received, respondents guarantied that reasonable and representative tests made under the procedures provided in Section 4 of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, showed that said articles of wearing apparel in the form delivered by the respondents, were not, so highly flammable under the provisions of the Flammable Fabrics Act as to be dangerous when worn by individuals. There was reason for respondents to believe that the articles of wearing apparel covered by such guaranty might be introduced, sold, or transported in commerce.

Said guaranty was false, in that with respect to some of the said articles of wearing apparel, respondents had not received such a guaranty.

PAR. 5. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder, and as such constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Flammable Fabrics Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Joan Dell, 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 501 Seventh Avenue, New York, N.Y.

Respondents Saul Field and Nathan Block are officers of said corporation and their address is the same as that of said corporation.

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 Joan Dell, Inc., a corporation, and its officers, and Saul Field and Nathan Block, individually and as officers of respondent corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

1. (a) Importing into the United States; or

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

(c) Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce;

any article of wearing apparel which, under the provisions of Section 4 of the Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

2. Manufacturing for sale, selling, or offering for sale any article of wearing apparel made of fabric, which fabric has been shipped or received in commerce, and which, under Section 4 of the Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

3. Furnishing to any person a guaranty with respect to any article of wearing apparel or fabric which respondents, or any of them, have reason to believe may be introduced, sold or transported in commerce, which guaranty represents, contrary to fact, that reasonable and representative tests made under the procedures provided in Section 4 of the Flammable Fabrics Act, as amended, and the Rules and Regulations thereunder, show and will show that the article of wearing apparel, or the fabric used or contained therein, covered by the guaranty, is not, in the form delivered or to be delivered by the guarantor, so highly flammable under the provisions of the Flammable Fabrics Act as to be dangerous when worn by individuals, provided, however, that this prohibition shall not be applicable to a guaranty furnished on the basis of, and in the reliance upon, a guaranty to the same effect received by respondents in good faith signed by and containing the name and address of the person by whom the article of wearing apparel or fabric was manufactured or from whom it was received.

It is further 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 this order.

IN THE MATTER OF

THE CAPITAL DISTRIBUTING COMPANY ET AL.

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

Docket C-267. Complaint, Nov. 15, 1962—Decision, Nov. 15, 1962

Consent order requiring the national distributor for the publications of some 27 publishers—including magazines, comic books, and paperbacks—to cease violating Sec. 2(d) of the Clayton Act by making payments or allowances to certain operators of chain retail outlets in railroad, airport, and bus terminals and outlets in hotels and office buildings, while not making them available on proportionally equal terms to competing drug and grocery chains and other newsstands; and, further, making such payments on the basis of individual negotiation and not on proportionally equal terms.

COMPLAINT

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

PARAGRAPH 1. Respondent The Capital Distributing Company (hereinafter referred to as Capital) is a corporation organized and doing business under the laws of the State of Connecticut, with its principal office and place of business located at Division Street, Derby, Conn. Said respondent, among other things, has been engaged and is presently engaged in the business of selling and distributing various publications including magazines, comic books and paperback books under copyrighted titles. Respondent's sales of publications during the calendar year 1960 exceeded $4,000,000.00.

PAR. 2. Respondent John Santangelo, an individual, is the principal officer of respondent Capital. He formulates, directs and controls the acts and practices of said corporate respondent and his address is the same as that of the corporate respondent.

PAR. 3. Respondent Capital acts as national distributor for the publications of 27 publishers. Five of such publishers are subsidiary corporations of said respondent; eight of such publishers are not affiliated with respondent Capital but are owned by the same persons; and fourteen of such publishers are wholly unaffiliated.

In its capacity as national distributor for the publications of these publishers, respondent Capital arranges for distribution of these publications to newsstands through local wholesalers. In making such arrangements, respondent Capital performs various services for these publishers including the taking of purchase orders and the distributing, billing and collecting for such publications from customers. Said respondent has also negotiated various promotional arrangements with the retail customers of said publishers.

In its capacity as national distributor for the publications of the publishers it represents, respondent Capital, in dealing with the customers of these publishers, served and is now serving as a conduit or intermediary for the sale, distribution and promotion of publications published by said publishers.

PAR. 4. Respondent Capital has sold and distributed and now sells and distributes its publications in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

PAR. 5. In the course and conduct of its business in commerce, respondent Capital has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of publications sold to them by said respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of said respondent competing in the distribution of such publications.

PAR. 6. As an example of the practices alleged herein, respondent Capital has made payments or allowances to certain retail customers who operate chain retail outlets in railroad, airport and bus terminals, as well as outlets located in hotels and office buildings. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers (including drug chains, grocery chains and other newsstands) competing with the favored customers in the sale and distribution of the publications of said respondent. Among the favored customers receiving payments in 1960, and during the first six months of 1961, which were not offered to other competing customers in connection with the purchase and sale of respondent's publications were:

	Approximate Amount Received	
Customer:	1960	1961 (Jan.–June)
Greyhound Post Houses, Forest Park, Ill	$3,937.47	$1,521.60
Interstate Hosts, Los Angeles, Calif	221.26	188.66
ABC Vending Corp., Long Island City, N.Y	1,020.72	569.86
Fred Harvey, Chicago, Ill	881.21	74.30
Sky Chefs, New York, N.Y	354.94	92.88

Said respondent made said payments to its favored customers on the basis of individual negotiations. Among said favored customers such payments were not made on proportionally equal terms.

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

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, The Capital Distributing Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at Division Street, in the city of Derby, State of Connecticut.

Respondent, John Santangelo, is an officer of said corporation and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents The Capital Distributing Company, a corporation, its officers, and John Santangelo, individually and as an officer of said corporation, and respondents' employees, agents and representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of publications including magazines, comic books and paperback books in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

> Paying or contracting for the payment of an allowance or anything of value to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of publications including magazines, comic books and paperback books distributed, sold or offered for sale by respondents, unless such payment or consideration is affirmatively offered and otherwise made available on proportionally equal terms to all of their other cutsomers competing with such favored customer in the distribution of such publications including magazines, comic books and paperback books.

The word "customer" as used above shall be deemed to mean anyone who purchases from a respondent, acting either as principal or agent, or from a distributor or wholesaler where such transaction with such purchaser is essentially a sale by such respondent, acting either as principal or agent.

It is further 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 this order.

IN THE MATTER OF

MINDLIN'S, INC., ET AL.

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

Docket C-268. Complaint, Nov. 15, 1962—Decision, Nov. 15, 1962

Consent order requiring Kansas City, Mo., retailers of fur products to cease violating the Fur Products Labeling Act by failing to show on labels and

invoices and in advertising the true names of animals producing certain furs, and failing in labeling and invoicing to disclose the country of origin of imported furs and to use the term "natural" where required; labeling fur products falsely as to the names of animals producing certain furs and to show that artificially colored furs were natural, and tagging them with fictitious prices; failing in labeling to disclose when fur was artificially colored, to identify the manufacturer, etc., and to use the term "Persian Lamb" as required; failing to use on invoices the terms "Dyed Broadtail-processed Lamb" and "Dyed Mouton Lamb"; by advertising in newspapers which represented excessive amounts as usual retail prices; failing to maintain adequate records as a basis for pricing and value claims; and failing in other respects to comply with labeling and invoicing requirements.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Mindlin's, Inc., a corporation, and its officers and Harold S. Mindlin, individually and as officer of said corporation, and Alexander Meltzer, individually and as fur buyer and manager of the fur department of corporate respondent, hereinafter referred to as respondents have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Respondent Mindlin's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri.

Individual respondent Harold S. Mindlin is an officer of the corporate respondent. Individual respondent Alexander Meltzer is fur buyer and manager of the fur department of corporate respondent. The individual respondents formulate, direct and control the acts, practices and policies of corporate respondent Mindlin's, Inc., including those hereinafter set forth.

Respondents are retailers of fur products and have their office and principal place of business at 201 West 47th Street, Kansas City, Mo.

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

PAR. 3. Certain of said fur products were misbranded in that they were falsely or deceptively labeled or otherwise falsely or deceptively identified with respect to the name or names of the animal or animals that produced the fur from which said fur products had been manufactured, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were falsely or deceptively labeled or otherwise falsely or deceptively identified to show that the fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 5. Certain of said fur products were misbranded in that labels affixed thereto contained fictitious prices and misrepresented the regular retail selling prices of such fur products in that the prices represented on such labels as the regular prices of the fur products were in excess of the retail prices at which the respondents usually and regularly sold such fur products in the recent regular course of business, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 6. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

1. To show the true animal name of the fur used in the fur product.

2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

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

4. To show the country of origin of the imported furs used in the fur product.

PAR. 7. 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 promulgated thereunder was set forth in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "Persian Lamb" was not set forth in the manner required by law, in violation of Rule 8 of the Rules and Regulations.

(c) The term "natural" was not used to describe fur products that were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(d) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not completely set out on one side of labels, in violation of Rule 29(a) of said Rules and Regulations.

(e) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30 of said Rules and Regulations.

(f) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth separately on labels with respect to each section of fur products composed of two or more sections containing different animal furs, in violation of Rule 36 of said Rules and Regulations.

(g) Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act, and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were invoices pertaining to such fur products which failed:

1. To show the true animal name of the fur used in the fur product.

2. To show the country of origin of the imported furs used in the fur product.

PAR. 9. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "Dyed Broadtail-processed Lamb" was not set forth in the manner required by law, in violation of Rule 10 of said Rules and Regulations.

(c) The term "Dyed Mouton Lamb" was not set forth in the manner required by law, in violation of Rule 9(a) of the said Rules and Regulations.

(d) The term "natural" was not used to describe fur products that were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

PAR. 10. Certain of said fur products were falsely or deceptively advertised in that said fur products were not advertised as required under the provisions of Section 5(a) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Said advertisements were intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondents which appeared in issues of The Kansas City Times, a newspaper published in the city of Kansas City, State of Missouri, and having a wide circulation in said State and various other States of the United States.

Among such false and deceptive advertisements of fur products, but not limited thereto, were advertisements which failed to disclose the name or names of the animal or animals that produced the fur contained in the fur product as set forth in the Fur Products Name Guide, in violation of Section 5(a)(1) of the Fur Products Labeling Act.

