It is ordered, That the initial decision be modified by striking therefrom findings numbered 10 through 12, on pages 938 and 939 thereof, and substituting therefor the following finding:

10. Counsel supporting the complaint has not sustained the burden of proving that the payments induced by respondent for its TV program were unavailable on proportionally equal terms to respondent's competitors competing in the resale of goods purchased from suppliers who made such allowances.

It is further ordered, That the findings in the initial decision numbered 13 through 21 be renumbered 11 through 19, respectively.

It is further ordered, That the initial decision be modified by striking therefrom that portion beginning on page 941 with the phrase "The position of counsel supporting the complaint" and ending on page 946 with the phrase "it is unnecessary to consider respondent's affirmative defense."

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

IN THE MATTER OF

ENTERPRISE STORES, INC., ET AL.

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

Docket 8028. Complaint, June 27, 1960—Decision, Oct. 5, 1962

Order requiring the Boston operators of chains of department stores selling electrical appliances and other merchandise to the public, to cease their practice of using amounts designated as "list", "mfr's list", "orig. list", and "reg.", together with lesser amounts in their advertising, representing falsely thereby that the higher amounts were the usual retail prices in their trade areas and that the difference represented a saving to the purchaser.

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 Enterprise Stores, Inc., a Massachusetts corporation, J. M. Fields of Orlando, Inc., a Delaware corporation, J. M. Fields of Worcester, Inc., a Massachusetts corporation, J. M. Fields of Holyoke, Inc., a Massachusetts corporation, J. M. Fields of Tampa, Inc., a Delaware corporation, J. M. Fields of Hartford, Inc., a Massachusetts corporation, J. M.

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Fields of Rochester, Inc., a Massachusetts corporation, and Frank G. Feldman, Frank M. Beckerman and Hyman S. Glass, individually and as officers of said corporations, 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. Respondents Enterprise Stores, Inc., J. M. Fields of Worcester, Inc., J. M. Fields of Holyoke, Inc., J. M. Fields of Hartford, Inc., and J. M. Fields of Rochester, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Massachusetts. Respondents J. M. Fields of Orlando, Inc., and J. M. Fields of Tampa, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Delaware. The corporate respondents maintain their principal office and place of business at 1050 Commonwealth Avenue, Boston, Mass.

The individual respondents Frank G. Feldman, Frank M. Beckerman and Hyman S. Glass are officers of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. Their principal place of business is the same as that of the corporate respondent.

PAR. 2. Respondents are now and for some time last past have been engaged in operating chains of department stores and in the advertising, offering for sale, sale and distribution of electrical appliances and other merchandise 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 merchandise when sold to be shipped from their place of business in the states wherein their stores are located to purchasers thereof located in various other states of the United States and maintained, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents, for the purpose of inducing the purchase of their products, have engaged in the practice of using certain amounts designated as "list", "manufacturer's list" and "original list" together with lesser amounts in their advertising in connection with certain of their merchandise. Typical but not all inclusive of which are the following statements:

The Wagner Stereo Hi-Fi
$117
mfr's list $199.
Admiral 21" Console TV
Reg. 529.95
$299
Cooker Fryer
Save
12.07 6.88
list 19.95
Save 15.07 on 6 foot 7 inch
PLAYGYMS * * *
19.87
list price 34.94
RCA WHIRLPOOL WASHER
orig. list
$259.95
$99.

PAR. 5. Through the use in their advertising, as aforesaid, of the amounts in connection with the words "mfr's list," "orig. list," "list price" and "list" respondents represent that said amounts were and are the prices at which the merchandise referred to was usually and customarily sold in their trade area. Through the use of said amounts and lesser amounts respondents represent that the difference between the said amounts represented a savings to a purchaser from the price at which said merchandise was usually and customarily sold in said trade area.

Through the use in their advertising, as aforesaid, of various amounts in connection with the words "reg." price respondents represented that said amounts were the prices at which they usually and customarily sold the merchandise referred to in their recent regular course of business, and, through the use of said amounts and the lesser amounts, that the difference between said amounts and the lesser amounts represented savings from the price at which the merchandise referred to had been sold by respondents in the recent regular course of their business.

PAR. 6. The aforesaid statements and representations were false, misleading and deceptive. In truth and in fact, the amounts set out in connection with the words "mfr's list," "orig. list," "list price" and "list" were in excess of the prices at which the article of merchandise referred to was usually and customarily sold in respondents' trade area and the differences between such amounts and the lesser amounts did not represent savings from prices at which the merchandise had been usually and customarily sold in respondents' trade area.

The amounts set out in connection with the words "reg." price were in excess of the prices at which the articles of merchandise referred to had been sold by respondents in the recent regular course of their business and the differences between the said amount and the lesser amount did not represent savings from the prices at which the merchandise had been sold by respondents in the recent regular course of their business.

PAR. 7. In the 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 merchandise of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements and representations 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' merchandise 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. 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 and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. Harry E. Middleton, Jr., of Washington, D.C., supporting the complaint.

Nathanson & Rudofsky, *Mr. Arthur D. Altman*, of Boston, Mass., for respondents.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

All the respondents were charged with violations of the Federal Trade Commission Act, consisting of alleged misrepresentations in connection with the offering for sale of goods sold in the stores of the corporate respondents. They answered, denying generally the allegations contained in the complaint and alleging further that advertisements such as were the subject thereof were being used by their competitors in the trade areas in which they used such advertising, and that the public had not been misled or deceived thereby.

Some time after the filing of these pleadings, an agreement was made whereby the various businesses involved in this proceeding were taken over by a purchasing corporation acting on behalf of Food Fair Stores, Inc., a company operating a chain of supermarkets along the Eastern seaboard. In connection with this transaction and as a result of it, all the corporate respondents, except Enterprise Stores, Inc. (whose name had been changed to Enterprise-J. M. Fields, Inc.), were to be liquidated and dissolved. The proceeds of the various transfers, to the extent that any were not paid over directly to the individuals interested therein, were paid to Enterprise-J. M. Fields, Inc. This was to marshal the assets until such time as they could conveniently and advantageously be reduced to cash or other distributable form for payment over to the persons entitled thereto. The process of liquidation and marshaling of assets involved changes of corporate names as follows:

Enterprise Stores, Inc., to Enterprise-J. M. Fields, Inc.
J. M. Fields of Tampa, Inc., to Walcott of Tampa, Inc.
J. M. Fields of Orlando, Inc., to Walcott of Orlando, Inc.
J. M. Fields of Worcester, Inc., to Walcott of Worcester, Inc.
J. M. Fields of Holyoke, Inc., to Walcott of Holyoke, Inc.
J. M. Fields of Rochester, Inc., to Walcott of Rochester, Inc.
J. M. Fields of Hartford, Inc., to Walcott of Hartford, Inc.

Satisfactory evidence has been filed herein showing (a) that Walcott of Orlando, Inc., and Walcott of Tampa, Inc., have been dissolved and (b) that dissolution proceedings are pending and may be completed for all other corporate respondents except Enterprise-J. M. Fields, Inc., by the time this decision is filed. If such dissolutions are not completed by then, they should be completed within a short time thereafter.

As part of the transfer, Food Fair Stores, Inc., or subsidiaries thereof, have become entitled to use the trade name "J. M. Fields" in connection with the operation of some of their stores.

A motion was filed on behalf of the corporate respondents for an order dismissing the complaint herein. Although counsel supporting the complaint originally opposed the motion, he withdrew his opposition. In view of the fact that all the corporate respondents except Enterprise-J. M. Fields, Inc., have been or are being dissolved, and Enterprise-J. M. Fields, Inc., is not engaged, and will not in the future be engaged, in the business involved in this proceeding, the motion on behalf of the corporate respondents will be granted.

The individual respondents have now withdrawn the answer filed on their behalf. This proceeding may therefore be decided on the basis of the complaint herein insofar as such individual respondents are concerned.

The following are my

FINDINGS OF FACT

1. Respondents Frank G. Feldman, Frank M. Beckerman and Hyman S. Glass formulated, directed and controlled the acts and practices hereinafter set forth. Their principal place of business was 1050 Commonwealth Avenue, Boston, Massachusetts.

2. For some time last past they were engaged in operating chains of department stores and in advertising, offering for sale, sale and distribution of electrical appliances and other merchandise to the public.

3. In the course and conduct of their business, they caused their merchandise when sold to be shipped from their places of business in the states wherein their stores were located to purchasers thereof located in various other states of the United States and maintained, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. For the purpose of inducing the purchase of their products, they have engaged in the practice of using certain amounts designated as "list," "manufacturer's list" and "original list" together with lesser amounts in their advertising in connection with certain of their merchandise.

5. Through the use in their advertising, as aforesaid, of the amounts in connection with the words "mfr's list," "orig. list," "list price" and "list," they represented that said amounts were the prices at which the merchandise referred to was usually and customarily sold in their trade areas. Through the use of said amounts and lesser amounts they represented that the difference between the said amounts represented a savings to a purchaser from the price at which said merchandise was usually and customarily sold in said trade areas.

6. Through the use in their advertising, as aforesaid, of various amounts in connection with the words "reg.' price they represented that said amounts were the prices at which they usually and customarily sold the merchandise referred to in their recent regular course of business, and, through the use of said amounts and the lesser amounts, that the differences between said amounts and the lesser amounts represented savings from the prices at which the merchandise referred to had been sold by them in the recent regular course of their business.

7. The aforesaid statements and representations were false, misleading and deceptive. In truth and in fact, the amounts set out in con-

nection with the words "mfr's list," "orig. list," "list price" and "list" were in excess of the prices at which the articles of merchandise referred to were usually and customarily sold in their trade areas and the differences between such amounts and the lesser amounts did not represent savings from prices at which the merchandise had been usually and customarily sold in their trade areas.

8. The amounts set out in connection with the words "reg." price were in excess of prices at which the articles of merchandise referred to had been sold by them in the recent regular course of their business and the differences between the said amounts and the lesser amounts did not represent savings from the prices at which the merchandise had been sold by them in the recent regular course of their business.

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

10. The use by them of the aforesaid false, misleading and deceptive statements and representations has had, and would have, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and would be true and into the purchase of substantial quantities of their merchandise by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and would be, unfairly diverted from their competitors, and substantial injury has thereby been, and would be, done to competition in commerce.

11. The aforesaid acts and practices were and would be all to the prejudice and injury of the public and of 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.

From the foregoing, the following are my

CONCLUSIONS

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

2. This proceeding is in the public interest.

3. The use of a manufacturer's suggested retail price, so or similarly designated, in advertising in commerce when such price is placed in juxtaposition with a lower price, constitutes an unfair or deceptive act or practice when such suggested retail price is not in fact the price at which the merchandise is usually and customarily sold in the trade area. The use of such a price, or of any price, without designation,

constitutes an unfair or deceptive act or pratice when such price is not the usual and customary price at which the advertiser sold in the recent regular course of business.

4. Respondents have engaged in unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act through use of such prices placed in juxtaposition in advertising with respondents' lower current prices.

5. The use of such acts and practices has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous belief that the lower prices quoted result in a saving in the purchase of the advertised articles. As a consequence, substantial commerce may be diverted from competitors and thus cause them and the public substantial injury.

It is, therefore, appropriate to enter the following

ORDER

It is ordered, That respondents, Frank G. Feldman, Frank M. Beckerman, and Hyman S. Glass, in connection with the offering for sale, sale, and distribution of any merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) Through the use of the term "Manufacturer's List" or any other term of the same import, or in any other manner, that any amount is the price of merchandise in respondents' trade areas when it is in excess of the price at which merchandise is usually and customarily sold at retail in said trade areas.

(b) That any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise advertised was usually and customarily sold at retail by the respondents unless such advertised merchandise was in fact usually and customarily sold at retail at such price by the respondents in the recent past.

(c) That any saving is offered in the purchase of merchandise from the respondents unless the price at which the merchandise is offered constitutes a reduction from the price at which said merchandise was usually and customarily sold by the respondents at retail or at which said merchandise was usually and customarily sold at retail in the trade area involved.

2. Misrepresenting, in any manner, the amount of savings avail-

able to purchasers of respondents' merchandise or the amount by which the prices of said merchandise have been reduced from the prices at which it is usually and customarily sold by the respondents at retail or in the trade area or areas where the representations are made.

It is further ordered, That the complaint herein against the corporate respondents, Enterprise Stores, Inc., a Massachusetts corporation, J. M. Fields of Orlando, Inc., a Delaware corporation, J. M. Fields of Worcester, Inc., a Massachusetts corporation, J. M. Fields of Holyoke, Inc., a Massachusetts corporation, J. M. Fields of Tampa, Inc., a Delaware corporation, J. M. Fields of Hartford, Inc., a Massachusetts corporation, and J. M. Fields of Rochester, Inc., a Massachusetts corporation, be, and the same hereby is, dismissed without prejudice to the right of the Commission to take such further action as may be warranted in the future.

Final Order

The Commission by its order of July 24, 1962, having placed this case on its docket for review; and

The Commission now having concluded that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the intitial decision of the hearing examiner filed June 11, 1962, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents Frank G. Feldman, Frank M. Beckerman and Hyman S. Glass 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 Kern not participating.

In the Matter of

BEECHAM PRODUCTS INC.

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

Docket C-249. Complaint, Oct. 5, 1962—Decision, Oct. 5, 1962

Consent order requiring a Clifton, N.J., distributor of its "Silvikrin" scalp preparation, to cease representing falsely in advertising that use of its said product would prevent and overcome thinning hair, hair loss and baldness, would grow hair and permanently eliminate baldness, unless such advertising conspicuously revealed that male pattern baldness was the cause of the great majority of such conditions, and in such cases "Silvikrin" was of no value.

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 Beecham Products Inc., a corporation, hereinafter referred to as respondent, has 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 Beecham Products Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 65 Industrial South, in the city of Clifton, State of New Jersey.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of a "cosmetic" or "drug" preparation as such terms are defined in the Federal Trade Commission Act, for external use in the treatment of conditions of the hair and scalp.

The designation used by respondent for said preparation, the formula thereof and directions for use are as follows:

Designation: Pure Silvikrin

Formula:

Ethyl Alcohol, Denatured	43.2% (50% by volume)
Neo Concentrate (a water concentrate of the amino acid derived from hydrolysis of the scleroprotein)	18.6%
Perfume Compound	0.6%
Nicotinic Acid, U.S.P	0.10%
Lactic Acid, U.S.P	0.63%
Dye	0.0013%
Sodium Hydroxide	0.19%
Water	To 100%
	100%

Directions:

1. The first day, wash and rinse hair thoroughly, preferably with Silvikrin Shampoo. Wash at least weekly thereafter.
2. During the course of the treatment, use Pure Silvikrin night and morning. If you have short hair, or suffer from thinning hair, apply a liberal quantity

directly to the scalp. If you have long hair, part the hair and apply Pure Silvikrin to the scalp with the fingertips.

3. Massage Pure Silvikrin gently into the scalp until it is completely absorbed.

PAR. 3. Said respondent causes said preparation, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in other states of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparation in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its aforesaid business, respondent has disseminated and caused the dissemination of advertisements concerning said preparation by the United States mails and by various other 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 sale of its said preparation; and respondent also disseminated and caused the dissemination of advertisements concerning its said preparation, by various means, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of its said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Among and typical of the statements contained in said advertisements, disseminated and cause to be disseminated as hereinbefore set forth, are the following:

(a) Thinning Hair, Excessive Falling Hair: What you can do to help your hair before it's too late! If you have dandruff, thinning hair, excessive falling hair—we strongly urge you to try new Pure Silvikrin.

(b) Doubly effective Because . . . Pure Silvikrin kills dandruff, too. As you massage, its antiseptic Hexachlorophene goes to work to destroy germs that cause flaky, itching dandruff. Goes on working even after massage to keep dandruff away.

(c) Thinning Hair! Then Falling Hair! What can *you* do to save your hair before it's *too* late? Thinning hair—falling hair—dull, listless hair. These are warning signs that threaten approaching hair failure. They are symptoms of hair *undernourishment.* * * *

Pure Silvikrin can make it possible for your hair to live and grow healthily. Can help arrest premature hair loss and restore hair to normal vibrant health.

(d) When Pure Silvikrin is massaged into the scalp, it helps increase normal circulation and adds nourishment to hair roots.

(e) The danger signs are obvious: hair becomes dull and lifeless—severe dandruff may occur—hair comes out thickly on the brush and comb—thinning patches appear. It's the threat of approaching hair failure! Hopeless? Don't say that until you try Pure Silvikrin. For the basic cause of much of hair's ill-health is undernourishment.

(f) Nuclear research proves biological hair formula called Pure Silvikrin can help prevent amino acid deficiency which may cause your thinning hair.

Today, new medical findings prove beyond any reasonable doubt that the hair protein material contained in Pure Silvikrin can penetrate the scalp, reach the hair roots, and *build itself into new hair structure.*

PAR. 5. Through the use of the aforesaid statements and representations, and others similar thereto not specifically set out herein, respondent has represented directly and by implication, that use of the said preparation will prevent and overcome thinning hair, hair loss and baldness, will grow hair, and will permanently eliminate dandruff.

PAR. 6. In truth and in fact the great majority of cases of baldness or excessive hair loss is the common type known as male pattern baldness. Respondent's preparation will not in such cases prevent or overcome thinning hair, hair loss or baldness or grow hair. Moreover, the use of said preparation will not permanently eliminate dandruff. The aforesaid advertisements are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 7. In advertising that its preparation will cause hair to grow and will overcome baldness, respondent suggests that there is a reasonable probability that hair loss or baldness in any particular case may be due to a cause for which its preparation will be of benefit and constitute an effective treatment. In truth and in fact the instances in which loss of hair or baldness is due to a cause or condition for which respondent's preparation will be of benefit, and constitute an effective treatment, are rare. In the great majority of cases, loss of hair or baldness is the male pattern type having no relation to causes or conditions for which respondent's preparation will be of any value whatever in the treatment thereof. Thus, there is no reasonable probability that any particular case of baldness is caused by a condition for which respondent's preparation will be beneficial, and respondent's advertising is misleading because of respondent's failure to reveal the material fact that the great majority of cases of loss of hair or baldness is the type known as male pattern baldness and when baldness is of that type respondent's preparation is of no value in the treatment thereof. Respondent's advertisements are, therefore, misleading in a further material respect and constitute "false advertisements" by reason of failure to reveal facts material in the light of representations made therein.

PAR. 8. The use by the respondent of the foregoing false and misleading statements and representations, disseminated as aforesaid and the failure to reveal material facts as aforesaid, have had and now have the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements and representations are true and to induce them to purchase said preparation because of such erroneus and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent 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 respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 respondent 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, Beecham Products Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 65 Industrial South, in the city of Clifton, State of New Jersey.

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

ORDER

It is ordered, That the respondent Beecham Products Inc., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of its preparation

"Pure Silvikrin," or any other product for use in treatment of hair and scalp conditions, do forthwith cease and desist from:

1. Disseminating or causing to be disseminated by means of the U.S. mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication, that the use of said preparation will:

(A) Prevent or overcome thinning hair, hair loss or baldness or cause hair to grow, unless such representation be expressly limited to cases other than those known as male pattern baldness and unless the advertisement clearly and conspicuously reveals that the great majority of cases of excessive hair fall and baldness are the beginning and more fully developed stages of male pattern baldness and in such cases respondent's preparation is of no value.

(B) Permanently eliminate dandruff.

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

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

IN THE MATTER OF

AMERICAN TRANSPORTATION INSTITUTE, INC., ET AL.

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

Docket C-250. Complaint, Oct. 5, 1962—Decision, Oct. 5, 1962

Consent order requiring Kansas City, Mo., sellers of correspondence courses in airline training to cease representing falsely, through their sales agents calling upon prospective purchasers, that they were affiliated with a large airline, that employment with an airline was guaranteed to persons completing their course, and that enrollees in the course would receive free air transportation to Kansas City to attend the resident portion of the course.

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 American Transportation Institute, Inc., formerly known as Air Age Institute, Inc., a corporation, and Leslie M. Reed, individually and as an officer of said corporation, and Arthur F. Lohrey, individually, 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 American Transportation Institute, Inc., formerly known as Air Age Institute, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri with its principal office and place of business located at 1211 Walnut Street, Kansas City, Mo.

Respondent Leslie M. Reed is an officer of said corporation. He participates in the formulation, direction and control of the policies, acts and practices of the said corporate respondent. His address is the same as that of the corporate respondent.

Respondent Arthur F. Lohrey was formerly an officer of said corporate respondent and participated in the formulation, direction and control of the policies, acts and practices of the said corporate respondent until sometime in December 1961. His address is in care of Hoffmann Aircraft Institute, 7924 Floyd, Overland Park, Kans.

Par. 2. Respondents are now, and have been for more than one year last past, engaged in the sale and distribution of a course of study and instruction intended to prepare students thereof for employment in various positions in the airline industry. The course is pursued by correspondence through the United States mail and in residence training at the school in Kansas City, Missouri.

Par. 3. In the course and conduct of their business respondents have caused said course of study and instruction to be sent from their place of business in the State of Missouri to, into and through States of the United States other than the State of Missouri, to purchasers thereof located in such other States. There has been at all times mentioned herein a substantial course of trade in said course of study and instruction, so sold and distributed by respondents in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Par. 4. Respondents at all times mentioned herein, have been, and are now, in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of like courses of study and instruction.

PAR. 5. In the course and conduct of their business, as aforesaid, respondents employ commission sales agents or representatives who call upon prospective purchasers and solicit their purchase of said course of study and instruction.

In the course of such solicitation, such sales agents or representatives have made directly or by implication many statements and representations to purchasers and prospective purchasers of said course of study and instruction; typical, but not all inclusive, of which are the following:

1. Employment with an airline is guaranteed to persons completing respondents' course of study and instruction; or that such persons are otherwise assured of employment with an airline upon completion of respondents' course of study and instruction;

2. Respondents are affiliated with or are sponsored by Trans World Airlines, a large and well known airline.

3. Persons enrolling in respondents' course will receive free air transportation from their place of residence to Kansas City, Missouri, for the purpose of attending the resident portion of respondents' course.

