(1) Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as compensation or in consideration for advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

It is further ordered, That the effective date of this order to cease and desist be and it hereby is postponed until further Order of the Commission.

IN THE MATTER OF

BENRUS WATCH COMPANY, INC., ET AL.

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

Docket 7352. Complaint, Jan. 8, 1959—Decision, Feb. 28, 1964

Order requiring two New York City associated distributors of watches to wholesalers, retailers and premium users for resale to the public, to cease using—in preticketing their watches, and in price lists, catalogs, newspaper and magazine and other advertising—fictitious amounts as the usual retail prices; setting forth fictitious amounts as retail prices from which reductions were to be made for trade-ins, allowance certificates and other reduction offers, and representing falsely that dealers would make such reductions against the indicated retail price; representing falsely that their watches were guaranteed and "shock proof"; failing to disclose the true metal content of bezels; and placing in the hands of purchasers for resale means for misleading the purchasing public in the above respects.

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 Benrus Watch Company, Inc., a corporation, Belforte Watch Company, Inc., a corporation, S. Ralph Lazrus, Oscar M. Lazrus and Benjamin Lazrus, individually and as officers of the above corporation, and Harvey M. Bond, Stanley M. Karp, Norman Slater, Samuel M. Feldberg, Jay K. Lazrus, Robert Weil, Martin J. Rasnow, Robert

Gasser, Clifford L. J. Siegmeister, Leo Hyman, and Julian Lazrus, individually and as officers of Benrus Watch Company, Inc., 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 Benrus Watch Company, Inc., and Belforte Watch Company, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York with their principal office and place of business located at 50 West 44th Street, New York 36, New York.

Respondents S. Ralph Lazrus, Oscar M. Lazrus and Benjamin Lazrus are officers of both of the aforesaid corporations. Harvey M. Bond, Stanley M. Karp, Norman Slater, Samuel M. Feldberg, Jay K. Lazrus, Robert Weil, Martin J. Rasnow, Robert Gasser, Clifford L. J. Siegmeister, Leo Hyman and Julian Lazrus are officers of the Benrus Watch Company, Inc. They formulate, direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

PAR. 2. Respondents are now and for some time last past have been engaged in the advertising, offering for sale, and selling of watches to wholesalers, retailers, and premium users, for distribution 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 products when sold to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States and the District of Columbia and maintain and at all times mentioned herein have maintained a substantial course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents, for the purpose of inducing the purchase of their products, have engaged in the practice of attaching or causing to be attached price tickets to their said products upon which certain amounts are printed. Respondents have also disseminated, or caused to be disseminated, price lists, catalogs, brochures, leaflets, newspaper and magazine advertisements, and other forms of advertising, in which certain amounts are shown as the retail prices of respondents' products. Respondents thereby represent, directly or by implication, that said amounts are the usual and regular retail prices of said products. In truth and in fact said amounts are fictitious and in excess of the usual and regular retail prices of said products.

PAR. 5. Respondents, for the purpose of inducing the purchase of their products, have disseminated or caused to be disseminated newspaper advertisements and other forms of advertising which contain statements that a designated amount will be granted as a trade-in allowance for an old watch, toward the purchase of a new watch, the product of respondents. Respondents thereby represent that by trading in an old watch a purchaser will save such designated amount as compared with the usual and regular retail price of said new watch, and that the purchaser by trading in an old watch will be obtaining a new watch, product of respondents, at a reduction of such designated amount below the usual and regular retail price of said new watch. In truth and in fact the purported trade-in allowance does not result in a saving to the purchaser, of such designated amount or any other amount; trading in an old watch does not enable the purchaser to obtain a new watch at a reduction of such designated amount or any other amount below the usual and regular price; the usual and regular prices quoted in such advertising are fictitious, misleading and deceptive.

PAR. 6. Respondents further use deceptive "allowance certificates" by representing in nation-wide advertising that they and their dealers will allow a certain amount against the advertised price of their products. In truth and in fact, their products are not usually and regularly sold at the said advertised price and the use of the "allowance certificate" does not effect an actual saving for the purchaser or prospective purchaser of respondents' products. Furthermore, dealers in respondents' products do not uniformly honor such "allowance certificates."

PAR. 7. In the course and conduct of their business as aforesaid and for the purpose of inducing the purchase of their said products respondents have made and are making false, deceptive and misleading representations through nationally distributed magazines, newspapers and other advertising media that certain low-priced models of their products are available at respondents' dealers, when such is not the fact, such representations being made to induce prospective purchasers of their products to make inquiry at the dealer's store, whereby the dealer can then induce the sale of more expensive models.

PAR. 8. Respondents represent in their advertising that their watches are guaranteed by the use of such terms as "guaranteed", "fully guaranteed", "guaranteed by Benrus", and other terms and expressions of which these are typical. Respondents also represent in guarantee certificates that their watches will be serviced upon payment of one dollar. In truth and in fact, the representations as to guarantee are false, misleading and deceptive. The fact that the guarantee provides for payment of a service charge is not set forth in advertising, and the respondents frequently impose service charges in excess of those set forth in the certificates of guarantee. The terms, conditions and extent to which such guarantee applies and the manner in which the guarantor will perform thereunder are not clearly and conspicuously disclosed in close conjunction with the representations of guarantee.

PAR. 9. Respondents further deceptively represent that their watches are "shock proof" or "shock protected". In truth and in fact, their watches are not "shock proof" or "shock protected" in every respect.

PAR. 10. Respondents' watches are in cases, the bezels of which have been treated or processed to simulate or have the appearance of precious metal, that is, gold or gold alloy. Said watch cases are not marked to disclose clearly that the bezels are composed of base metal. The practice of respondents in offering for sale and selling watches with bezels which have been treated or processed to simulate or have the appearance of precious metal as aforesaid without disclosing clearly the true metal composition of said bezels is misleading and deceptive and has a tendency and capacity to lead members of the purchasing public to believe that the said bezels are composed of precious metal.

PAR. 11. Respondents represent in advertising through use of terms such as "chrome top case" that certain of their watches contain tops or bezels composed throughout of chromium or chromium steel, commonly known as chrome steel or as stainless steel. In truth and in fact said bezels are not composed throughout of chromium or chromium steel and contain only a surface coating or plating of chromium. The practice of respondents in this respect is misleading and deceptive, as watch cases or parts thereof composed throughout of chromium or chromium steel are of greater utility than watch cases which are only surface coated or plated with chromium or chromium alloy.

PAR. 12. Respondents, by furnishing advertising and labeling material and selling and distributing watches to dealers, retailers and premium users as above set forth, furnish said dealers, retailers and premium users with means and instrumentalities by and through which they may mislead and deceive the public as to usual and regular prices, availability, quality and construction of respondents' watches, the amount of allowances, savings and price reductions in connection with the sale of respondents' watches, the nature and extent of respondents' guarantee and the manner of performance thereunder.

PAR. 13. 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 watches of the same general kind and nature as that sold by respondents.

PAR. 14. The use by respondent 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. 15. 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. H. E. Middleton, Jr., for the Commission.
Weisman, Allan, Spett & Sheinberg, New York, N. Y., for the respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

MAY 23, 1962

Respondents are charged in the Commission's complaint, issued on January 8, 1959, with having made false, misleading and deceptive statements with respect to their watches in the conduct of their business. The crux of the substantive charges alleged in the complaint is as follows:

1. Respondents, for the purpose of inducing the purchase of their products, have engaged in the practice of attaching, or causing to be attached, price tickets to their said products, upon which certain amounts are printed. Respondents have also disseminated, or caused to be disseminated, price lists, catalogs, brochures, leaflets, newspaper and magazine advertisements, and other forms of advertising in which certain amounts are shown as the retail prices of respondents' products. Respondents thereby represent, directly or by implication,

that said amounts are the usual and regular retail prices of said products. In truth and in fact, said amounts are fictitious and in excess of the usual and regular retail prices of said products. (See paragraph 4 of complaint.)

2. Respondents, for the purpose of inducing the purchase of their products, have disseminated, or caused to be disseminated, newspaper advertisements and other forms of advertising which contain statements that a designated amount will be granted as a trade-in allowance for an old watch, toward the purchase of a new watch, the product of respondents. Respondents thereby represent that by trading in an old watch a purchaser will save such designated amount as compared with the usual and regular retail price of said new watch, and that the purchaser by trading in an old watch will be obtaining a new watch, product of respondents, at a reduction of such designated amount below the usual and regular retail price of said new watch. In truth and in fact, the purported trade-in allowance does not result in a saving to the purchaser of such designated amount or any other amount; trading in an old watch does not enable the purchaser to obtain a new watch at a reduction of such designated amount or any other amount below the usual and regular price; the usual and regular prices quoted in such advertising are fictitious, misleading and deceptive. (See paragraph 5 of complaint.)

3. Respondents further use deceptive "allowance certificates" by representing in nation-wide advertising that they and their dealers will allow a certain amount against the advertised price of their products. In truth and in fact, their products are not usually and regularly sold at the said advertised price and the use of the "allowance certificate" does not effect an actual saving for the purchaser or prospective purchaser of respondents' products. Furthermore, dealers in respondents' products do not uniformly honor such "allowance certificates." (See paragraph 6 of complaint.)

4. In the course and conduct of their business as aforesaid and for the purpose of inducing the purchase of their said products respondents have made and are making false, deceptive and misleading representations through nationally distributed magazines, newspapers and other advertising media that certain low-priced models of their products are available at respondents' dealers, when such is not the fact, such representations being made to induce prospective purchasers of their products to make inquiry at the dealer's store, whereby the dealer can then induce the sale of more expensive models. (See paragraph 7 of complaint.)

5. Respondents represent in their advertising that their watches are guaranteed by the use of such terms as "guaranteed", "fully

guaranteed", "guaranteed by Benrus", and other terms and expressions of which these are typical. Respondents also represent in guarantee certificates that their watches will be serviced upon payment of one dollar. In truth and in fact, the representations as to guarantee are false, misleading and deceptive. The fact that the guarantee provides for payment of a service charge is not set forth in advertising, and the respondents frequently impose service charges in excess of those set forth in the certificates of guarantee. The terms, conditions and extent to which such guarantee applies, and the manner in which the guarantor will perform thereunder, are not clearly and conspicuously disclosed in close conjunction with the representations of guarantee. (See paragraph 8 of complaint.)

6. Respondents further deceptively represent that their watches are "shock proof" or "shock protected". In truth and in fact, their watches are not "shock proof" or "shock protected" in every respect. (See paragraph 9 of complaint.)