PAR. 11. By means of the advertisements referred to in paragraph 10, and other advertisements of similar import and meaning not specifically referred to herein respondents represented prices of fur products as having been reduced from regular or usual prices and the amount of such reductions constituted savings to the purchasers, where the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent course of business and no savings were thereby afforded to the purchasers, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated under the said Act.

PAR. 12. Respondents by means of the advertisements referred to in paragraph 10 and other advertisements of similar import and meaning not specifically referred to herein, falsely and deceptively advertised fur products in that respondents represented that fur products offered for sale were the stock of a business in a state of liquidation, when such was not the fact, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(g) of the Rules and Regulations promulgated under the said Act.

PAR. 13. Respondents further falsely and deceptively advertised fur products, in violation of Section 5(a)(5) of the Fur Products Labeling Act, by affixing labels to fur products which contained fictitious prices and misrepresented the regular retail selling prices of such products in that the prices represented on such labels as the regular prices of the fur products were in excess of the retail prices at which respondents usually and regularly sold such products in the recent regular course of business.

PAR. 14. Respondents in advertising fur products for sale as alleged in paragraphs 10 through 12 made claims and representations respecting prices and values of fur products. Said representations were of the types covered by subsections (a), (b), (c), and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based in violation of Rule 44(e) of said Rules and Regulations.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Mindlin's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 201 West 47th Street, in the city of Kansas City, State of Missouri.

Respondent Harold S. Mindlin is an officer of said corporation. Respondent Alexander Meltzer is fur buyer and manager of the fur department of said corporation. Their address is the same as that of said corporation.

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, Mindlin's, Inc., a corporation, and its officers, and Harold S. Mindlin, individually and as an officer of said corporation, and Alexander Meltzer, individually and as fur buyer and manager of the fur department of the corporate respondent, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce or the transportation or distribution in commerce of any fur product; or in connection with the sale, advertising, offering for sale, transportation, or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

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

2. Representing directly or by implication on labels that the fur contained in fur products is natural when such fur is pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

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3. Falsely or deceptively labeling or otherwise identifying any such product as to the name or names of the animal or animals that produced the fur from which such product was manufactured.

4. Falsely or deceptively labeling or otherwise identifying such products as to the regular prices thereof by any representation that the regular or usual prices of such products are any amount in excess of the prices at which respondents have usually and customarily sold such products in the recent regular course of business.

5. Setting forth on labels affixed to fur products information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

6. Failing to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of the term "Lamb".

7. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in the sequence required by Rule 30 of said Rules and Regulations.

8. Failing to set forth separately on labels attached to fur products composed of two or more sections containing different animal furs the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to the fur comprising each section.

9. Failing to set forth on labels the item number or mark assigned to a fur product.

10. Failing to describe fur products as natural when such fur products are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

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

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

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

3. Failing to set forth the term "Dyed Mouton Lamb" in the manner required where an election is made to use that term instead of the term "Dyed Lamb".

4. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the term "Dyed Lamb".

5. Failing to describe fur products as natural when such fur products are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

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

1. Fails to set forth all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.

2. Represents directly or by implication that the regular or usual price of any fur product is any amount in excess of the price at which respondents have regularly and usuallv sold such products in the recent regular course of business.

3. Misrepresents directly or by implication that any such products are the stock of a business in a state of liquidation.

4. Misrepresents in any manner that savings are available to purchasers of respondents' fur products.

D. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

It is further 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 this order.

IN THE MATTER OF

YOUR INCOME TAX RECORDS, INC., ET AL.

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

Docket C-269. Complaint, Nov. 15, 1962—Decision, Nov. 15, 1962

Consent order requiring New York City sellers, through their franchised distributors, of a combined record keeping system and tax service for small businesses, to cease—in advertisements in newspapers, brochures, and other advertising material to induce the purchase of distributorships—misrepresenting distributors' earnings and opportunities for profits; respondents' time in business, experience and importance; approval of their system by banks, etc., as in the order below set forth in detail.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Your Income Tax Records, Inc., a corporation, and James W. Riley, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Your Income Tax Records, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 53 Worth Street, New York 13, N.Y.

Respondent James W. Riley is an officer of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution, through franchised distributors, of a combined record keeping system and tax service for small businesses. Businessmen purchasing said systems and service are referred to as "subscribers" by respondents. The record keeping system consists of a loose-leaf binder called "Your Income Tax Saver" which contains forms and instructions for maintaining records of the business. The tax service furnishes the subscriber with a monthly income tax bulletin, answers his inquiries regarding income taxes which the subscriber may submit, and prepares his income tax return at the end of the year from a summary of figures furnished by him. The record keeping system and tax service, covering a period of two years, is called the Executive Two Year System and costs the subscriber $99.50.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other states of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of their business, at all times mentioned herein, respondents have been and are in substantial competition, in commerce, with corporations, firms and individuals in the sale of products and services of the same general kind and nature as those sold by respondents.

PAR. 5. In furtherance of the sale of their products and services, respondents grant to distributors the right to sell their products and services in an exclusive trade territory in consideration of the initial purchase by distributors, covering the first year, of an inventory consisting of said bookkeeping systems and various supplies called the "franchise investment" in the minimum amount of $6500, and the purchase each year thereafter by the distributor of at least twenty-five Executive Systems during each calendar quarter. For the purpose of inducing the purchase of said distributorships, respondents have made various statements in advertisements in newspapers of national circulation, in brochures, in letters and in other advertising material respecting the prospective earnings from said distributorships, the permanency of ownership of said distributorships and affiliation with respondents, their experience and expertness in preparing income tax returns, the length of time they have been in business, their staff and facilities and their recognition and approval by banks, credit bureaus and others. Typical, but not all inclusive, of such statements are the following:

FED UP WITH THE RAT RACE?
• ENJOY SECURITY • DIGNITY • PRESTIGE IN A PROFITABLE BUSINESS OF YOUR OWN

* * * * * * *

This is our proposition: We provide an essential service to small businesses. We've been in business for 18 years, have clients from coast to coast, many of them for all these years. Our service is sold only through exclusively franchised local distributors.

A man with executive ability who can devote full time to this business can earn in excess of $10,000 a year and establish his own retirement fund through automatic renewals of the service.

If you are interested in a solid, profitable business of your own, you can secure your future in this non-seasonal, recession proof professionally proven Business Management Service with a constant flow of reorders. This service is built around a record control system for medium sized companies that is recognized as unique by Banks, Chambers of Commerce as well as credit associations across the country.

You need no special knowledge or experience, no office other than your own home. We train you at our expense right in your own territory and back you up all the way with an effective sales promotion program. If you qualify then the minimum investment is $6,650 in an inventory of material with a resale value of more than $10,000.

We think this final word is an order: We're not interested in the "fast buck operator" in allocating distributorships. We want to talk only to men who want to establish a solid, profitable business of their own . . . a business they can live with . . . a business they can be proud to talk about at a local business club luncheon.

Choice territories: In New York, New Jersey, Pennsylvania, Maryland, New England and Georgia.

. . . many of our distributors recoup their original investment . . . plus a substantial profit in the first few months.

Most of our distributors earn back every penny of their investment in a matter of a few months plus a substantial profit.

. . . our service is . . . a plan that is approved by Banks, Chambers of Commerce, Credit Bureaus.

A man of normal executive ability could earn a minimum of $10,000 per year in his efforts . . . and then build from there.

. . . a modest investment to make . . . can lead up to a normal yearly income of up to $15,000.

THE GROWTH POTENTIAL of the Typical YITR Distributorship

A CONSTANTLY EXPANDING BUSINESS

In a few years it can start working "for you" and give you a lucrative semi-retirement income. The growth possibilities are big enough to be staggering. You establish for yourself hundreds of friendly clients or subscribers, who create for you a permanent ever-increasing, steady income through the renewal of our service every twenty-four months. It is a constantly increasing income since you are continually adding new Subscribers who in turn keep renewing.

* * * * * * *

SCHEDULE of COST and POTENTIAL PROFIT

Distributor's Cost \$44.50 Dealer's Cost \$54.50 Subscriber's Cost \$99.50

NATURE OF SALES FORCE		Weekly Total	Yearly Total
Your personal sales of just one each day or five per week at a \$55.00 profit per sale	\$275.00	\$475.00	\$24,700
4 Associate-Distributors (Your salesmen or dealers) each making one sale per day or a total of twenty sales per week at your override of \$10.00 each	\$200.00		
Your personal sales of just one each day or five sales per week at a \$55.00 profit per sale	\$275.00	\$375.00	\$19,500
2 Associate-Distributors (your salesmen or dealers) each making one sale per day or a total of ten sales per week at your override of \$10.00 each	\$100.00		
Just covering the territory by yourself and making just one sale per day or five sales per week at \$55.00 profit per sale		\$275.00	\$14,300

Your work is complete after the initial sale.

The distributor has only one job to do: sell the service. All tax work is the responsibility of the New York Office. Every two years his customers' subscriptions come up for renewal, giving him steadily increasing income as new subscribers are enrolled, and the old ones renewed.

. . . you are the owner of your own business.

Since 1943 . . .

The personnel of Your Income Tax Records, Inc., has processed over ONE QUARTER MILLION TAX RETURNS . . . .

We've been in business for 18 years, have clients from coast to coast, many of them for all these years. . . .

The staff of Your Income Tax Records, Inc., has available one of the finest and costliest income tax libraries. This library is available to them during your entire business year so that they may properly answer all your questions on income taxes. This library is a permanent one and belongs to our organization. It is not hired for only the Income Tax Season. No other organization can make this statement!

The Staff of Your Income Tax Records, Inc., will serve you your entire business year! This is a full time staff employed not only for the Income Tax season but on a permanent basis! No other organization can make this statement.

The personnel of Your Income Tax Records, Inc., is the staff who for 14 years prepared an average of over 15,000 income tax returns per year. No other organization can make this statement.

Ours is the only company of this type that is successfully and entirely managed by accountants and Income Tax specialists who have been in this work since 1943. YOUR INCOME TAX RECORDS, INC., is the most experienced Income Tax organization of its kind in America . . . . No other organization can claim these advantages.