PAR. 6. In truth and in fact:

1. Respondents do not guarantee employment with an airline to persons completing respondents' course. Such persons are in no way assured of employment with an airline upon completion of said course.

2. Respondents are neither affiliated with nor sponsored by Trans World Airlines or any other airline.

3. Persons enrolling in respondents' course do not receive free air transportation from their place of residence to Kansas City, Missouri, for the purpose of attending the resident portion of respondents' course.

Therefore, the representations referred to in paragraph 5 were, and are, false, misleading and deceptive.

PAR. 7. The use by respondents of the foresaid false, misleading and deceptive statements, representations and practices, has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and to induce a substantial number thereof to purchase respondents' said course of study and instruction.

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 methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5(a)(1) 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 American Transportation Institute, Inc., formerly known as Air Age Institute, Inc., is a corporation organized, existing and doing business under the laws of the State of Missouri, with its principal office and place of business located at 1211 Walnut Street in the city of Kansas City, State of Missouri.

Respondent Leslie M. Reed is an officer of said corporation and his address is the same as that of said corporation.

Respondent Arthur F. Lohrey was formerly an officer of said corporation. His address is in care of Hoffman Aircraft Institute, 7924 Floyd, Overland Park, Kansas.

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 American Transportation Institute, Inc., formerly known as Air Age Institute, Inc., a corporation, and its officers, and Leslie M. Reed, individually and as an officer of said corporation, and Arthur F. Lohrey individually, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of courses of training and instruction in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

1. Employment with an airline is guaranteed to persons completing respondents' course of study and instruction, or that such persons are otherwise assured of employment with an airline upon completion of respondents' course of study and instruction, or misrepresenting in any other manner the opportunities for employment by persons completing said course.

2. Respondents are affiliated with or sponsored by Trans World Airlines or any other airline, or misrepresenting in any other manner respondents' relationship with members of the airline industry.

3. Persons enrolling in respondents' course will receive free air transportation from their place of residence to Kansas City, Missouri, for the purpose of attending the resident training portion of respondents' course, or representing in any other manner that persons enrolling in said course can attend the resident training portion of said course without expense for transportation between their place of residence and respondents' resident training school.

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

JEFFERSON-TRAVIS INCORPORATED

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

Docket 7970. Complaint, June 23, 1960—Decision, Oct. 10, 1962

Order dismissing—respondent having divested itself of the distribution business involved—complaint charging a wholly owned subsidiary of Emerson Radio & Phonograph Corporation with violating Secs. 2(a) and 2(d) of the Clayton Act, respectively, by selling "Emerson" brand appliance products to some purchasers at higher prices than it charged their competitors, and by granting discriminatory promotional payments to certain customers in connection with their advertising of Emerson products.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Jefferson-Travis Incorporated has violated and is now violating the provisions of subsections (a) and (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:

COUNT I

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

PARAGRAPH 1. Respondent Jefferson-Travis Incorporated is a corporation organized and doing business under the laws of the State of Illinois, with its office and principal place of business located at 32–50 Ross Street, New York, N.Y.

PAR. 2. Respondent is a wholly owned subsidiary of Emerson Radio & Phonograph Corporation (hereinafter referred to as either Emerson Corporation or parent corporation). Said parent corporation, among other things, is engaged in the business of manufacturing and distributing for consumer use television and radio receiving sets, high fidelity phonographs, air conditioning units and other consumer appliance products. Emerson Corporation's net sales exceeded $58,000,000 in 1958.

Respondent manufactures television cabinets exclusively for the Emerson Corporation. In addition, respondent purchases from its parent corporation television and radio receiving sets, high fidelity phonographs, air conditioning units and other consumer appliance products manufactured by said parent corporation under the brand name "Emerson". It sells and distributes these products to retail outlets through divisions which it operates in various parts of the country. Included among the consumer appliance distributing divisions operated by respondent in large metropolitan areas in various parts of the nation are: Emerson-Midwest Division which operates in the Chicago, Illinois metropolitan area; Emerson-Michigan Division which operates in the Detroit, Michigan metropolitan area; Emerson West Coast Division which operates in the San Francisco, California metropolitan area; and Emerson-Columbus Division which operates in the Northern Ohio area.

Respondent's net sales exceeded $13,000,000 in 1958.

PAR. 3. In the course and conduct of its business, respondent has been engaged and is presently engaged in commerce, as "commerce" is defined in the amended Clayton Act, by selling and distributing its products throughout various States of the United States.

PAR. 4. In the course and conduct of its business in commerce, respondent has been and is now in competition with other corporations, partnerships, firms and individuals engaged in the manufacturing, selling and distributing of various consumer appliance products, including television and radio receiving sets, high fidelity phonographs and air conditioning units.

PAR. 5. In the course and conduct of its business in commerce, respondent has sold and is now selling certain "Emerson" brand consumer appliance products to some purchasers at prices substantially higher than those charged other purchasers of these products of like grade and quality who have been and are now competing with said unfavored purchasers.

For example, in the Chicago, Illinois area, respondent has granted Polk Bros. substantial price concessions in connection with Polk Bros.' purchase from respondent of "Emerson" appliance products. Respondent did not offer or grant these price concessions to other purchasers competing with Polk Bros.

PAR. 6. The effect of respondent's discriminations in price, as alleged above, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondents and its purchasers are respectively engaged; or to injure, destroy, or prevent competition with purchasers of respondent who receive the benefit of such price discriminations.

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

COUNT II

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

PAR. 8. Paragraphs 1 through 3 of Count I hereof are hereby repeated and made a part of this count as fully and with the same force and effect as though here again set forth in full.

PAR. 9. In the course and conduct of its business 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 "Emerson" appliance products sold to them by respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondent competing with said favored customers in the distribution of such products.

For example, respondent has granted and is presently granting Polk Bros., of Chicago, Illinois, substantial promotional payments or allowances in connection with the advertising by Polk Bros. of respondent's products in newspapers and on radio and television stations. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with Polk Bros.

PAR. 10. 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 supporting the complaint.

Weisman, Allan, Spett & Sheinberg, by *Mr. Harry I. Rand*, of New York, N.Y., for respondents.

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

As this matter is before the undersigned hearing examiner on respondent's motion filed June 11, 1962, for a dismissal of the complaint herein "on the grounds [1] that respondent is no longer engaged in the distribution and sale of the products forming the subject of this proceeding [involving charges of violations of subsections (a) and (d) of the Clayton Act as amended by the Robinson-Patman Act] and [2] does not intend to resume such business and [3] that the public interest will not be served by the continuation of the proceeding." The motion is supported by various annexed documents to which reference will be made below.

Complaint counsel by answer filed June 19, 1962, to said motion states that he "does not oppose respondent's motion to dismiss the complaint". He further avers that the supporting documents attached to respondent's motion would "sustain a finding that a cease and desist order in this proceeding would serve no useful purpose" and asserts that under the facts which appear from said documents he "does not deem it appropriate to engage in costly litigation to obtain cease and desist order having no proscriptive value."

The complaint in this proceeding, involving as heretofore indicated charges of violations of Sections 2 (a) and (d) of the amended Clayton Act, was issued on June 23, 1960. An answer to the complaint was duly filed on November 4, 1960, and an amendment to the answer was filed on November 10, 1960. After the present hearing examiner was substituted on July 19, 1961, for the original hearing examiner herein, respondent on October 18, 1961, filed an amended answer pursuant to leave granted on respondent's unopposed motion for such leave. The only new matter in the amended answer are affirmative defenses which may be briefly described for present purposes as the so-called "cost justification" and "meeting of competition" defenses to the said Sections 2 (a) and (d) charges of the complaint.

This matter has been in the prehearing stage up to the present time. Pursuant to an order dated August 14, 1961, the first prehearing conference herein was held on September 26, 1961, which was concerned primarily with procedures required for the production of documents desired by complaint counsel from the files and records of respondent. The second prehearing conference herein, originally scheduled for December 4, 1962, but postponed from time to time at request of complaint counsel, was held on April 9, 1962, when the examiner was advised (1) that respondent was in the process of divesting itself from that part of its business which gave rise to the complaint, (2) that the divestiture would be completed on or before June 14, 1962, and (3) that respondent on or before June 14, 1962, would present a motion for the dismissal of the complaint on the ground that it was no longer engaged in that portion of its business which gave rise to the complaint.

Upon indication from complaint counsel that he would not oppose the proposed motion for dismissal of the complaint when made, the examiner continued the prehearing conference then in session to allow the indicated time required for the presentation of such motion and for its consideration but fixed times for additional prehearing conferences and for the hearing proper herein after June 14, 1962, to cover the possibility that the motion would not be presented or that the motion, if presented, might be denied upon due consideration. Respondent's motion to dismiss the complaint, as heretofore indicated, was filed on June 11, 1962.

The complaint herein consists of two counts. The first count charges violation of Section 2(a) of the amended Clayton Act. The second count charges violation of Section 2(d) of the amended Act.

The following allegations of the complaint are established as facts under both counts of the complaint by the pleadings of the parties herein, except that with respect to one of the sentences hereinafter indicated the facts stated therein are established by documents attached to respondent's aforementioned motion to dismiss the complaint:

PARAGRAPH 1. Respondent Jefferson-Travis Incorporated is a corporation organized and doing business under the laws of the State of Illinois, with its office and principal place of business located at 32-50 Ross Street, Brooklyn, N.Y.

PAR. 2. Respondent is a wholly owned subsidiary of Emerson Radio & Phonograph Corporation (hereinafter referred to as either Emerson Corporation or parent corporation). Said parent corporation, among other things, is engaged in the business of manufacturing and distributing for consumer use television and radio receiving sets, high fidelity phonographs, air conditioning units and other consumer appliance products. Emerson Corporation's net sales exceeded $58,000,000 in 1958.

Respondent manufactures television cabinets exclusively for the Emerson Corporation. In addition, respondent purchases from its parent corporation television and radio receiving sets, high fidelity phonographs, air conditioning units and other consumer appliance products manufactured by said parent corporation under the brand name "Emerson".[1] It sells and distributes these products to retail outlets through divisions which it operates in various parts of the country. Included among the consumer appliance distributing divisions operated by respondent in large metropolitan areas in various parts of the nation are: Emerson-Midwest Division which operates in the Chicago, Illinois metropolitan area; Emerson-Michigan Division which operates in the Detroit, Michigan metropolitan area; Emerson West Coast Division which operates in the San Francisco, California metropolitan area; and Emerson-Columbus Division which operates in the Northern Ohio area.

Respondent's net sales exceeded $13,000,000 in 1958.

PAR. 3. In the course and conduct of its business, respondent has been engaged and is presently engaged in commerce, as "commerce" is defined in the amended Clayton Act, by selling and distributing its products throughout various States of the United States.

PAR. 4. In the course and conduct of its business in commerce, respondent has been and is now in competition with other corporations, partnerships, firms and individuals engaged in the manufacturing, selling and distributing of various consumer appliance products, including television and radio receiving sets, high fidelity phonographs and air conditioning units.

With reference to the first count, the complaint sets forth the following additional allegations which are denied by respondent's pleadings:

PAR. 5. In the course and conduct of its business in commerce, respondent has sold and is now selling certain "Emerson" brand consumer appliance products to some purchasers at prices substantially higher than those charged other purchasers of these products of like grade and quality who have been and are now competing with said unfavored purchasers.

For example, in the Chicago, Illinois area, respondent has granted Polk Bros. substantial price concessions in connection with Polk Bros.' purchase from respondent of "Emerson" appliance products. Respondent did not offer or grant these price concessions to other purchasers competing with Polk Bros.

PAR. 6. The effect of respondent's discrimination in price, as alleged above, may be substantially to lessen competition or tend to create a monopoly in the

[1] The facts stated in the foregoing sentence are denied in respondent's amended answer but are conceded in respondent's aforementioned motion to dismiss the complaint. However, see page 973 herein wherein it is established by documentary evidence that respondent's purchases of the described commodities are not from the parent corporation, Emerson Radio & Phonograph Corporation, but the latter's wholly owned subsidary, Emerson Radio, Inc.

lines of commerce in which respondent and its purchasers are respectively engaged; or to injure, destroy, or prevent competition with purchasers of respondent who receive the benefit of such price discriminations.

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

With reference to the second count, the complaint after incorporating in paragraph 8 thereof by reference the allegations shown in paragraphs 1 through 3 above, sets forth the following additional allegations which are denied by respondent's pleadings:

PAR. 9. 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 "Emerson" appliance products sold to them by respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondent competing with said favored customers in the distribution of such products.

For example, respondent has granted and is presently granting Polk Bros. of Chicago, Illinois, substantial promotional payments or allowances in connection with the advertising by Polk Bros. of respondent's products in newspapers and on radio and television stations. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with Polk Bros.

PAR. 10. 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.

As heretofore indicated respondent's amended answer filed on October 18, 1961 sets forth certain affirmative defenses briefly described above as the "cost justification" and "meeting of competition" defenses. The full text of these defenses as set forth in the amended answer are as follows:

11. Alleges that such differences in prices, if any, respondent charged to different purchasers of commodities of like grade and quality reflect due allowances for differences in the cost of manufacture, sale and delivery resulting from the differing methods or quantities in which such commodities were sold or delivered.

12. Alleges that lower prices, if any, charged to purchasers of commodities of like grade and quality were so charged in good faith to meet an equally low price of a competitor.

13. Alleges that disproportionate, promotional payments or allowances granted by respondent, if any, reflected due allowances for the differences in the costs of manufacture, sale and delivery resulting from the differing methods or quantities in which such commodities were sold or delivered.

14. Alleges that disproportionate promotional payments or allowances granted by respondent, if any, were granted in good faith to meet the promotional payments, services or facilities furnished by a competitor.

The most noteworthy fact for present purposes is that although the complaint alleges that respondent is engaged both in the (1) business of manufacturing television cabinets exclusively for the parent corporation Emerson Radio & Phonograph Corporation and in the (2) business of selling and distributing the aforementioned Emerson brand products [2] to retail outlets through divisions which respondent operates in various parts of the country, the complaint charges respondent with violations of the involved sections of the amended Clayton Act only with respect to respondent's *second* mentioned business function. Stated more directly, the complaint does not charge respondent with violations of any of the involved provisions of the Act with respect to that portion of respondent's business which is devoted solely to the manufacturing of television cabinets exclusively for the parent corporation. Respondent's motion to dismiss the complaint asserts that respondent's "sole business activity at the present time is the manufacture of cabinets exclusively for Emerson Radio & Phonograph Corporation, its parent company."

From the uncontested facts reflected in the supporting documents attached to respondent's motion to dismiss the complaint, the following facts are established:

1. Respondent's supplier of "Emerson" brand products has been Emerson Radio, Inc., another wholly owned subsidiary of respondent's parent company, the aforementioned Emerson Radio & Photograph Corporation, and not the said parent company as alleged in the complaint.

2. Respondent had eight contracts, each dated January 1, 1962, with the aforementioned Emerson Radio, Inc., each of which is entitled "Distributor Franchise Agreement 1962". Under the terms of each contract, respondent was given a distributorship "for the sale of Emerson television, radio, high fidelity and stereophonic instruments and phonographs, and air conditioners, parts and accessories therefor, and other products" in a franchised territory for a period of one year commencing January 1, 1962. The eight contracts cover the territories described in paragraph 2 of the complaint as set forth above. Although the contracts are for terms of one year, each contract is expressly made subject to termination by either party by 30 days notice. Each contract provides that upon its termination, the re-

[2] For the convenience of the reader, these are again identified as Emerson brand television and radio receiving sets, high fidelity phonographs, air conditioners and other consumer appliance products alleged in the complaint to be manufactured by Emerson Radio & Phonograph Corporation but which are actually manufactured, as will be shown below, by Emerson Radio, Inc., a wholly owned subsidiary of the said Emerson Radio & Phonograph Corporation.

spondent "agrees to remove and not thereafter to use all signs containing the word 'Emerson' and immediately to cease using all stationery, advertising matter and other printed matter in its possession or under its control containing the word 'Emerson'. Numerous other provisions of these distributor franchise agreements are not particularly pertinent here.

3. At a meeting of its board of directors held on March 7, 1962, respondent resolved to discontinue "as soon as possible" its distributorships of "Emerson" brand products. Pertinent minutes of the said meeting relating to this subject are as follows:

RESOLVED, that this Corporation should discontinue as soon as possible the distribution of "Emerson" brand radios, television sets, phonographs (including high-fidelity and stereophonic sets) separately or in combination with each other and air-conditioning units and divest itself of ownership, direction and control of all its distributorships which are now located in Chicago, Illinois, San Francisco, California, Columbus, Ohio, Pittsburgh, Pennsylvania, Buffalo, New York, Detroit, Michigan and Cleveland, Ohio, and

FURTHER RESOLVED, that this Corporation as soon as possible should no longer engage in the distribution of such products, nor should it have any connection with, or exercise any direction or control of any distributors of such products; and

FURTHER RESOLVED, that the written resignations received from all of the officers and directors of the Corporation are accepted, effective as of the close of this meeting.

4. At a meeting of the board of directors of Emerson Radio & Phonograph Corporation held on April 25, 1962, the Chairman informed the board of the decision of its said wholly owned subsidiary, Emerson Radio, Inc., to discontinue respondent as a distributor of Emerson products in all territories. He further advised the board that the discontinuance of the distributorships was then in process and would be completed shortly.

5. Between the dates of April 2 and June 4, 1962, Emerson Radio, Inc., entered into new distributor franchise agreements with seven successor distributor corporations to respondent for the territories formerly franchised to respondent. The new contracts run from the dates in 1962 on which respondent's aforementioned franchise agreements with Emerson Radio, Inc., were terminated, to the end of 1962. The general provisions of the new distributor franchise agreements issued by Emerson Radio, Inc., to respondent's successor distributor corporations are identical with those theretofore issued by Emerson Radio, Inc., to respondent, as described above.

6. Respondent, between the dates of April 2 and June 7, 1962, sold all of the assets of that portion of its business relating to the distribution of "Emerson" products to the aforementioned seven successor

distributor corporations for an aggregate net sum of $5,246,925. These assigned assets included inventories, accounts and notes receivable, and deferred charges.

7. There is no corporate relationship between Emerson Radio & Phonograph Corporation (as seen, respondent's parent company) or any of said parent company's subsidiaries, on the one hand, and any of the successor distributor corporations of respondent, on the other.

8. At the present time the sole business of respondent is the manufacture of cabinets exclusively for its said parent company, Emerson Radio & Phonograph Corporation. These cabinets are built to specifications provided by this parent company and are suitable for use only in products manufactured by the parent company.

9. Respondent does not intend to manufacture or sell any cabinets for anyone other than its said parent company.

10. Respondent does not intend to resume the distribution of "Emerson" brand products or to engage in any other business except the manufacture and sale of cabinets for the parent company.

In summary, the facts show that respondent has completely and totally discontinued that portion of its business relating to the sale and distribution of "Emerson" brand name products. This discontinuance is signified (1) by the surrender of its franchise agreements with Emerson Radio, Inc., for the sale of "Emerson" products, (2) by the appointment of successor-distributor corporations by Emerson Radio, Inc., to take over the franchise arrangements theretofore enjoyed by respondent, and (3) by respondent's sale of all of its "Emerson" distributorship assets, aggregating more than $5,000,000, to successor distributor corporations. All of respondent's officers and directors have resigned as of March 7, 1962. Under all of these circumstances, the likelihood of respondent's resumption of its former business activities as a franchised distributor of "Emerson" products, although theoretically possible because respondent's corporate relationship to the parent company Emerson Radio & Phonograph Corporation, appears for all practical purposes to be quite remote. Respondent's remaining business is the manufacture of cabinets exclusively for the parent company. Since such cabinets are built to the specifications of the parent company and are suitable only for use in the products manufactured by or in behalf of the parent company, their sale to other manufacturers appears to be wholly unlikely. Respondent's present remaining business as a manufacturer of cabinets for the exclusive use of the parent company obviously cannot lead to violations of the antidiscriminatory practices prescribed by the amended Clayton Act. From this analysis, the examiner concludes that no useful purpose would be served by the prosecution of this proceeding. Accordingly, respondent's motion to dismiss the complaint is granted, subject, however, to the condition that the dismissal shall be without prejudice to the right of the Commission to reopen the instant proceeding if future circumstances warrant, and a formal order calling for the dismissal of the complaint, subject to the same condition, is entered below.

ORDER

It is ordered, That the complaint in this proceeding be, and the same hereby is, dismissed, subject, however, to the right of the Commission to reopen the matter if future circumstances warrant.

DECISION OF THE COMMISSION

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 10th day of October 1962, become the decision of the Commission.

IN THE MATTER OF

PURE GOLD, INC.

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

Docket 8209. Complaint, Dec. 7, 1960—Decision, Oct. 10, 1962

Consent order requiring packers of citrus fruit in Redlands, Calif., to cease paying unlawful commissions or discounts in lieu thereof to brokers and direct buyers on purchases for their own accounts for resale.

COMPLAINT

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

PARAGRAPH 1. Respondent Pure Gold, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 307 Brookside Avenue, Redlands, Calif.

Par. 2. Respondent is now and for the past several years has been engaged in the business of packing, selling and distributing citrus fruit such as oranges, tangerines and grapefruit, all of which are hereinafter referred to as citrus fruit or fruit products. Respondent sells and distributes its citrus fruit through brokers, wholesalers and jobbers, as well as direct, to customers located in many sections of the United States. When brokers are utilized in making sales for it respondent pays them for their services a brokerage or commission, usually at the rate of 10 cents per 1⅗ bushel box or equivalent. Respondent's annual volume of business in the sale and distribution of citrus fruit is substantial.