7. Respondents' watches are in cases, the bezels of which have been treated or processed to simulate or have the appearance of precious metal, that is, gold or gold alloy. Said watch cases are not marked to disclose clearly that the bezels are composed of base metal. The practice of respondents in offering for sale and selling watches with bezels which have been treated or processed to simulate or have the appearance of precious metal as aforesaid, without disclosing clearly the true metal composition of said bezels, is misleading and deceptive and has a tendency and capacity to lead members of the purchasing public to believe that the said bezels are composed of precious metal. (See paragraph 10 of complaint.)

8. Respondents represent in advertising through use of terms such as "chrome top case" that certain of their watches contain tops or bezels composed throughout of chromium or chromium steel, commonly known as chrome steel or as stainless steel. In truth and in fact, said bezels are not composed throughout of chromium or chromium steel and contain only a surface coating or plating of chromium. The practice of respondents in this respect is misleading and deceptive, as watch cases or parts thereof composed throughout of chromium or chromium steel are of greater utility than watch cases which are only surface coated or plated with chromium or chromium alloy. (See paragraph 11 of complaint.)

Respondents' position with regard to these charges is that counsel supporting the complaint has failed to prove the following:

1. That respondents have represented, directly or by implication, that the amounts appearing on the price tickets attached to their

watches and in their advertising are the usual and regular price of such watches.

2. That the trade-in of a watch does not result in a saving to the consumer.

3. That the presentation of an allowance certificate did not result in a saving to the customer and that the pre-ticketed price was not usually and regularly charged without the presentation of such a certificate.

4. That respondents have not honored their guarantees in accordance with their terms.

5. That respondents have represented, except in one instance, that their watches are "shock proof" or that such a representation, if made, was misleading in the circumstances of this case.

6. That respondents' watches do not contain gold or gold alloy, or that any watch composed solely of base metal has been considered by consumers to consist of gold or gold alloy.

7. The metal composition of respondents' "chrome top" cases, or that consumers are misled by the appearance of such cases.

Proposed findings and conclusions of law were filed by counsel for the parties. The hearing examiner has carefully reviewed and considered same. Proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or involving immaterial matters.

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

FINDINGS OF FACT

1. Respondents Benrus Watch Company, Inc., and Belforte Watch Company, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York with their principal office and place of business located at 50 West 44th Street, New York 36, New York.

2. Respondents Oscar M. Lazrus and Benjamin Lazrus are officers of both of the aforesaid corporations. Harvey M. Bond, Stanley M. Karp, Norman Slater, Samuel M. Feldberg, Jay K. Lazrus, Robert Weil, Martin J. Rasnow, Clifford L. J. Siegmeister, Leo Hyman, and Julian Lazrus are officers of the Benrus Watch Company, Inc. Respondent S. Ralph Lazrus died in September 1959.

3. Individual respondents Oscar M. Lazrus, Benjamin Lazrus, Harvey M. Bond, Stanley M. Karp, Samuel M. Feldberg, Jay K. Lazrus, Robert Weil, Clifford L. J. Siegmeister and Julian Lazrus formulate, direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

Robert Weil heretofore referred to although initially found to be in default in this proceeding, subsequently appeared by counsel and is properly chargeable only with the violations established by the evidence herein. See the order of the hearing examiner dated March 31, 1961, granting the Motion for Default against this respondent.

As regards Robert Gasser, it has been established that he was last employed by the Benrus Watch Company, Inc., on December 30, 1957, at which time he retired from the corporation's employ, and since that time has not been employed by the corporation in any capacity whatsoever. The Commission's complaint was filed January 8, 1959. It would appear, therefore, that service on Mr. Gasser at the offices of Benrus Watch Company, Inc., 50 West 44th Street, New York, New York, was invalid and did not meet the requirements of Section 3.4(a)(1) of the Commission's Rules of Practice for adjudicative proceedings. The Commission therefore is without jurisdiction as to this respondent.

4. Respondents are now and for some time last past have been engaged in the advertising, offering for sale and selling of watches to wholesalers, retailers and premium users for distribution to the public.

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

6. In the course and conduct of their business respondents have made deceptive and misleading representations with respect to the prices of their watches. Respondents attached to certain of their watches price tickets upon which various prices were printed, thereby representing directly or indirectly, or by implication, that such prices were the generally prevailing retail prices for their watches. Respondents also have disseminated, or caused to be disseminated, price lists, catalogs, brochures, leaflets, newspaper and magazine advertisements, and other forms of advertising in which they represent the prices set forth therein were the generally prevailing retail prices for their watches. In fact, the aforesaid ticketed prices and prices listed in advertising, or otherwise, were not the generally prevailing retail prices for respondents' watches. The prices charged for respondents' watches by different dealers in the same trade area varied consider-

ably, so that no single uniform retail price existed. Furthermore, respondents' watches were widely sold in the same trade area at a variety of retail prices significantly lower than those stated on respondents' price tickets, price lists, catalogs, brochures, leaflets, newspaper and magazine advertisements, and other forms of advertising.[1]

7. Respondents for the purpose of inducing the purchase of their products have disseminated, or caused to be disseminated, newspaper advertisements and other forms of advertising which contain statements that a designated amount will be granted as a trade-in allowance for an old watch toward the purchase of a new watch, the product of respondents. They have not thereby represented that by trading in an old watch a purchaser would save such designated amount as compared with the usual and regular retail price of said new watch, and that the purchaser by trading in an old watch will obtain a new watch, the product of respondents, at a reduction of such designated amount below the usual and regular retail price of said new watch. Furthermore, a misrepresentation can not be imputed since there is no allegation in the complaint to the effect that trade-in allowances are not uniformly granted or that respondents have represented that the value of the watch traded in is equal to the saving granted the purchaser who trades in an old watch. Regardless of any defect in the allegation, however, the evidence establishes that a uniform trade-in allowance has been granted by the respondents.

8. Respondents engaged in issuing deceptive "allowance certificates" in nation-wide advertising indicating that they and their dealers will allow a certain amount against advertised products when, in fact, dealers in respondents' products do not uniformly honor such allowance certificates.

9. Since January 1, 1959, respondent Benrus has had an unconditional 3-year guarantee policy. In performance of this policy, respondent has repaired or replaced all watches for a period of three years from the date of purchase regardless of the cause of damage to such watches. This policy was adopted in the fall of 1958 or some four months prior to the institution of this proceeding. Prior to the present guarantee policy, respondent Benrus guaranteed its watches for any difficulties in manufacture and complied with the terms of its guarantee certificate.[2] There is therefore no deception in this respect.

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[1] See Commission's finding numbered 6, Rayex Corporation, et al., Docket No. 7346, April 2, 1962 [60 F.T.C. 664], and opinion of that date affirming the initial decision of the hearing examiner dated July 18, 1961.

[2] Tr. 1248–1329; Respondents' Exhibits 12 through 21.

10. With the exception of one mat prepared by respondent Benrus, the term "shock proof" or "shock protected" was never employed by respondent.[3]

11. Respondents have customarily and consistently, with the one exception above noted, employed other terms such as "shock resistant" or "shock absorbing" to describe the protection from shock afforded by its watches. No charge of deception in the use of such terms is made by the complaint.[4]

12. The single instance of the term "shock proof" on this record was not deceptive since there is no absolute prohibition of the use of such term and there is no evidence that the term as employed was construed by consumers as representing that respondents' watches afforded a greater protection from shock than was the case.

13. There is no evidence that respondents have manufactured any watch cases having the appearance of gold or gold alloy which do not in fact contain such gold or gold alloy. The only watch cases of respondents having such appearance which were subjected to metallurgical analysis in fact had gold plate of 18.46 and 18.32 carat gold respectively.[5]

14. There is no evidence that consumers regarded these watch cases as having a different gold content from that which in fact they had. The evidence establishes that all watch cases presently being manufactured by respondents which are of base metal and which have a yellow or gold color are clearly marked as base metal or aluminum, as the case may be.[6] There is therefore no deception in this respect.

15. There is no evidence of the actual metallic composition of any watches advertised by respondents as having "chrome top cases". There is no evidence that any consumer regarded a watch advertised as having a "Chrome top case" as being composed throughout of chromium or chromium steel. There is therefore no deception in this respect.

16. 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 watches of the same general kind and nature as those sold by respondents.

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[3] Tr. 1434–1460; Commission's Exhibits 288, 290, 291 and 293.

[4] Commission Exhibits 10, 11, 19, 31–34, 36, 45, 47, 64, 65, 75, 93; Respondents' Exhibit 25.

[5] Tr. 839–841.

[6] Tr. 1388–1389; Respondents' Exhibit 24(A–L).

CONCLUSIONS

I

The main charge alleged in the complaint appears to be Paragraph Four thereof which is as follows:

> Respondents, for the purpose of inducing the purchase of their products, have engaged in the practice of attaching or causing to be attached price tickets to their said products upon which certain amounts are printed. Respondents have also disseminated, or caused to be disseminated, price lists, catalogs, brochures, leaflets, newspaper and magazine advertisements, and other forms of advertising, in which certain amounts are shown as the retail prices of respondents' products. Respondents thereby represent, directly or by implication, that said amounts are the usual and regular retail prices of said products. In truth and in fact, said amounts are fictitious and in excess of the usual and regular retail prices of said products.

The evidence adduced appears to support this charge, although some retail sales of Benrus watches were made at the manufacturer's ticketed price, other retail sales, equally substantial, were made at prices less than the manufacturer's ticketed price. The general retail price structure appears to have no uniformity except that some retailers having a discount policy consistently sell at prices less than the manufacturer's ticketed price, whereas other retail merchants sell at the best obtainable price not exceeding the manufacturer's ticketed price, or consistently sell at the ticketed price. It is unnecessary for counsel supporting the complaint to establish that Benrus watches were predominantly sold at less than the ticketed price. It is sufficient if it may be inferred from the evidence adduced that a substantial number of retailers of Benrus watches sell at prices less than the price ticketed by Benrus in a market where the retail price pattern is varied.

As pointed out by Commissioner Elman in rendering the opinion of the Commission in the Rayex case, Docket No. 7346 [60 F.T.C. 664, 675]:

> The danger inherent in price preticketing is that, whatever other purpose it may serve, it gives many consumers the impression that the stated price is the retail price generally prevailing in the area. Everyone loves, and hopes to find, bargains. It is this universal human trait which is exploited by the practice of fictitious pricing, whatever its form. In *George's Radio & Television Company, Inc.*, Docket 8134, decided January 19, 1962, we held that "The representation 'Mfr's Sug. List' creates the impression that there is a usual and customary retail price for the product in the trade area, and that that price is the specified 'Mfr's Sug. List' price." (Opinion, p. 3) The record there showed that "the products in question were being widely sold in the trade area at a variety of retail prices significantly lower than" the "Mfr's Sug. List" price (*Ibid.*) Accordingly, the Commission found that the public had been misled.