PAR. 6. Through the use of the aforesaid statements and representations set out in paragraph 5, above, respondents have represented directly or by implication:

1. That purchasers of respondents' distributorships are assured of earning substantial incomes that will increase yearly.

2. That the sale of distributorships confers absolute ownership thereof on purchasers and creates permanent business affiliations between the parties.

3. That distributors recoup the purchase price of distributorships within six months after purchase.

4. That distributors make a substantial net profit in addition to recovery of the amount paid for the distributorship within the first six months and that distributors are assured of earning $10,000 in the first year of their operation.

5. (a) That distributors customarily or typically employ associate distributors.

(b) That distributors employing associate distributors will likely derive additional net income in the amount of from $5200 to $10,400 per year.

(c) That distributors employing associate distributors will likely realize a profit of from $19,500 to $24,700 per year resulting from earnings from their own sales and from those of their associate distributors.

6. That a distributor can establish his own retirement fund by automatic renewals of the service without requiring further effort on his part.

7. That distributors could devote their time exclusively to making sales.

8. That the corporate respondent is the only organization engaged in the same kind of business having a full time staff and its own income tax library.

9. That Your Income Tax Records, Inc., has been in the record keeping and tax service business for 18 years.

10. That Your Income Tax Records, Inc., has prepared over 250,000 income tax returns.

11. That Your Income Tax Records, Inc., is the most experienced organization of its kind in the United States.

12. That respondents' record keeping systems and services are approved, and recognized as unique, by banks, chambers of commerce and credit organizations throughout the United States.

PAR. 7. In truth and in fact:

1. The income earned from respondents' distributorships by many distributors has been insubstantial and many of the distributorships sold failed to produce incomes that increased yearly.

2. The sale of distributorships by respondents does not confer absolute ownership thereof on purchasers or create permanent business affiliations between the parties. The continuance of such ownership or affiliation is dependent upon purchasers' conformance with terms and conditions of the franchise agreement entered into by the parties.

3. Many purchasers of respondents' distributorships have not recouped the purchase price of their distributorships within six months or in a longer period of time during which they held such distributorships.

4. Seldom if at all has any distributor of respondents' systems earned net profits in the first year of his operation in an amount in excess of the amount paid for the distributorship and $10,000 is not typical of the earnings by distributors in the first year.

5. (a) Distributors do not customarily or typically employ associate distributors.

(b) Distributors' net income is not customarily or typically augmented by income from sales by associate distributors in the amounts of $5,200 to $10,400 per year.

(c) Distributors do not customarily or typically earn net profits combined with those of associate distributors which amount to $19,500 to $24,700 per year.

6. In many instances the distributor must keep in contact with the subscriber in order to retain the subscriber's business and the distributor must continue to sell a minimum number of systems per year in order to retain his franchise.

7. Distributors are required to perform services and give advice to subscribers from time to time, hence they are unable to devote their time exclusively to making sales.

8. Other organizations engaged in the same kind of business as the corporate respondent have full time staffs and income tax libraries similar to respondents.

9. The respondent corporation was incorporated in February 1956 and therefore has been engaged in the record keeping and tax service for less than seven years.

10. The respondent organization has not prepared 250,000 income tax returns. This claim is based largely on the number of income tax returns allegedly prepared by persons prior to their joining the respondent organization.

11. The corporate respondent is not the most experienced organization of its kind in the United States. Other organizations have been engaged in the same kind of business as long or longer than the corporate respondent.

12. Respondents' record keeping system and services have not been approved, or recognized as being unique, by banks, chambers of commerce and credit organizations throughout the United States.

Therefore, the statements and representations referred to in paragraphs 5 and 6 hereof were false, misleading and deceptive.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices 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' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Your Income Tax Records, 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 53 Worth Street, in the city of New York, State of New York.

Respondent James W. Riley is an officer of said corporation and his address is the same as that of said corporation.

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 Your Income Tax Records, Inc., a corporation, and its officers, and James W. Riley, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of business record keeping systems and tax services in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist representing directly or indirectly to prospective distributors of such record keeping systems:

1. That purchasers of respondents' distributorships are assured of earning substantial incomes that will increase yearly.

2. That the sale of distributorships confers absolute ownership thereof on the purchasers or that a permanent business affiliation between the parties is created by such sale, without disclosing that the permanency of such ownership or affiliation is dependent on purchasers' conformance with the terms and conditions set out in franchise agreements.

3. That distributors are assured of recouping the purchase price of distributorships within six months, or any other specified period of time.

4. That the net profit of a new distributor in his first year of operation will exceed the purchase price of such distributorships or that any distributor is assured of earnings amounting to $10,000 in his first year of operation; or misrepresenting in any manner the net profit of earnings to be made by distributors in the first year of operation.

5. (a) That distributors customarily or typically employ associate distributors.

(b) That distributors employing associate distributors will or are likely to earn an additional income in the amount of from $5,200 to $10,400 per year.

(c) That distributors employing associate distributors will realize a profit from their own sales and those of associate distributors in the amount of $19,500 to $24,700 per year.

6. That profits or earnings to be realized by distributors will be any amount in excess of the average earnings or profits in fact being realized or derived by respondents' distributors similarly engaged in selling respondents' systems and services.

7. That distributors can establish their own retirement funds by automatic renewals of the service by subscribers without requiring any further effort on the part of distributors.

8. That distributors will be able to devote their time exclusively to making sales.

9. That Your Income Tax Records, Inc., is the only organization engaged in the sale of record keeping systems and tax service which has a full time staff or its own income tax library.

10. That Your Income Tax Records, Inc., has been in the business record keeping and tax service business for 18 years, or any other period of time not in accordance with fact.

11. That Your Income Tax Records, Inc., has prepared over 250,000 income tax returns or any number of income tax returns not in accordance with fact.

12. That Your Income Tax Records, Inc., is the most experienced organization of its kind in the United States; or misrepresenting in any manner the business experience of respondents.

13. That respondents' system or services are approved, or are recognized as being unique, by banks, chambers of commerce or credit institutions throughout the United States; or misrepresenting in any manner the approval or recognition of said systems or services by others.

It is further 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 this order.

IN THE MATTER OF

PARKER BROTHERS, INC.

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

Docket 7976. Complaint, June 24, 1960—Decision, Nov. 19, 1962

Consent order requiring a Salem, Mass., toy manufacturer to cease violating Sec. 2(d) of the Clayton Act by granting promotional allowances to certain wholesale customers in connection with their advertising of its products in the toy catalogues they published and sold to retail outlets for redistribution to the consuming public—such as approximately $12,000 paid in 1959 to members of an association of toy wholesalers—without offering proportionally equal payments to all customers competing with those so favored.

COMPLAINT

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

PARAGRAPH 1. Respondent Parker Brothers, Inc., is a corporation organized and doing business under the laws of the State of Massachusetts, with its principal office and place of business located at 190 Bridge Street, Salem, Mass.

PAR. 2. Respondent has been engaged, and is presently engaged, in the business of manufacturing and distributing toys. These products are sold and distributed by respondent to wholesalers, department stores and chain stores located in various parts of the nation. Respondent's sales in 1959 approximated $7,500,000.

PAR. 3. Respondent has sold and distributed, and now sells and distributes, its products in substantial quantities in commerce, as "commerce" is defined in the amended Clayton Act, to competing customers located throughout various States of the United States, and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of products sold to them by respondent. Such payments or allowances were not offered or made available on proportionally equal terms to all other customers of respondent competing with said favored customers in the distribution of respondent's products.

PAR. 5. As an example of the practices alleged herein, respondent has granted, and is presently granting, promotional payments or allowances for the promoting and advertising of its products to certain wholesale customers who publish toy catalogues either in combination with each other through wholesaler associations and groups, or in an individual capacity. The payments or allowances are granted by respondent to said wholesale customers in connection with their advertising respondent's products in their toy catalogues. These catalogues are sold and distributed by said favored wholesale customers to retail outlets for redistribution to the consuming public.

The aforesaid promotional payments or allowances were not offered or granted on proportionally equal terms to all other custmers of respondent who compete with said favored customers in the distribution of respondent's products. These unfavored customers include wholesalers who are not members of any toy wholesaler associations or groups. Included among the favored customers are the members of Individualized Catalogues, Inc., New York, New York, an association composed of toy wholesalers which publishes a toy catalogue. In 1959, the promotional payments or allowances granted to the members of said wholesaler association by respondent approximated $12,000.

Par. 6. The acts and practices of respondent, as alleged above, are in violation of the provisions of subsection (d) of Section 2 of the amended Clayton Act.

Mr. James E. Corkey and *Mr. Stanley M. Lipnick* for the Commission.

Mr. Harold M. Wilcox and *Mr. W. Sidney Felton*, of *Herrick, Smith, Donald, Farley & Ketchum*, Boston, Mass., for the respondent.

INITIAL DECISION BY RAYMOND J. LYNCH, HEARING EXAMINER

In a complaint issued June 24, 1960, the respondent, Parker Brothers, Inc., a corporation, located at 190 Bridge Street, Salem, Massachusetts, was charged with violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. Sec. 13), in the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of products sold to them by respondent, without making such payments or allowances available to all other competing customers on proportionally equal terms.

The respondent, by and with the advice of counsel, and counsel supporting the complaint have entered into an agreement containing a consent order to cease and desist, thus disposing of all the issues involved in this proceeding.

In the agreement it is expressly provided that the signing thereof 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.

By the terms of the agreement, the respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with the allegations.