Par. 3. In the course and conduct of its business over the past several years, respondent has sold and distributed, and is now selling and distributing, its citrus fruit in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, to buyers located in the several states of the United States other than the State of California in which respondent is located. Respondent transports, or causes such citrus fruit, when sold, to be transported, from its place of business or packing plant in the State of California, or from other places within the State, to such buyers or to the buyers' customers located in various other states of the United States. Thus there has been at all times mentioned herein a continuous course of trade in commerce in such citrus fruit across state lines between said respondent and the respective buyers of such citrus fruit.

Par. 4. In the course and conduct of its business as aforesaid, respondent has been and is now making substantial sales of citrus fruit to some, but not all, of its brokers and direct buyers purchasing for their own account for resale, and on a large number of these sales respondent paid, granted or allowed, and is now paying, granting or allowing to these brokers and direct buyers on their purchases, a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection therewith.

Par. 5. The acts and practices of respondent in paying, granting or allowing to brokers and direct buyers a commission, brokerage or other compensation, or an allowance or discount in lieu thereof, on their own purchases, as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

Mr. Cecil G. Miles and *Mr. Ernest G. Barnes* for the Commission.

Surr & Hellyer, by *Mr. James R. Edwards*, of San Bernardino, Calif., and *Tilden and Leventritt*, by *Mr. Richard A. Tilden*, of New York, N.Y., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) on December 7, 1960, issued its complaint herein, charging the above-named respondent with having violated the provisions of § 2(c) of the Clayton Act, as amended (U.S.C. Title 15, § 13) in certain particulars, and respondent was duly served with process.

On August 9, 1961, there was submitted to the undersigned hearing examiner of the Commission, for his consideration and approval, an "Agreement Containing Consent Order To Cease And Desist", which had been entered into by and between respondent and counsel for both parties, under date of April 10, 1961, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent Puro Gold, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 307 Brookside Avenue, Redlands, California.

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

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

4. Respondent waives:

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

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

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

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

6. This agreement, and the inital decision based thereon, shall not become a part of the official record unless and until it becomes a part of the decision of the Commission. This agreement is entered into subject to the condition that the initial decision based thereon shall

be stayed by the Commission unless and until the Commission disposes of Docket No. 8194, *In the Matter of Western Fruit Growers Sales Co.* [p. 586 herein], by an order to cease and desist in substantially the same form as set forth hereinafter in this agreement, or by other appropriate order to cease and desist, or by dismissal.

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

8. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease and Desist", the hearing examiner approves and accepts this agreement; finds that the Commission has jurisdiction of the subject matter of this proceeding and of the respondent herein; that the complaint states a legal cause for complaint under § 2(c) of the Clayton Act, as amended (U.S.C. Title 15, § 13) against the respondent, both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the order proposed in said agreement is appropriate for the just disposition of all the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

It is ordered, That the respondent, Pure Gold, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of citrus fruit or fruit products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

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

Final Order

By its order of September 18, 1961, the Commission extended until further order the date on which the initial decision of the hearing examiner herein would become the decision of the Commission; and

It appearing that said initial decision is based on an agreement containing a consent order, which agreement provides that said initial decision will be stayed pending Commission disposition of the proceeding in Docket No. 8194, *Western Fruit Growers Sales Co.;* and

The Commission by its order of September 18, 1962, having adopted as the decision of the Commission the initial decision in Docket No. 8194 [p. 586 herein] wherein the hearing examiner issued his order to cease and desist in substantially the same form as set forth in the agreement herein;

The Commission now having concluded that the hearing examiner's initial decision herein is appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner filed August 17, 1961, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent Pure Gold, Inc., 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 initial decision.

IN THE MATTER OF

WARREN FRUIT COMPANY, INC.

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

Docket C-251. Complaint, Oct. 10, 1962—Decision, Oct. 10, 1962

Consent order requiring citrus fruit packers in Lutz, Fla., to cease paying illegal commissions or discounts in lieu thereof on a large number of sales made to brokers and direct buyers purchasing for their own accounts for resale.

COMPLAINT

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

PARAGRAPH 1. Respondent Warren Fruit Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its offices and principal place of business located at Lutz, Florida, with its mailing address as Post Office Box 7, Lutz, Fla.

PAR. 2. Respondent is now and for the past several years has been engaged in the business of packing, selling and distributing citrus fruit, such as oranges, tangerines and grapefruit, all of which are hereinafter sometimes referred to as citrus fruit or fruit products. Respondent sells and distributes its citrus fruit directly, and in many instances through brokers, to buyers located in various sections of the United States. When brokers are utilized in making sales, respondent pays said brokers for their services a brokerage or commission, usually at the rate of 5 cents per carton or 10 cents per 1⅗ bushel box or equivalent. Respondent's annual volume of business in the sale and distribution of citrus fruit is substantial.

PAR. 3. In the course and conduct of its business over the past several years, respondent has sold and distributed and is now selling and distributing citrus fruit, in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, to buyers located in the several states of the United States other than the State of Florida in which respondent is located. Respondent transports, or causes such citrus fruit, when sold, to be transported from its place of business or packing plant in the State of Florida, or from other places within said State, to such buyers or to the buyers' customers located in various other states of the United States. Thus there has been, at all times mentioned herein, a continuous course of trade in commerce in citrus fruit across state lines between said respondent and the respective buyers thereof.

PAR. 4. In the course and conduct of its business, as aforesaid, respondent has been and is now making substantial sales of citrus fruit to some, but not all, of its brokers and direct buyers purchasing for their own account for resale, and on a large number of these sales respondent paid, granted or allowed, and is now paying, granting or allowing to these brokers and other direct buyers on their purchases a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection therewith.

PAR. 5. The acts and practices of respondent in paying, granting or allowing to brokers and direct buyers a commission, brokerage or other compensation, or an allowance or discount in lieu thereof, on their own purchases, as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

Decision and Order

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of subsection (c) of Section 2 of the Clayton Act, as amended, and the respondent 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 respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdicitional 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 respondent 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 Warren Fruit Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its offices and principal place of business located at Lutz, Florida, with its mailing address as Post Office Box 7, Lutz, Fla.

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

ORDER

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

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

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

IN THE MATTER OF

THE REGINA CORPORATION ET AL.

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

Docket 8323. Complaint, Mar 14, 1961—Decision, Oct. 11, 1962

Order requiring a large manufacturer of electric floor polishing machines, vacuum cleaners, and other household appliances, with headquarters in Rahway, N.J., to cease supplying its distributors and retailers with fictitious "manufacturer's list prices" or "suggested list prices", thereby represented as the usual retail prices.

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 Regina Corporation, a corporation, and Lannon F. Mead and Robert C. Cassatt, 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, The Regina Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Regina Avenue, Rahway, N.J.

Respondents Lannon F. Mead and Robert C. Cassatt are officers of the corporate respondent and as such they formulate, direct and control the acts and practices thereof, including the acts and practices hereinafter set forth. Their business address is the same as the corporate respondent.

PAR. 2. Respondents are now and for some time last past have been engaged in the business of manufacturing, selling, and distributing electric floor polishing machines and vacuum cleaners and cause such merchandise, when sold, to be transported to distributors and retailers in states other than the State of New Jersey, and maintain and at all times mentioned herein have maintained a substantial course of trade in said electric floor polishing machines and vacuum cleaners, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their business, respondents are in competition, in commerce, with corporations, firms and individuals in the sale of similar items.

PAR. 4. Respondents, for the purpose of inducing the purchase of their electric floor polishing machines and vacuum cleaners, have engaged in the practice of supplying their distributors and retailers with fictitious "manufacturer's list prices" or "suggested list prices", thereby representing, directly or by implication, that such "list" prices are the usual and customary retail prices for such merchandise. In truth and in fact, such "list" prices are fictitious and are in excess of the usual and customary retail prices for said merchandise.

PAR. 5. Respondents, by the aforesaid practice, place in the hands of retailers and others the means and instrumentalities by and through which they may mislead the public as to the usual and customary retail prices for their electric floor polishing machines and vacuum cleaners.

PAR. 6. The use by the 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. 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. 7. 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. Ames W. Williams for the Commission.
Mr. Chester Mueller, of Toms River, N.J., for respondents.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

The Regina Corporation, of Rahway, New Jersey, is a large, long-established manufacturer of various electrical household appliances, including, among other things, electric floor polishing machines and vacuum cleaners. Lannon F. Mead is its president and Robert C. Cassatt is its vice president.

In a complaint issued March 14, 1961, the Federal Trade Commission charged Regina, Mead and Cassatt with engaging in unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. It alleged that the corporate respondent, under the direction and control of the individual respondents, supplied manufacturer's list prices or suggested list prices to distributors and retailers which were fictitious because they exceeded the usual and customary retail prices for the floor polishing machines and vacuum cleaners involved in this proceeding. In essence, the charge is that by supplying such list prices to distributors and retailers a representation is made, either directly or by implication, that such prices are the usual and customary retail prices for the goods. It is alleged further that respondents, by engaging in this practice, placed in the hands of retailers and "others" the means and instrumentalities whereby such retailers and "others" may mislead the public as to the usual and customary retail prices for the floor polishing machines and vacuum cleaners. The conclusion sought to be drawn is that such alleged false, misleading and deceptive statements, representations and practices had and have the capacity and tendency to mislead purchasers into the erroneous belief that the list prices are in fact the usual and customary retail prices, thus inducing the purchase of substantial quantities of respondents' products.

During the hearing, after hearing and interrogating Lannon F. Mead, I granted the motion to dismiss as to him in his capacity as an individual. Decision was reserved on a similar motion made on behalf of Robert C. Cassatt. Commission counsel now takes no exception to the disposition as to Mead and states that he requests no action against Cassatt in his capacity as an individual. The motion to dismiss as to Cassatt, in his capacity as an individual, is now granted. All other motions not consistent with my conclusions hereinafter set forth are denied.

Regina admits that it furnishes suggested list prices. It denies that such prices are fictitious and that the implication to be drawn therefrom is that they are the usual and customary retail prices for the goods involved. It denies also that it provides to retailers and others the means and instrumentalities whereby the public is misled as to the usual and customary retail prices.

No element of preticketing, labeling or marking is involved in this case. (E.g., cf. *The Baltimore Luggage Company*, F.T.C. Docket No. 7683, aff'd. 296 F. 2d 608 (U.S.C.A., 4th Cir.), November 7, 1961.

We are confronted first with the need for determining just what is sought to be accomplished by this complaint. At the commencement of the hearing, in response to my inquiry, the Commission attorney made it clear that there is no contention here that a manufacturer, by establishing a list price or furnishing a retailer with a list price, is engaging in a wrongful practice. He went on, however, to say that if a retailer uses the list price "for purposes other than a sale at that price, why, I think that the use goes back to the manufacturer. After all, he is the one who created this and put it into circulation." This could be interpreted to mean simply that if a retailer unlawfully or deceptively uses a suggested list price supplied to him by the manufacturer, the manufacturer is responsible for that retailer's conduct. It seems to me that, in view of the manner in which this case was tried and progressed, Commission counsel really did not seek to impose such a harsh rule. It is doubtful whether wrongful use by any recipient of anything, not inherently dangerous, supplied by another person could be imputed to that other person unless other facts existed to fasten liability on such other person.

There is little doubt that mere establishment, by a manufacturer of retail selling prices for branded commodities manufactured by him, is not unlawful. Federal Trade Commission Act, Section 5(a)(2); *U.S.* v. *Parke, Davis and Co.*, 362 U.S. 29; *U.S.* v. *Colgate & Co.*, 250 U.S. 300. However, a legal practice may not be used to accomplish an illegal objective. *Opera on Tour* v. *Weber*, 285 N.Y. 348, 34 N.E. 2d 349, *cert. denied*, 314 U.S. 615.

The lists provided by Regina to its distributors and customers set forth in detail the various models of floor polishers and vacuum cleaners and they contain for each a suggested list price. There is also in evidence a large number of advertisements of various department stores, appliance stores and other stores in New York, Philadelphia, Newark and Boston containing the familiar format of two prices for either the floor polisher or the vacuum cleaner. In each instance are shown a price, which is called "the manufacturer's list price" or some similar term, and a lower price, which is the offering price. It is contended, in support of the complaint, that in the areas where the advertisements appear, Regina's list prices are not the actual, normal, usual retail prices, and that this comparative type of advertising falsely represents, impliedly or directly, that a purchaser, by making a purchase at the offering price, will enjoy a saving equivalent to the difference between the two prices. The evidence shows that in almost all the areas in which these advertisements are placed, the usual, normal and customary retail selling prices are considerably below the manufacturer's list prices and are in a narrow fluctuating area above or below the offering prices. The testimony of respondents' witnesses is that generally it is the rule that Regina carpet sweepers and floor polishers are sold at prices lower than the suggested list prices. Conversely, they can be said to agree that when an appliance is sold at the list price, it is the exception to the rule.

The evidence shows further that Regina makes cooperative advertising payments to wholesalers and retailers. Advertising by a retailer which portrays a comparison between a manufacturer's list price and a lower offering price is deceptive advertising when in fact, as here, the manufacturer's suggested list price is not the actual, usual and customary retail selling price in the retailer's trade area. To the extent that Regina participated in advertising of this nature by contributing to the cost thereof, Regina is responsible equally with the retailer for the representations made.

This does not, however, dispose of all the issues in this case. The larger issue is whether Regina, merely by establishing and conveying to distributors and retailers the suggested list prices, was engaging in a deceptive practice because retailers utilized those list prices for deceptive purposes. Upon the facts of this case, giving a strict construction to Regina's knowledge of the market, this issue could be resolved with a finding that since Regina well knew that the usual selling prices for its carpet sweepers and floor polishers were less than its suggested list prices, by making such list prices available to retailers it was consciously providing a means whereby they might use them for deceptive purposes. Such a finding might justify the entry of an order banning entirely the establishment and furnishing of suggested retail selling prices for Regina's commodities.[1] If Regina's suggested list prices were extravagantly or unreasonably high to the point that the conclusion would follow that they were fixed for the purpose of deceiving the ultimate purchaser, I would not hesitate to enter an order banning that practice. This, however, is not the situation here. The undisputed evidence is to the contrary.

Since our primary objective is to stop deceptive practices, our primary assault should be at the place where such practices occur. This approach requires a broader analysis of marketing problems involving suggested retail selling prices.

Regina has never imposed "fair trade" agreements in connection with the marketing of its products in those states where such agree-

[1] Since the practice is practically universal in many businesses and the same price conditions exist generally, a precedent would be established for similar orders throughout the economy.

ments are valid. Regina does not discriminate against retailers. It sells or permits the sale of its products to all, regardless of the prices at which they sell those products.

In the appliance field, the established practice is to list-price products.

Prior to 1958, Regina published retail prices for its products in advertising placed by it. It has not done so since. It also has changed its price terminology and uses the words "suggested selling prices" or "suggested list prices." It has maintained this practice ever since even though it is aware, as noted before, that, as a rule, the suggested list price is not followed. Generally speaking, there are only isolated areas and certain so-called "class stores" where it is followed. Its experience is that a list price cannot be maintained unless the manufacturer engages in door-to-door or other direct selling to the consumer. Its suggested list prices are now uniform for all areas of the country although, for a period of four or five years after World War II, a $5.00 differential west of the Rockies had been maintained. Its list prices do not vary from season to season or for classes of customers or channels of trade. Regina has revised its suggested list prices from time to time in order to meet competition, but by and large the prices have been kept steady because of improved methods in manufacture and reduced profits. Regina's stated policy is to keep its suggested list prices as low as possible in order to hold the market. Once Regina has determined at what suggested list price a particular model floor polisher or vacuum cleaner should be sold, it fixes its selling charge to distributors and retailers by reference to that price and making percentage allowances from it. While it would be inconvenienced if it had to change this method of pricing to retailers and distributors, it could, if it had to, determine its charges on a cost basis. Although Regina has several models of each of the products involved in this case (floor polishers and vacuum cleaners) basically the differences among them (and the list prices suggested for them) result from added parts and functions.

So much for marketing as it is related directly to Regina. There is much evidence of marketing practices and problems in general, with all of which Regina is concerned. All this evidence was presented by the respondents and their experts. It has not been rebutted and appears to be reasonable, logical and a fair portrayal. Much of it is familiar.

It is traditional in the appliance field to compute manufacturers' selling prices to distributors and dealers by discounts originating from list or suggested retail prices. A *bona fide* retail list price is determined by consumer preferences, habits and thinking and a manufacturer normally will manufacture for a conventional price bracket, giving due consideration to the characteristics of the product, its quality and the promotion necessary to create desires for it. Actual cost of manufacture is not necessarily the prime factor for determination of a retail list price. When the *bona fide* list price finally is determined, this represents the manufacturer's opinion as to value of the commodity on the retail market, conditioned by the probability that it can be sold at that price. The *bona fide* list price is intended to take care of intervening margins or markups for both the retailer and the distributor to compensate them for the services they are expected to render and to give them a reasonable profit.

A new commodity, like color television or a well-known instant camera, may be introduced to the market at a suggested list price which has no relation at all to its then actual cost of manufacture. However, in determining the price at which it is to be offered to the consumer, the manufacturer takes into consideration the development expense which was necessary before the product became marketable, its uniqueness and the fact that it is not an article of general manufacture. Here the list price performs a dual function. It enables the manufacturer to be compensated for developing the new product and it protects the consumer from paying an exorbitant price determined only by desire and scarcity. But the suggested list price for such a new commodity, once having been established, does not remain static. As the market changes, as the manufacturer recoups his development expense, as the demand increases, as he introduces newer or improved models, he will change the list price and the usual pattern is downward. This then has an additional value to the consumer. If, at first, he was entirely out of the market for that commodity, he may be informed that its price may be coming down to the point where it is within his reach or low enough to make him want to acquire it.

A reputable brand name manufacturer cannot recklessly fix retail selling prices at figures having no relation to the true value of his commodity, assuming that he observes traditional practices of pricing to retailers and distributors. If he should do this, he soon would price his commodity out of the market or lose his good reputation.

List prices serve also to prevent overcharging in times of short supply, to provide a standard for value, as a guide for trade-in purposes and as loan justifications for finance companies.

The list price method of doing business, however it may be abused and subverted to harmful practices, has become a way of life. The consumer is habituated to it and for him it provides both identification and comparison standards among different brands of the same commodity. It is conceded and there is no doubt that there are gullible consumers who will pay the list price. This happens when it is used for the purpose of deception. I do not mean to imply that the gullible consumer should not be protected when I say that the general populace knows that a list price is only a means of identification and a starting point for value to be fixed ultimately by the forces of competition. Our duty is to protect the gullible consumer within the framework of existing and lawful practices. The action we take should be compatible.

Today's retail market is not an orderly market. Prices are not stable. Variations result mainly from competition. This is nothing new and this is good. However, different retailers have different motives and objectives and they have varying methods of operation. There are and always will be the conventional retail outlets as we knew them before the era of discount stores.[2] Among the current varieties are catalogue houses, mail-order houses, "I can get it for you wholesale" operators, "mark-down" (discount) appliance and general stores, closed-door, class or group stores, and stamp plans, to name a few. A list-priced brand name article, marked down, is used as a lure to get customers into a store in the hope that when there he will buy other goods bringing higher markups. Some dealers are interested only in volume, traffic and quick turnover. Some need to raise cash in a hurry. Some want to make themselves known to the area. Some dealers give only price, do not have large selections or adequate stock, provide no information or guidance, do not install, do not instruct as to use or operation, do not give credit, do not deliver, while others provide some or all of these services. Some stores are little more than barns and others are beautifully furnished and lighted. These factors matched against the demands or preferences or needs of the customer determine the actual retail prices of goods today. They have become part of the "competition" concept.

Actual prices are not always normal, usual or customary prices. There is evidence that some stores sell some appliances below cost and that limited numbers of articles are sometimes offered at drastically reduced prices during ungodly hours—24 hair clippers at $3.69, one to a customer, from 12 p.m. to 1 a.m.; similarly, complete transistor radios from 1 a.m. to 2 p.m.; and so on all through the night until 6 a.m., when 24 of Regina's Electricbrooms were offered, one to a customer, below cost, until 7 a.m.

[2] I question the use of the term "discount stores" as it is used today. Once upon a time there were "discount stores" but today they might be termed more properly "competition stores."

I do not doubt that suggested list prices have some of the attributes of value assigned to them by respondents, that their abandonment could cause confusion among consumers and promote the manufacture of potentially dangerous electrical appliances put out solely to meet price situations. All this could be to the disadvantage of the honest, legitimate manufacturer and contribute to deception of the consumer.

We do not cure a bad condition by creating another, possibly worse condition. As noted before, Commission counsel says he does not contend that the establishment of list prices and the furnishing thereof to retailers are illegal. He contends, however, that remedial action must be taken against Regina, because, as I have related above, Regina furnished these list prices to retailers when it knew that they were not the usual, customary prices for the commodities in the areas involved and thereby provided the means whereby some of those retailers deceived the public as to what such prices actually were. He proposes an order which would bar Regina from "Representing, through the use of . . . [list prices] that any amount is the usual and customary retail price of merchandise, when such amount is in excess of the price at which said merchandise is usually and customarily sold in the trade area or areas where the representation is made."