There is, of course, no convention requiring manufacturers and distributors to use preticketing as a means for "suggesting" resale prices to their dealers. They could as well simply enclose a list of suggested prices with each shipment. That procedure would involve no possibility of the sort of deception with which we are here concerned, assuming that the price list information was not passed on to the public. Such conduct would not necessarily be immune from scrutiny under other statutory provisions regulating business activity. For example, it might in some circumstances suggest the existence of illegal anti-competitive pricing conditions in the industry.[7] But ordinarily there would be no occasion to question such a practice on the ground that it is deceptive.

However, when resale prices supplied to dealers—whether through preticketing or some similar practice—*are* made public, the consequences may vary considerably. It may be, for example, that the industry in which the practice is undertaken is characterized by price rigidity or uniformity. That is to say, all dealers in a particular product may be content to sell at the same price. If a manufacturer of such a product pretickets it at what is in fact the uniform retail price in the area, he is not engaging in false or misleading pricing. Of course, rigidity and uniformity of price may make preticketing even more suspect as a manifestation of some form of illegal restraint of trade, but in such circumstances the practice is not vulnerable as deceptive to consumers.

A different problem is presented by an industry in which the manufacturer habitually labels his product at a given price and his dealers in a trade area, or many of them, just as habitually market it for substantially less. This is the context of classic "fictitious" pricing. In such circumstances, the preticketing's tendency to deceive, and hence its illegality, are settled matters. As the court stated in *Clinton Watch, supra*, note 1, a case involving factory preticketing of watches at a price substantially in excess of the "normal" retail price:

"Preticketing at fictitious and excessive prices must be deemed to have the tendency of deceiving the public as to the savings afforded by the purchase of a product thus tagged as well as to the value of the product acquired. Petitioners' practice places a means of misleading the public into the hands of those who ultimately deal with the consumer. Notwithstanding the prevalence of these practices and the familiarity therewith among members of the trade, these activities are proscribed to protect the interest of the public. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922).

"Misrepresentation as to the retail value of merchandise by means of an attached, fictitious price and deception as to savings afforded by the purchase of the product at a substantially lower price than that indicated thereon consitute unfair methods of competition. *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337, 340 (7th Cir. 1960), cert. denied 364 U.S. 883; *Harsam Distributors, Inc.* v. *Federal Trade Commission*, 263 F. 2d 396, 397 (2d Cir. 1959)." 291 F. 2d, at 840.

In such a situation there is a substantial likelihood of deception, whether the dealers resell the product to the public at a uniform lower price or at a widely varying range of lower prices. Since the preticketed price is not in fact

[7] Compare, *e.g., United States* v. *Parke, Davis & Co.*, 362 U.S. 29. [Footnote 2, original footnote.]

the usual or regular price generally prevailing in the area, the public may be misled. In appraising the capacity of a business practice to deceive and mislead, it is not the understanding or purpose of the manufacturer or distributor or dealer that is of critical importance; rather, it is the public impression created by that practice.[8] And, so far as many members of the public are concerned, the impression made by preticketing is that it is the manufacturer's indication of the approximate retail value of his product, i.e., his representation that this is what it should and generally does sell for in the sales area.[9]

The manufacturer or distributor who provides his dealers with a spurious indication of a normal and generally prevailing price places in their hands a ready-made instrument of deception.[10] If the buyer believes—as the preticketed price may well lead him to believe—that that is the the going price generally being charged for the product, he will be forestalled from seeking it at a lower price elsewhere. The dealer can thus induce the consumer not to shop among his competitors for a bargain. Obviously, both consumers and competitors are thereby prejudiced.

The evidence adduced in the within case clearly establishes that the manufacturer's ticketed price is not the usual and regular price in the sense that the price pattern as evidenced indicates the nonexistence of a usual and regular price.

Respondents' counsel, however, takes the position that there is no misrepresentation since most of the buying public understands that medium priced watches are sold in the same market at variable prices. Supporting his view in this respect is "A Motivation Pilot Study" with respect to the patterns of price perception among watch purchasers, received in evidence as Respondents' Exhibit 26. This study was prepared by Motivation Dynamics, Inc., under the direction of Albert Shepard, president, who testified in detail as to the manner in which the studies were made as the result of interviews. The basic data supporting the expert opinion rendered by Mr. Shepard was not received in evidence for the purpose of establishing the truth of what was stated, but as the premise upon which Mr. Shepard rendered his opinion. From his testimony it is apparent that, premised upon his experience in making such studies, he could rely upon the basic data with a reasonable degree of certainty in rendering

[8] *E.g., Koch* v. *Federal Trade Commission,* 206 F. 2d 311, 319, (C.A. 6); *P. Lorillard Co.* v. *Federal Trade Commission,* 186 F. 2d 52, 58 (C.A. 4); *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission,* 143 F. 2d 676, 679 (C.A. 2). [Footnote 3, original footnote.]

[9] The Commission so finds in the discharge of its duty to make the necessary factual determination of the impression on the public that advertising creates. See, *e.g., Niresk Industries, Inc.* v. *Federal Trade Commission,* 278 F. 2d 337 (C.A. 7); *Kalwajtys* v. *Federal Trade Commission,* 237 F. 2d 654, 656 (C.A. 7); *Rhodes Pharmacal Co.* v. *Federal Trade Commission,* 208 F. 2d 382 (C.A. 7). [Footnote 4, original footnote.]

[10] See *Federal Trade Commission* v. *Winsted Hosiery Co.,* 258 U.S. 483; *Baltimore Luggage, supra,* note 1; *C. Howard Hunt Pen Co.* v. *Federal Trade Commission,* 197 F. 2d 273 (C.A. 3). [Footnote 5, original footnote.]

an opinion. At page 17 of his opinion pursuant to the survey, he states as follows:

> Confirming the tone and the frequency of their spontaneous remarks, we find that 86% of all respondents, report as matching their own personal impression the comment that "the actual purchase price that people pay often varies from one kind of store to another, even though the manufacturer's list price remains the same for the same watch in all stores." [11]

It must be concluded from this evidence offered by respondents, that they concede a variability of watch prices within the market areas at issue. It would also appear from this evidence, which confirms the proof adduced by the Commission, as further indicated in Test III of the survey, that 14% of those investigated were of the view that prices were not variable. As to this latter group, therefore, it is clearly apparent that they would be misled into believing that the ticketed price was invariable, and therefore the usual and customary price they would be required to pay, when in fact there was no usual and regular price in the market in question. Even assuming that 86% of the public would not be deceived by the ticketed price because they knew prices were variable, the remaining 14% would apparently be deceived by the ticketed price. Test III therefore indicates unequivocally that a substantial segment of the public would be deceived by respondents' representation as to the price indicated on the price tickets attached to respondents' watches. The Commission is not required to establish that a preponderance of the public is deceived. It is only necessary to establish that the manufacturer's indicated price is a misrepresentation in a substantial segment of the market. This concept, enunciated by the Commission, requires the protection of any group of buyers even though they may not be in the majority and even though they may be more susceptible to the misrepresentations of the seller (intended or unintended) than a majority of buyers perhaps more experienced in seeking bargains.

II

There is no merit to what appears to be the argument of counsel for the Commission that he has proved that the trade-in of a watch does not result in a saving to the consumer. In the first place, it is not charged in the complaint that the respondents have represented that the value of the watch traded in is equal to the saving granted the purchaser who trades in an old watch. Paragraph Five of the complaint alleges that respondents for the purpose of inducing the purchase of their products have disseminated, or caused to be disseminated, newspaper advertisements and other forms of advertis-

[11] Respondents' Exhibit 26.

ing which contain statements that a designated amount will be granted as a trade-in allowance for an old watch, toward the purchase of a new watch, the product of respondents. The complaint then goes on to say that respondents thereby represent that by trading in an old watch a purchaser will save such designated amount as compared with the usual and regular retail price of said new watch. This deduction from the prior sentence of the allegation can not logically be imputed. Furthermore, the Commission is not in a position to prove that trade-in allowances were not made, since there is no allegation to this effect.

The same type of allegation is set forth in Paragraph Six of the complaint with regard to allowance certificates. The allegation there states that dealers in respondents' products do not uniformly honor such allowance certificates. There is persuasive proof to this effect, since the evidence establishes that some dealers will not allow a certain amount against the advertised price of their products if such certificates are presented. However, with regard to Paragraph Six of the complaint, there is a failure of proof, as in Paragraph Five, of a misrepresentation based upon a claimed saving to the customer.

III

On the issue as to whether or not the respondents have honored their guarantees in accordance with their terms, the Commission's evidence is unsubstantial.

Paragraph Eight of the complaint alleges that respondents have represented that their watches are "guaranteed, fully guaranteed and guaranteed by Benrus" and that such representations are false in that the fact that the guarantee provides for a service charge is not set forth in advertising, and service charges in excess of those set forth in the certificate of guarantee are charged.[12]

The guarantee policy presently being followed by respondent Benrus Watch Company was summarized as follows by Milton H. Putterman, vice president of Benrus Watch Company, who is directly responsible for the supervision of the service department which administers this guarantee policy:

Q What is the present policy with respect to guarantees of the Benrus Watch Company?

A. We have an unconditional three-year guarantee on all of our Benrus watches.

Q Can you explain what you mean by an unconditional three-year guarantee?

A Every watch that is sold, the consumer is to take a portion of this guarantee, fill out the information, and send it in to validation. Three years from

[12] This charge is not directed to respondent Belforte. No evidence whatever was offered concerning the practice of Belforte in honoring its guarantees.

the date of that validation the watch is unconditionally guaranteed. When we say 'unconditionally', there are no strings attached, no matter what happens to the watch, no matter what damage occurs to the watch, that watch is repaired absolutely free of charge.

Hearing Examiner Buttle: Suppose through some act of mine—I have a Benrus watch—and something broke on the watch, aren't there some limitations in that respect?

The Witness: There are no limitations at all.

Hearing Examiner Buttle: In other words, you mean what you say by your guarantee.

The Witness: It is absolutely unconditional.

Hearing Examiner Buttle: And that has been your practice, to repair those watches in the event something did happen?

The Witness: That's right.