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

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

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

The hearing examiner has considered the agreement and the order therein contained, and, it appearing that said agreement and order provide for an appropriate disposition of this proceeding, the same is hereby accepted and it is hereby 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 hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent named herein, and that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That respondent Parker Brothers, Inc., a corporation, and its officers, directors, employees, agents, and representatives, directly or through any corporate or other device, in, or in connection with, the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Clayton Act, as amended, of any toy, game, or hobby products, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondent as compensation or in consideration for any services or facilities consisting of advertising or other publicity, furnished by or through such customer, in a toy catalogue, handbill, circular, or any other printed publication serving the purpose of a buying guide, distributed, directly or through any corporate or other device, by such customer, in connection with the processing, handling, sale, or offering for sale of any toy, game, or hobby products manufactured, sold, or offered for sale by respondent, unless such payment of consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

ORDER WAIVING FILING OF NOTICE, DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having come before the Commission upon the certification by the hearing examiner, under Section 4.13(c)(9) of the Rules of Practice, of the quetsion of acceptance of a duly executed consent agreement between respondent Parker Brothers, Inc., and counsel supporting the complaint; and

The Commission having concluded that, in the circumstances presented, it should exercise its discretion and waive the requirement for more timely filing of notice:

It is ordered, That the provision of the Commission's Notice of July 14, 1961, requiring the filing of notice by September 1, 1961, be, and it hereby is, waived in this case.

It is further ordered, That the initial decision of the hearing examiner accepting the consent agreement executed by the parties be, and it hereby is, adopted as the decision of the Commission, and; accordingly:

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

IN THE MATTER OF

BILNOR CORPORATION

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

Docket 7975. Complaint, June 24, 1960—Decision, Nov. 27, 1962

Order requiring a Brooklyn, N.Y., manufacturer of games, toys, and hobbies, to cease violating Sec. 2(d) of the Clayton Act by making promotional payments to certain jobber customers' toy catalog companies—such as payments of $500 in both 1958 and 1959 to Individualized Catalogues, Inc., for illustrations and advertisements of its products in the latter's catalog—while not making such payments proportionally available to competing jobber customers.

COMPLAINT

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

PARAGRAPH 1. Respondent Bilnor Corp. is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 300 Morgan Avenue, Brooklyn 11, N.Y.

PAR. 2. Respondent has been engaged, and is presently engaged, in the business of manufacturing and distributing toy products, including children's swimming pools. These products are sold and distributed by respondent to wholesalers and department stores located in various parts of the nation. Respondent's sales in 1959 approximated $5,000,000.

PAR. 3. Respondent has sold and distributed, and now sells and distributes, its products in substantial quantities in commerce, as "commerce" is defined in the amended Clayton Act, to competing customers located throughout various States of the United States, and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of products sold to them by respondent. Such payments or allowances were not offered or made available on proportionally equal terms to all other customers competing with said favored customers in the distribution of respondent's products.

PAR. 5. As an example of the practices alleged herein, respondent granted, and is presently granting, promotional payments or allowances for the promoting and advertising of its products to certain wholesale customers who publish toy catalogues either in combination with each other through wholesaler associations and groups, or in an individual capacity. The payments or allowances are granted to said wholesale customers in connection with their advertising respondent's products in their toy catalogues. These catalogues are sold and distributed by said favored wholesale customers to retail outlets for redistribution to the consuming public.

The aforesaid promotional payments or allowances were not offered or granted on proportionally equal terms to all other customers of respondent who compete with said favored customers in the distribution of respondent's products. These unfavored customers include wholesalers who are not members of any toy wholesaler associations or groups. Included among the favored customers are the members of Individualized Catalogues, Inc., New York, New York, an association composed of toy wholesalers which publishes a toy catalogue.

PAR. 6. The acts and practices of respondent, as alleged above, are in violation of the provisions of subsection (d) of Section 2 of the amended Clayton Act.

Mr. Jerome Garfinkel for the Commission.

Mr. Leon Silverman, of *Strasser, Spiegelberg, Fried & Frank* of New York, N.Y., for respondent.

INITIAL DECISION BY RAYMOND J. LYNCH, HEARING EXAMINER

The complaint charges the respondent, Bilnor Corp., with violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. Sec. 13), in the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for any services or facilities to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of products sold to them by respondent, without making such payments or allowances available to all other competing customers on proportionally equal terms. As an example of this practice, the complaint alleges the respondent made payments to certain wholesale customers for the advertising of its products in the catalogs of these wholesale customers, without proportionally equal payments to the rest of respondent's customers competing with the recipients of the promotional payments.

Respondent's answer to the complaint, dated September 28, 1960, made partial admissions of the allegations of the complaint, in particular catalog advertising, but denied that any of its promotional payments constituted violations of the Act.

On May 18, 1962, a stipulation was executed by the respondent and counsel for both parties, setting forth certain facts and waiving hearing. Argument was reserved on the scope of the cease and desist order to be entered. Proposed findings and order were submitted by both parties and, on July 6, 1962, oral argument was allowed thereon.

The hearing examiner has considered the stipulation, the proposed findings of fact and conclusions submitted by counsel representing the parties, and all findings of fact and conclusions of law not hereinafter specifically found or concluded are herewith rejected and the hearing examiner having considered the entire record makes the following findings as to the facts, conclusions drawn therefrom and order.

FINDINGS OF FACT

I

Bilnor Corp. is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 300 Morgan Avenue, Brooklyn 11, New York.

II

Respondent has been engaged, and is presently engaged, in the business of manufacturing toys, games and hobbies such as swimming pools and wading pools (hereinafter called "products"). These products are sold by respondent to jobbers located in various parts of the nation for resale to retailers. Respondent's sales in 1959 approximated $5,000,000.

III

Respondent has sold, and now sells, its products in commerce, as "commerce" is defined in the amended Clayton Act, to customers located throughout various States of the United States, and in the District of Columbia, some of whom are in competition with other of its customers.

IV

In the course and conduct of its business in commerce respondent, on June 20, 1958, made a $500 payment to Individualized Catalogues, Inc., for the latter's illustration and advertisement in its 1958 summer catalog of products manufactured by Bilnor Corp. for jobber customers of respondent who owned Individualized Catalogues, Inc. Respondent, on August 10, 1959, made a further $500 payment to Individualized Catalogues, Inc., for the latter's illustration and advertisement in its 1959 summer catalog of products manufactured by Bilnor Corp. for jobber customers of said respondent who owned Individualized Catalogues, Inc.

Individualized Catalogues, Inc., is a toy catalog company owned and controlled by jobber customers of respondent. The payments to Individualized Catalogues, Inc., were made by respondent as compensation or in consideration for the illustration and description in the catalogs of Individualized Catalogues, Inc., of one or more products sold by respondent to jobber customers who owned and controlled Individualized Catalogues, Inc. Specifically, the products were sold by respondent to Schranz and Bieber, Inc., and Lachman, Rose & Company, two of the four toy jobbers who owned and controlled Individualized Catalogues, Inc. The payments made by respondent to Individualized Catalogues, Inc., were not offered or made available by respondent on proportionally equal terms to all of its other jobber customers who were in competition in the contemporaneous resale of its products of like grade and quality with those jobber customers who owned and controlled Individualized Catalogues, Inc., a toy catalog company, to which the aforesaid advertising payments were made.

V

The jobber customers who owned and controlled Individualized Catalogues, Inc., sold and distributed the toy catalogs of Individualized Catalogues, Inc., to retailers for redistribution to the consuming public.

CONCLUSIONS

The acts and practices of the respondent as herein found were in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C., Sec. 13) in the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with the handling, sale, or offering for sale of products sold to them by respondent, without making such payments or allowances available to all other competing customers on proportionally equal terms.

Based upon the above findings, the public interest requires the issuance of a cease and desist order. The only question before the examiner is a determination of the type order that should issue. Counsel supporting the complaint requests a broad order,[1] while counsel representing respondent argues that the order should be limited to the specific violation admitted by the stipulation.[2] The examiner is of the opinion that the *Ruberoid* case can be distinguished from the *Swanee Paper Co.* case and that the former sets forth the policy established by the Commission in a number of cases.[3]

[1] *FTC* v. *Ruberoid Co.*, 343 U.S. 470 [5 S. & D. 388] (1952).

[2] *Swanee Paper Co.* v. *FTC* 291 F. 2d 833; [7 S. & D. 175].

[3] (See *In the Matter of Chestnut Farms Chevy Chase Dairy*, Docket No. 6465, 53 FTC 1050, 1062 (1957); *In the Matter of Henry Rosenfeld, Inc., et al.*, Docket 6212, 52 FTC

In addition, the most recent decision by the Supreme Court, January 15, 1962, in *FTC* v. *Broch*, FTC Docket 6484 [368 U.S. 360, 7 S. & D. 305] although involving a Section 2(c) violation of the Clayton Act follows the reasoning in the Ruberoid case endorsing a broad order and concludes that this type order is necessary to stop the *illegal practice* regardless of the form it takes whether it be a vehicle such as that used in the present case, or any other type, such as radio, television, newspaper or other media. In the *Shulton* decision, Docket No. 7721, dated July 25, 1961 [59 F.T.C. 106], the Commission adopted the position that the specific practice found to be illegal under Section 2(d) was the granting of discriminatory payments to certain customers for services and facilities furnished by such customers. As previously stated, the practice involved is the discriminatory payment to a buyer regardless of the form in which such discrimination takes place. Based upon the above precedents, the examiner concludes a broad order as recommended by Counsel Supporting the Complaint is required in this proceeding.

ORDER

It is ordered, That respondent Bilnor Corp., a corporation, its officers, directors, representatives, agents or employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of toy, game or hobby products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any toy, game or hobby product manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such toy, game or hobby product.

FINAL ORDER

The Commission on October 5, 1962, having issued its order providing for the filing of objections by the respondent to the proposed final order of the Commission in modification of the order to cease

1535, 1544–1545 (1956); *In the Matter of P. Lorillard Company*, Docket No. 6600, Init. Dec., dated Oct. 9, 1957, Init. Dec. adopted by Commission May 7, 1958 [54 FTC 1550]; *In the Matter of Swanee Paper Corporation*, Docket 6927, Init. Dec. dated August 18, 1959, adopted by Commission March 22, 1960) [56 FTC 1077].

and desist contained in the hearing examiner's initial decision filed August 16, 1962; and

Respondent having been served with said order of October 5, 1962, and not having filed objections to the proposed final order of the Commission within the time granted in said order; and

The Commission having determined that its proposed final order should be adopted and entered as the final order of the Commission:

It is ordered, That the respondent, Bilnor Corporation, and its officers, directors, employees, agents, and representatives, directly or through any corporate or other device, in, or in connection with, the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Clayton Act, as amended, of any toy, game, or hobby products, do forthwith cease and desist from:

> Paying or contracting for the payment of anything of value to or for the benefit of any customer of such respondent as compensation or in consideration for any services or facilities consisting of advertising or other publicity, furnished by or through such customer, in a toy catalogue, handbill, circular, or any other printed publication serving the purpose of a buying guide, distributed, directly or through any corporate or other device, by such customer, in connection with the processing, handling, sale, or offering for sale of any toy, game, or hobby products manufactured, sold, or offered for sale by such respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

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

By the Commission, Commissioner Higginbotham not participating.