This is an impossible and undeserved burden to place upon Regina.[3]

The 1958 Census of Business of the Bureau of the Census, Department of Commerce, discloses that, as of June 30, 1959, the Bureau of the Budget had established 189 Standard Metropolitan Statistical Areas in the Continental United States and Hawaii, in addition to two Standard Consolidated Areas described as the Chicago, Illinois-Northwestern Indiana Standard Consolidated Area and the New York, N.Y.-Northeastern New Jersey Standard Consolidated Area. In making the census, the Bureau of the Census studied all establishments engaged in retail trade in accordance with the principles of the 1957 edition of the *Standard Industrial Classification (SIC) Manual* issued by the Bureau of the Budget. Retail trade was allocated to eight major groups and these included establishments primarily engaged in selling merchandise to personal, household and farm users. These eight groups were: SIC Major Group 52, Lumber, Building

[3] Commission counsel cites, in support of his proposed order: In the Matter of *National Silver Company, et al.*, Docket No. 3162, 1938, 27 F.T.C. 596, 610; In the Matter of *The Firestone Tire & Rubber Co., et al.*, Docket No. 3983, 1941, 33 F.T.C. 282, 297; In the Matter of *The Goodyear Tire and Rubber Company*, and *The Goodyear Tire and Rubber Company, Inc.*, Docket No. 3984, 1941, 33 F.T.C. 298, 311; In the Matter of *B. F. Goodrich Company*, Docket No. 3985, 1941, 33 F.T.C. 312, 332; In the Matter of *Sears, Roebuck & Company*, Docket No. 4033, 1941, 33 F.T.C. 334, 354; In the Matter of *Western Auto Supply Company*, Docket No. 4054, 1941, 33 F.T.C. 356, 365. Regina has committed no acts comparable to those found in the cited cases, except as specifically mentioned.

Materials, Hardware, Farm Equipment Dealers; SIC Major Group 53, General Merchandise Group, which included department stores, limited price variety stores, general merchandise stores, dry goods stores, sewing, needlework stores and chain stores; SIC Major Group 54 included food stores; SIC Major Group 55 covered automotive dealers; SIC Major Group 56 covered apparel and accessory stores; SIC Major Group 57 covered furniture, home furnishings and equipment stores and among these were numerous types of stores which would regard vacuum cleaners and floor polishers as major items of sale, for example, furniture stores, household appliance stores and radio and television stores; SIC Major Group 58, Eating, Drinking places; SIC Major Group 59, Other Retail Stores.

One Hundred Eighty-Nine Standard Metropolitan Statistical Areas for which so many different types of retail outlets must be studied, must necessarily present an insurmountable problem to a manufacturer who might be required to compute his suggested retail selling prices according to the usual and customary prices at which they might be sold in any given area. The problem becomes more complicated by a reference to a map prepared by the Bureau of the Census showing the Standard Metropolitan Statistical Areas in the United States from which it appears that in several of the states there is no Standard Metropolitan Statistical Area.

This difficulty cannot be ignored and it is my opinion that the order thus requested would prevent and prohibit Regina from using any suggested list price except within the limitations of Colgate, 250 U.S. 300, or by resorting to fair trade contracts, where legal.

If this happened, the wrongful practice condemned by the Commission, the practice which works the deception, would not be prevented thereby. Any retailer could still engage in the self-same practice merely by changing his tune. Instead of advertising, "Manufacturer's Suggested List Price," he would advertise, "Manufacturer's Fair Trade Price in ——————" or "Manufacturer's Established Price in ——————."

An order which is both impossible to obey and subject to evasion by the persons primarily responsible for deception should not be entered by an administrative agency. This does not mean that the agency is thereby rendered powerless to act. I am of the opinion that appropriate remedial action can be taken which will be effective to lay the groundwork for detecting and halting deceptive practices of retailers. This can be accomplished by making it clear, and a matter of contract or voluntarily assumed obligation, that the manufacturer's suggested list price may not be used for deceptive comparative pricing. This is the objective which I seek by the order to be set forth below.

In summary of, but not restrictive of, the record and all the foregoing, the following are my ultimate

FINDINGS OF FACT

1. Respondent, The Regina Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Regina Avenue, Rahway, New Jersey.

2. Respondent is now and for many years has been engaged in the business of manufacturing, selling and distributing electric floor polishing machines and vacuum cleaners and causes such merchandise, when sold, to be transported to distributors and retailers in all the states of the United States, its territories and the District of Columbia. It maintains and at all times mentioned herein has maintained a substantial course of trade in electric floor polishing machines and vacuum cleaners, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. In the course and conduct of its business, respondent is in competition, in commerce, with corporations, firms and individuals in the sale of electric floor polishers and vacuum cleaners.

4. For the purpose of promoting the sale of its electric floor polishers and vacuum cleaners, as a means or method for the identification of models thereof, and to provide a base figure from which its prices to distributors and retailers are calculated, respondent is and has been engaged in the practice of supplying distributors and retailers with lists and literature (separate from and not affixed or attached to the commodities or packaging) wherein it has set forth model numbers or illustrations to which it has assigned certain figures in dollars and cents which have been described by it as "Suggested List" prices and are interchangeably referred to as "list prices," "suggested list prices," "suggested retail selling prices" or words of similar import.

5. The prices set forth in such lists and literature with rare and isolated exceptions, are not the usual and customary retail prices for said commodities; the actual, usual and customary retail prices are generally lower; and respondent is and has been aware that these are the facts.

6. The determination of the actual retail prices at which the said commodities are sold is dependent upon the nature of the retail outlet in which any particular sale is made, the location of such outlet, the manner or means whereby it may have acquired the commodities, the

services rendered or not rendered by it in connection with such sale, the motives or promotion objectives which it may have at the time of such sale, the classes or groups of customers to whom it caters, and other factors in addition to the normal pressures of competition.

7. There are many hundred, conceivably thousands of retail trade areas in the United States. In the preparation of the 1958 Census of Business, the Bureau of the Census, United States Department of Commerce, designated 189 Standard Metropolitan Statistical Areas. This number was selected for statistical purposes. There are a number of states in which no such statistical area was designated and there are, in addition, many more retail sales areas in the United States. For the purposes of the census, Standard Industrial Classifications (abbreviated SIC) were made for the retail outlets within the areas. One of these is *SIC Major Group 57* and within this major group are not only *SIC 572, Household Appliance Stores*, but also several other SIC stores, all of which customarily sell commodities such as are involved in this proceeding. Moreover, stores in other major groups also sell such commodities.

8. Respondent cannot, at any time, furnish to any person, distributor or retailer any suggested list price or suggested retail selling price for any vacuum cleaner or floor polisher manufactured by it with the assurance, regardless of care, that when such commodity is offered for retail sale, the price so designated will be the price at which it is usually and customarily sold in any trade area or areas unless respondent successfully enforces in such area or areas dealers' retail selling prices by such legal means as may be available to it or engages in illegal practices in restraint of trade.

9. If respondent were made subject to an order restraining it from furnishing or setting suggested retail selling prices unless such prices did not exceed the prices at which its commodities were usually and customarily sold in the trade area or areas where the representation is made, retailers in such area or areas would not thereby be prevented from engaging in deceptive practices related to the usual and customary retail prices of such commodities if respondent elected to avail itself of the procedures for which provision is made in subdivision (2) of part (a) of Section 5 of the Federal Trade Commission Act.

10. Not only has respondent supplied the lists and literature containing the said suggested list prices or suggested retail selling prices with knowledge that the actual, usual and customary retail prices were and are generally lower, but it has made allowances or contributions for advertising by retailers in which advertising the said prices have been used in a comparative manner for the purpose of mislead-

ing the public and prospective purchasers as to the usual and customary retail prices for such floor polishing machines and vacuum cleaners.

11. Respondent, by this practice, places in the hands of retailers and others, the means and instrumentalities by and through which they may mislead the public and prospective purchasers as to the usual and customary retail prices for its electric floor polishing machines and vacuum cleaners.

12. The unrestricted and unqualified furnishing by respondent of suggested retail selling prices and its allowances and contributions for advertising the same in the manner aforesaid have had, and now have, 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 respondent's products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondent from its competitors and substantial injury has thereby been, and is being, done to competition in commerce.

And, from the foregoing, I make these

CONCLUSIONS

The aforesaid acts and practices of the respondent as herein found are all to the prejudice and injury of the public and of respondent's 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.

It is my further conclusion that it is necessary and appropriate, therefore, to enter this

ORDER

It is ordered, That the respondent, The Regina Corporation, and its officers, agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the offering for sale, sale and distribution of electric floor polishers and vacuum cleaners, or other household appliances, or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Furnishing or supplying to any person any literature, list, schedule or material mentioning or describing any such products which contains, sets forth or states any price or statement of value purporting to be a "manufacturer's list price," "suggested list price," "suggested retail price," or words of similar meaning

unless, in connection with the furnishing or supplying thereof and clearly stated thereon, the reservation is made that the same is furnished or supplied only for the information of any recipient thereof for the purpose of identification, that nothing therein contained shall be regarded or used as an indication that it is the usual and customary retail price of the product or products to which it refers and that it is received by the recipient and by any person who may receive it from the recipient upon the express condition and understanding that nothing therein contained shall at any time be used in any manner for the purpose of representing, or in a manner tending to represent, that any such price or statement is the usual and customary retail price of any product, when it (that is, any amount mentioned in the literature, list, schedule or material) is in excess of the price at which the same is usually and customarily sold in the trade area or areas where the representation is made.

2. Furnishing to any other person, firm or corporation any benefit, payment, allowance or thing of value contributing to or aiding such person, firm or corporation in the performance of, or doing of, any act or thing interdicted by the reservation for which provision is made in Part 1 hereof.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as respects respondents Lannon F. Mead and Robert C. Cassatt, in their individual capacities, but not to the extent that they may be subject to this order as officers or agents of the corporate respondent.

Opinion of the Commission

By MacIntyre, *Commissioner:*

The complaint herein charges respondents with violating Section 5 of the Federal Trade Commission Act, alleging in substance that respondents, by supplying their distributors and retailers with fictitious "manufacturer's list prices" or "suggested list prices", have placed in the hands of retailers and others the means and instrumentalities by and through which they may mislead the public as to the usual and customary retail prices for respondents' products.

The hearing examiner, in his initial decision filed November 16, 1961, found the charges sustained and ordered respondent Regina, and its officers, agents, representatives and employees, to cease and desist the practices he found unlawful. He dismissed the complaint as to respondents Lannon F. Mead and Robert C. Cassatt in their individual capacities, and no appeal was taken from such dismissal. His order would prohibit, *inter alia*, the furnishing of any price literature with suggested list prices, however designated, unless " . . . in connection with the furnishing or supplying thereof and clearly stated thereon, the reservation is made that the same is furnished or supplied only for the information of any recipient thereof for the purpose of identification, that nothing therein contained shall be regarded or used as an indication that it is the usual and customary retail price of the product or products to which it refers and that it is received by the recipient and by any person who may receive it from the recipient upon the express condition and understanding that nothing therein contained shall at any time be used in any manner for the purpose of representing, or in a manner tending to represent, that any such price or statement is the usual and customary retail price of any product, when it (that is, any amount mentioned in the literature, list, schedule or material) is in excess of the price at which the same is usually and customarily sold in the trade area or areas where the representation is made."

Counsel supporting the complaint has appealed from the initial decision principally on the ground that the order as qualified or limited is not proper. He requests that the examiner's order be stricken and that the proposed order in his brief be substituted therefor. Respondents have not appealed; however, in answer to the appeal of counsel supporting the complaint they contend that the complaint should be dismissed because, among other things, they claim that the suggested list prices were not fictitious and that such prices served a useful purpose as a mean of identification.

The Regina Corporation (Regina), a Delaware corporation with principal offices in Rahway, New Jersey, is, and has been, engaged in the manufacture and interstate sale of electric floor polishers and vacuum cleaners. In promoting the sale of these products, Regina supplied distributors and retailers with lists and literature setting forth its models and prices. These prices were described therein with phrases such as "Suggested List", "list price", and with other phrases of similar import. These prices hereinafter will be referred to simply as "suggested list prices". In supplying these suggested list prices, respondent Regina has represented, and has placed in the hands of others the instrument with which to represent, that these prices are the usual and customary retail prices for such merchandise.

In fact, as the record clearly shows, the suggested list prices furnished by respondent Regina to retailers and others were not the usual and customary retail prices for which the commodities involved were sold in the trading areas in which such prices were furnished.

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Moreover, respondent Regina, through its officers, was clearly aware that Regina products generally sold at retail for less than its suggested list prices. Included in the evidence on this point are advertisements of Regina products by retailers showing offers at less than the suggested list prices and testimony to the effect that suggested list prices are not generally followed. The record also contains stipulations between counsel as to sales of Regina products at less than suggested retail prices. Mr. Mead, president of Regina, testified that suggested list prices are not generally adhered to. The record shows that in many instances Regina's suggested list prices were substantially higher than the prices which the goods were generally sold at retail. The examiner found in part that the usual and customary retail prices of Regina products are generally lower than its suggested list prices and that Regina was aware of these facts. Respondents agree with this as well as certain other findings in the initial decision.

Misrepresentations of the usual and customary value of a product and of savings afforded by an offered sale price of such product are unfair and deceptive practices under the Federal Trade Commission Act. *Niresk Industries, Inc., et al.* v. *Federal Trade Commission*, 278 F. 2d 337 [6 S. & D. 727] (7th Cir. 1960); *Harsam Distributors, Inc., et al.* v. *Federal Trade Commission*, 263 F. 2d 396 [6 S. & D. 528] (2d Cir. 1959). In this case, Regina disseminated its suggested list prices to resellers rather than directly to the purchasing public. Regina was fully aware that these suggested list prices were not the usual and customary retail prices at which Regina products were sold in the trading areas involved. In so furnishing fictitious retail prices to resellers, Regina placed in the hands of retailers and others the means and instrumentalities by which they could mislead and deceive the purchasing public. Such a practice is a violation of the Federal Trade Commission Act. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494 [1 S. & D. 198] (1922); *C. Howard Hunt Pen Co.* v. *Federal Trade Commission*, 197 F. 2d 273 [5 S. & D. 405] (3d Cir. 1952); Cf. *Clinton Watch Company, et al.* v. *Federal Trade Commission*, 291 F. 2d 838 [7 S. & D. 184] (7th Cir. 1961); *The Baltimore Luggage Company* v. *Federal Trade Commission*, 296 F. 2d 608 [7 S. & D. 251] (4th Cir. 1961).

Respondents make the contention that manufacturer's suggested list prices are desirable as a means of identification and to aid in distinguishing products. However, even if it were shown that such prices are intended for the purpose of identification, the risk of deception is still present. A dealer supplied with fictitious list prices has a handy and easy means by which he may misrepresent as to the value of the goods. The public interest in preventing such deception clearly outweighs any possible benefit there may be in the use of these prices for identification. This contention of the respondents is rejected.

Respondents also urge that the following benefits, among others, flow from the use of list prices: (a) they discourage overcharging, (b) they give a basis for trade-in negotiations, (c) they provide a guide to financing institutions, and (d) they offer an aid to the retailer in determining product value. Respondent Regina's practice of supplying distributors and dealers with suggested retail price lists and providing therein a means, through a system of discounts, for determining the manufacturer's selling prices to distributors and dealers may be said to be of a benefit to dealers in determining their markups. However, whatever such benefits may be they cannot justify the dissemination of such suggested retail price lists known by respondents to be fictitious and which may be used in misleading and deceiving the public. Consequently, we reject contentions that any of these alleged benefits would justify our condoning respondent Regina's continuation of the practice of supplying the suggested retail price lists, through the use of which the public may be deceived.

In a further argument, respondents assert that the law recognizes the right of a manufacturer to disseminate list prices, and they cite *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919), and *United States* v. *Parke, Davis & Company*, 362 U.S. 29 (1960). These cases cover the question of the limited right of a seller to refuse to sell to customers who will not resell at prices suggested by the seller. They do not authorize the dissemination of fictitious list prices. This argument is likewise rejected.

We conclude that the charges of the complaint have been sustained as to respondent Regina and that an order to cease and desist the unlawful practices should be entered, but we do not agree with the form of the order contained in the initial decision. As we construe this order, it would broadly prohibit the use of suggested list prices unless accompanied by a certain reservation statement, and it would apparently permit the furnishing of fictitious list prices when such statement is attached. It would not be an effective order. The fact that the reservation statement would accompany suggested list prices would not prevent use of such prices as a means of misrepresentation. We believe that an appropriate order should proscribe the furnishing of all suggested list prices when the respondent knows, or has reason to know, that the figures furnished are in excess of the price or prices at which the goods are usually sold at retail in the trade areas where they are supplied.

The appeal of counsel supporting the complaint is granted to the extent indicated herein and otherwise denied. The Commission, in conformity with the views expressed in this opinion, will make its own findings of fact, conclusions and order in lieu of those contained in the initial decision. An appropriate order will be entered.

Findings as to the Facts, Conclusions and Order

The Federal Trade Commission issued its complaint against the above-named respondents on March 14, 1961, charging them with violation of the Federal Trade Commission Act in connection with the furnishing of price literature to distributors and retailers containing alleged fictitious "list" prices. After the filing of an answer by respondents, hearings were held before a duly designated hearing examiner of the Federal Trade Commission and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In the initial decision filed November 16, 1961, the hearing examiner ordered respondent, The Regina Corporation, and its officers, agents, representatives and employees to cease and desist from the practice which he found to be in violation of the Federal Trade Commission Act. Counsel supporting the complaint appealed therefrom, challenging mainly the form of the order.

The Commission, having considered the appeal by complaint counsel, the opposition thereto by respondents and the entire record in this proceeding, and having granted in part and denied in part the appeal, and having determined that the initial decision should be vacated and set aside, now makes this its findings as to the facts, conclusions drawn therefrom and order to cease and desist, which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, The Regina Corporation (Regina), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Regina Avenue, Rahway, New Jersey.

2. Respondent Regina is now and for many years has been engaged in the business of manufacturing, selling and distributing electric floor polishing machines and vacuum cleaners and causes such merchandise, when sold, to be transported to distributors and retailers in all the

states of the United States, its territories and the District of Columbia. It maintains and at all times mentioned herein has maintained a substantial course of trade in electric floor polishing machines and vacuum cleaners, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. In the course and conduct of its business, respondent Regina is in competition, in commerce, with corporations, firms and individuals in the sale of electric floor polishers and vacuum cleaners.

4. For the purpose of promoting the sale of its electric floor polishers and vacuum cleaners, respondent Regina is and has been engaged in the practice of supplying distributors and retailers with lists and literature (separate from and not affixed or attached to the commodities or packaging) wherein it has set forth model numbers or illustrations to which it has assigned certain figures in dollars and cents which have been described by it as "Suggested List" prices and are interchangeably referred to as "list prices," "suggested list prices," "suggested retail selling prices" or words of similar import.

5. In supplying these suggested list prices, respondent Regina has represented, and has placed in the hands of others the instrumentality which may be used to represent, that such prices were the usual and customary retail prices of the products mentioned in the area or areas in which the representation was made.

6. In truth and in fact the suggested list prices set forth in the lists and literature above referred to were not the usual and customary retail prices of the products mentioned in the area or areas in which the representation was made; the usual and customary prices were generally lower, and in many instances they were substantially lower. Respondent Regina was aware that the usual and customary retail prices for its products were generally lower than its suggested list prices.

7. Respondent Regina furnished its said suggested list prices to distributors and to retailers. In the period covered by the complaint it did not make any representations as to customary and usual prices directly to the purchasing public. Regina, however, placed in the hands of retailers and others the means and instrumentalities by and through which they may mislead the purchasing public as to the usual and customary prices for Regina electric floor polishing machines and vacuum cleaners.

8. The furnishing by respondent Regina of the aforesaid suggested list prices has introduced in commerce instrumentalities which have the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the representations

were true and into the purchase of substantial quantities of its products by reason of this erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce may be unfairly diverted to respondent Regina from competitors and substantial injury thereby done to competition in commerce.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents.
2. This proceeding is in the public interest.
3. The acts and practices of respondent Regina, as found herein, were and are to the prejudice and injury of the public 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.
4. The complaint should be dismissed as to respondents Lannon F. Mead and Robert C. Cassatt in their individual capacities, but not in their capacities as officers of corporate respondent.

ORDER*

It is ordered, That the respondent, The Regina Corporation, and its officers, agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the offering for sale, sale and distribution of electric floor polishers and vacuum cleaners, or other household appliances, or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

> Supplying to, or placing in the hands of, any distributor or retailer any tabulation of figures, sales literature, price list or other material containing "manufacturer's list prices," "manufacturer's suggested list prices," "suggested list prices," or "sug-

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*NOTE.—This order is issued subject to Section 4.22(c) of the Commission's Rules of Practice, which provides as follows:

In any case where the Commission's decision contemplates the entry of an order against a respondent broader in its prohibitions than those, if any, contained in the initial decision, or where the Commission's decision differs from the initial decision in any substantial respect affecting the scope or content of the order which should properly be entered, the Commission will cause a copy of its decision, together with a proposed form of order, to be served upon all parties. Within twenty days after service upon it of the Commission's decision and proposed order, the respondent may file with the Commission its exceptions to any of the provisions of the proposed order, a statement of its reasons in support thereof, and a proposed alternative form of order appropriate to the Commission's decision. If no exceptions to the Commission's proposed order are filed within twenty days, such proposed order shall become the final order of the Commission. If exceptions to the proposed order are filed by the respondent, counsel supporting the complaint may within ten days after service of such exceptions upon him file a statement in reply thereto, supporting the proposed order. The Commission will thereafter enter its final order.

gested retail prices," when said respondent knows, or has reason to know, that such figures are in excess of the price or prices at which the items of merchandise to which they refer are usually and customarily sold at retail in the trade area or trade areas where the figures are supplied.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Lannon F. Mead and Robert C. Cassatt in their individual capacities.

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

Final Order

Respondents having filed, under Section 4.22(c) of the Commission's Rules of Practice, exceptions to the proposed order in this proceeding, reasons in support thereof and a proposed alternative form of order, and counsel supporting the complaint having filed a reply opposing said exceptions; and

The Commission having determined that respondents have not given sufficient grounds for modification of the proposed order, and that said order should be entered and adopted as the Final Order of the Commission:

It is ordered, That respondents' exceptions to the proposed order be, and they hereby are, denied.