Hearing Examiner Buttle: Suppose you couldn't repair the watch?

The Witness: We would replace it.

Hearing Examiner Buttle: With the same type of watch?

The Witness: Absolutely.

Q Is it your policy to make any charge with respect to such watches so far as postage or handling charges are concerned?

A No. There is absolutely no charge to the consumer. Once the watch is received in our company, there is no bill. The watch is simply repaired and returned to the customer.

Q How long has this been the policy and practice of Benrus?

A Since January 1, 1959." [13]

This policy was in effect prior to the issuance of the complaint, and the decision to adopt this policy predated the complaint by some four or five months.[14]

As Mr. Putterman's testimony made abundantly clear, this three-year unconditional guarantee means exactly what it says. If a consumer were to take a watch and smash it against the wall, Benrus Watch Company would repair or replace the watch. Even compliance with the formality of sending in a validated guarantee card is not required. For a period of three years from the date of purchase, the watch is absolutely and unconditionally guaranteed without any limitation whatever. Mr. Putterman testified at length without contradiction to the careful and conscientious manner in which Benrus Watch Company performs its guarantee policy. The issuance of an order concerning the guarantee policy of respondent would therefore appear to be inappropriate.

Furthermore, there is no evidence of consumer deception prior to the institution of the present policy. The prior policy provided a guarantee against any defects in workmanship. It is difficult to believe that any consumer would, in any case, expect more.[15] The evi-

[13] Tr. 1251–1253.
[14] Tr. 1305.
[15] Tr. 1296–1297.

dence of consumer deception offered by Commission counsel does not support a conclusion of consumer deception. This evidence, consists of a letter from the Better Business Bureau to Benrus Watch Company with respect to an alleged complaint and the response of Benrus to that letter.[16] In its letter, Benrus states that its watches are "fully guarantee (d) * * * against any manufacturing defect" and that the damage to the watch was not caused by any such defect but because of the "type of wear and handling the watch had been given." Obviously the charges in the complaint are not proved by this exchange of correspondence.

IV

Commission's proof that respondents have represented, except in one instance, that their watches are shock proof or that such representation they made was misleading in the circumstances of this case is unsubstantial and without merit.

Paragraph Nine of the complaint alleges that respondents have represented that their watches are "shock proof" or "shock protected" when, in truth and in fact, the watches are not "shock proof" or "shock protected" in every respect.

It must be noted initially that the complaint takes no exception to the use of the terms "shock resistant" or "shock absorbing" in the advertising of respondents' watches. It is these terms which have been used practically without exception by respondents.[17]

Respondents' policy with respect to the use of the term "shock proof" was described as follows by Harvey M. Bond, vice president of Benrus Watch Company, who is responsible for all of respondents' advertising:

Q In the course of approving the advertising submitted by you and in composing that advertising which you prepared, you develop certain policy with respect to the inclusion and exclusion of certain representations in that advertising?

A That's correct.

Q Do you have such a policy with respect to the use of the word "shockproof"?

A Yes, we have.

Q Tell us, please, what that policy is.

A We do not use the word "shockproof."

Q Have you so advised your subordinates?

A Yes.

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[16] Commission's Exhibits 59 and 60.

[17] Commission's Exhibits 10, 11, 19, 31–34, 36, 45, 47, 64, 65, 75, 93; Respondents' Exhibit 25.

Q Have there ever been instances, Mr. Bond, in which you or your subordinates have detected the use of the word "shockproof" in copy submitted to you.

A Yes.

Q What actions have you taken in those instances?

A We have deleted that phrase.[18]

This policy according to the evidence dates at least to January 1, 1955, the earliest date upon which Commission counsel purports to rely.[19]

Commission counsel, in a lengthy cross-examination of Mr. Bond,[20] attempted to demonstrate that respondents have frequently employed the term "shock proof" in their advertising. What emerges from this cross-examination and an examination of the few exhibits introduced by Commission counsel in which the term was, in fact, employed was that the term was used in but a single advertising mat among the hundreds prepared by Benrus. To issue an order on the basis of what appears to be a single inadvertent inclusion of a term in advertising would be inappropriate and unjustified.[21]

Moreover, the evidence establishes that the device employed in respondents' watches does in fact afford substantial protection from damage through shock.[22] The Trade Practice Rules of the Watch and Watch-Case Industry, promulgated April 24, 1947 (sec. 170.3), do not forbid the use of the term "shock proof" in all cases. They forbid the use of that term only "under any false, misleading or deceptive circumstances or conditions, or in any manner which has the capacity and tendency or effect of causing the purchasing or consuming public to be misled or deceived". Since the evidence adduced by Commission counsel establishes that no device offers absolute protection from damage from shock, it is apparent that, in promulgating the rule, the Commission did not believe the public construed the term "shock proof" to mean absolute protection. If it had so believed, it would necessarily have forbidden the use of the term in all cases, since there is no device which affords such protection.

In order to establish a violation, therefore, it is essential to show not only that the term was used, but that it was used in combination with other representations so as to convey the impression that the watch afforded protection from damage beyond that actually afforded. The record here discloses that the exhibits in which the term was used contain no language whatever which would convey such an impression.

[18] Tr. 1418–1419.

[19] Tr. 1423.

[20] Tr. 1434–1460.

[21] Tr. 1434.

[22] Tr. 783–832.

In any event, respondents in the within case have regularly employed the terms "shock resistant" or "shock absorbing" rather than "shock proof" and the complaint does not charge that these terms are misleading.

V

There is also merit to the position of counsel for respondents that counsel in support of the complaint has failed to prove that respondents' watches do not contain gold or gold alloy or that any watch composed solely of base metal has been considered by consumers to consist of gold or gold alloy.

Paragraph Ten of the complaint reads, as follows:

> Respondents' watches are in cases, the bezels of which have been treated or processed to simulate or have the appearance of precious metal, that is, gold or gold alloy. Said watch cases are not marked to disclose clearly that the bezels are composed of base metal. The practice of respondents in offering for sale and selling watches with bezels which have been treated or processed to simulate or have the appearance of precious metal as aforesaid without disclosing clearly the true metal composition of said bezels is misleading and deceptive and has a tendency and capacity to lead members of the purchasing public to believe that the said bezels are composed of precious metal.

Thus, it is charged that the consumer is misled into believing that there is gold in the bezels of the watches, whereas in fact, those bezels are made entirely of base metal treated to simulate gold or gold alloy.

In the within case, the bezels of respondents' watches were gold electroplated. The only testimony offered with respect to the metal composition of respondents' watch bezels was that of Frederick Wright. He testified that the bezels of the watches contained gold plating of 18.46 and 18.32 carat gold respectively.[23] There is no evidence establishing that any of the bezels did not contain any gold or gold alloy. The charge should be dismissed since it is distinguishable in this respect from the Kagan case.[24]

Apparently Commission's counsel has attempted herein to prove a charge not set forth in the complaint. He refers to the watches as "thin skinned",[25] and by this he obviously means the gold electroplating is so thin that a failure to disclose that there is such electroplating over base metal constitutes a deceptive practice. However, no such charge is contained in the complaint.

[23] Tr. 839–41.

[24] See Theodore Kagan Corp., Docket 6893 (1959) affirmed 283 F. 2d 371 CADC.

[25] See Commission counsel's memorandum in opposition to respondents' motion to dismiss at p. 12.

VI

There is further merit to the position of respondents' counsel that counsel supporting the complaint has failed to prove the metal composition of respondents' chrome top cases or that consumers are misled by the appearance and description of such cases as to their metal composition.

Paragraph Eleven of the complaint alleges that respondents, through use of terms such as "chrome-top case", represented that their watch tops or bezels were composed throughout of chromium or chromium steel, commonly known as chrome steel or stainless steel, whereas, in truth and in fact, the bezels are not composed throughout of chromium or chromium steel.

An obvious defect in the proof offered with respect to this charge is that no testimony establishing the actual metal composition of the bezels was offered. The record thus does not sustain the allegation that in fact respondents' watch bezels were not composed throughout of chromium or chromium steel.

Nevertheless, even assuming that the bezels were chromium plated rather than chrome or chrome steel throughout, the evidence fails to establish that consumers believe that the bezels are composed of chrome or chrome steel throughout and are thereby misled.[26] Furthermore, there is no evidence that the watches utilized by Commission counsel in questioning consumer witnesses were in fact advertised as having chrome top cases.

VII

Paragraph Seven of the complaint has heretofore been dismissed pursuant to order of the hearing examiner of June 9, 1961, since there was no evidence sufficient to establish a prima facie case as indicated therein. This charge is as follows:

> In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their said products, respondents have made and are making false, deceptive and misleading representations through nationally distributed magazines, newspapers and other advertising media, that certain low-priced models of their products are available at respondents' dealers, when such is not the fact, such representations being made to induce prospective purchasers of their products to make inquiry at the dealer's store, whereby the dealer can then induce the sale of more expensive models.

Although the hearing examiner, pursuant to his order of June 9, 1961, did not dismiss any allegations of the complaint except Paragraph Seven in whole or in part, at the termination of the Com-

[26] Tr. 709, 762, 764; see also, Tr. 686.

mission's prima facie case, his denial of a motion to dismiss was premised upon the concept enunciated in the *Brillo* case and the *Consolidated Foods* case [27] to the effect that at this stage of the proceedings of the case the evidence and inferences reasonably to be drawn therefrom should be viewed in the light most favorable to the complaint.

VIII

Counsel in support of the complaint presses for a default judgment against respondent Robert Weil, as to all charges set forth in the complaint. He has apparently overlooked the fact that after the objections to the service of process over Mr. Weil were rejected by the examiner, a separate answer was filed on behalf of Mr. Weil, incorporating the answer previously filed on behalf of the remaining respondents, and denying responsibility for any of the acts and practices here involved. Consequently, no default judgment may be entered.

IX

To the extent heretofore indicated, the use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been and is being unfairly diverted to the respondents from their competitors and substantial injury has thereby been and is being done to competition in commerce.