IN THE MATTER OF

SACKS WOOLEN CO., INC., ET AL.

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

Docket 8436. Complaint, June 21, 1961—Decision, Nov. 27, 1962

Order requiring New York City distributors of wool products, principally to retail stores including chain and department stores, to cease violating the Wool Products Labeling Act by selling in commerce skirt lengths containing wool, without any tags or labels disclosing the fiber content.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Sacks Woolen Co., Inc., a corporation, and Abraham Goodman, Nathan Sacks, and Martin Sbarge, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sacks Woolen Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondents Abraham Goodman, Nathan Sacks, and Martin Sbarge are officers of the corporate respondent. Said individual respondents cooperate in formulating, directing, and controlling the acts, policies, and practices of the corporate repondent, including the acts and practices hereinafter referred to. All respondents have their office and principal place of business at 215 West 39th Street, New York, N.Y.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since November 1959, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment, and offered for sale in commerce, as "commerce" is defined in said Act, wool products as "wool products" are defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products were woolen piece goods, labeled or tagged by respondents as consisting of "50% wool, 50% rayon" and "36% wool, 34% cotton, 20% rayon, 10% nylon", whereas, in truth and in fact, said woolen pieces contained substantially less woolen fibers than was stated on the foregoing labels or tags affixed thereto.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, or labeled as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were woolen piece goods with labels which failed: (1) to show the true generic names of the fibers present and (2) to show the percentages of such fibers.

PAR. 5. The respondents in the course and conduct of their business as aforesaid were and are in substantial competition in commerce with other corporations, firms and individuals likewise engaged in the sale of wool products, including woolen piece goods.

PAR. 6. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, 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.

Mr. Bruce T. Fraser for the Commission.

Guzik and Boukstein, of New York, N.Y., by *Mr. Leo Guzik* for respondents.

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

The Federal Trade Commission, on June 21, 1961, issued its complaint, charging the respondents named in the caption hereof with violations of the Wool Products Labeling Act of 1939 and the Federal Trade Commission Act. By their answer, respondents made a general denial of the alleged violations, and entered certain affirmative defenses.

After postponements for negotiations and for the convenience and necessity of counsel, hearings were held in New York, New York, on February 19 and 20, 1962, at which the presentation of evidence in support of, and in opposition to the complaint was concluded. Proposals and briefs were filed by both sides on March 23, and replies thereto were filed on April 3 and 9, 1962.

After having carefully considered the entire record in this proceeding and the proposals and briefs of the parties, the hearing examiner issues this initial decision. Findings proposed by the parties, which are not adopted herein, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

FINDINGS OF FACT

1. Respondent Sacks Woolen Co., Inc., sometimes herein referred to as Sacks, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

2. Individual respondents Abraham Goodman, Nathan Sacks, and Martin Sbarge are officers of the corporate respondent. 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 office and principal place of business at 215 West 39th Street, New York, N.Y.

3. Subsequent to the effective date of the Wool Products Labeling Act of 1939, sometimes herein referred to as the Wool Act, and more especially since November 1959, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment, and offered for sale in commerce, as "commerce" is defined in said Act, wool products as "wool products" are defined therein.

4. The average volume of business of Sacks during the past several years has been approximately $2,500,000 annually. It sells principally to retail stores, including chain and department stores, which resell its products primarily to women who do their own sewing.

5. Although Sacks sells other kinds of merchandise, including woolen fabrics in 12 and 15 yard lengths, the evidence herein with respect to its branding of wool products relates to one yard pieces of fabric which are referred to as "skirt lengths", each containing the amount of material normally required to make a skirt. To produce these skirt lengths, piece goods are cut by Sacks into one yard lengths, folded, and separately packaged by means of a tag or label usually in the form of a polyethylene band or cardboard header attached to a hanger. The tag or label attached to each piece identifies the skirt length as Sacks' product and provides for its fiber content to be shown by imprinting, by rubber stamp impressions, or by self-adhesive stickers. Sacks sells about 700,000 skirt lengths per year, which retail at prices ranging from about $1.99 to $3.99 each.

6. The respondents, in the course and conduct of their business, were and are in substantial competition in commerce with other corporations, firms, and individuals likewise engaged in the sale of wool products, including woolen piece goods.

7. Paragraph 3 of the complaint charges that certain of respondents' wool products were misbranded within the intent and meaning of the Wool Act, in that they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein; and that among such misbranded wool products were woolen piece goods which contained substantially less woolen fibers than stated on the tags or labels affixed thereto. The evidence in support of this charge was based upon Commission's Exhibits (abbreviated herein as CX) 7, 10, 11 and 12.

8. CX 10, 11 and 12 were obtained from Sacks on November 22, 1960, before the complaint in this matter was issued. They are samples of fabrics sold in commerce by Sacks with tags showing their fiber content as 15% reprocessed wool, 35% nylon, and 50% rayon. These fabrics were purchased by Sacks from Irving S. Cohen, Inc., which, it is officially noticed, was a respondent in a Federal Trade Commission proceeding, Docket No. 7478, in which a consent cease and desist order was issued September 9, 1959 [56 FTC 287].

9. CX 10 contains 58.8% woolen fibers, 22.4% nylon, 1.3% acetate, and 17.5% residue consisting of rayon and a trace of cotton. CX 11 contains 30.9% woolen fibers, 29.4% nylon, 4% acetate, and 35.7% residue consisting of rayon and a trace of cotton. CX 12 contains 32.9% woolen fibers, 24.9% nylon, 4.9% acetate, and 37.3% residue consisting of rayon and a trace of cotton.

10. The vice president of Sacks testified that the fabrics represented by CX 10, 11 and 12, because of their actual fiber content, were superior to fabrics having the fiber content shown on their tags. There is no direct contradiction of this testimony, but the same witness also testified, in effect, that the value of fabrics containing reprocessed woolen fibers might be increased or decreased by an increase in the proportion of nylon in the fabrics, depending upon the mill which makes them. Accordingly, there is no satisfactory basis on which it can be found that CX 10, 11 and 12, which contain a higher percentage of reprocessed wool and a lower percentage of nylon and rayon than shown on their tags, were, in fact, superior to fabrics having the fiber content shown on their tags. In any event, it does not appear that the comparative value or quality of the fabrics as marked and as constituted is relevant to the issues here presented.

11. The fiber content shown on the label attached to CX 7 was 33⅓% wool, 33⅓% nylon, and 33⅓% orlon-acrylic; and its actual content was 43.6% woolen fibers, 51.1% acrylic, and 5.3% orlon. This fabric was sold and shipped to the Hecht Company, Washington, D.C., by Sacks on September 8, 1961, several months after the complaint

issued, as part of a trial shipment of 12 skirt lengths. The uncontradicted evidence is that this fabric has a higher value on the basis of its actual fiber content than its value on the basis of the content shown on the label, and that it would have been to the advantage of Sacks to label it correctly.

12. All the evidence offered in support of the charge contained in Paragraph 3 of the complaint relates to fabrics having a substantially higher wool content than that shown on the labels. The instances alleged in this paragraph of the complaint as examples of misbranding relate to piece goods which contained substantially less woolen fibers than stated on their tags and labels. No evidence was offered to support the allegations with respect to those examples. The respondents contend, therefore, that the allegations of Paragraph 3 are not sustained, and that the charge based upon that paragraph should be dismissed.

13. The broad charge of Paragraph 3 that respondents' wool products were misbranded "in that they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein" is not necessarily limited by the alleged examples of misbranding which were not supported by the evidence. It is concluded, therefore, that the evidence relating to fabrics having a higher wool content and a lower content of certain other fibers than shown on the labels falls within the scope of this charge of the complaint.

14. Respondents contend that a label which understates the wool content does not violate the Wool Act. They argue, in effect, that the purpose of the Act was to prohibit the deceptive use of nonwoolen fibers as a substitute for wool; that there is no prior instance in which the Commission has based a charge of violation on the understatement of the wool content; and that there is no public interest in protecting the consumer against a product containing more wool than represented on the label.

15. Section 4 of the Wool Act specifically provides that a wool product shall be misbranded "If it is falsely or deceptively stamped, tagged, labeled, or otherwise identified"; and it requires, in effect, that the label must show the percentage of wool and of each fiber other than wool. This section is not satisfied by showing a *minimum* percentage of wool and disregarding the requirement that the label must also show the percentage of each fiber other than wool.

16. An understatement of the wool content and a consequent overstatement of other constituent fibers in a wool product are squarely in conflict with the requirements of Section 4 of the Wool Act. Since

this constitutes misbranding within the meaning of the Act, and since, under Section 3, anyone who misbrands a wool product "is guilty of an unfair method of competition, and an unfair or deceptive act or practice", it is unnecessary, and would be irrelevant, to inquire concerning relative values or consumer preferences with respect to fabrics so misbranded.

17. Counsel supporting the complaint has cited no prior instance in which the Commission has based a charge of violation on the understatement of wool content, and the hearing examiner has found none. This may well be due to the fact, as indicated by the evidence in this case, that ordinarily it is to the advantage of one who offers wool products for sale to show on the label a percentage of wool representing the maximum proportion of its content in the product. In such circumstances, misbranding by understating wool content would be expected to occur rarely, if at all. Where it does occur, however, and is challenged, its rarity, either in occurrence or in discovery, constitutes no defense.