It is further ordered, That the respondent, The Regina Corporation, and its officers, agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the offering for sale, sale and distribution of electric floor polishers and vacuum cleaners, or other household appliances, or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Supplying to, or placing in the hands of, any distributor or retailer any tabulation of figures, sales literature, price list or other material containing "manufacturer's list prices," "manufacturer's suggested list prices," "suggested list prices," or "suggested retail prices," when said respondent knows, or has reason to know, that such figures are in excess of the price or prices at which the items of merchandise to which they refer are usually and customarily sold at retail in the trade area or trade areas where the figures are supplied.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Lannon F. Mead and Robert C. Cassatt in their individual capacities.

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

In the Matter of

DEBUTANTE FURS, INC., TRADING AS SCHIAPARELLI FURS ET AL.

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

Docket C-252. Complaint, Oct. 11, 1962—Decision, Oct. 11, 1962

Consent order requiring manufacturing furriers in New York City to cease violating the Fur Products Labeling Act by labeling and invoicing as "natural", fur that was artificially colored, and failing to disclose on labels and invoices when fur products contained artificially colored fur.

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 Debutante Furs, Inc., a corporation trading under its own name and as Schiaparelli Furs, and Louis Brown, and Harry Brown, 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 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 Debutante Furs, 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 305 Seventh Avenue, New York, N.Y.

Individual respondents Louis Brown and Harry Brown are officers of the said corporate respondent and control, direct and formulate the acts, practices and policies of the said corporate respondent. Their office and principal place of business is the same as that of the said corporate respondent.

Respondents are manufacturers of fur products.

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 manufacture for introduction into commerce, and in the sale, advertising and offering for sale, in commerce, and in the transporation and distribution, in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce as 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 and deceptively labeled or otherwise falsely and deceptively identified in that the said fur products were labeled 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. 4. 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 to show that the fur contained in the fur products was pointed, bleached, dyed, tip-dyed or otherwise artificially colored, when such was the fact.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced in that said fur products were invoiced 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 5(b)(2) of the Fur Products Labeling Act.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in that they were not invoiced as required under the provisions of Section 5(b)(1) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to disclose that the fur contained in the fur products was pointed, bleached, dyed, tip-dyed or otherwise artificially colored, when such was the fact.

PAR. 7. 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 Debutante Furs, 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 305 Seventh Avenue, New York, N.Y.

Respondents Louis Brown and Harry Brown are officers of the 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 Debutante Furs, Inc., a corporation trading under its own name or as Schiaparelli Furs or under any other tradename, and its officers and Louis Brown and Harry Brown, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale, in commerce, or the transportation or distribution in commerce of any fur product; or in connection with the sale, manufacture for sale, advertising, offering for sale, transportation or distribution, of any fur product which has been made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. Misbranding fur products by:

   A. 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.

   B. 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. Falsely or deceptively invoicing fur products by:

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

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

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

STERLING DRUG, INC., TRADING AS WINTHROP LABORATORIES

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

Docket C-253. Complaint, Oct. 12, 1962—Decision, Oct. 12, 1962

Consent order requiring New York City distributors to cease representing falsely, in advertising in magazines and otherwise, that their "Isuprel" drug "for oral inhalation only" was safe for use when it had potentially adverse effects on cardiac action and might cause tachycardia, palpitation, nausea, headache, nervousness, weakness, and other toxic side effects.

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 Sterling Drug, Inc., a corporation, trading as Withrop Laboratories, hereinafter referred to as respondent, has 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, Sterling Drug, Inc., is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1450 Broadway, in the city of New York, State of New York.

PAR. 2. Respondent is now, and has been for more than one year last past, engaged in the sale and distribution of various preparations that contain an ingredient which comes within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act. This said drug ingredient is isoproterenol, which respondent designates "Isuprel".

The designations used by respondent for said preparations, the formulas thereof and directions for use are as follow:

(1) *Designation:* "Isuprel Soution 0.25%"
Brand of Isoproterenol HCL with Mistometer Oral Inhaler.
Formula: Contains Isuprel HCL 0.25%
w/w (=2.8 mg./ml.), inert propellants (dichlorodifluoromethane and dichlorotetrafluoroethane), flavor, alcohol 33% and, as preservative, ascorbic acid 0.1%.
Directions: For oral inhalation only.
Usual dose:
1 or 2 inhalations.

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Do not inhale more often than directed by physician.
1. Pull green cap from mouthpiece.
2. Pull white mouthpiece off bottle, turn it sideways and fit hole in flattened end onto metal spout (valve stem) of bottle.
3. Hold assembled unit between thumb and index finger.
4. Invert bottle and close lips around open end of mouthpiece. Inhale deeply while firmly pressing down on bottle. Wait one full minute if second dose is necessary.
5. Replace mouthpiece and cap on bottle to protect it at all times. Fit into your pocket or purse or place it on your bedside table.

During use, the Mistometer must always be inverted as it does not operate properly in an upright position. Do not inhale more often than directed by your physician. Run warm or cold water through mouthpiece once daily to wash it.

You may sanitize it by immersing it in alcohol. Warning: Contents under pressure. Keep Mistometer away from extreme heat. Exposure to temperatures above 130° F. may cause bursting. Do not incinerate.

(2) *Designation:* "Isuprel Solution 0.5% (1:200)
Brand of isoproterenol hydrochloride"

Formula: Contains Isuprel HCL 0.5% in buffered aqueous solution containing sodium chloride, sodium citrate, citric acid and glycerine, with chlorobutanol 0.5% and sodium bisulfite 0.3% as preservatives.

Directions: For oral inhalation only. Not for injection. Usual dose: 5 inhalations. Use an all-glass or plastic nebulizer. Do not inhale more often than ordered by physician.

(3) *Designation:* "Isuprel Solution 1% (1:100)
Brand of isoproterenol hydrochloride"

Formula: Contains Isuprel hydrochloride 1% in buffered aqueous solution (containing sodium chloride, sodium citrate, citric acid and saccharin, with chlorobutanol 0.5% and sodium bisulfite 0.3% as preservatives).

Directions: For oral inhalation only.
Not for injection. Usual dose: 3 inhalations. Use an all-glass or plastic nebulizer. Do not inhale more often than ordered by physician.

(4) *Designation:* "Isuprel Glossets 10 mg.
Brand of isoproterenol hydrochloride"

Formula: Each Glosset contains 10 mg.
Isuprel HCL, with starch, lactose, sodium saccharin, talcum and, as preservative, 2 mg. sodium bisulfite.

Directions: For Sublingual Use only.
Usual dose: 1 Glosset placed under tongue and allowed to dissolve without swallowing saliva.
Do not use more often than ordered by physician.

(5) *Designation:* "Isuprel Glossets 15 mg.
Brand of isoproterenol hydrochloride"

Formula: Each Glosset contains 15 mg.
Isuprel HCL, with starch, lactose, sodium saccharin, talcum and, as preservative, 2 mg. sodium bisulfite.

Directions: For Sublingual Use Only.
Usual Dose: 1 Glosset placed under tongue and allowed to dissolve without swallowing saliva. Do not use more often than ordered by physician.

(6) *Designation:* "Isuprel Compound Elixir"

Formula: Each tablespoon (15 cc.) contains:

Luminal (brand of phenobarbital)	6 mg.
Warning: May be habit forming.	
Isuprel (brand of isoproterenol) HCL	2.5 mg.
Ephedrine sulfate	12 mg.
Theophylline	45 mg.
Potassium iodide	150 mg.
Alcohol	19%

Directions: Usual Dosage:
Adults: 1 to 2 tablespoons (15 to 30 cc.) three or four times daily as needed. Children: 1 to 3 teaspoons (5 to 15 cc.) three times daily as needed.

PAR. 3. Respondent causes its said preparations, when sold, to be transported from places of business located variously in the States of Georgia, Texas, Illinois, California and New Jersey to purchasers thereof located in various other states of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said preparations by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in magazines and other advertising media, and by means of circulars and brochures, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations; and has disseminated, and caused the dissemination of, advertisements concerning said preparations by various means including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among the typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth with respect to respondent's preparations are the following:

Isuprel, most potent bronchodilator, is safe and, in contrast with epinephrine, has no potentially adverse effects on cardiac action."

PAR. 6. Through the use of the said advertisements, and others similar thereto not specifically set out herein, respondent has represented and is now representing, directly and by implication, that:

1. "Isuprel" has no potentially adverse effects on cardiac action.
2. "Isuprel" is safe, that is, free from the risk of toxic side effects.

PAR. 7. In truth and in fact:

1. "Isuprel" has potentially adverse effects on cardiac action.
2. "Isuprel" is not safe, that is, it is not free from the risk of toxic side effects, since it may cause tachycardia, palpitation, nausea, headache, nervousness, weakness and other toxic side effects.

The said advertisements therefore were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 8. The dissemination by the respondent of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent 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 respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent 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 respondent 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, Sterling Drug, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1450 Broadway, in the city of New York, State of New York.

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

ORDER

I. *It is ordered*, That respondent Sterling Drug, Inc., a corporation, trading as Winthrop Laboratories or under any other name, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Isuprel Solution 0.25%", "Isuprel Solution 0.5%", "Isuprel Solution 1%", "Isuprel Glossets 10 mg.", "Isuprel Glossets 15 mg.", "Isuprel Compound Elixir" or any other preparation that contains the drug isoproterenol whether designated "Isuprel" or any other name, or any other preparation of substantially similar composition, do forthwith cease and desist from, directly or indirectly:

A. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication, that any such preparation has no potentially adverse effect on cardiac action.

B. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of respondent's preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph I.A. hereof.

II. *It is further ordered*, That respondent Sterling Drug, Inc., a corporation, trading as Winthrop Laboratories or under any other name, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of "Isuprel Solution 0.25%", "Isuprel Solution 0.5%", "Isuprel Solution 1%", "Isuprel Glossets 10 mg.", "Isuprel Glossets 15 mg.", "Isuprel Compound Elixir" or any preparation that contains the drug isoproterenol whether designated "Isuprel" or any other name, or any other preparation of substantially similar composition, do forthwith cease and desist from, directly or indirectly:

A. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication, through use of the word "safe" or other word or words of similar import or meaning, or in any other manner, that any such preparation can be used without risk of toxic side effect.

B. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of respondent's preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph II.A. hereof.

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

IN THE MATTER OF

LEVER BROTHERS COMPANY ET AL.

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

Docket 7747. Complaint, Jan. 13, 1960—Decision, Oct. 15, 1962

Order dismissing, for failure of proof—with dissenting opinion by two Commissioners—complaint charging the manufacturers of "Pepsodent" toothpaste and its advertising agency with using a deceptive demonstration in television commercials for the product.

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 Lever Brothers Company, a corporation, and Foote, Cone and Belding, a corporation, and William H. Bambrick, individually and as an officer and Account Executive of Foote, Cone and Belding, 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 Lever Brothers Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maine, with its principal place of business located at 390 Park Avenue, New York, N.Y.

PAR. 2. Respondent Foote, Cone and Belding is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 247 Park Avenue, New York, N.Y. This corporate respondent is the advertising agency of the respondent referred to in paragraph 1 above and prepares and places for publication advertising material including, but not limited to, that hereinafter set forth to promote the sale of toothpaste and related products.

Individual respondent William H. Bambrick is a vice president and account executive of said corporate respondent Foote, Cone and Belding, and insofar as the allegations of this complaint are concerned, was responsible for, or active in, the practices of said corporate respondent Foote, Cone and Belding.

PAR. 3. Respondent Lever Brothers Company is now and for more than one year last past has engaged in the business of manufacturing, selling, and distributing toothpaste sold under the brand name Pepsodent, and now causes said Pepsodent toothpaste, when sold, to be transported from its factories in various cities to wholesalers, distributors and retailers located in various states of the Union and in the District of Columbia, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent Lever Brothers Company, in the course and conduct of its business, and at all times mentioned herein, has been in substantial competition in commerce with other corporations, firms and individuals in the sale of toothpaste and related products of the same general kind and nature as those sold by respondent.

PAR. 5. Respondents Foote, Cone and Belding and William H. Bambrick are now and have been in substantial competition in commerce with other corporations, firms and individuals engaged in the advertising business.

PAR. 6. In the course and conduct of its aforesaid business and for the purpose of inducing the sale of its Pepsodent toothpaste, respondent Lever Brothers Company has, with the aid and direct participation of respondents Foote, Cone and Belding and William H. Bambrick, made certain statements, representations and pictorial presentations with respect to said Pepsodent toothpaste by means of television broadcasts transmitted by television stations located in various states of the United States and in the District of Columbia having sufficient power to carry such broadcasts across state lines.

Among and typical of the statements and representations contained in said advertisements, but not all-inclusive, including the audio-video representations contained in said broadcasts as above set forth, are the following:

Audio	*Video*
ANNCR (*VO*): Right! Pepsodent cleans away yellow smoke stains as well as stains caused by many foods.	DIS CU 2-PRODUCT SHOT (PASTE IS GOING ONTO BRUSH) AND LEGEND: "CLEANS AWAY YELLOW SMOKE STAINS".
LAB TECHNICIAN (*LIP SYNC*): I'd like to prove that to you right now.	DIS TO LAB TECHNICIAN BEHIND DEMONSTRATION TABLE CONTAINING EQUIPMENT FOR TEST.
LAB TECHNICIAN (*VO*): This is a cigarette smoking machine.	WORKS CIGARETTE MACHINE HOLDING LIGHTED CIGARETTE. NEARBY IS PEPSODENT BRUSH WITH PASTE ALREADY ON IT. ALSO PEPSODENT TUBE WITH CAP OFF IS IN PICTURE.
It deposits yellow smoke stain on enamel like the hard surface of your teeth.	CONTINUES WORKING CIGARETTE MACHINE.
(SOUND OF RAPPING ON ENAMEL)	CU AS ANNCR. REMOVES SMOKING MACHINE FROM THE ENAMEL PLATE.
With the Pepsodent, we brush across the stain	PICKS UP BRUSH WITH PASTE ON IT AND BRUSHES ACROSS STAIN.
Then rinse with plain water. (WATER EFFECT)	USES SMALL HAND HOSE TO RINSE.
See? The smoke stain is gone	CU ENAMEL PLATE. HAND INDICATES CLEAR AREA.
Where we used Pepsodent.	LIVE PEPSODENT PKG APPEARS IN CLEAR AREA.
ANNCR. (*VO*): Yes, Pepsodent removes even yellow smoke stain, perhaps the hardest of all stains to remove. In fact, Pepsodent cleans your teeth more *effectively*.	DIS TO BATHROOM SCENE. YOUNG MAN FROM OPENING IS IN BATHROBE. HOLDS TUBE IN ONE HAND AS HE SQUEEZES PASTE ONTO BRUSH.
	YOUNG MAN STARTS TO BRUSH. DIS TO
	TIGHTER SHOT ON YOUNG MAN'S FACE. WORD "CLEANS" COMES IN FROM UPPER LEFT; "MORE" FROM UPPER RIGHT. "EFFECTIVELY" FROM LOWER MIDDLE.

Through the use of the aforesaid statements and representations and said video demonstrations and others of the same import not specifically set out herein, respondents have represented, directly or by implication, that said demonstration proves that Pepsodent toothpaste is effective in removing tobacco smoke stains from the teeth of all smokers.

PAR. 6. The aforesaid statements, representations and demonstrations are false, misleading and deceptive. In truth and in fact, said demonstration is not valid for the purpose of proving, and does not prove, that Pepsodent toothpaste is effective in removing tobacco smoke stains from the teeth of all smokers, and especially the accumulated stains from the teeth of habitual smokers.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements and misrepresentations has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of a substantial quantity of respondent Lever Brothers Company's product Pepsodent toothpaste because of such erroneous and mistaken belief. As a result thereof substantial trade has been and is being unfairly diverted to respondent Lever Brothers Company from its competitors, and substantial injury has 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. Frederick McManus for the Commission.

Mr. Abe Fortas and *Mr. G. Duane Vieth* of *Arnold, Fortas & Porter*, of Washington, D.C., for respondent Lever Brothers Company.

Mr. David M. Solinger, *Mr. Eugene H. Gordan* and *Mr. Jerome Gotkin* of *Solinger & Gordon*, of New York, N.Y., for respondents Foote, Cone & Belding, Inc., and William H. Bambrick.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents, charging violation of the Federal Trade Commission Act in connection with the sale and advertising of Pepsodent toothpaste. Answers generally denying the charges and asking for dismissal of the complaint were filed by all respondents, and hearings were held pursuant to notices duly issued. Briefs and proposed findings have been filed by each of the parties.

FINDINGS OF FACT

1. Respondent Lever Brothers Company (hereinafter referred to as Lever) is a corporation engaged, existing and doing business under and by virtue of the laws of the State of Maine. Its principal place of business is located at 390 Park Avenue, New York, New York.

2. Respondent Foote, Cone & Belding, Inc. (proceeded against as Foote, Cone and Belding, and hereinafter referred to as FC&B), is a corporation engaged, existing and doing business under and by virtue of the laws of the State of Delaware. Its principal place of business is located at 247 Park Avenue, New York, New York. It is in substantial competition with other firms, individuals and corporations engaged in the advertising business.

3. Respondent Lever is engaged in the interstate sale and dissemination of advertisements designed to induce the sale of toothpaste which is sold under the brand name of "Pepsodent." Lever is engaged in substantial competition with other manufacturers of toothpaste.

Respondent FC&B is an advertising agency which was engaged by respondent Lever to prepare and place advertisements of Pepsodent toothpaste, including advertisements via television.

Respondent William H. Bambrick is a vice president of FC&B. At all times mentioned in the complaint, however, he was an account executive of FC&B assigned to the Pepsodent account. To most of FC&B's accounts, and especially to major ones such as the Pepsodent account, there are assigned a management representative, an account supervisor and an account executive. The account executive reports to the account supervisor and the account supervisor to the management representative. The management representative, who is in all cases one of the company's principal officers and in most cases also a director of the company, is primarily concerned with major questions of policy affecting the relationship of the agency to its client. To that end, he maintains liaison between the principal officers of the agency and the principal officers of the client. The account supervisor, who is usually a vice president of the company, is primarily responsible for developing long-range advertising plans for the client. The management representative and the account supervisor jointly decide when to recommend major changes in advertising to the client, what advertising plans should be presented and what media selections should be recommended. While the account executive participates in the intra-agency meetings in which recommendations relating to advertising plans and changes and media selections are decided upon, and is present when these recommendations are made to the client, his principal duties commence after the client has generally approved the advertising plans or changes and media selections recommended. The account executive then makes the necessary assignments within the agency (to the creative, copy, layout, art, production, media and other deparments) and coordinates every phase of the work until the advertisements are completed and media cost estimates and schedules are prepared. At that time, the completed advertisements and media cost estimates and schedules are reviewed by the management representative and the account supervisor and, if approved, presented by them and the account executive to the client for its final approval. An account executive at FC&B also supervises the making of analyses of the client's sales and advertising problems, schedules meetings with the client, obtains written authorization from the client for advertising space and time orders and keeps the account supervisor and, through the account supervisor, the management representative posted on all important matters respecting the client. With respect to the Pepsodent account, Mr. Bambrick's duties as the account executive paralleled the duties of an account executive as set forth above.

4. Work started on the Pepsodent advertisement involved in this proceeding in or about February 1958 when there were intra-agency discussions at FC&B. In April 1958, at a meeting attended by Mr. Bambrick and the account supervisor, FC&B obtained authorization from Lever for further preparatory work and in June 1958 Mr. Bambrick and the management representative and other department heads at FC&B presented the commercial campaign to Lever and obtained their preliminary approval. In November 1958, at a meeting with Lever, the account supervisor and Mr. Bambrick recommended the campaign to be used and Lever gave its final approval.

5. Respondent Lever has established procedures under which all advertising copy and material proposed for its products, including scripts and storyboards of television commercials, are examined by the company's research and development division and legal division to insure the technical accuracy and legal acceptability of an advertisement. Pursuant to these procedures, no advertising may be disseminated unless the written approval of both of these divisions has first been obtained.

6. The advertisements in issue were all television commercials of 30 or 60-second duration. Except for slightly different introductions and conclusions they are practically identical. In the introductory phase of each of the commercials, models are depicted smoking; then

follows the principal part of the commercials which is a tobacco smoke stain removal demonstration introduced by a laboratory technician; at the conclusion of the demonstration, except in the 30-second commercials, models are depicted brushing their teeth with Pepsodent toothpaste. The demonstration has the following sequence:

(a) A lighted cigarette is placed in a holder located in the top of a jar-like glass container with an open bottom (referred to in the commercials as a smoking machine). This container is placed on the top of a white pot opal glass plate.

(b) A laboratory technician squeezes a rubber bulb attached to the jar, and air is drawn through the lighted cigarette in the same manner as if it were being smoked by a person. The smoke drawn from the cigarette enters the chamber of the container and deposits a tobacco smoke stain on the bottom of the white plate.

(c) After a sufficient number of cigarettes have been smoked (four) to leave a visible stain on the plate, the cigarette smoking machine is lifted from the plate.

(d) A portion of the stained area is then subject to brushing with Pepsodent toothpaste, applied on a regular toothbrush. This brushing removes all of the visible stain, except for some loosened stain material mixed in with streaks of Pepsodent toothpaste left by the brushing. The brushed area of the plate is then rinsed with water which removes the remaining debris. After the operation, the brushed area appears as clean as the portion of the plate which was not exposed to the tobacco smoke, while the unbrushed area remains stained.