The aforesaid acts and practices of respondents, to the extent that the Commission's case has been sustained, were and 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. Accordingly, since the Federal Trade Commission has jurisdiction of the respondents herein and this proceeding is in the public interest, the following order shall issue:

ORDER

It is ordered, That respondents Benrus Watch Company, Inc., a corporation, Belforte Watch Company, Inc., a corporation, and their

[27] Matter of *Brillo Manufacturing Company, Inc.*, Docket No. 6557, [p. 245 herein] and *Consolidated Foods Corporation*, Docket 7000 [62 F.T.C. 929].

officers, Oscar M. Lazrus and Benjamin Lazrus, individually and as officers of the above named corporations, and Harvey M. Bond, Stanley M. Karp, Norman Slater, Samuel M. Feldberg, Jay K. Lazrus, Robert Weil, Martin J. Rasnow, Clifford L. J. Siegmeister, Leo Hyman and Julian Lazrus, individually and as officers of Benrus Watch Company, Inc., and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches or other related merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. The act or practice of preticketing such merchandise at an indicated retail price, or of otherwise conveying an impression to the public concerning retail prices, when there is no generally prevailing retail price for such merchandise in the trade area, or when the indicated retail price is in excess of the prices at which such merchandise is sold at retail in a substantial segment of the trade area.

2. Representing that dealers in respondents' watches or other related merchandise will allow a certain amount against the advertised price of their products upon the presentment of an allowance certificate incident to the purchase of a watch or other merchandise manufactured by respondents unless such allowance is granted without exception,

and it is

Further ordered, That respondents do forthwith cease and desist from placing in the hands of jobbers, retailers, dealers, and others, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning any merchandise in the respects set out above, and it is

Further ordered, That the complaint is dismissed as to respondent Robert Gasser, and as to respondent S. Ralph Lazrus, who is deceased, and it is

Further ordered, That the complaint is otherwise herein and hereby dismissed.

Opinion of the Commission

JULY 31, 1963

By Anderson, *Commissioner:*

Respondents in this matter were charged in the complaint with various misrepresentations in violation of Section 5 of the Federal Trade Commission Act. The corporate respondents are Benrus Watch Company, Inc., and Belforte Watch Company, Inc., both corporations organized and doing business under the laws of the State of New York. Belforte Watch Company, Inc., is a subsidiary of Benrus Watch Company, Inc. The hearing examiner, in his initial decision, filed May 24, 1962, found that part of the charges were sustained and part were not. He ordered those practices to be discontinued which he found to be unlawful.

Counsel supporting the complaint and respondents have both filed exceptions to the initial decision. The former excepts to the dismissal of certain charges as follows: (a) alleged misrepresentation as to the savings from turning in an old watch and the savings involved in the use of "allowance certificates", (b) the use of the term "guaranteed", (c) the use of "shock proof" and "shock protected", and, finally, (d) misrepresentation as to the composition of certain bezels (rims in which watch crystals are set). Respondents except to the examiner's findings that respondent misrepresented the usual and regular resale prices of their watches, that respondents' dealers did not uniformly honor "allowance certificates" and to the inclusion in the order of certain named respondents.[1]

We will proceed to consider the facts for each alleged misrepresentation charged in the complaint as to which an exception to the examiner's findings thereon has been taken.

Misrepresentation As To Usual And Regular Retail Prices

The complaint first charges respondents with falsely representing certain amounts as the usual and regular prices of their products through both preticketing and advertising statements. Respondents concede in their answer that they have attached or caused to be attached price tickets to their watches upon which certain amounts are printed and that they have disseminated advertising containing representations as to the retail prices of their watches.[2] They assert, however, that they had no knowledge sufficient to form a belief as to whether the prices printed on the tickets and the advertisements have been or are in excess of the usual and regular retail prices.

The hearing examiner found that the preticketed prices and the prices listed in the advertising were not the generally prevailing retail prices for respondents' watches, that prices charged for respondents' watches by different dealers in the same trade area varied considerably so that no single uniform retail price existed,

[1] The allegations under Paragraph Seven of the complaint charging misrepresentation as to the availability of certain watches from dealers were dismissed by order of the examiner on the ground of a failure to show a prima-facie case. No exception was taken to this action.

[2] Admissions by individuals named in the complaint were only as to their capacities as officers and employees of corporate respondent.

and that respondents' watches were widely sold in the same trade area at a variety of prices significantly lower than those stated on its price tickets and advertising.

Preticketing refers to the practice of supplying with the watch a ticket upon which is printed a represented retail price. For convenience, the term "preticket" will hereafter be used, unless otherwise stated, to refer to the prices appearing on the tickets supplied with the watches and to respondents' representations as to retail prices in other advertising. It is used interchangeably because for the same model of watch the preticketed price and the advertised retail price were the same.

The record supports the charge of false and fictitious preticketing. We will proceed to review evidence on this issue.

Respondent Benrus had two categories of customers: catalog customers and retail customers; respondent Belforte had three: catalog, jobbing and retail customers. The catalog customers distribute merchandise by means of catalogs and in some cases by retail outlets. The customers of the catalog houses include industrial accounts, small retailers and consumers. Many of the catalog houses sell large amounts of merchandise to consumers. Some of them sell respondents' products to consumers almost exclusively. For example, Zeff Distributing Company, Inc., a catalog house, sold approximately 85% of its purchases of respondents' watches to consumers.

The catalogs distributed by the catalog houses typically contain code numbers which reveal the actual selling prices of the articles. They also contain other figures higher than the actual selling prices which purport to be the suggested retail prices or the usual and regular prices for the articles. Respondents provide inserts for these catalogs, which inserts contain a display of their watches and price information, including the representations as to usual and regular retail prices. One such catalog insert sheet prepared by respondents is identified Commission Exhibit 91. As an example of pricing representations thereon, the "Hampton" watch is identified with the following reference:

36–32080–1908..39.39

The actual retail price which the customer pays is shown by the last four digits in the first part of the reference, i.e., "1908" means the actual price is $19.08. The last four figures "39.39" are a representation that the suggested retail price or the usual and regular retail price is $39.39.

Samuel Felderman, vice president of Benrus Watch Company, testified that only catalog houses were solicited by respondents for the purchase of certain designated watches such as those identified in Commission Exhibits 91 and 92. According to the testimony, Commission Exhibit 92 was a list distributed exclusively to the catalog houses. Mr. Felderman's further testimony was that such watches were available to other customers but he did not know whether any non-catalog customers purchased them. We may infer from the evidence, however, that few, if any, of such watches were sold to other than catalog houses. The finding is that respondents offered and sold certain groups of watches to catalog houses and other groups of watches to other customer categories. The record shows that the catalog houses regularly sold the watches for substantially less than the prices represented to be the usual and regular retail prices. Their usual and regular retail prices were the lower actual prices charged their customers (the "coded" prices). The conclusion is that the generally prevailing retail prices were such "coded" prices and that these were substantially less than the prices represented by respondents as the "retail" prices. Accordingly, the respondents' representations as to the regular retail prices were false and deceptive. *Leeds Travelwear, Inc.*, Docket No. 8140 (Commission decision, July 20, 1962) [61 F.T.C. 152]. Cf *Helbros Watch Company, Inc., et al.* v. *Federal Trade Commission*, 310 F. 2d 868 (D. C. Cir. 1962).

The record additionally supports the examiner's finding that respondents' watches were widely sold in the same trade area at prices significantly less than the advertised or preticketed retail prices. Kansas City, Missouri, is one such area. The evidence taken in this market includes testimony from various retail distributors, all of whom sold respondents' watches, or at least certain groups of respondents' watches, at prices substantially below the preticketed prices. The distributors in Kansas City included jewelry stores or the jewelry departments of stores, a consumer buying organization, catalog houses selling through catalogs as well as through retail outlets, and a wholesale concern which sold at retail. Mr. Hickock, of Emery, Bird, Thayer Dry Goods Company, testified that the watches identified as Superior 25, Space Ranger, Diamond Tiara, and Diamond Glitter all sold at prices under the preticketed amount. Included in his testimony was the statement that the Space Ranger and the Diamond Glitter models were preticketed at $59.50 and sold for $34.50. Mr. Keller of Jones Stores testified that watches identified as Space Ranger and Diamond Glitter were preticketed at $59.50 (stipulated by respondents' counsel) and were sold at $34.50.

The concerns in the Kansas City area selling at retail through catalogs as well as through retail outlets from which testimony was received were Meyer Jewelry Company and Zeff Distributing Co., Inc. The witnesses representing these businesses testified to the effect that in all instances sales were made at prices below respondents' preticketed prices. Other witnesses from Kansas City included Gerald Jaben, of Employers Consumer Organization, Inc., and David Dolginow, of Dolginow's Wholesale Company (a concern selling at retail). The last witness testified that he shopped other stores in competition with his kind of business on a regular basis and that he never found any selling at the preticketed prices. It is clear from the testimony that the differences between the preticketed prices and the actual selling prices were substantial.

The evidence from the Kansas City, Missouri, market, which includes the testimony of representative retailers selling in that market, such as dealers, catalog houses, discount houses and other types of retailers, shows in substance that a number of retailers regularly sell respondents' watches at prices substantially below the preticketed prices. We find and conclude, therefore, that in this market the preticketed prices were not the generally prevailing retail prices or the usual and regular prices for respondents' watches.

The hearing examiner received into evidence a study entitled "A Motivation Pilot Study", identified as Respondents' Exhibit 26. Albert Shepard, president of Motivation Dynamics, Inc., the firm which prepared this study, testified to the effect that it shows the patterns of perception of price among watch purchasers. The study is based upon interviews with consumers. The hearing examiner gave no weight to the study because he found that test III therein indicates unequivocally that a substantial segment of the public would be deceived by respondents' price representations. Respondents take exception to this finding.

We do not agree, nor does it appear that the examiner found, that the study shows that 86 percent of the purchasers of watches interviewed would not be deceived. The examiner decided the question by making the assumption merely for the purpose of his analysis that the study showed a high level of nondeception. The fact is it shows nothing of the kind. If it does show something about "the patterns of perception of price among watch purchasers" as Mr. Shepard testified, it shows very little if anything as to the impression which prospective purchasers or purchasers have in seeing the prices which respondents place on tickets attached to watches or the prices they include in advertising. The impression of the representations is the critical issue. As indicated, the evidence clearly shows that the prices on the tickets were not the regular and usual prices of respondents' watches. The only question, therefore, is what was represented by such tickets as to price. This the study fails to answer.

Moreover, even if the study does show 86 percent nondeception as assumed by the examiner, which it does not, this still leaves 14 percent of the prospective purchasers who may be deceived, and, of course, these are entitled to protection. *Helbros Watch Company, Inc., et al.* v. *Federal Trade Commission*, 310 F. 2d 868, 869 (D.C. Cir. 1962).

Preticketing at fictitious prices must be deemed to have the tendency of deceiving the public as to the savings afforded by the purchase of a product thus tagged, as well as to the value of the product acquired. The practice places a means of misleading the public into the hands of those who ultimately deal with the consumer. *Clinton Watch Company, et al.* v. *Federal Trade Commission*, 291 F. 2d 838, 840 (7th Cir. 1961). See also *Baltimore Luggage Company* v. *Federal Trade Commission*, 296 F. 2d 608 (4th Cir. 1961).