18. In view of the unequivocal requirements of Section 4 of the Wool Act, an examination of its legislative history to ascertain its purpose with respect to the understatement of wool fibers could not serve to alter the clear and unambiguous language of the Act, itself. It may be helpful, however, to consider the Textile Fiber Products Identification Act, approved September 2, 1958, which provides, in part, that a textile fiber product is "misbranded if it is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein." Respondents are not here charged with violation of that Act, but it reflects a public policy which cannot be ignored in this case. In adopting that Act, Congress clearly determined that there is a public interest in the correct disclosure of the amount of all constituent fibers contained in textile products generally. While this declaration of public policy does not extend the scope, it does affirm and clarify, if clarification is needed, the comprehensive requirements of the Wool Act. The Wool and Textile Acts are so closely related in subject matter and purpose that their requirements must necessarily be construed and applied on a consistent basis.

19. It is concluded, therefore, that the understatement of the wool content and the consequent overstatement of other constituent fibers on the tags and labels of CX 7, 10, 11 and 12 constitute misbranding within the meaning of Section 4 of the Wool Products Labeling Act and violations of Section 5 of the Federal Trade Commission Act. Although the misbranding of CX 7 occurred after the issuance of the

complaint herein, it is a post-complaint instance of a similar type of misbranding represented by CX 10, 11 and 12, and should be considered.

20. Paragraph 4 of the complaint charges that certain of respondents' wool products were misbranded, in that they were not stamped, tagged, or labeled as required by the Wool Act. The evidence in support of this charge is based upon CX 6 and 13, the tags or labels of which were not marked so as to disclose the fiber content.

21. CX 6 is a skirt length containing wool, which was sold and shipped by Sacks to Scott Stores, Western Springs, Illinois, in December, 1959. No tag or label disclosing its fiber content was attached to this exhibit when it was obtained. It was one of about 30 skirt lengths from Sacks which were on display in the store from which it was obtained, all of which were also unmarked as to fiber content. These skirt lengths were part of a shipment by Sacks of 100 skirt lengths to each of six Scott Stores.

22. Respondents contend that CX 6, and the other skirt lengths on display in the store from which it was obtained, were unmarked as to fiber content through inadvertence after the exercise of considerable care. In discussing how this inadvertence may have occurred, it was explained by the witness that these skirt lengths were assorted by Sacks in bundles, each containing 25 pieces, after which care was exercised to staple a heavy paper label showing fiber content to each piece. It was stated that in this process of labeling one bundle of 25 pieces must have been missed, and that it was, therefore, apparently shipped without any marking as to fiber content.

23. Respondents contend that this is the logical explanation of the presence of "about 30" skirt lengths in the store which were not marked as to fiber content, and that, in all probability, only one bundle of 25 pieces was shipped without fiber identification. In support of this contention they emphasize the care which the record shows they exercise in marking wool products generally, and which they exercised in marking this particular shipment of wool products as to fiber content. Although persuasive, this was a hypothetical explanation, and the witness making it conceded that it was possible the entire shipment to that store could have been unmarked; but he stated: "It doesn't seem logical in my mind. I don't know how four bundles could have been mislabeled."

24. CX 13 is a skirt length, which was sold and shipped by Sacks to Stern's Department Store, Paramus, New Jersey, in November, 1960. When it was obtained, the portion of the label on this exhibit designed to be stamped with the fiber content was blank. There were

30 or 40 skirt lengths in the same display in the store from which this exhibit was obtained. One of these skirt lengths was obtained, in addition to CX 13, and it was marked as to fiber content. There is no evidence that the other skirt lengths in the display came from Sacks, or that they were not marked as to fiber content.

25. The investigating attorney who obtained CX 13 explained that for the purposes of his investigation he selected Stern's Department Store in Paramus, New Jersey, from a number of respondents' customers in order to meet interstate commerce requirements, and that, finding evidence of misbranding there which he considered sufficient, he did not go to other stores.

26. Respondents contend that CX 13 represents an inadvertent omission of the fiber content stamp from the label of a single skirt length which was selected from many other properly labeled skirt lengths on the counter of the store from which it was obtained. Through a defense witness they offered a logical explanation of how such an inadvertence may have occurred.

27. It is apparent, therefore, that the evidence discloses two instances, in widely separated locations in which respondents' wool products were unmarked as to fiber content. One such instance is representative of 25 or more unmarked skirt lengths, and the other represents only one unmarked skirt length. Respondents contend that they exercised great care in marking wool products to show fiber content, and that these were inadvertent instances which escaped their vigilance.

28. No evidence has been offered to show that respondents did not exercise care as claimed, or that the instances of misbranding disclosed by the evidence were not the result of inadvertence. There is no suggestion in the evidence, either directly or by implication, that respondents have deliberately misbranded their wool products by failure to mark or by inaccurately marking them as to fiber content.

29. These considerations, however, do not warrant dismissal. The Wool Act does not make the misbranding of wool products unlawful only when it is intentionally done, but, on the contrary, it also provides a criminal penalty, not here invoked, for the willful misbranding of wool products. The exercise of reasonable care to avoid misbranding does not constitute a defense under the Act, except in connection with unavoidable variations in manufacture not applicable here. In these circumstances, there was no obligation upon counsel supporting the complaint to prove intent or carelessness by respondents in misbranding their wool products, or to establish that a substantial portion of such products were misbranded. It was accord-

ingly unnecessary, and would have been inappropriate, for counsel supporting the complaint to attempt to rebut the evidence tending to support respondents' contentions on these points.

CONCLUSION

It is concluded, therefore, that the acts and practices of the respondents, as set forth above, were and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and that they 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, and that this proceeding is in the interest of the public.

ORDER

It is ordered, That respondents, Sacks Woolen Co., Inc., a corporation, and its officers, and Abraham Goodman, Nathan Sacks, and Martin Sbarge, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the offering for sale, or the sale, transportation, distribution or delivery for shipment in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of woolen fabrics, including ladies' skirt lengths, or other "wool products", as such products are defined in and subject to the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

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

2. Failing securely to affix to, or place on, each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

FINAL ORDER

This matter having been heard upon exceptions to the initial decision and brief in support thereof, filed by respondents, and upon oral argument, and the Commission having considered said exceptions and opposition thereto presented by counsel supporting the complaint; and

It appearing that Paragraph 3 of the complaint alleges that among the wool products misbranded by respondents in violation of Section 4(a)(1) of the Wool Products Labeling Act were woolen pieces containing substantially less woolen fibers than was stated on the labels attached thereto, whereas, as found by the hearing examiner, all of the evidence in support of the charge in said Paragraph 3 relates to fabrics having a substantially higher wool content than shown on the labels; and

The Commission having concluded that, although respondents' practice of understating on labels attached to wool products the amount of wool contained therein with the consequent overstatement of the other constituent fibers is false and deceptive and constitutes misbranding within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act and is in violation of Section 5 of the Federal Trade Commission Act, due to the substantial variance of the pleadings from the evidence it would be inappropriate to enter a cease and desist order as to this charge on this record; and

The Commission having further concluded that the hearing examiner's finding that respondents have violated Section 4(a)(2) of the Wool Products Labeling Act, as charged in Paragraph 4 of the complaint, is fully supported on the record by evidence showing that certain of respondents' wool products were unmarked as to fiber content, and that consequently this finding must be affirmed in the public interest:

It is ordered, That the initial decision be modified by striking therefrom finding number 13 on page 1231 thereof and by renumbering findings number 14 through 19 as findings number 13 through 18.

It is further ordered, That the initial decision be modified by addition of the following sentence to the hearing examiner's Conclusion:

> However, in view of the substantial variance in the allegation in the complaint that respondents misbranded wool products in violation of Section 4(a)(1) of the Wool Products Labeling Act and the proof in support thereof, it is concluded that an order to cease and desist should not issue on this charge.

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

It is ordered, That respondents, Sacks Woolen Co., Inc., a corporation, and its officers, and Abraham Goodman, Nathan Sacks, and Martin Sbarge, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the offering for sale, or the sale, transportation, distribution or delivery for shipment in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, of woolen fabrics, including ladies' skirt lengths, or other "wool products", as such products are defined in and subject to the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Failing securely to affix to, or place on, each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner 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 the charge in Paragraph 3 of the complaint that respondents have misbranded wool products in violation of Section 4(a)(1) of the Wool Products Labeling Act be, and it hereby is, dismissed without prejudice, however, to the right of the Commission to reopen this proceeding, amend the complaint and take such action as may be warranted in the public interest.

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 respondents, Sacks Woolen Co., Inc., Abraham Goodman, Nathan Sacks and Martin Sbarge, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

By the Commission, Commissioners Anderson and Higginbotham not participating.

IN THE MATTER OF

OXFORD HANDKERCHIEF CO., INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket 8464. Complaint, Jan. 30, 1962—Decision, Nov. 27, 1962

Order requiring New York City distributors to cease violating the Textile Fiber Products Identification Act by failing to affix to handkerchiefs sold in commerce the required stamps, tags, labels, or other means of identification.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Oxford Handkerchief Co., Inc., a corporation, and Lester K. Lipson, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of such Acts and the Rules and Regulations under the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Oxford Handkerchief Co., 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 51 Orchard Street, New York, N.Y.

Respondent Lester K. Lipson is an officer of said corporate respondent. He formulates, controls and directs the acts, practices and policies of the said corporate respondent, including the acts and practices complained of herein. His office and place of business is the same as that of the corporate respondent.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, sale, advertising and offering for sale in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, or labeled as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded textile fiber products were handkerchiefs which had no stamp, tag, label or other means of identification on or affixed to such product.

PAR. 4. The acts and practices of respondents as set forth herein, were and are in violation of the Textile Fiber Products Identification Act and the Rules and Regulations thereunder, 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.

Mr. Bruce T. Fraser and *Mr. William H. Garber* supporting the complaint.

Mr. A. Harry Flescher, of New York, N.Y., for respondents.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint in this matter January 30, 1962, and it was duly served on both respondents. The complaint charges in effect the marketing in commerce of handkerchiefs that did not bear the labels required by the Textile Fiber Products Identification Act. In addition to charging violation of that Act, the complaint alleged that the practices also constituted unfair and deceptive acts and practices and unfair methods of competition in violation of the Federal Trade Commission Act.

After being served with the complaint, respondents appeared by counsel and filed answer denying generally any violation of law and advancing, as an affirmative defense, the allegation that any unlabeled products handled by them were acquired before the effective date of the Textile Act.