7. A typical script of the commercials in issue in which the demonstration appears is as follows:

Audio	*Video*
1. ANNOUNCER (VO): Whether you prefer a cigarette	1. FADE ON SHAPE CONTAINING CLOSE-UP OF WOMAN SMOKER—UPPER RIGHT. SHE IS DRAWING ON A CIGARETTE OR CIG. IS IN PIX AS SHE EXHALES.
2. . . . a pipe	2. ON SAME SCREEN, LIGHT UP YOUNG MAN'S HEAD AS HE LIGHTS UP A PIPE—UPPER LEFT.
3. . . . or a good cigar	3. ON SAME SCREEN, LIGHT UP HEAD OF MUCH OLDER MAN AS HE DRAWS ON A CIGAR—LOWER MIDDLE.
4. You'll prefer	4A. OPTICAL TRANSITION FROM ABOVE 3-PERSON SHOT TO—

Audio	*Video*
5. Pepsodent Toothpaste. Because Pepsodent is the toothpaste that cleans away yellow smoke stains, as well as stains caused by many foods.	5. 2-PRODUCT SHOT (PASTE IS GOING ONTO BRUSH) AND LEGEND: "CLEANS AWAY YELLOW SMOKE STAINS."
6. *LAB TECHNICIAN* (*LIP SYNC*): I'. like to prove that to you right now.	6. CUT TO LAB TECHNICIAN BEHIND DEMONSTRATION TABLE CONTAINING EQUIPMENT FOR TEST.
7. LAB TECHNICIAN (VO): This a cigarette smoking machine.	7. WORKS CIGARETTE MACHINE HOLDING LIGHTED CIGARETTE. NEARBY IS PEPSODENT BRUSH WITH PASTE ALREADY ON IT. ALSO PEPSODENT TUBE WITH CAP OFF IS IN PICTURE.
7A. It deposits yellow smoke stain	7A. CONTINUES WORKING CIGARETTE MACHINE.
8. on enamel like the hard surface of your teeth. (HAND RAPS ON ENAMEL)	8. CU AS ANNOUNCER REMOVES SMOKING MACHINE FROM THE ENAMEL PLATE.
9. With the Pepsodent we brush across the stain.	9. PICKS UP BRUSH WITH PASTE ON IT AND BRUSHES ACROSS STAIN.
10. Then rinse with plain water (WATER EFFECT)	10. USES SMALL HAND HOSE TO RINSE.
11. See? The smoke stain is gone—	11. CU ENAMEL PLATE. HAND INDICATES CLEAR AREA.
12. Where we used Pepsodent	12. LIVE PEPSODENT PKG. APPEARS IN CLEAR AREA.
13. ANNOUNCER (VO): Yes, Pepsodent removes even yellow smoke stain, perhaps	13. BOX WIPE REVEALS BATHROOM SCENE. YOUNG MAN FROM OPENING IS IN BATHROBE. HOLDS TUBE IN ONE HAND AS HE SQUEEZES PASTE ONTO BRUSH. STARTS TO BRUSH.
14. the hardest of all stains to remove. In fact,	14. YOUNG MAN STARTS TO BRUSH. DISSOLVE TO—
15. Pepsodent cleans your teeth more *effectively*,	15. TIGHTER SHOT ON YOUNG MAN'S FACE. WORD "CLEANS" COMES IN FROM UPPER LEFT; "MORE" FROM UPPER Right; "EFFECTIVELY" FROM LOWER MIDDLE
16. Polishes more protectively than any other leading toothpaste.	16. CONTINUE TO TIGHTEN ON MOUTH AND TEETH. WORD "POLISHES" POPS IN FROM UPPER LEFT: "MORE" FROM UPPER RIGHT; "PROTECTIVELY" FROM LOWER MIDDLE.

Audio	*Video*
17. And Peposodent makes every breath nicer for you GIRL (VO) (EFFECT): . . . and for everyone close to you, too	17. And Pepsodent makes every YOUNG LADY.
18. ELECTRONIC BEEP ON FIRST LINE OF JINGLE IN BG. *ANNOUNCER (VO):* Yes, you'll wonder where the yellow went	18. YOUNG MAN AND YOUNG LADY LOOK AT EACH OTHER FONDLY.
19. ELECTRONIC BEEP OF SECOND LINE IN JINGLE IN BG. When you brush your teeth with Pepsodent	19. GLAMOUR CU OF CARTON.
20. Whether you smoke or not, Pepsodent cleans more effectively than any other leading toothpaste.	20. HAND SETS LIGHTED CIGARETTE ON CARTON.
21. SILENT	21. SUPER LEGEND: "GUARANTEED BY LEVER BROTHERS".

8. The foregoing television commercials were prepared and placed by FC&B as agents of Lever and projected on three major television networks.

9. All sequences of the demonstration were accurately represented in the television commercials in issue. No optical illusions, deceptive devices or other tricks were employed in depicting the demonstration.

10. In the commercials, the surface of the white pot opal glass plate used in the demonstration was accurately referred to as "enamel like the hard surface of your teeth," since it had properties of glossiness and hardness similar to tooth enamel.

11. The demonstration in itself, and when viewed in the context of the commercials in which it appears, is represented as proof only of Pepsodent's ability to remove fresh or recent tobacco smoke stains deposited on the teeth. There are no references, either express or implied, in the demonstration or commercials to accumulated tobacco smoke stains. The tobacco smoke stain is repeatedly referred to in the commercials as "yellow smoke stain" which is the usual color of a fresh tobacco smoke stain, as distinguished from the brown or black stains of accumulated tobacco smoke. The teeth of the models depicted as smokers in the commercials appear white and not stained before and after smoking and before and after brushing.

12. There are many differences between the surface of a glass plate and the surface of a tooth in the mouth of a smoker. The plate is nonorganic; the tooth is a mixture of organic and inorganic matter. The plate is quite smooth, even microscopically; the surface of the

human tooth is marked by ridges and crevices and other irregularities. However, macroscopically (i.e., as seen with the unaided eye), both surfaces are hard and glossy smooth.

13. Stain of any kind on the tooth in vivo (in the mouth of a living person) is brought about by the presence on the teeth in vivo of a substance called plaque, a sticky mass of microorganisms, food debris and salivary substances in which the tobacco smoke becomes embedded as a stain.

14. The record does not show that the toothpaste brushing demonstration, depicted in the commercials as effectively cleaning a freshly deposited smoke stain from a hard glossy glass surface, is not valid for the purpose of proving, and does not prove, that Pepsodent toothpaste will similarly remove a like stain from teeth in vivo, despite the microscopic and chemical differences between the two surfaces, the absence of plaque on the glass surface, the absence of moisture on the glass surface, or other differences.

DISCUSSION

The complaint charges that the demonstration is not valid for the purpose of proving that Pepsodent toothpaste is effective in removing accumulated stains from the teeth of habitual smokers. At no point does the commercial refer to accumulated stain or to an habitual smoker. The stain is shown removed immediately after its deposit on the glass plate. There is no accumulation. The models used in the demonstration appeared to have clean teeth, not the stained teeth of the habitual smoker. The stains are referred to as yellow smoke stains, which is the usual color of a fresh tobacco stain, instead of the brown or black color usually associated with accumulated stains. It is well settled that the Commission may not inject novel meanings into advertising which expand the claims beyond their intended scope and then strike down the advertisement because the expanded claim cannot be supported (*International Parts Corporation* v. *Federal Trade Commission*, 133 F. 2d 883 [3 S. & D. 535] (7th Cir. 1943)). The meanings to be ascribed to the acts of the respondent are only the ordinary, common and accepted understandings and, in this case, cannot be extended to include accumulated smoke stains or habitual smokers. It thus becomes unnecessary to decide whether or not the demonstration was valid to prove that Pepsodent toothpaste could remove the accumulated stains from the teeth of habitual smokers—a question which the record does not clearly answer.

Nor is the issue whether Pepsodent toothpaste will remove smoke stains from teeth. At no place does the complaint charge any misrepresentation with respect to the performance of the toothpaste in question. Instead, the complaint limits itself to a charge that the *television demonstration* was deceptive because it was not valid for the purpose of proving, and did not prove, that the toothpaste could remove tobacco stain. Respondent argues that the demonstration of a product cannot be subjected to trial as a false advertisement unless the complaint alleges that the claim which it demonstrates is itself false or misleading. This argument was raised by a respondent in a recent case where the Commission ruled that the use of a plexiglass mock-up instead of actual sandpaper in a shaving cream commercial constituted an unfair and deceptive practice even if the product could in fact have shaved the actual sandpaper.

> The point is that the "proof" offered was a material element of the advertising; without it, the advertising might not have succeeded in selling the product; and, in fact, the "proof" was not proof at all. . . . Without this visible proof of its qualities some viewers might not have been persuaded to buy the product. (*In the Matter of Colgate-Palmolive Company, et al.*, Docket No. 7736, December 29, 1961) [59 F.T.C. 1452].

We must, therefore, consider whether the demonstration was deceptive assuming Pepsodent toothpaste can do the stain removing job claimed of it. Unlike the *Colgate-Palmolive* case, *supra*, there was no distortion or concealment of the nature of the demonstration. Pepsodent toothpaste was used on a Pepsodent brush and applied to a glass surface on which a tobacco stain had just been deposited. Upon rinsing with water, the brushed portion of the plate was seen cleansed.

Counsel supporting the complaint emphasizes the audio portions of these commercials where the demonstrating technician referred to the glass plate as "enamel like the hard surface of your teeth." He argues that this is a misstatement of fact and cites the testimony of three expert witnesses called by him in support of the complaint. These experts concluded that the television demonstration was not valid to prove that Pepsodent toothpaste would remove tobacco smoke stains from teeth. All of them based their conclusions upon the structural, chemical and other differences between a glass plate as used in the demonstration and teeth in vivo. They emphasized the presence of ridges and imperfections in such teeth and an absence of such surface structures on a glass plate. They admitted, however, that these tooth structures which made cleaning of a tooth difficult were in the main microscopic. Macroscopically, both the glass plate and a tooth would be quite similar in glossy smoothness. Moreover, these experts doubted the ability of an ordinary dentifrice to remove smoke stains from teeth. In this respect, however, they were contradicted by others whom they cited as experts. Thus, Commission witness Dr. Bhussry cited himself and four other experts as authority for the proposition that teeth could not be cleaned by a dentifrice. Two of these four were shown to disagree with him, and, in fact, the witness finally admitted that the macroscopic plaques, which, he said, were those of the initial smoke stain, could be removed by a dentifrice (Transcript pp. 68, 80, 104). Similarly, Commission witness Dr. Ferrigno testified that the television demonstration did not prove Pepsodent effective in removing stains from teeth. He, too, disagreed with other experts but admitted that an abrasive dentifrice would have some effect in removing tooth stains and that the stains could be removed macroscopically by polishing. The final Commission witness, Dr. Scott, described at length the physical and chemical differences between a glass plate and a tooth. He, too, however, stated that both might be smooth and glossy to the naked eye.

In a demonstration which purports to show the appearance of a tooth before and after brushing with a dentifrice, the obvious meaning and interpretation is the one that must be sought for and obtained and not necessarily the scientific or esoteric. One does not ordinarily go about observing others' teeth with a microscope, or even a jeweler's eye piece. It thus becomes immaterial that there are microscopic differences between the surfaces of a tooth and a glass plate. The critical test is the appearance of the subject matter when viewed grossly, which is the way teeth are ordinarily observed. In this respect, even the Commission witnesses made it clear that there was no material misrepresentation or deception when the television technician referred to the glass plate as "enamel like the hard surface of your teeth."

It appears that Commission counsel actually agrees, at least in part, with this conclusion. In his eighth proposed finding he states:

> . . . Only if the toothpaste is applied immediately or soon after the tobacco smoke stain has been deposited will the tooth paste be effective, and then only upon the frontal surface of the teeth which can be reached by the brush will it be effective. Under the latter conditions, cleaning the teeth right after smoking, toothpaste is not needed; plain water is just as effective as toothpaste. . . .

If Commission counsel means that water alone is as effective as toothpaste applied with a brush, he is patently in error: in the television commercial, the part of the stain which was not touched by the brush remained on the plate despite the action of the rinse water applied to it. If Commission counsel means that brushing with water is as effective as brushing with toothpaste, the record fails to support him. One witness did state that water alone could remove materia alba, which adheres very loosely to a tooth, but which does not stain. The record is silent as to what results could be obtained on a stain with a brush and water instead of a brush and toothpaste.

In summary, it must be concluded that the television commercials involved in this proceeding cannot be construed to represent that Pepsodent toothpaste will clean the accumulated smoke stains from the teeth of habitual smokers. At most, these are demonstrations of Pepsodent toothpaste's ability to clean recently deposited smoke stains from clean surfaces. The surface of the glass plate used in the commercial, although different in many respects from the surface of a living tooth, is sufficiently like a living tooth surface to render the demonstration valid in all material respects.

ORDER

It is ordered, That the complaint be, and it is hereby, dismissed.

COMMISSIONERS DIXON AND MACINTYRE, DISSENTING

The majority would dismiss this complaint for failure of proof. We disagree.

The complaint charges that a television demonstration used by respondents to promote the sale of Pepsodent toothpaste "is not valid for the purpose of proving, and does not prove, that Pepsodent toothpaste is effective in removing tobacco smoke stains from the teeth of all smokers, and especially the accumulated stains from the teeth of habitual smokers."

The fundamental mistake made by the hearing examiner is his conclusion that the commercial relates only to Pepsodent's ability to remove fresh or recent tobacco stains deposited on the teeth. To reach this conclusion, he relies on the reference in the commercial to "yellow smoke stain" and to the fact that the teeth of the model depicted in the demonstration appear white before and after smoking. He flatly states that "There are no references, either express or implied, in the demonstration or commercials to accumulated tobacco smoke stains."

To accept the conclusion of the hearing examiner requires a distinction which, in our view, is not usually made by the public. Specifically, we do not believe that the reference to smoke stains as "yellow" precludes an understanding by the public that such stains include those accumulated over a long period of time and that such an understanding results only from the description of such stains as "brown" or "black." More importantly, and a fact not commented on by the examiner, any interpretation of "yellow" as relating to fresh tobacco stains is completely negated by the announcer's statement that "Pepsodent removes even yellow smoke stain, perhaps the hardest of all stains to remove." To construe that statement as meaning that the demonstration is for the purpose of showing that Pepsodent will remove the stain caused by the smoking of one cigarette, as shown in the commercial, is wholly unrealistic.

The hearing examiner is on sound ground in holding that the Commission may not inject novel meanings into advertising which expand the claims beyond their intended scope. There is no need to inject a novel meaning into this advertising. To us, the reasonable and intended meaning of this advertising is that if a person's teeth are stained from tobacco smoke, whether the stain be fresh or the accumulated stain of an habitual smoker, such stain can be removed with Pepsodent as demonstrated. In any event, the most charitable interpretation of this commercial is that it is ambiguous. If respondents intended that this demonstration should relate to only freshly deposited tobacco stain, they could have clearly so stated. To rely on the use of the word "yellow" and the whiteness of the model's teeth requires entirely too technical an interpretation of the advertising for the average viewer. It is well settled that representations susceptible of both a misleading and a truthful interpretation will be construed against the advertiser.[1]

The record in this case clearly shows that tobacco stains, as well as other stains, become imbedded in a substance on the teeth that is so adherent that it is extremely difficult, if not impossible, to remove them with an ordinary dentifrice, including Pepsodent. In fact, these accumulated stains usually require the use of a sharp instrument and a highly abrasive compound, such as pumice material, for their removal. Anyone who has been through that experience in a dental chair recognizes the difficulty in removing this accumulated stain. The demonstration here in question shows the removal of a freshly deposited stain from one cigarette by using Pepsodent. Considering the difficulty in removing accumulated stains as opposed to a fresh stain, as shown by this record, it is obvious that this demonstration is not valid for the purpose of proving and does not prove, that Pepsodent will remove accumulated tobacco stains.

We have no doubt that persons may be induced to buy Pepsodent toothpaste as a result of this commercial in the mistaken belief that they have been shown that Pepsodent will remove stains from their teeth which have accumulated through the use of tobacco. As we said in the *Hutchinson* case,[2] the quality of the product is not directly in

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[1] *Murray Space Shoe Corporation* v. *Federal Trade Commission*, 304 F. 2d 270 [7 S. & D. 480] (2nd Cir. 1962).

[2] In the Matter of *Hutchinson Chemical Corporation*, Federal Trade Commission Decisions 1942 [55 F.T.C. 1942] (1959).

issue in a proceeding of this nature. However, the demonstration not being valid, the advertising is deceptive and should be enjoined. We would so order.

ORDER DISMISSING COMPLAINT

The Commission having considered this case on the appeal of counsel supporting the complaint from the initial decision and order of the hearing examiner dismissing the complaint, and having concluded that the complaint should be dismissed because of failure of proof:

It is ordered, That the complaint be, and it hereby is, dismissed.

By the Commission, Chairman Dixon and Commissioner MacIntyre dissenting.

IN THE MATTER OF

WALTHAM PRECISION INSTRUMENT COMPANY INC., FORMERLY KNOWN AS WALTHAM WATCH COMPANY ET AL.

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

Docket 6914. Amended Complaint, March 26, 1958—Decision, Oct. 16, 1962

Order requiring the successor to the well-known Waltham Watch Co. and a second corporation spun off the assets of the old firm and later merged with Hallmark, Inc., to cease—in advertising in magazines, newspapers, and circulars distributed to the trade, and on labels and packages—overstating the number of jewels in their watches and using the name "Waltham" for the watches without clearly disclosing the foreign origin of Swiss-made parts.

AMENDED AND SUPPLEMENTAL 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 Waltham Precision Instrument Company, a corporation formerly known as Waltham Watch Company, Waltham Watch Company, a corporation, and Joseph Axler, Melvin Axler, Irving H. Stolz, Seth Harrison and Frank Silver, individually and as officers and former officers of said corporations, 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 amended and supplemental complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Waltham Precision Instrument Company, Inc., formerly known as Waltham Watch Company, is a corporation organized, existing and doing business by virtue of the laws of the State of Massachusetts with its office and principal place of business located in Waltham, Mass. Respondent Waltham Watch Company is a corporation organized, existing and doing business by virtue of the laws of the State of Delaware with its office and principal place of business located at 475 Fifth Avenue, New York 17, N.Y.

During a part of the time referred to hereinafter, respondents Joseph Axler, Melvin Axler, Irving H. Stolz, Seth Harrison and Frank Silver were officers of respondent Waltham Precision Instrument Company, Inc., then known as Waltham Watch Company. The aforesaid respondents have formulated, directed and controlled the policies and practices of said Massachusetts corporation. The address of respondent Frank Silver is the same as that of respondent Waltham Precision Instrument Company, Inc., and he and respondent Irving H. Stolz presently serve as officers and/or directors of said corporation. Respondents Joseph Axler, Melvin Axler, Irving H. Stolz and Seth Harrison are now officers and/or directors of respondent Waltham Watch Company, a Delaware corporation. They formulate, direct and control the policies, acts and practices of said respondent corporation. Respondents Joseph Axler, Melvin Axler and Seth Harrison have their principal place of business at 475 Fifth Avenue, New York 17, N.Y., and the address of respondent Irving H. Stolz is 122 East 42nd Street, New York, N.Y.

PAR. 2. The respondents have purchased 17-jewel watch movements made in Switzerland, added a device containing 4- or 8-synthetic jewels, and cased them. The watches have then been advertised, offered for sale, and sold by respondents under the name of "Waltham Premier," principally to retailers.

PAR. 3. Respondents have caused their said products when sold to be transported from the State of Massachusetts and elsewhere to purchasers thereof located in various other States of the United States and in the District of Columbia.

Respondents have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. The respondents have advertised their said watches in newspapers, jewelers' trade magazines, nationally distributed magazines, and by means of circulars distributed to the trade. Labels and packages also have contained various advertising inscriptions. Among and typical, but not all inclusive, of the statements appearing in such advertising material have been the following:

> Watches that are worthy successors to the famed, history rich Waltham creations of the past 107 years.
>
> The 25 jewel premier group has patented oil reserve jewels, a horological development that adds 8 extra ruby jewels to the customary 17 friction bearing jewels.
>
> Waltham premier 25.
>
> Presenting the 25 JEWEL PREMIER by Waltham . . . America's first watch.

PAR. 5. By means of the above-quoted statements, and others of similar import but not specfically set out herein, respondents have represented, directly or by implication, that said watches contain 25 jewels, each of which serves a mechanical purpose as a frictional bearing, that is, each jewel provides a mechanical contact at a point of wear; that the so-called oil reserve jewels are genuine rubies; and that their said watches are manufactured in their entirety in the United States by the well-known and long-established Waltham Watch Company, which company's products have long been held in high esteem by the American public.

PAR. 6. The aforesaid statements were and are false, misleading and deceptive. In truth and in fact, the jewels contained in the device attached by respondents to the 17-jewel movements do not serve a mechanical purpose as frictional bearings and the watches are not 25 or 21-jewel watches but are 17-jewel watches. The jewels used in the so-called oil reserve device are synthetic. The movements in respondents' said watches are not manufactured in the United States nor are they made by the Waltham Watch Company, but are made in Switzerland by watchmakers other than Waltham Watch Company and imported.

PAR. 7. By the acts and practices aforesaid, respondents have placed in the hands of retailers a means and instrumentality whereby such retailers may mislead and deceive members of the purchasing public as to the number of friction bearing jewels contained in the respondents' watches and into believing that the jewels in the so-called oil reserve device are genuine rubies and that the said watches are manufactured in this country by the long-established Waltham Watch Company.

There is and has been a decided preference among a substantial segment of the purchasing public for watches containing movements manufactured in the United States over those manufactured in whole or in part in foreign countries.

PAR. 8. Respondents, in the course and conduct of the sale of their watches, have been in substantial competition in commerce with other corporations, firms and individuals engaged in the manufacture, sale and distribution of watches.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements and representations has had the capacity and tendency to induce members of the purchasing public into the erroneous and mistaken belief that all of said statements and representations are true, and into the purchase of a substantial number of their watches as a result of such erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, have been 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.

Mr. Harry E. Middleton for the Commission.

Noble & Moyle, by *Mr. Paul Noble*, of Washington, D.C., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding involves charges that respondents have violated the Federal Trade Commission Act by disseminating advertising matter containing false and misleading representations concerning their Waltham watches. The case has been tried upon an amended and supplemental complaint and the several answers thereto. An appropriate order is being issued herein against all respondents except Irving H. Stolz, Seth Harrison, and Frank Silver, as to whom the complaint is being dismissed.