We find and conclude that respondents by misrepresenting their usual and regular prices engaged in false and misleading advertising, and further that respondents, by furnishing advertising materials, such as catalog insert sheets, advertising mats and other advertising to customers, provided their customers with a means of deceiving the public as to the usual and regular prices.

Represented Savings on Trade-Ins

The next allegation, which charge was dismissed by the examiner, concerns the trade-in allowance. The complaint alleges that advertisements stating that a designated amount would be given on a trade-in on an old watch represents that the purchaser will save such amount over the usual and regular retail price and that, in fact, there is no saving of the designated amount or any amount below the usual and regular price. A similar charge is made in connection with the advertising promotion involving "allowance certificates". An "allowance certificate" is a coupon or certificate which states that the holder will be granted a designated allowance upon the purchase of a new watch. The hearing examiner dismissed the trade-in charge, and in this we believe he erred. Commission Exhibit 64 is a typical advertisement offering trade-in allowances. It contains the following price representation:

Price	$59.50
Trade-in allowance	20.00
	39.50
$5 extra for a coupon from *Reader's Digest*	5.00
You pay only	34.50

We find that this is a representation that the prospective purchaser will save $20.00 (for a trade-in) and $5.00 (for the coupon) from the usual and regular price, which price is represented to be $59.50. Retailers sold the watches for which allowances were advertised at the same price whether or not the customer brought in the old watch or the coupon. For instance, in the above illustration the watch was sold for $34.50 whether or not it was sold with a trade-in and the coupon. Dealers so testified. (Transcript 301, 325.) This testimony was from dealers in the Kansas City market, an area in which we have found that the preticketed prices were not the usual and regular prices. Accordingly, the prospective purchaser, believing he would have a saving of $20.00 from the usual and regular price, falsely stated to be $59.50, in fact had no such saving from the true usual and regular price. Similarly, there was no saving of $5.00 for the coupon. The reduction given to the purchaser, if any, was from the fictitious price of $59.50, not from the usual and regular price as represented. In some cases, moreover, dealers did not honor the allowance certificates, and the examiner so found.

We find and conclude that respondents' representations as to savings in connection with trade-in allowances and allowance certificates and as to the honoring by dealers of allowance certificates were misleading and deceptive. Furthermore, they provided means to the dealers for misleading and deceiving the purchasing public.

Guarantee

The complaint alleges deception in connection with use of terms such as "guarantee", "fully guaranteed", and "guaranteed by Benrus". The charge is, in effect, that the terms, conditions and extent to which such guarantee applies and the manner in which the guarantor will perform thereunder are not clearly and conspicuously disclosed in close conjunction with guarantee representations. The examiner dismissed the charge from which counsel supporting the complaint has taken exception.

Respondents have admitted as to the charge on guarantees as follows:

b. Admit that respondents have from time to time represented in advertising, that certain of the corporate respondents' watches are guaranteed.

c. Admit that respondents have represented in some certificates accompanying certain of the corporate respondents' watches that the sum of one dollar must be enclosed with watches returned for servicing, to defray handling charges; and that such information has not been set forth in advertising. State that respondent Benrus has made no such representations in any such certificates accompanying its watches since on or about January 1, 1959.

Thus, respondents have admitted representing their watches as guaranteed without disclosing a service charge. This is an important limitation on respondents' guarantee liability, and the failure to reveal such limitation has the tendency and capacity to mislead and deceive the purchasing public. *Parker Pen Co. v. Federal Trade Commission*, 159 F. 2d 509 (7th Cir. 1946). In addition, the record shows that respondents have referred to guarantees in their advertising representations in a deceptive manner. For instance, Commission Exhibit 61, a guarantee certificate, represents that there is a guarantee on the watch referred to but does not clearly disclose that a service charge is made for sending the watch to respondents. The fact that there is a minimum charge of $1.00 on all watches returned for repair or adjustment is inconspicuously stated in small print remote from the word "guarantee". Accordingly, it is found and concluded that respondents have engaged in deceptive representations in connection with guarantees on their watches. Additionally, by furnishing such representations to their dealers they have provided them with a means of deception. The Commission has prohibited deceptive guarantee claims in watch cases, including the following: *Helbros Watch Company, Inc.*, Docket No. 6807, *aff'd Helbros Watch Company, Inc., et al. v. Federal Trade Commission*, 310 F. 2d 868 (D.C. Cir. 1962); *Hilton Watch & Clock Co., Inc.*, Docket No. 8402; and *The Clinton Watch Company*, Docket No. 7434, *aff'd Clinton Watch Company, et al. v. Federal Trade Commission, supra.* See also the Commission's Guides Against Deceptive Advertising of Guarantees, adopted April 26, 1960. These provide in part that any guarantee in advertising shall clearly and conspicuously disclose (a) the nature and extent of the guarantee, (b) the manner in which the guarantor will perform, and (c) the identity of the guarantor.

"Shock Proof" and "Shock Protected"

The complaint charges that respondents falsely represented their watches as "shock proof" and "shock protected." The hearing examiner dismissed this charge on the ground that the evidence is insufficient. He stated that, to issue an order on the basis of what appears to be a single inadvertent inclusion of a term in advertising would be inappropriate and unjustified. The issue, however, is not so narrow since respondents (except Belforte) admitted in their answer that from time to time they represented certain of respondents' watches as "shock proof" or "shock protected." Commission Exhibits 164 and 171 show the use of the words "shock proof" in advertisements. Accordingly, the examiner's dismissal on the ground of a single violation appears to be clearly in error.

The testimony in the record is to the effect that no watch is absolutely protected against shock or is "shock proof." Henry B. Fried, a teacher of watch making for the New York City Board of Education and an expert in watches, testified in substance that the devices used to cushion shock in watches do not make them shock proof and that at the most such devices provide only shock resistance for certain parts of the watch. Such is revealed in the following colloquy with the examiner:

> Hearing Examiner Buttle: * * *
> Is there such a thing, Doctor, as a shockproof watch?
> The witness: There is no such thing as a shockproof watch in the sense that the watch will break, can break, and does break.
> Hearing Examiner Buttle: So that when you use terminology "shockproof"——
> The witness: It is too broad.
> Hearing Examiner Buttle:—it is a misnomer?
> The witness: It is too inclusive and includes a field far beyond its potential.

This testimony applied to respondents' use of the term "shock proof" as well as to use of the term generally in the watch industry. Respondents themselves seem to recognize the inappropriateness of the term "shock proof" as applied to their watches since the testimony is that they have a current policy not to use the term in their advertising copy.

The hearing examiner, in dismissing the charge as to "shock proof" and "shock protected," cites the trade practice rules relating to such terms promulgated for the watch industry, April 24, 1947 (16 C.F.R. 170.3). Rule 3(a) of these rules provides in substance that it is an unfair trade practice to use the term "shock proof" and other terms relating to shock protection under any false, misleading or deceptive circumstances or in any manner having the capacity and tendency or effect of misleading or deceiving the purchasing public or of aiding sellers in misleading the public. To use the terms referred to in any false or deceptive manner would constitute a violation of Section 5 of the Federal Trade Commission Act. Their use in accordance with Rule 3(a) would be deemed to be compliance with the law. The examiner held that to prove a violation of law, counsel supporting the complaint must show not only that a term such as "shock proof" was used but that it was used in combination with other representations so as to convey the impression that the watch afforded protection from damage beyond that actually afforded. He erred in this holding because nothing in Section 5 of the Federal Trade Commission Act or the rule referred to sets forth such a standard. It is well established on this record that respondents have used the term "shock proof" falsely. They have represented their watches as "shock proof" when in fact the watches are not shock proof. Accordingly, we find and conclude that such representation is false and deceptive and that the furnishing of material containing this term to customers has provided them with a means of deception.

Metal Content of Bezels

The complaint charges deception as to the metal content of bezels. Specifically, Paragraph Ten thereof alleges that bezels treated or processed to simulate gold or gold alloy were not marked clearly to disclose that they are composed of base metal and that this is deceptive. Deception is also charged in connection with using the term "chrome-top case" on bezels not composed throughout of chromium or chrome steel. As to the latter, there is insufficient evidence to prove the charge. However, the examiner erred in dismissing the charge of deception involved in the practice of simulating precious metal. He dismissed the charge because he found as a fact that the bezels were electroplated and contained a trace of gold. We think that he interpreted the language in the complaint too narrowly.

Paragraph Ten states in part, "Respondents' watches are in cases, the bezels of which have been treated or processed to simulate or have the appearance of precious metal, that is, gold or gold alloy. Said watch cases are not marked to disclose clearly that the bezels are composed of base metal." This language is broad enough to cover non-precious or base metal as well as metal containing a trace of gold where the gold content is so small as to be insignificant. The essence of the charge, which is deception as to gold content, is not altered by the fact that the bezels may contain insignificant quantities of gold. We note that the Trade Practice Rules for the Watch Case Industry, promulgated January 30, 1948 (16 C.F.R. PART 174) in effect include, in the category of base metal, metal which has been flashed or coated with a very thin and unsubstantial coating of precious metal. Thus, where the complaint alleges that the watch cases were not marked to disclose clearly that the bezel was composed of base metal, the term "base metal" may be construed as meaning not only metal without gold but also metal with an insignificant quantity of gold. The position of counsel supporting the complaint as to the interpretation of this paragraph of the complaint was clearly made known at the close of the case-in-chief in his reply to respondents' memorandum in support of motion to dismiss. It is in this document that complaint counsel refers to the "thin skinned" products of respondents. Accordingly, the respondents were informed of this construction of the complaint and they had complete and adequate opportunity to defend on the issue. We believe it fair to say that the issue was directly brought into question by the language of the complaint.

Two of respondents' unmarked bezels were put in evidence and identified as Commission Exhibits 174 and 175. Witnesses testified that these bezels had the appearance of gold or gold alloy. Tests of the bezels disclosed that they had gold coverings, respectively, of .00083 of an inch of 18.46 karat gold and .0007 of an inch of 18.32 karat gold. The report of the test is identified Commission Exhibit 179 A–B. The test document further reveals that the gold coating on both bezels referred to had been applied by electroplating.