Hearings were held in New York, New York, April 30 and July 6, 1962. The latter hearing was held, on motion of respondents, to permit the introduction of additional evidence on behalf of respondents. The motion seeking reopening of the proceeding after the record had been closed for the reception of evidence presented, as an additional affirmative defense, the contention that any unlabeled textile products acquired by respondents after the effective date of the Textile Act had been manufactured prior to such date.

At the hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint, and this testimony and evidence were duly recorded and filed in the office of the Commission.

Both sides were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues.

At the close of all the evidence, counsel for respondents moved to dismiss the complaint as to all respondents for failure of proof. That motion was taken under advisement and decision deferred until the filing of this initial decision. That motion is now denied.

Proposed findings of fact and conclusions of law and a proposed form of order were filed at the conclusion of all the evidence by counsel supporting the complaint. Counsel for respondents waived the filing of such proposals. Proposed findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

After carefully reviewing the entire record in this proceeding, and the proposed findings, conclusions and order filed by counsel supporting the complaint, the hearing examiner finds that this proceeding is in the interest of the public, and based on the entire record and his observation of the witnesses, makes the following findings of fact and conclusions drawn therefrom, and issues the following order.

FINDINGS OF FACT

1. Respondent Oxford Handkerchief Co., 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 51 Orchard Street, New York, New York.

Respondent Lester K. Lipson is an officer of the corporate respondent. He formulates, controls and directs the acts, practices and policies of the corporate respondent, including the acts and practices complained of herein. His office and place of business is the same as that of the corporate respondent.

Respondents are handkerchief jobbers, buying handkerchiefs from manufacturers and reselling them to retail stores. The business of respondents is substantial, with annual sales of about $100,000.

2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, sale, advertising and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

3. The findings set forth in the first two subparagraphs of paragraph 1 and in paragraph 2 are predicated primarily on the pleadings. Those findings correspond to the allegations of paragraphs 1

and 2 of the complaint. Although respondents filed answer denying the allegations of paragraphs 3 and 4 of the complaint, the answer neither admitted nor denied, nor otherwise referred to, the allegations of paragraphs 1 and 2.

Rule 4.5 of the Commission's Rules of Practice for Adjudicative Proceedings prescribes that an answer contesting the allegations of a complaint shall contain "Specific admission, denial, or explanation of each fact alleged in the complaint or, if the respondent is without knowledge thereof, a statement to that effect."

In this state of the record, it is appropriate to apply the established principle of law that material facts alleged in a complaint are taken as true where no responsive pleading is interposed by the party charged. As stated in 41 Am. Jur., Pleading § 198, "Admissions may arise by implication from a party's failure to plead or from his failure to deny. If the law requires him to file a pleading responsive to that of his adversary and he neglects or fails to do so, he may be taken as admitting the cause of action . . . stated in his adversary's pleading. Thus, the facts alleged in a petition, declaration, or complaint are generally taken as true where no responsive pleading is interposed by the defendant. . . .

"It is an established rule of pleading that where in the pleading of one party there is a material averment which is traversable but which is not denied by the other party, it stands admitted for purposes of the suit. . . . Hence, any well-pleaded averment of fact in the plaintiff's declaration, petition, or complaint which is not expressly denied in the plea or answer must be taken as true for the purposes of the action . . . ." See also *National Candy Company* v. *F.T.C.*. 104 Fed. 2d 999, 1003 (7th Cir. 1939), cert. denied 308 U.S. 610 [3 S. & D. 116].

Additionally, the testimony of respondent Lester K. Lipson establishes that he is president of the corporate respondent and controls and directs its acts and practices.

The jurisdictional findings in paragraph 2 are supported not only by the admissions implied from respondents' failure to deny, but also by uncontroverted evidence of the actual shipment of unlabeled textile fiber products in commerce. Also, the record shows that the unlabeled handkerchiefs were obtained from the regular stock of respondents which was offered for sale and made available to the public in general, including out-of-state purchasers. On the basis of this fact, coupled with proof of actual sales in commerce, it may be and is inferred that all the respondents' handkerchiefs in stock were being offered for sale in commerce.

Furthermore, the record specifically supports a finding that a substantial portion of the handkerchiefs here involved were manufactured from textile fiber products shipped in commerce.

4. Certain of the textile fiber products referred to in paragraph 2 were misbranded by respondents in that they were not stamped, tagged, or labeled as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded textile fiber products were handkerchiefs which had no stamp, tag, label or other means of identification on or affixed to such product.

5. There really is no dispute that certain of respondents' handkerchiefs did not bear the required stamps, tags or labels, although respondent Lipson seemed to raise some question as to the extent of the stock misbranded. However, the Commission attorney who inspected respondents' place of business testified that, on the basis of random sampling, he had found a "substantial portion" of respondents' stock that bore no labels whatever. In fact, he testified that there were in the store no handkerchiefs of domestic origin that were labeled. The only handkerchiefs he observed to be labeled were of foreign origin. The uncontroverted evidence is to the effect that Commission Exhibits 1, 2, 3, 5 and 6 were misbranded in that the label required by the statute was not affixed. The exhibits obtained at the respondents' place of business (CX 1–3) were obtained by random sampling and were typical of the handkerchiefs constituting respondents' stock in trade.

Respondents' own evidence is that all the satin-stripe handkerchiefs in stock (exemplified by CX 3) were unlabeled.

In addition to the evidence cited regarding respondents' stock, the record contains a stipulation to the effect that in November 1960, respondents shipped to an Atlanta, Georgia, department store some thirty dozen handkerchiefs which bore no labels or marks to disclose fiber content.

The substantiality of the business is indicated by the fact that respondents' stock is ordinarily composed of approximately 20,000 to 25,000 dozen handkerchiefs.*

6. Respondents did not establish by records or other competent means that the unlabeled textile fiber products described in paragraphs 4 and 5 (above) were entitled to exception from the labeling requirements of the Act under Section 15 as having been acquired prior to the effective date of the Act on March 3, 1960. Such textile

*Respondents' witnesses simply said 20,000 or 25,000 (Tr. 25, 63), but the dollar value indicates that they were referring to dozens (Tr. 29, 68, 75).

fiber products are therefore not entitled to the exception referred to in Section 15 of the Act as products acquired prior to its effective date.

7. Although respondents originally contended that all handkerchiefs purchased by them since the effective date of the Act (March 3, 1960) were labeled in accordance with the law, the ground of defense later shifted. In addition to claiming, at the first hearing, that unlabeled goods had been purchased prior to the effective date of the statute, they also contended, at a second hearing, that unlabeled goods, even though "subsequently acquired," were "manufactured prior to such date or certified to the respondents by their suppliers to have been manufactured prior to such date. . . ."

Conceding in effect that handkerchiefs sold and offered for sale by them after the effective date of the Act were not labeled, respondents thus took the position that any such unlabeled handkerchiefs were either *purchased* by them prior to the effective date of the statute or *manufactured* before that date. Although the record had been closed for the reception of evidence, it was reopened to give respondents an opportunity to present proof in support of their defense that unlabeled goods had been manufactured before March 3, 1960.

Respondents' defense was based on Section 15 of the Textile Fiber Products Identification Act, providing that "The Commission shall provide for the exception of any textile fiber product acquired prior to the effective date of this Act."

Under that statutory provision, the Commission adopted and published, on June 1, 1959, a policy reading in pertinent part as follows:

> The exception provided by Sec. 15 of the Act shall apply to textile fiber products acquired prior to the effective date of the Act (March 3, 1960) where such products are marketed or handled on or after March 3, 1960, in the same basic form as that in which they were acquired, but shall not apply to textile fiber products manufactured or processed on or after March 3, 1960, from other textile fiber products acquired prior to that date where such manufacturing or processing changes the basic form of the textile fiber product to the extent that it becomes a different type of product. * * *
>
> On or after March 3, 1960, any person who desires to claim the exception provided by Sec. 15 of the Act must be able to establish by records or other competent means that the products as to which he claims the exception were acquired in the same basic form prior to March 3, 1960, and that he is entitled to the exception claimed.[1]

[1] 24 *Federal Register* 4480. Despite a possible ambiguity in Sec. 15 and the Commission's policy statement, the examiner interprets both to mean that the exception is available to a marketer even though he himself did not acquire the goods prior to March 3, 1960. In other words, if a product is excepted because it was "acquired"—e.g., manufactured—by a supplier before the crucial date, the exception is applicable to the product in the hands of subsequent purchasers—even though their acquisition was after such date. It would appear that the exception attaches *in rem*, not *in personam*.

8. However, the evidence presented by respondents does not measure up to a valid defense. They had no records to establish with any degree of certainty their *acquisition* of the unlabeled goods before March 3, 1960, and no records whatever to establish the *manufacture* of the unlabeled goods before that date.

The question remains whether they established by "other competent means" that the goods were excepted from the labeling requirements by virtue of either or both of the circumstances alleged. To resolve this question necessitates examination and analysis of the testimony offered by respondents, as well as their pre-complaint statements to the Commission's investigating attorney.

9. Until the close of the initial—and presumably, the only—hearing in this matter, respondents consistently maintained that any unlabeled goods were purchased before March 3, 1960. This is what respondent Lipson told the Commission's investigating attorney in November 1960, and this is what he swore to at the hearing in April 1962.[2]

It is true that despite his firm statements on direct examination that all goods purchased after March 3, 1960, were labeled, Mr. Lipson did finally retreat, on cross-examination, to the contention that they "must have been" labeled by respondents' suppliers.

The significant point is that when he was insisting that all handkerchiefs purchased after March 3, 1960, were or must have been labeled, Mr. Lipson made no suggestion that any manufacturer was shipping unlabeled goods subsequent to the effective date of the Act.[3]

It was not until cross-examination had demonstrated that they could not establish their pre-Act acquisition of the unlabeled goods that respondents moved for reopening of the record and advanced the inconsistent claim that some of the unlabeled goods were *purchased* after the cutoff date but had been *manufactured* prior to that date.

10. Mr. Lipson produced invoices dated prior to March 3, 1960,

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[2] Mr. Lipson testified positively and unequivocally on direct examination that all unlabeled goods handled by respondents were purchased before the March 3, 1960, deadline:

Q. Tell me, all merchandise that you have purchased since the effective date of the Act on March 3rd, 1960, did they come into your place labeled?