This proceeding was originally instituted on October 14, 1957, by a complaint against Waltham Watch Company, a Massachusetts corporation, and the five individual respondents herein. On December 2, 1957, said respondents filed their answer, setting forth in substance that there had been a material change in the corporate structure of respondent Waltham Watch Company some months prior to the issuance of said original complaint. As a result of these revelations, the Commission, on March 26, 1958, issued its amended and supplemental complaint, including as a respondent Waltham Precision Instrument Company, Inc., a Massachusetts corporation formerly known as Waltham Watch Company; a new corporation, Waltham Watch Company, a Delaware corporation; and the five said individual respondents. On September 9, 1958, Waltham Precision Instrument Company, Inc., filed its answer; on September 10, 1958, Waltham Watch Company, the Delaware corporation, filed its answer; and on September 11, 1958, the individual respondents filed their joint answer to the amended and supplemental complaint. Extensive hearings were held in Washington, D.C.; Chicago, Illinois; and New York, N.Y., on various dates from June 27, 1958, to December 2, 1960. The Commission's case-in-chief was rested on September 30, 1959. Thereafter, on June 19 and 20, 1959, respondents filed their several motions to dismiss the amended and supplemental complaint, which motions were denied on August 19, 1959, by an interlocutory order in which it was found that a *prima facie* case had been established. Respondents' presentation of evidence in support of their answers was commenced on January 11, 1960, and completed on October 14, 1960, such hearings having been held in Chicago, Illinois, and New York, N.Y.

During the pendency of respondents' evidence, on June 6, 1960, American Watch Association, Inc., moved for leave to intervene, and on June 14, 1960, Elgin National Watch Company and Hamilton Watch Company filed their joint motion for leave to intervene. Respondents opposed these motions, and they were denied, respectively, on June 10 and 24, 1960, leave being granted, however, if such would-be intervenors so desired, to file briefs *amicus curiae*. No such briefs have ever been filed.

Counsel supporting the complaint presented further evidence in Chicago, Illinois, on December 1 and 2, 1960, purportedly in rebuttal, but upon motion of respondents the evidence proffered in rebuttal was rejected by the hearing examiner in an order issued December 30, 1960, on the ground that it was cumulative and merely an attempt to retry the case-in-chief. All parties having rested, this order also terminated reception of evidence and fixed March 1, 1961, as the time for filing proposed findings. On January 11, 1961, however, counsel supporting the complaint filed a motion to reopen hearings for the purpose of receiving certain rebuttal evidence of other witnesses than those whose evidence was proffered on December 1 and 2, 1960. On April 21, 1961, counsel supporting the complaint withdrew his said motion to reopen hearings, and therefore the evidence proposed therein is not a part of this record.

The order of December 30, 1960, terminating the reception of evidence had never been rescinded; but, by reason of the delay occasioned by the said motion to reopen hearings filed by counsel supporting the complaint on January 11, 1961, and withdrawn on April 21, 1961, the time designated for filing proposed findings by the parties was extended to June 26, 1961, at which time counsel supporting the complaint filed his proposed findings, conclusions and order. In lieu thereof, however, respondents, on June 21, 1961, filed a motion to consolidate this case with several others then pending before the Commission against one or more of the respondents herein, together with a motion to dismiss, or, in the alternative, to consolidate the said cases. These motions were opposed by counsel supporting the complaint on June 22, 1961, and on July 14, 1961, the motions to consolidate were denied on the ground that the hearing examiner was without authority to consolidate proceedings. Ruling on the motion to dismiss was deferred, and will be made hereinafter. Respondents, pursuant to leave granted, filed their proposed findings of fact and conclusions of law on August 14, 1961, and the record is now before the hearing examiner for decision.

While the record is fairly extensive, the issues in this case are relatively simple. They consist of three charges that, by their advertisements, respondents have falsely and deceptively represented, directly or by implication:

1. That their watches contain 25 jewels, each of which serves a mechanical purpose as a friction bearing; that is, each jewel provides a mechanical contact at a point of wear;

2. That the so-called oil reserve jewels of respondents' "Resevoil" device are genuine rubies; and

3. That respondents' watches are manufactured in their entirety in the United States by the well-known and long-established Waltham Watch Company, which company's products have long been held in high esteem by the American public.

The respondents, by their several answers, deny these charges, and respondent Waltham Precision Instrument Company, Inc., while admitting its engagement in commerce, denies that it is now engaged in commerce involving civilian watches. Waltham Watch Company, the Delaware corporation, in its answer pleads, as a special defense, that the alleged jewels in question, added to a normal 17-jewel watch movement, are patented oil supply jewels which improve said movement by adding more oil to and enhancing the fluid life of jewel bearings, into which they are assembled and of which they become an integral part. According to said respondent, these additional "jewels" are part of a patented device designated "Resevoil" under United States Patent No. 2,478,865, which was granted to one Rene Fiechter on August 9, 1949, and by the use of such patented device on a basic 17-jewel watch, the same becomes a 25-jewel watch, superior to competitive watches not using the patented Resevoil features.

In the answer of the five individual respondents, in addition to denying the material charges of the complaint, it is pleaded that respondents Joseph Axler and Melvin Axler are the officials of respondent Waltham Watch Company, the Delaware corporation, who are responsible for the practices, acts and policies of that corporation, but that the other individual respondents, Irving H. Stolz, Seth Harrison and Frank Silver, while occupying various positions in the respondent corporations at various times, were in no way concerned with or empowered to direct the policies, acts and practices of the respondent corporations. There being in the record no evidence to the contrary, this proceeding is being dismissed as to them, both individually and as officers or former officers of said respondent corporations. Accordingly, all further general reference to respondents in this initial decision will mean all respondents except the individual respondents Stolz, Harrison and Silver.

Running parallel to the case at bar are several other proceedings of importance in this case. As the following discussion of the evidence will develop, these cases have a close relationship to the instant one. While counsel supporting the complaint was presenting his case-in-chief, an ancillary investigative proceeding was pending in the United States District Court of the Southern District of New York against Waltham Watch Company, the Delaware corporation, a respondent herein. In that proceeding a subpoena was enforced against the said corporation in *F.T.C.* v. *Waltham Watch Co.*, 169 F. Supp. 614 [6 S. & D. 498], decided January 13, 1959. Some of the evidence produced in response to that subpoena was presented in the course of this proceeding. Similarly, in *F.T.C.* v. *Hallmark, Inc., et al.*, 265 F. 2d 433 [6 S. & D. 539] (C.A. 7, March 30, 1959), an investigative proceeding, further evidence was adduced which is material here, inasmuch as it was disclosed in the record herein that the owners of Hallmark, Inc., bought the name, business and assets, with minor exceptions not material hereto, of Waltham Watch Company, the Delaware corporation, a respondent herein, and then merged the two corporations, Hallmark and Waltham, under the name of Waltham Watch Company, the Delaware corporation respondent herein.

Another case whose history parallels the case at bar, and which is the controlling decision in this case, is *Allen V. Tornek Company*, 55 F.T.C. 1770, in which the Commission found that the so-called "jewels" in the same basic Resevoil device involved in the present proceeding were not jewels, as that term is understood and used in the watch industry and trade, and prohibited advertising so representing them. The complaint in that case was issued May 16, 1955; the initial decision was issued September 23, 1958; and the Commission's decision was issued May 13, 1959. Subsequent thereto, respondent petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Commission's order. That Court, on February 25, 1960, found no error in the Commission's proceedings, affirmed its order, and granted enforcement thereof (276 F. 2d 513 [6 S. & D. 726]; 107 App. D.C. 267). On March 23, 1960, that Court denied rehearing to respondent. On application to the Supreme Court of the United States, certiorari was denied October 10, 1960 (364 U.S. 829), and on November 21, 1960, rehearing thereof was denied (364 U.S. 906). It will be noted that the various decisions and orders material hereto in the *Tornek* case occurred during the course of the proceedings before the hearing examiner in the case at bar. The initial decision and the decision of the Commission in *Tornek* were issued during the presentation of the case-in-chief herein. During the hearing of the defense herein, the Court of Appeals issued its decision and also denied rehearing thereof in *Tornek*. The Supreme Court also denied certiorari in *Tornek* while respondents herein were presenting their defense. After the defense had rested in the instant proceeding, and before counsel supporting the complaint attempted to present his rebuttal evidence, the Supreme Court finally terminated the litigation in *Tornek* by denying rehearing. Since the *Tornek* case is of paramount importance herein, and is relied upon both by counsel supporting the complaint and by respondents, it will be more fully analyzed and discussed in the course of the findings hereinafter.

During the course of the hearings rulings were reserved on several matters. These rulings will now be made as follows:

1. Respondents' Exhibits 54, 55, 56 and 57 for identification are hereby received into the record.

2. Any and all motions to strike evidence are hereby denied.

3. In the light of the findings hereinafter made, respondents' motion to dismiss the complaint, filed June 21, 1961, on which ruling was reserved, is hereby denied.

All proposed findings of fact and conclusions of law submitted by the parties which are not incorporated herein, either verbatim or in substance and effect, are hereby rejected.

The hearing examiner has carefully and fully analyzed the whole record, taking into consideration his observation of the appearance, conduct and demeanor of the witnesses who appeared before him. All procedural matters have been thoroughly reviewed. All proposals and briefs of counsel have been studied in the light of the entire record. Respondents' counsel have requested oral argument, but this is deemed unnecessary, and is hereby denied.

Upon the whole record, the hearing examiner finds generally that the Commission has fully sustained the burden of proof incumbent upon it, and has established by reliable, probative and substantial evidence and the fair and reasonable inferences drawn therefrom all the material allegations of the complaint; and further finds that the evidence submitted or relied upon by respondents fails to establish facts constituting any valid defense to the violations charged in the complaint. More specifically, upon due consideration of the whole record, the hearing examiner makes the following:

FINDINGS OF FACT

Respondent Waltham Precision Instrument Company, Inc., formerly known as Waltham Watch Company, is a corporation organized, existing and doing business by virtue of the laws of the State of Massachusetts, with its office and principal place of business located in Waltham, Massachusetts. Respondent Waltham Watch Company is a corporation organized, existing and doing business by virtue of the laws of the State of Delaware, with its office and principal place of business formerly located at 475 Fifth Avenue, New York 17, New York, but since June 30, 1960, located at 231 South Jefferson Street, Chicago, Illinois.

From October, 1956, until July, 1957, respondents Joseph Axler and Melvin Axler were officers of respondent Waltham Precision Instrument Company, Inc., then known as Waltham Watch Company, a Massachusetts corporation. The aforesaid individual respondents, during that time, formulated, directed and controlled the policies and practices of said corporation. Respondents Joseph Axler and Melvin Axler became officers and directors of the respondent Waltham Watch Company, a Delaware corporation, from the time of its incorporation on June 30, 1957, until on or about July 1, 1960. During this time they formulated, directed and controlled the policies, acts and practices of said respondent corporation. On June 30, 1960, the business and assets, with minor exceptions not pertinent hereto, of the Waltham Watch Company, including its rights to the said Patent No. 2,478,865 on the basic Resevoil device, were acquired by interests controlling Hallmark, Inc., an Illinois corporation, which, on that date, was merged into respondent Waltham Watch Company, the latter's Delaware charter being retained. The two respondents Axler at that time resigned their offices and sold their interests in Waltham, the Delaware corporation, and since then have held no stock in said respondent corporation, nor had any official connection therewith. After the merger, the offices of Waltham Watch Company were transferred from New York to the Chicago address, above stated.

The Waltham Watch Company was a Massachusetts corporation that had had a long and successful history in the watch industry, and its products were well known throughout the United States. The history of this company is in the record as Respondents' Exhibit 57, a publication entitled "Timing A Century", which is one of the Harvard studies in business history, published by the Harvard University Press. In 1956 the respondents Axler and others associated with them in business, acquired control of said company. About that time it had ceased to manufacture watches at Waltham, Massachusetts, and had opened an office in New York City and had begun to purchase watch movements from Switzerland and watch cases in both Switzerland and the United States, and to assemble such watches. The watch business had become unprofitable in the Waltham, Massachusetts, operations, and the directors took appropriate action to divide the business of the company; and on June 30, 1957, the stockholders authorized the corporation to spin off its assets in such a manner as to set up a new corporation to be known as the Waltham Watch Company, the Delaware corporation respondent herein. It took over the watch business of the former Massachusetts corporation of the same name. The Massachusetts corporation, Waltham Watch Company, changed its corporate name to Waltham Precision Instrument Company, Inc., also a respondent herein. This company was to continue the business at Waltham, Massachusetts, but to engage in the manufacture of various precision instruments other than watches. Inquiry as to the details of this spin-off were objected to by respondents' counsel, and not pursued by counsel supporting the complaint; and the record, therefore, is not clear as to whether the respondent Waltham Precision Instrument Company, Inc., by covenant or otherwise, had agreed never to manufacture, assemble or sell watches in the future under the old, well-established Waltham name. It was during the period of the existence of this Massachusetts corporation as Waltham Watch Company, however, that most of the advertising in the record was disseminated through the media of various trade magazines and newspapers. Therefore the order issued herein must include Waltham Precision Instrument Company, Inc.

During the progress of the Tornek case the respondent therein, Allen V. Tornek, sold and transferred to Waltham Watch Company, the Massachusetts corporation, all of his interest in the said Patent No. 2,478,865, in which the inventor, Rene Fiechter, still held a half interest. The original patent had been granted on August 9, 1949. On April 16, 1954, Fiechter applied for another patent on a lubricated jewel bearing for watch movements and other precision instruments. That patent was granted on January 12, 1960. While it is an independent patent, it is the substantial contention of respondents that this patent covers a device which is an improvement over the said prior invention. This patent also was issued to Fiechter, with Tornek as assignee of a half interest therein. Prior to the dissemination of the advertisements in question herein, the Massachusetts corporation, Waltham Watch Company, had acquired Tornek's interest in this second patent as well as in the prior patent. The advertisements received in evidence in this proceeding, and which are the basis thereof, contain statements pertaining to the latter patent, which purports to add eight jewels to a standard 17-jewel watch movement, rather than four jewels, as in the original device, and as litigated in the *Tornek* case.

The advertisements involved herein were published by the Massachusetts "Waltham Watch Company, Executive and Sales Offices, 475 Fifth Avenue, New York 17, N. Y.; Joseph Axler, President; Melvin Axler, Executive Vice President", in various trade journals circulating among the jewelry and watch trade, and in metropolitan newspapers of wide and general circulation throughout the United States. Only one publication was made of the advertisement in such newspapers, but it was published simultaneously on Sunday, April 21, 1957, in the magazine sections of the New York Times, Philadelphia Inquirer, Chicago Tribune, Detroit Free Press and St. Louis Post-Dispatch. Official notice is taken of the fact that the circulation of these five newspapers, combined, was at that time about four and three-quarters of a million copies every Sunday, and they were circulated throughout a very substantial part of the United States. While the respondents, on the record, generally admitted that they were engaged in interstate commerce, there was no specific admission that their challenged advertising circulated in commerce. The exhibits were received in evidence, however, without objection, and unquestionably establish that the respondents did engage in substantial interstate advertising of the "Waltham Premier 25" jewel watch, which contained the "Resevoil" device with the eight alleged extra "oil reserve jewels", under the then pending application for patent therefor.

The advertisements so disseminated by respondent Waltham Watch Company, the Massachusetts corporation, contained statements pertaining to Waltham being America's first watch, and also referred to their watches as "25-jewel Walthams". Among other statements, material herein, appearing in such advertising were the following:

> Watches that are worthy successors to the famed history-rich Waltham creations of the past 107 years.
>
> The 25-jewel Premier by Waltham * * * America's First Watch.
>
> Waltham Premier 25.
>
> The 25-jewel Premier group has patented oil reserve jewels, a horological development that adds 8 ruby jewels to the customary 17 friction-bearing jewels.

In addition to these publications, respondents also placed in the cases in which their watches were distributed and sold throughout the country their guarantee, which included the following statements:

> Waltham, the first American watch company;
>
> Waltham is the first American standardized watch;
>
> Introducing * * * your new Waltham watch * * * precision made to the traditionally high quality specifications of America's first watch maker. It is made by expert watch makers using scientific methods and precision machinery and embodies the skills developed during Waltham's 102-year existence. Nowhere in the world are there better equipped or more thoroughly experienced craftsmen.
>
> At their disposal are machines, equipment and testing devices of such rare sensitivity that parts are produced within 1–10,000th of an inch".

The record is clear that respondents have caused their watches to be advertised, sold and transported from the State of New York and elsewhere to purchasers located in various other states of the United States and in the District of Columbia.

The record is replete with the evidence of experts who agree upon the parts and functions of a traditional 17-jewel watch. This evidence is in accord with the description of the construction and operation of such a watch, as so well stated by the Commission in the *Tornek* case, 55 F.T.C. at pages 1772–1775. For brevity, that description will not be repeated here. In the course of that decision, however, and within the issues of that case, there was a definite finding that "as used in the watch industry and trade, a jewel must serve a mechanical function as a frictional bearing before it is entitled to be represented as a 'jewel' * * *" (Id. p. 1776). This opinion discusses and explains the functions of the patented device Resevoil as covered by the said patent of Fiechter issued in 1949. In the *Tornek* case, this device had four alleged jewels, and the Commission succinctly described their functions as follows:

> Respondent's device, which has been patented by the U.S. Patent Office, consists of a small metal plate containing four stones of identical construction and material as the cap jewels found in regular 17-jewel and 21-jewel watches. Respondent's device has been so designed that it fits exactly over the train bridge of the 17-jewel watch, and is attached thereto by using the same screwholes which hold the train bridge in place. The four stones in the device are so positioned as to

be mounted directly under the hole jewels in the train bridge, in the same manner as the cap jewels in a regular 21-jewel watch. However, the stones in the Resevoil device do not touch anything because there is a minute space or gap between the concave side of the hole jewel and the bottom of the stone. On the other hand, as previously described, in a regular 21-jewel watch or the balance staff of a 17-jewel watch, the cap jewel takes the end thrust of the pinion and hence is in contact with the point of the pivot when this occurs (55 F.T.C. 1774).

Accordingly, the Commission found "that the jewel-like stones in the Resevoil device do not serve such a [mechanical] function [as a frictional bearing]" (Id. p. 1776).

In the case at bar, during the case-in-chief, two witnesses testified in substance to the definition of a jewel as stated by the Commission in *Tornek*, and that the alleged jewels in the Resevoil device were set too high to come into any mechanical contact with the moving pivot they were presumed to oil. It was undisputed by respondents' many expert witnesses that none of the eight jewel-like stones contained in the new Resevoil device, under the second patent above referred to, came into any physical contact with any pivot or other moving part of a watch. The only difference between the device covered by the new patent and that under the former one is that the new device is so arranged that under each of the four cap "jewels" therein, there is an additional "jewel", called an "idler" or "floating jewel", and between these two "jewels" is a cavity containing oil. It is the theory of the defense that this oil is distributed down to the shaft or balance staff by the action of the "floating jewel", thereby improving the lubrication of the bearing beneath it. It is repeatedly conceded on the record by counsel for respondents, and the testimony of all of the respondents' experts is to the same effect, that neither of these two "jewels", or any of the eight "jewels" contained in the Resevoil device, come into any contact with any moving part of the watch. While great effort was made to press the lubricating advantages of the Resevoil device in this proceeding, it would serve no useful purpose to outline in detail any of the extensive testimony relating thereto. This is because the basic principle has already been decided adversely to respondents' contentions in *Tornek:* that a stone which does not have a mechanical function as a frictional bearing may not be properly described as a jewel. Not only was this point decided adversely to respondents' contentions in the *Tornek* case, but the definition of a jewel, as adopted in that case, had long been accepted by the trade, as thoroughly discussed in the Commission's decision. Also the term "watch jewel" had been similarly defined by the Commission for many years prior to the *Tornek* decision. As so ably stated in the Commission's brief, filed with the Court of Appeals in the *Tornek* case, at page 25, Since 1926 at least ten stipulations and consent orders have been entered by the Federal Trade Commission in which respondents have agreed to cease and desist from representing that watches sold by them contain a stated number of jewels, unless each and every one of the jewels serves "a mechanical purpose as frictional bearing." 10 F.T.C. 583, 585 (1926); 10 F.T.C. 590, 593 (1926); 10 F.T.C. 593, 596 (1926); 10 F.T.C. 603, 606 (1926); 11 F.T.C. 494, 497 (1926). To the same effect, see *Bulova Watch Co.*, 16 F.T.C. 529, 532 (1932); *Roseman Enterprises Company*, 52 F.T.C. 467, 471 (1955); *Windsor Pen Corporation*, 52 F.T.C. 655, 658 (1956); *Cimier Watch Corp.*, 54 F.T.C. 542 (1957); *World Wide Watch Co.*, 55 F.T.C. 1072 (1959).

Hence, over a period of thirty-three years the Commission has consistently construed the term watch jewel as referring only to those jewels which serve the mechanical function of bearing friction. And as stressed by the Supreme Court in *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 391 (1959): "This contemporary construction is entitled to great weight * * * even though it was applied in cases settled by consent rather than in litigation."

With this long history of the acceptance of the Commission's definition of the term "jewel", respondents still attempt in this proceeding to give a secondary meaning to the word "jewel" so firmly established in the trade by tradition, and now by judicial decision. Any secondary meaning must be shown to be "as firmly anchored as the first one" (*F.T.C.* v. *Algoma Lumber Co.*, 291 U.S. 67, 80) [2 S. & D. 247], and "a high degree of proof was essential in establishing the defense of secondary meaning before the Commission" (*C. Howard Hunt Pen Company* v. *F.T.C.*, 197 F. 2d 273, 280 [5 S. & D. 405, 414]). See also *Vulcanized Rubber and Plastics Co.*, 53 F.T.C. 920, 934–935. Respondents' evidence does not establish any change in the traditional, accepted and approved definition of the term "jewel".