From the exhibits themselves and testimony of record it is clear that the bezels tested have the appearance of gold or gold alloy. It is also established that they do in fact contain some gold. The mere presence of gold in the coatings, however, does not necessarily mean that markings are unnecessary to prevent deception. A purchaser who is led to believe from appearances that articles are made of substantial gold, when they are only base metal with an insignificant coating of precious metal, would be deceived. *Cf. Theodore Kagen Corp.* v. *Federal Trade Commission*, 283 F. 2d 371 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 843. There the court sustained the Commission in its holding that the base metal bezels of respondents in that proceeding could be mistaken for precious metals, in the absence of a clear disclosure to the contrary, because of the appearance of the bezels.

The record here shows that respondents' bezels, even though containing some gold, were in fact composed of base metal with a thin and unsubstantial coating of gold. The test results disclose that the gold coatings were extremely thin. We note that under the Commission's Trade Practice Rules for the Watch Case Industry a coating of less than 1½/1000 of an inch thickness of precious metal is deemed either base metal or base metal flashed or coated with a very thin and unsubstantial coating. 16 C.F.R. 174.2(9). A bezel with less than 1½/1000 of an inch thickness of gold marked in a manner set forth in such rule would not be considered misleading. Watches improperly marked as to gold content may be found to be deceptive and in violation of the Federal Trade Commission Act. Respondents do not dispute the reasonableness of the rule referred to. In fact, they assert in their reply brief that "* * * the record discloses that respondents, at the present time, mark all the watch cases they manufacture strictly in accordance with the regulations of the Commission."

We find and conclude that the gold appearance of respondents' bezels and the failure of respondents to properly mark them as a base metal or as base metal with a thin and unsubstantial gold coating has the tendency and capacity to mislead and deceive the purchasing public as to the metal content of such bezels. We also find and conclude that respondents, by their failure to properly mark their bezels, have provided their customers with a means of deception.

Counsel supporting the complaint has asked that individual respondent Robert Weil be held in default as to all the charges because of a failure to file a timely answer. The hearing examiner on April 3, 1961, entered an order holding this respondent in default, but further ordered that a hearing be held to determine the form of the "default order" to be entered. Subsequently, on April 13, 1961, respondent Weil filed an answer. The hearing examiner, in view of the answer, stated in his initial decision that no "default judgment" may be entered. He included respondent Weil in the order for the practices which he found to be unlawful. Since respondent Weil, along with other respondents, is found to be in violation of the law as to practically all of the allegations in the complaint, making the question nearly moot, we do not believe that further consideration of the issue is warranted. The contention of complaint counsel is rejected.

Respondents in their exceptions claim there is no evidence that Norman Slater, Martin J. Rasnow and Leo Hyman formulated, directed or controlled the acts and practices here involved. Such responsibility was expressly denied as to the three men in respondents' answer. The hearing examiner, while he made no finding as to the individual responsibility of these respondents, includes them in the order in their individual as well as their official capacities. Counsel supporting the complaint claims that the hearing examiner inadvertently omitted these names in his findings on individual liability and further asserts that the hearing examiner must have been satisfied that policy was jointly determined by the officers. Complaint counsel, however, gives no record support for this view and in fact suggests that the Commission should "either support the order in the initial decision in this respect, or hold the particular individuals as officers of respondent Benrus Watch Company." Moreover, the evidence fails to show that such officers were individually responsible for the violations. In the circumstances, the complaint will be dismissed as to the aforementioned persons in their individual capacities.

The exceptions of complaint counsel are sustained to the extent above indicated and otherwise rejected. Respondents' exceptions likewise are sustained to the extent above indicated and otherwise rejected. It is ordered that the initial decision be modified in accordance with the views expressed in this opinion and that as modified adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Elman concurs in the result.

Final Order

Pursuant to § 4.22(c) of the Commission's Rules of Practice, published May 16, 1962, 27 Fed. Reg. 4609, 4621 (superseded August 1, 1963), respondents were served with the Commission's decision on appeal and afforded the opportunity to file exceptions to the form of the order which the Commission contemplates entering; and

Respondents having timely filed exceptions to the order proposed, which were opposed by a reply thereto filed by counsel supporting the complaint; and the Commission, upon review of these pleadings, having determined that the exceptions filed by the respondents should be disallowed and that the order proposed should be entered as the final order of the Commission:

It is ordered, That the initial decision be modified by striking the findings in paragraphs 7 and 9 through 15 contained in the Findings of Fact and substituting therefor the findings and conclusions of the Commission contained in the Commission's opinion.

It is further ordered, That the initial decision be modified by striking therefrom all paragraphs under the heading "Conclusions" except for those under the Roman numeral IX.

It is further ordered, That respondents Benrus Watch Company, Inc., a corporation, Belforte Watch Company, Inc., a corporation, and their officers, Oscar M. Lazrus and Benjamin Lazrus, individually and as officers of the above-named corporations, and Harvey M. Bond, Stanley M. Karp, Samuel M. Feldberg, Jay K. Lazrus, Robert Weil, Clifford L. J. Siegmeister, and Julian Lazrus, individually and as officers of Benrus Watch Company, Inc., and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watches or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. The act or practice of preticketing merchandise at an indicated retail price, or otherwise setting forth an indicated retail

price as to merchandise in any material disseminated or intended for dissemination to the public, when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area or when there is no generally prevailing retail price for such merchandise in the trade area.

2. The act or practice, in connection with the use of trade-in allowances, allowance certificates, coupons, or other promotions offering price reductions, of setting forth an indicated retail price for which reductions or allowances are to be made unless there is a generally prevailing retail price in the market in which the act or practice is engaged in, and such indicated retail price is not in excess of the generally prevailing retail price in said market.

3. Representing, directly or by implication:

a. That their merchandise is guaranteed unless the nature and extent of the guarantee and the manner in which the guarantor shall perform thereunder are clearly and conspicuously disclosed.

b. That their watches are "shock proof" or "shock protected" or otherwise representing that their watches possess greater shock resistance than is a fact.

c. That dealers in their merchandise will allow a certain amount against the indicated retail price thereof upon the presentation of an allowance certificate or coupon or for any reason in connection with the purchase of said merchandise, unless such allowance is granted without exception.

4. Offering for sale or selling watches, the cases of which are in whole or in part composed of base metal which has been treated to simulate precious metal, without clearly and conspicuously disclosing on such cases the true metal composition of such treated cases or parts.

5. Offering for sale or selling watches, the cases of which are in whole or in part composed of base metal which has been treated with an electrolytically applied flashing or coating of precious metal of less than 1-1/2/1000 of an inch over all exposed surfaces after completion of all finishing operations, without clearly and conspicuously disclosing on such cases or parts that they are base metal which have been flashed or coated with a thin and unsubstantial coating.

6. Supplying to, or placing in the hands of, any jobber, retailer, dealer, or other purchaser, means and instrumentalities by and through which they may deceive and mislead the pur-

chasing public in respect to practices prohibited in paragraphs 1 through 5 above.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondent Robert Gasser and as to respondent S. Ralph Lazrus, who is deceased.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Norman Slater, Martin J. Rasnow and Leo Hyman in their individual capacities.

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

It is further ordered, That the respondents, except Robert Gasser and S. Ralph Lazrus, 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 set forth herein.

Commissioner Elman not concurring in the provisions of the order, and Commissioner Reilly not participating.

IN THE MATTER OF

BULOVA WATCH COMPANY, INC.

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

Docket 7583. Complaint, Sept. 11, 1959—Decision, Feb. 28, 1964

Order dismissing—on findings that in three of the four communities selected for investigation, the respondent's watches were fair-traded and the preticketed prices were the prevailing prices—complaint charging a watch manufacturer with preticketing its watches with fictitious prices, thereby representing that said prices were the usual retail prices in the trade areas concerned.

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 Bulova Watch Company, 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:

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*Paragraph 4 is set forth as amended by order of hearing examiner dated Feb. 10, 1960.

PARAGRAPH 1. Respondent Bulova Watch Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at Bulova Park, in the City of Flushing, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacturing, assembling, advertising, offering for sale, sale and distribution of watches to retailers, distributors and jobbers and others for ultimate resale to the public.

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

PAR. 4. Respondent has engaged in the practice of using fictitious prices by attaching or causing to be attached to the watches themselves, or by placing or causing to be placed in conjunction therewith, tickets or tags upon which certain amounts are printed, thereby representing, directly or by implication, that said imprinted amounts are the usual and customary retail prices for said watches in the trade areas where offered for sale. In truth and in fact, said amounts are not the usual and customary prices for said watches in trade areas where offered for sale but are fictitious.

PAR. 5. Respondent, by the aforesaid practice, places 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 its watches.

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

PAR. 7. The use by respondent 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 respondent's watches 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.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's 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 Middleton and *Mr. Francis Charleton* for the Commission.

Mr. Sol E. Flick, Bulova Watch Company, Inc., New York, N.Y., for respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

OCTOBER 11, 1962

The Federal Trade Commission on September 11, 1959, issued and subsequently served a complaint in this proceeding upon respondent.

The crux of the charges alleged in the complaint as amended is set forth in Paragraph Four thereof as follows:

PARAGRAPH FOUR: Respondent has engaged in the practice of using fictitious prices by attaching or causing to be attached to the watches themselves, or by placing or causing to be placed in conjunction therewith, tickets or tags upon which certain amounts are printed, thereby representing, directly or by implication, that said imprinted amounts are the usual and customary retail prices for said watches in the trade areas where offered for sale. In truth and in fact, said amounts are not the usual and customary prices for said watches in trade areas where offered for sale but are fictitious.

Respondent, before offering testimony in support of its defense, moved to dismiss the amended complaint, and in the alternative, to have the testimony of the New York City witnesses stricken on jurisdictional grounds claiming that the sales of watches in New York City did not involve interstate commerce, but intrastate commerce only. The basis of this contention was that the watches were manufactured by Bulova in New York and sold to retailers in New York for consumer purchase in that trade area. The hearing examiner denied respondent's motion on this premise, since the evidence established that the respondent engaged in nation-wide advertising through interstate media of communication for the purpose of inducing interstate sales. Furthermore, aside from the use of interstate communications to consummate sales, the nation-wide advertising conceded by respondent serves as an inducement to consumers residing in states adjoining New York such as New Jersey and Connecticut to make retail purchases in the New York City market which extends beyond the borders of the State of New York. See *Progress*

Tailoring Co., et al. v. *Federal Trade Commission*, 153 F. 2d 103 and *Ford Motor Company* v. *Federal Trade Commission*, 120 F. 2d 175, 314 U. S. 668.