A. Yes, they did.

Q. Were they labeled?

A. Yes (Tr. 26–27).

Q. Mr. Lipson, did you add any tags or do they come tagged from your manufacturers, your suppliers?

A. We don't add anything. However they come from our manufacturers, that's how they are sold.

Q. And they are tagged ever since the Act went into effect?

A. Yes.

Q. All merchandise bought by you since March 3, 1960, have they been tagged or not?

A. Yes. (Tr. 33)

[3] As a matter of fact, Mr. Lipson did not again take the stand, and his testimony stands unretracted except by virtue of the contradictory testimony of his employee.

that he testified covered purchases of the sample handkerchiefs in the record.

Despite his positive identification, on direct examination by defense counsel, of these invoices as covering the handkerchiefs in question, Mr. Lipson, on cross-examination, conceded that he had no way to link any particular handkerchief to any particular purchase invoice.

11. As to the red bandanas exemplified by CX 1 and the cotton cord handkerchiefs exemplified by CX 2, 5 and 6, his position in effect was that he had checked his invoices, and the only relevant purchases of those handkerchiefs up to November 1960 (when the Commission's inspection was made) were dated before March 3, 1960. This testimony was not specifically refuted, but in the context of the whole record, its probative force is blunted.[4]

12. In the case of the satin-stripe handkerchiefs (CX 3), both Mr. Lipson and his employee, Abe Weinberg, admitted the purchase of some 8,000 dozen such handkerchiefs between March 3, 1960, and October 20, 1960. All the purchases referred to were from Rose Handkerchief Works, although Mr. Lipson stated he bought such handkerchiefs from other suppliers as well.

13. Mr. Lipson first agreed "positively" that none of the satin-stripe handkerchiefs in stock November 25, 1960, were labeled, because they were "all purchased before that date [March 3, 1960]." But he then receded to a position that some "could have been" labeled (Tr. 45), while Mr. Weinberg testified later that in fact, none were labeled (Tr. 69).

14. On direct examination, Mr. Lipson took the position that all the unlabeled satin-stripe handkerchiefs found in his stock in November 1960 had been purchased on March 1, 1960, and he produced an invoice (RX 3) showing the purchase of 1,520 dozen from Rose Handkerchief Works on that date. When confronted with invoices showing the purchase of some 8,000 dozen satin-stripe handkerchiefs between that date and October 20, 1960, he finally conceded he had

[4] On cross-examination, Mr. Lipson admitted purchasing other red bandanas besides those shown on the invoice (RX 1) he produced dated March 11, 1959. As to whether or not he had purchased any since that date, his testimony was equivocal. He first said he didn't recollect; that it was possible he had done so; that he didn't order any in 1959 or 1960 other than those shown on the invoice; that he didn't believe he had, but he might have (Tr. 34–35).

The key to this testimony is his frank statement that he "didn't find any invoices while looking through, but it could have been mislaid." He gave no other basis for his belief that the unlabeled red bandana handkerchief was from the March 11, 1959, shipment.

Referring to the unlabeled cotton cord handkerchiefs (CX 2, 5 and 6), Mr. Lipson stated they came from a shipment covered by an invoice dated January 18, 1960 (RX 2) and denied any other purchases of that type of handkerchief *from the same supplier* subsequent to that date (Tr. 36).

See also par. 15, *infra*.

no way of tying the unlabeled handkerchiefs to the shipment of March 1, 1960.

Mr. Lipson conceded also that there was no distinguishing characteristic to distinguish one manufacturer's handkerchiefs from another. His position that CX 3 was from a shipment purchased from Rose March 1, 1960, was based on his knowledge that he was buying that type of handkerchief from Rose at that time.[5] However, he could not establish that the unlabeled satin-stripe handkerchiefs in question were part of the March 1, 1960, shipment from Rose.

Then, after an objection by counsel (as to which Mr. Lipson was constrained to deny that counsel was putting words in his mouth), he retreated to the contention that any goods purchased by respondents after March 3, 1960, "must have been" labeled by the manufacturer before shipment.

15. Statements by Mr. Lipson, both on the stand and during the pre-complaint investigation, provide a shaky foundation for the claims of pre-Act acquisition of the unlabeled handkerchiefs—and also for the claim of pre-Act manufacture.

On direct examination by his own counsel, Mr. Lipson was asked whether he told the Commission's investigating attorney when the unlabeled handkerchiefs were acquired. He answered: "I couldn't possibly tell him," except that "if they were not labeled they were acquired before the Act" (Tr. 26).

The Commission's attorney was told inventory records were not maintained and were not in existence (Tr. 18); that the questioned handkerchiefs "could not be traced to specific purchase invoices" (Tr. 20); that many manufacturers produce the same types of handkerchiefs (Tr. 19); and that there was no distinguishing characteristic to distinguish one manufacturer's handkerchiefs from another's (Tr. 41).[6]

16. The testimony and exhibits (RX 1, 2) presented by respondents relating to unlabeled red bandana handkerchiefs (CX 1) and un-

[5] Mr. Lipson stated, during the pre-complaint investigation, that he "believed that these handkerchiefs were either purchased from Rose Handkerchief Company . . . or Standard Handkerchief Company," but "he was not certain which company they were purchased from" (Tr. 12).

[6] On cross-examination, Mr. Lipson was asked:

"How do you handle your stock? Do you sell the first things that come in first, or in what order?"

He replied:

"No. I just put it in. Sometimes the last thing could go out first. I mean, I just don't keep—if you follow my business, it's just a two-man business, myself and the boy who works for me.

"When merchandise comes in, we check it off and put it on the shelves and when customers come in and buy it we just take it out of the shelves and we sell it to them. I don't labeled cotton cord handkerchiefs (CX 2, 5, 6) indicate that they might have been purchased before March 3, 1960.

However, in the light of the whole record, and particularly in view of the inconsistencies in the statements of Mr. Lipson, together with the record-keeping deficiencies testified to, it is found that respondents have not carried their burden of proving the goods come within the statutory exception as having been acquired before March 3, 1960.

17. Regarding the unlabeled satin-stripe handkerchiefs, it must be and is found that respondents failed to prove that they were acquired by respondents prior to March 3, 1960.

18. In support of the belatedly offered defense that some of the handkerchiefs were manufactured before March 3, 1960, although acquired subsequently by respondents, respondents presented the testimony of their employee, Abe Weinberg, and of Howard Osher, owner of Rose Handkerchief Works.

These two witnesses were in agreement that for a period of some months after March 3, 1960, Rose shipped to respondents unlabeled satin-stripe handkerchiefs, and that Osher told Weinberg by telephone that they had been manufactured before March 3, 1960. They differed, however, on the duration of Rose's shipments of unlabeled goods. Mr. Weinberg specifically stated that unlabeled goods were received from Rose as late as October 1960, and indicated that the practice continued until as late as July 1961.

Mr. Osher, on the other hand, was insistent that he had disposed of his unlabeled goods by the middle of 1960; that his August 1960 shipments were "probably labeled"; and that those in September and October 1960 definitely were. He said Mr. Weinberg was mistaken in his positive statements of checking with him by phone as to the August, September and October shipments.

19. At the most, then, respondents have shown that it is *possible* that the unlabeled handkerchiefs were either manufactured or purchased before March 3, 1960. But the evidence does not compel any

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keep any permanent inventory or any particular inventory of what I have. It's from looking around and checking it physically that I know it.

"We don't keep any inventory sheets or anything of that style, so it's hard to say—like, I will give you an example:

"When Mr. Turiel was in, he said 'Where did you get this handkerchief?' Offhand, I can't say if it was Rose's or Norfolk or ten or twenty other manufacturers. They all make the same handkerchief. . . ." (Tr. 40–41).

Witness also the following statement.

"I am talking about this particular item [CX 3]. If the item is labeled or not, I don't know which one it was, so I can't answer that to you, because this could have been the merchandise that was bought prior or it could be merchandise they labeled and it was bought afterwards and it was still in the same shelves" (Tr. 48).

such inference. Conflicts in the testimony, coupled with respondents' obvious inability to identify with reasonable certainty the source and acquisition date of any particular merchandise, raise serious doubts as to whether all or any of the unlabeled goods were either acquired or manufactured before the applicable date.

While the record indicates that one supplier (Rose) furnished to respondents, subsequent to March 3, 1960, unlabeled handkerchiefs that were represented as having been manufactured before the cutoff date, respondents neither established that the unlabeled goods came from that source, nor did they present any evidence, by records or otherwise, to corroborate the supplier's statement as to pre-Act manufacture.[7]

In any event, their acceptance of telephoned assurances that the unlabeled goods had been made before the cutoff date does not demonstrate that degree of diligence on their part to establish that respondents are "entitled" to the statutory exception.[8]

It seems obvious that if such evidence as was offered here were to be accepted to defeat a charge of misbranding, the requirements of the statute would become a nullity.

The burden was on respondents to "establish by records or other competent means" that the products in question came within the exception. This they have not done.

CONCLUSIONS OF LAW

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

2. The complaint herein states a cause of action, and this proceeding is in the public interest.

3. The acts and practices of respondents as set forth herein were and are in violation of the Textile Fiber Products Identification Act and the Rules and Regulations thereunder, 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.

4. Respondents have not established by records or other competent means that the unlabeled products here involved were acquired prior to the effective date of the Textile Fiber Products Identification Act, nor that they are entitled to the exception provided for by Section 15 of the Act.

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[7] It is not without significance in this connection that the supplier showed himself blatantly hostile to the purposes and requirements of the Act (Tr. 78–79, 81).

[8] It was testified that Mr. Osher offered to furnish a certificate of pre-Act manufacture, but it was declined.

ORDER

It is ordered, That respondents Oxford Handkerchief Co., Inc., a corporation, and Lester K. Lipson, individually and as an officer of such corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported, in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product either in its original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

Misbranding textile fiber products by failing to affix labels to such products showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 4.19 of the Commission's Rules of Practice, effective June 1, 1962, the initial decision of the hearing examiner shall on the 27th day of November 1962, 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.