As already stated, counsel are not agreed upon the interpretation of the Court of Appeals' decision in *Tornek*. This was a short *per curiam* decision in which the Court summarized the long record before the Commission, and the Commission's decision and opinion. The Court briefly stated that there are "no jewels that do not have either a function of bearing or a function of protection against wear from friction, and that it is only stones that perform these functions that are properly called 'jewels' in the watch industry". Counsel for respondents argues that the use of the word "or" followed by the words "a function of protection against wear from friction" brings the stones in the Resevoil device within the Court's definition of "jewels", because the evidence shows that the Resevoil device aids the lubrication of the bearings. This is clearly not what the Court intended by its language, since it affirmed the Commission's order and granted enforcement thereof without any limitation or qualification. In the course of the proceedings in the case at bar, as well as in the *Tornek* case, there was some contention that, strictly speaking, the two pallet jewels and the roller jewel of a regular 17-jewel watch were not jewels as were the other fourteen bearing jewels, because they were not oiled and did not constantly come into contact with any moving part. The Commission held, however,

Each of these three jewels contact moving parts, although intermittently, at points of wear (55 F.T.C. 1774).

Since it is necessary that these three stones be composed of the same hard substance as the fourteen bearing jewels, because they strike against other parts of the watch, they perform a function of protection against wear from friction, although they are not, strictly speaking, bearings. That is undoubtedly what the Court of Appeals meant to express by its alternative reference. These three stones may therefore be properly called jewels, and have been so accepted in the trade as well as in the decisions of the Commission.

Respondents' counsel urges that the Commission, in adhering to the traditional definition of "jewel" as set forth in the *Tornek* decision, is limiting the scope of respondents' patent and obstructing the progress of discovery and promotion of new inventions. Such a contention has been judicially denied (*Decker* v. *F.T.C.*, C.A. D.C. 1949, 176 F.2d 461, *cert. den.* 1949, 70 S. Ct. 159 [5 S. & D. 137]). As we said in *Vulcanized Rubber and Plastics Co.*, *supra*, at page 941, the adoption of a conservative, well-established definition rather than a new definition proposed by respondent "does not mean that the Commission stands in the way of progress. It is its duty to stand in the way of fraud and deception of the public".

Counsel supporting the complaint urges that an order be issued specifically prohibiting the use of the words "ruby jewels" by respondents. Respondents' counsel argues that "ruby" is used as an adjective, and is merely descriptive of the color of the jewel. Further discussion of this point is unnecessary, since the advertisements in question containing this expression were addressed to the watch-making industry rather than to the general public, and used these words as a part of the expression "Adds 8 extra ruby jewels to the customary 17 friction-bearing jewels * * * to assure better service", and also refers to them as "oil-reserve jewels". This would not be likely to confuse the technical experts engaged in the business of manufacturing, repairing and selling watches. The order issued herein, since it prohibits the use of the words "jewel" or "jewels" in any advertisement of the Resevoil device, encompasses the word "ruby" as designating a precious gem stone, and specific reference thereto in the order would be entirely superfluous.

In paragraph 7 of the amended and supplemental complaint it was alleged that there was a decided preference among a substantial segment of the purchasing public for watches containing movements manufactured in the United States, over those manufactured in whole or in part in foreign countries. Respondents properly contend that there is no evidence of such preference in the record. In the particular circumstances of this case, with the precise precedents cited, such allegation and proof thereof are wholly unnecessary. This is not a case where an importer brings foreign-made goods into the country and fails to reveal their foreign origin to the public. In this case the old and famous American name "Waltham" is used repeatedly in various ways to mislead the public into believing that the old Waltham firm is still manufacturing all parts of its watches in the United States.

CONCLUSIONS OF LAW

1. Respondents are engaged in commerce, and did engage in the above-found acts and practices in the course and conduct of their business in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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

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

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

Accordingly,

It is ordered, That respondents Waltham Precision Instrument Company, Inc., a corporation formerly known as Waltham Watch Company; Waltham Watch Company, a Delaware corporation; and Joseph Axler and Melvin Axler, individually and as former officers of said corporations, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing in any manner, by implication or otherwise:

1. That the Resevoil device in their watches, or any other device of the same or similar construction or operation, contains

or adds to a watch any designated number of jewels, unless said device actually contains the stated number of jewels, each and every one of which serves a mechanical purpose as a frictional bearing in the watch in which it is installed;

2. That their watches are manufactured in their entirety in the United States.

It is further ordered, That the complaint herein be, and it hereby is, dismissed insofar as it relates to individual respondents Irving H. Stolz, Seth Harrison and Frank Silver.

Opinion of the Commission

By Elman, *Commissioner*:

This case is before the Commission on cross-appeals from the initial decision of the hearing examiner.[1]

In 1956 respondents Joseph and Melvin Axler, and others associated with them, acquired control of the Waltham Watch Company, a Massachusetts corporation. Joseph and Melvin Axler became, respectively, president and executive vice president, and members of the board of directors, of the corporation. In the same year the Waltham Watch Company licensed Hallmark, Inc., to use the trademark "Waltham" on watches sold by it in the United States.

About July 1, 1957, the Waltham Watch Company, by means of a "spin off", transferred its watch business to a new Delaware corporation which adopted the same name. The Massachusetts corporation was renamed the Waltham Precision Instrument Company, Inc. Joseph and Melvin Axler became president and vice president, and members of the board of directors, of the Delaware corporation.

In 1959 the Waltham Watch Company of Delaware was merged with Hallmark, Inc., under the name Waltham Watch Company. At this time the Axlers terminated their association with the company.

Most of the advertising and labeling in the record in this proceeding was disseminated during the existence of the Massachusetts corporation as the Waltham Watch Company, and while this company was controlled by the Axlers who served as its chief executive officers. The Commission concurs, therefore, in the examiner's finding that the Axlers and the Massachusetts corporation, now known as the Waltham Precision Instrument Company, Inc., are proper parties respondent herein and were properly made subject to the order to cease and desist. The Waltham Watch Company of Delaware is also properly subject to

[1] The examiner also dismissed the complaint as to three of the individual respondents, Irving H. Stolz, Seth Harrison and Frank Silver. No appeal was taken from that action.

this order, not only because it succeeded to the watch business of the Massachusetts corporation but because, as the record shows, the deceptive advertisement of Waltham watches was continued by Hallmark, Inc., which is now merged with Waltham Watch Company of Delaware.

I

The record shows that respondents' "Waltham" watches contain 17-jewel movements imported from Switzerland to which have been added a so-called "Resevoil" device containing eight additional synthetic stones. These watches were advertised and labeled as 25-jewel watches. The following examples are noted by the examiner:

Waltham Premier 25

The 25-jewel Premier by Waltham

The 25-jewel Premier group has patented oil reserve jewels, a horological development that adds 8 extra ruby jewels to the customary 17 friction-bearing jewels

The complaint alleges, and we find, that by these statements "respondents have represented, directly or by implication, that said watches contain 25 jewels, each of which serves as a mechanical purpose as a frictional bearing, that is, each jewel provides a mechanical contact at a point of wear."

It is uncontested that only the 17 jewels contained in the imported movements of respondents' watches come in contact with any other moving parts at points of wear. Respondents claim, however, that the 8 stones in the Resevoil device perform a useful function in reducing friction in that they retain oil and distribute it to the bearings over which they are located; and, therefore, that the description of these stones as jewels and their inclusion in the total number of jewels contained in Waltham watches is not deceptive.

An identical contention was rejected by the Commission in *Allen* v. *Tornek Company*, 55 F.T.C. 1770 (1959). That case, like this one, involved the advertisement of stones contained in the patented "Resevoil" device as jewels. Although the "Resevoil" device in *Tornek* was covered by an earlier patent and contained only four synthetic stones, they were located in the same places over the wheel bearings of the watch and were claimed to have the same lubricating function as the eight stones in the "improved" device. The Commission considered the function of "jewels" used in watch movements and the understanding of the meaning of this term in the trade. It found that "Jewels are used [as bearings] instead of some other material because of their extreme hardness, their ability to take a high polish, and their relative imperviousness to wear and changes in temperature." In addition to bearing jewels, watches also frequently contain so-called "roller" and "pallet" jewels which come in contact with moving parts, although intermittently, at points of wear. These jewels are also used because of their hardness and resistance to wear. The Commission concluded that the meaning of the term "jewel" in the watch industry is determined by the function which these synthetic stones perform. It stated that "The experts who testified on the subject, although they may have used different terminology, all appeared to agree that every jewel in the traditional 17-jewel and 21-jewel watch is a friction bearing jewel in the sense that they contact a moving part at a point of wear. They likewise agreed in essence that the Resevoil stones are not friction bearing jewels because the properly installed Resevoil stone does not touch a moving part."

In sum, the Commission found that "the industry looks upon a jewel as a small, hard, highly processed gem placed in a watch movement to contact a moving part at a point of wear." The Commission concluded, therefore, that to describe Resevoil stones as jewels was deceptive. As the opinion of the Commission pointed out, "to qualify for the term 'jewel', as understood by the industry, it is not enough that it serve some useful function. It must perform the function with which the word 'jewel' has long been associated." The order of the Commission was affirmed in a *per curiam* opinion. 276 F.2d 513 (C.A. D.C. 1960), *cert. denied*, 364 U.S. 829 [6 S. & D. 726].[2]

On the basis of the Commission's decision in *Tornek*, the long history of similar Commission orders, and the additional testimony taken in this proceeding, the examiner held that respondents' representation of the stones in the Resevoil device as "jewels" was deceptive and in violation of the Federal Trade Commission Act.

Respondents appeal from this finding of the examiner on four principal grounds: first, that complaint counsel failed to establish the meaning of the term "jewel" in the watch trade; second, that the opinion of the Court of Appeals in the *Tornek* case modified the Commission's definition; third, that regardless of the meaning of the term "jewel", respondents' advertisements were not the same as those

[2] Although the *Tornek* case is the most directly in point, it was not the first time that the Commission had considered the meaning of the term "jewel" in the advertisement of watches. The same definition of "jewel" was adopted in *N. Shure Company*, 12 F.T.C. 105 (1928), and has appeared in at least ten stipulations and consent orders in which parties agreed to cease and desist from representing that watches sold by them contained a stated number of jewels, unless each and every jewel serves "a mechanical purpose as a frictional bearing." 10 F.T.C. 583, 585 (1926); 10 F.T.C. 590, 593 (1926); 10 F.T.C. 593, 596 (1926); 10 F.T.C. 603, 606 (1926); 11 F.T.C. 494, 497 (1926); *Bulova Watch Co.*, 16 F.T.C. 529, 532 (1932); *Roseman Enterprises Company*, 52 F.T.C. 467, 471 (1955); *Windsor Pen Corporation*, 52 F.T.C. 655, 658 (1956); *Cimier Watch Corp.*, 54 F.T.C. 542, 544 (1957); *World Wide Watch Co.*, 55 F.T.C. 1072, 1074 (1959).

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challenged in *Tornek* and were not deceptive; and fourth, that respondents must be permitted to call the stones in the Resevoil device "jewels" since this is the way they are described in the Resevoil patent and in fact the only way in which they can be described.[3]

We find no merit in any of these contentions. The examiner properly relied upon *Tornek* and the other prior Commission cases in determining the meaning of the term "jewel" as used in the watch trade. "The facts in that regard obviously do not vary, depending on whether Seller X rather than Y happens to be the respondent." *Manco Watch Strap Co., Inc., et al.*, Docket 7785 [60 F.T.C. 495, 511] March 13, 1962. The testimony and other evidence in the present proceeding serve only to corroborate the meaning of the term "jewel" which the Commission found in *Tornek;* and, in any event, are sufficient in themselves to support the examiner's finding.

Nor can we agree that the definition of the term "jewel" was in any way modified by the opinion of the Court of Appeals in the *Tornek* case. The court stated:

> Examination of the testimony before the Federal Trade Commission shows clearly that in the 21-jewel watch commonly sold by others in the trade there are no jewels that do not have either a function of bearing or a function of protection against wear from friction, and that it is only stones that perform these functions that are properly called "jewels" in the watch industry. . . .
>
> As to the Resevoil device in question, convincing evidence indicated that the four stones of the Resevoil did not serve a mechnical function of bearing or a protection against frictional wear. Petitioner's statement that the Resevoil watches were 21-jewel watches is therefore misleading.

Respondents claim that since the Resevoil stones have "a function of protection against wear from friction", the court's opinion permits them to be described as jewels. But the court was obviously referring to protection from wear by reason of the qualities which the Commission found to be the characteristics of jewels, i.e., their hardness and imperviousness to wear. Had it disagreed with the Commission's definition, the Court of Appeals would not have granted enforcement of the Commission's order, which required that each "jewel" serve "a mechanical purpose as a frictional bearing".[4]

Although respondents' advertisements were slightly different from those in *Tornek*, their representation of the stones in the Resevoil

[3] In its "Exceptions to Examiner's Findings", respondents deny that either Waltham or "interests controlling Hallmark" ever obtained any interest in the Resevoil patents. But the issue in this proceeding is the description by respondents of the stones contained in the Resevoil devices incorporated in their watches. The ownership of the Resevoil patents is obviously irrelevant to this issue.

[4] A petition for rehearing which contended there was an inconsistency between the Commission's and the court's definition of "jewel" was denied (March 23, 1960).

device as "jewels" was no less deceptive. Respondents' intimation (Brief, p. 7) that an asterisk, followed by a clear and conspicuous explanation of the type of jewels concerned, appeared after the word "jewel" in all of its advertisements is not substantiated by the record. To the casual reader the phrase that would stand out in many of these advertisements is "25 jewel". Even if the reader went further he would find no statement that any of these jewels were not the usual friction-bearing jewels but only that some of them were "oil-reserve jewels", a phrase which, this record makes clear, has no meaning in the watch trade. As the Commission recently had occasion to point out, *Giant Food, Inc.*, Docket 7773 [p. 326 herein] (July 31, 1962), such "explanations" or "disclaimers" are not likely to save the casual reader from being misled. The record in this case plainly shows that respondents' "explanation" of the term "25 jewel" failed to avoid the deception inherent in their advertisements.

Finally, description of the Resevoil stones as jewels cannot be justified on the ground that they are so described in the Resevoil patent. The patent was not a license to advertise watches containing the device in any particular manner. *Cf.*, *Decker* v. *Federal Trade Commission*, 176 F.2d 461 [5 S. & D. 137] (C.A. D.C. 1949), *cert. denied*, 338 U.S. 878. If respondents wish to describe the Resevoil device in advertisements for their watches, they must do so truthfully. The stones in this device may be described as what they are—tiny bits of synthetic material. They may not be described by a term, whether it appears in the patent or not, which accurately reflects neither their composition nor their function.

II

Complaint counsel appeals from the examiner's limitation of the order to "jewels" in the Resevoil or similar devices. The examiner gave no reason for this limitation. We agree that it is unnecessarily restrictive. The violation alleged and proved in this record is the representation as "jewels" of stones which do not perform a mechanical purpose to reduce friction and wear. The record shows that the practice of "up-jeweling" has been accomplished in many ways, of which the Resevoil device is only one. In the *Tornek* case and in the other proceedings cited above which have involved the use of the term "jewel" in the sale of watches, the Commission's orders have prohibited any misrepresentation of the number of jewels in the respondents' watches. We believe that, in view of the nature of the misrepresentations shown by the record, such an order is necessary here to protect the public.[5]

III

On the second principal charge in the complaint, the examiner found that respondents had used "the old and famous American name 'Waltham' . . . repeatedly in various ways to mislead the public into believing that the old Waltham firm is still manufacturing all parts of its watches in the United States." This finding is compelled by the record. The following excerpts from respondents' advertising and labeling show how they have made use of this name:

> The 25-jewel Premier by Waltham * * * America's First Watch.
>
> Waltham, the first American watch company.
>
> Waltham is the first American standardized watch.
>
> Introducing * * * your new Waltham watch * * * precision made to the traditionally high quality specifications of America's first watch maker. It is made by expert watch makers using scientific methods and precision machinery and embodies the skills developed during Waltham's 102-year existence. Nowhere in the world are there better equipped or more thoroughly experienced craftsmen.

The record shows, and in fact respondents urge, that the name Waltham has, over a period of 100 years and more, come to be associated by the public with watches manufactured by the famous old American company bearing the name. As the advertisements quoted above show, the Axler management and Hallmark exploited this common understanding of the name Waltham by repeatedly referring to it as "America's First Watch," made by "the first American watch company," etc. The fact is, however, that the movements of the watches sold by respondents under the name "Waltham" are not made in the United States at all, but are imported from abroad. The sale of such watches under a name long associated by the public with entirely American-made products—an association accentuated by respondents' own advertising—is obviously deceptive. The Commission has always prohibited the use of names which carry false implications of a product's country of origin.[6] The fact that such a name is a trademark is irrelevant. *Cf., Edward P. Paul & Company, Inc.* v. *Federal Trade Commission*, 169 F. 2d 294 [4 S.&D. 734] (C.A.D.C., 1948).

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[5] In the interest of clarity, we are modifying the language of the order to make it clear that the term "jewel" is not limited to stones used as bearings, but may also properly be used to describe those which, like the pallet and roller jewels, are employed because of their resistance to wear in making contact with other moving parts.

[6] See, *e.g., Standard Sewing Equipment Corp.*, 51 F.T.C. 1012, 1029–31 (1955); *El Moro Cigar Co.* v. *Federal Trade Commission*, 107 F. 2d 429 [3 S.&D. 166] (C.A. 4, 1939); *Alvin M. Hayim*, Docket 7749 [56 F.T.C. 1392] (May 12, 1960); *Couristan, Inc.*, Docket 7853 [57 F.T.C. 794] (September 29, 1960).

The examiner's order, on this phase of the case, simply prohibits respondents from representing "that their watches are manufactured in their entirety in the United States." This prohibition will not suffice to assure discontinuance of the deception found. As we have pointed out, the name Waltham, in part through respondents' own efforts, has come to be associated by the public with entirely American-made watches. Deception of the public can be avoided only by requiring respondents, wherever they use the name "Waltham" in the advertisement or labeling of their watches, to disclose, clearly and prominently, the foreign origin of any of the components thereof. Respondents should be prohibited from using the term "American", or any reference to "Waltham", in any manner or context suggesting that the watches which they sell under the Waltham name are made in the United States. To provide effective relief these provisions are necessary at least until such time as the harmful effects of respondents' deceptive advertising have been erased. If and when this has been accomplished, the Commission will entertain any application for such modification as may then be appropriate. *Cf., Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419 [6 S.&D. 193].

IV

The examiner found that no deception was likely to result from respondents' use of the term "ruby" in describing the synthetic stones in their Resevoil device, since all of the advertisements containing this expression were addressed to the trade rather than to the general public. Complaint counsel does not challenge the findings that these advertisements were addressed only to the trade, and that those in the trade would not be likely to be deceived by such use of the term "ruby". We can find no reason to reverse the examiner's conclusion on this issue.

The appeal of respondents is denied. The appeal of counsel supporting the complaint is granted in part and denied in part. The findings and conclusions contained in the initial decision, as modified and supplemented by this opinion, are adopted as the findings and conclusions of the Commission. The order contained in the initial decision is set aside, and an order in conformity with this opinion will be issued.

FINAL ORDER

Respondents having filed, under Section 4.22(c) of the Commission's Rules of Practice, exceptions to the proposed order in this proceeding, reasons in support thereof and a proposed alternative form of order, and counsel supporting the complaint having filed a reply opposing said exceptions; and

The Commission having determined that respondents have not given sufficient grounds for modification of the proposed order, and that said order should be entered and adopted as the Final Order of the Commission:

It is ordered, That respondents' exceptions to the proposed order be, and they hereby are, denied.

It is further ordered, That respondents, Waltham Precision Instrument Company, Inc., a Massachusetts corporation, formerly known as Waltham Watch Company; Waltham Watch Company, a Delaware corporation; and Joseph Axler and Melvin Axler, individually and as former officers of said corporations, their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner, directly or indirectly, including any use of a number in the name or names of their watches, that watches manufactured or sold by them contain a designated number of jewels, unless said watches actually contain the stated number of jewels, each and every one of which serves a purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear.

2. Using the name "Waltham" in advertising or in labeling to designate or describe watches manufactured or sold by them, without expressly, clearly, conspicuously, and prominently stating in immediate connection therewith the country of origin of each component of said watches which is not entirely manufactured in the United States.

3. Using, in advertising or labeling watches manufactured or sold by them, the terms "America's first watch", the first American watch company", "American", or any similar word or expression, to describe respondents or such watches.

4. Furnishing any means or instrumentality to others whereby the public may be misled as to any of the matters or things prohibited by the above provisions of this order.

It is further ordered, That the allegation of the complaint that respondents' use of the term "ruby" in describing the stones in their Resevoil device violated Section 5 of the Federal Trade Commission Act be, and it hereby is, dismissed.

It is further ordered, That the complaint, insofar as it relates to individual respondents Irving H. Stolz, Seth Harrison and Frank Silver, be, and it hereby is, dismissed.

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

IN THE MATTER OF

GIMBEL BROTHERS, INC.

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

Docket 7834. Complaint, Mar. 21, 1960—Decision, Oct. 17, 1962

Order requiring the corporate operator of 13 retail department stores in and around the cities of New York, N.Y., Philadelphia and Pittsburgh, Pa., and Milwaukee, Wis., to cease making in advertising deceptive pricing and savings claims for merchandise—including rugs, luggage, Hotpoint refrigerators, and cashmere coats—through use of such words as "comparable value", "regularly", "originally", "list price" with a fictitious price figure; and to cease overstating the size of rugs offered for sale.

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 Gimbel Brothers, Inc., a corporation, hereinafter referred to as respondent, has 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 Gimbel Brothers, 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 33rd Street and Broadway in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of floorcoverings, luggage, household appliances, women's wearing apparel and other articles of general merchandise to the public.