Respondent also moved to have this proceeding discontinued or suspended pending institution of a trade practice conference. This relief was also denied by the hearing examiner, premised upon the fact that he was without authority to grant such relief and that an appropriate application therefor would have to be made to the Commission itself.

On April 5, 1962, the hearing examiner closed the hearings subject to a motion by respondent to reopen. Respondent so moved and, on July 19, 1962, further testimony was taken and the hearings closed. In moving to reopen respondent also requested leave to file a supplemental answer, which request was granted, and the supplemental answer was duly filed.

Following hearings on the issues, proposed findings and conclusions and proposed orders were filed by counsel supporting the complaint and counsel for respondent. Oral argument was had thereon on September 11, 1962. The examiner has carefully reviewed and considered the proposed findings and briefs, and oral argument of counsel. Proposed findings which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters. Upon the entire record in the case, the hearing examiner makes the following:

FINDINGS OF FACT

1. Bulova Watch Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at Bulova Park, in the city of New York, New York.

2. Respondent is now and for some time last past has been engaged in the manufacture, assembling, advertising, offering for sale, sale and distribution of watches to retailers for resale to the public, to post exchanges and ship stores and to premium houses.

3. Respondent does not sell to jobbers or wholesalers, with the single exception of premium jobbers, which latter group distributes watches not for resale but for incentive award programs.

4. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said watches, when sold, to be shipped from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintains, and at all times mentioned herein has maintained, a substantial course of trade

in watches in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. Respondent in the course of its business is in substantial competition with corporations, firms and individuals in the sale of watches in Washington, D.C.; Newark, New Jersey; New York City, New York; Boston, Massachusetts, and elsewhere throughout the United States.

6. Respondent has been selling its watches for approximately fifty years.

7. Respondent sells directly to approximately seventeen thousand (17,000) authorized retail dealers. Respondent's customers include retail jewelers who are able to provide watch repairs and maintenance.

8. At the time respondent's watches are shipped from its plant in Flushing, New York, each watch bears a price tag which respondent prefixes to the box or container. Respondent does not furnish its customers with any other price ticket.

9. Approximately 75 percent, by volume, of respondent's watches are sold by its customers on credit, as contrasted to cash or charge account sales, and it is undisputed that all credit sales of respondent's watches are at the full ticket price. Of the dealers who testified that they are cash or cash and credit retailers, rather than straight credit retailers, several stated that they always received the full ticketed price.

10. Respondent's watches are classified by a number of series, and each series, in turn, includes a number of models which vary in certain characteristics although having a common characteristic.

11. Each individual model always bears the same price wherever and to whomever it may be shipped.

12. Respondent manufactures and sells to its customers between 350 and 400 different models, having prefixed prices ranging from $24.75 to $350, at an average discount of 50 percent therefrom.

13. Respondent has adopted fair trade agreements governing the prices at which its watches can be sold in every State, including New Jersey, Massachusetts and New York, where such agreements are authorized under state law.

14. Respondent, twice a year, sends a fair trade price list for all its watches to all of its dealers in each fair trade state.

15. The price on the tag affixed by respondent to a particular model watch is always the same without regard to the particular customer to whom it is being sent, and that price is identical with the one appearing for the same watch on the fair trade price list.

16. Respondent sends warning letters and telegrams to retailers when it first discovers a violation of its fair trade agreement. Re-

spondent also regularly enforces its fair trade agreements by means of litigation. In 1962, respondent had forty fair trade enforcement proceedings pending in the United States, of which three were pending in Massachusetts and two in Newark, New Jersey.

17. The testimony adduced in support of the complaint relates to the following trade areas only: New York City, Boston, Newark and the District of Columbia.

18. Respondent urges a finding that the primary purpose in preticketing its watches is the protection of the consumer in that it enables him to comparatively evaluate their dollar worth and the secondary purpose is to assist the retailer in pricing the watches. The evidence supports such a finding. However, as pointed out by Commissioner Elman in rendering the Commission's opinion in the Rayex case, Docket No. 7346, "In appraising the capacity of a business practice to deceive and mislead, it is not the understanding or purpose of the manufacturer or distributor or dealer that is of critical importance; rather, it is the public impression created by that practice. And, so far as many members of the public are concerned, the impression made by preticketing is that it is the manufacturer's indication of the approximate retail value of his product, *i.e.*, his representation that this is what it should and generally does sell for in the sales area."

19. Respondent engages in a national advertising program utilizing all mass media of communication.

20. Respondent has spent $112,000,000 over the last 25 years in advertising. Since 1950 through 1961, respondent has spent $78,000,000 on advertising and the current advertising budget is $3,500,000, and respondent currently advertises in national media such as Life, Look, Ebony, Time, U.S. News & World Report, Newsweek, New Yorker, Fortune, Sports Illustrated, National Geographic magazines.

21. Respondent has been advertising on television at least since 1951, and currently sponsors the following nationally shown television programs: The Outlaws, The Detectives, Laramie, 87th Precinct, International Showtime, Saturday Night at the Movies.

22. All of respondent's advertising always includes the preticketed prices.

23. Respondent does not furnish its dealers with price tickets other than those physically attached to the boxes containing its watches.

24. Respondent does not furnish any "inserts" to the catalog houses to which it sells.

25. The evidence establishes that during the period contemplated by the complaint, respondent's watches have been sold in the retail market in the trade areas in which proof was adduced [1] at the preticketed prices and at various prices less than the preticketed price.

26. In the course and conduct of its business, respondent has made deceptive and misleading representations with respect to the prices of its watches in Washington, D.C. In attaching or causing to be attached to the watches themselves, or by placing or causing to be placed in conjunction therewith, tickets and tags upon which certain amounts are printed, respondent thereby represented directly or by implication that said imprinted amounts are its usual or customary retail prices for said watches in the Washington, D.C. trade area where offered for sale. In truth and in fact, said amounts are not the usual and customary prices for said watches in the aforesaid trade area since the evidence adduced establishes that in a substantial number of instances said watches of the respondent were sold at a price less than the ticketed price.[2] This being the case, the hearing examiner finds respondent's price tickets to be unlawfully misleading in that they conveyed the impression that the stated prices were the regular and usual retail prices for the watches when in fact the price pattern as evidenced indicate the nonexistence of a usual and regular price. Under these circumstances, it would appear that the price tickets provided by the respondents are meaningless and if so, fictitious. However, with regard to the Newark, New Jersey, New York City, New York, and Boston, Massachusetts areas, the evidence is abundant that, although the prices of respondent's watches vary from the ticketed price to some degree, the respondent has been diligent and reasonably successful in enforcing its preticketed prices as the fair trade prices of its watches. Under these circumstances preticketing cannot be deemed to be meaningless and therefore fictitious or misrepresentative. To the contrary, the respondent's preticketed prices are exceptionally meaningful as a media for enforcement of predetermined prices within the scope of the fair trade laws of New York, New Jersey and Massachusetts. A substantial likelihood of deception would therefore appear to be remote since the ticketed price (also the fair trade price) of respondent's watches is the usual and regular price generally prevailing in the Newark, New Jersey, New York City and Boston, Massachusetts trade areas.[3]

[1] See Finding of Fact No. 17.

[2] See testimony of Cohen (Tr. 288); Ahren (Tr. 311) and Greenbaum (Tr. 325).

[3] See opinion of Commissioner Elman in the matter of Rayex Corporation et al, Docket No. 7346, dated April 2, 1962 [60 F.T.C. 664], particularly at pages 3 and 4 thereof. A rule of reason is clearly applicable. Although the Act is protective of the most *unsuspecting,* such protection cannot be deemed to extend to those who are unreasonably so.

The constitutionality of the fair trade laws of Massachusetts, New Jersey and New York, to wit, Massachusetts General Laws, 1932, Chap. 93, Sec. 14A–14D, New Jersey Revised Statutes, 1937, Title 56, Chap. 4, Art. 2 and New York General Business Law, 19 McKinney's, Sec. 369, including the non-signer provisions, has been upheld by the highest court of each state under both Federal and State constitutional objections. *General Electric Co.* v. *Kimball Jewelers, Inc.*, 333 Mass. 665, 132 N.E.2d 652 (1956); *Lionel Corp.* v. *Grayson-Robinson Stores, Inc.*, 15 N.J. 191, 104A 2d 304 (1954), appeal dismissed for want of a substantial federal question sub nominee *Grayson-Robinson Stores, Inc.* v. *Lionel Corp.*, 348 U.S. 859; *General Electric Co.* v. *Masters, Inc.*, 307 N.Y. 229, 120 N.E.2d 802 (1954), appeal dismissed for want of a substantial federal question sub nominee *Masters, Inc.* v. *General Electric Co.*, 348 U.S. 892.

CONCLUSIONS

1. The Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

2. The use by the respondent of the aforesaid false, misleading and deceptive representations in Washington, D.C., as to prices has had and now has the capacity and tendency to mislead and deceive members of the purchasing public into the mistaken belief that the stated prices were the usual and regular retail prices for the watches so marked, thus providing dealers in respondent's watches in Washington, D.C., with the means of deceiving the purchasing public. This deception, however, does not extend to those trade areas such as New York City, New York, Boston, Massachusetts and Newark, New Jersey, where there is no substantial likelihood of deception since the ticketed price is the enforced fair trade price. For this reason the cease and desist order hereinafter set forth is limited to the Washington, D.C., and other jurisdictions in which fair trade agreements are not enforceable since there is no substantial likelihood of deception resulting from respondent's preticketed prices elsewhere.

3. The aforesaid acts and practices of respondent as hereinabove found are 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.

ORDER

It is ordered, That in selling watches in commerce, as "commerce" is defined in the Federal Trade Commission Act, that respondent

Bulova Watch Company, Inc., a corporation, and its officers, representatives, agents and employees, acting for or in behalf of respondent corporation, do forthwith cease and desist from the act or practice of preticketing watches for sale in Washington, D.C., and other jurisdictions in which fair trade agreements are not enforced, at an indicated retail price, or of otherwise conveying an impression to the public concerning such retail prices in said trade areas when there is no generally prevailing retail price for such watches, or when the indicated retail price is in excess of the prices at which such merchandise is sold at retail in a substantial segment of the area, and it is

Further ordered, That respondent Bulova Watch Company, Inc., a corporation, and its officers, representatives, agents and employees, acting for or in behalf of respondent corporation, do forthwith cease and desist from placing in the hands of jobbers, retailers and dealers, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning the usual and regular prices of its watches in the respects set out above.

Opinion of the Commission

FEBRUARY 28, 1964

This matter is before the Commission for consideration of exceptions to the hearing examiner's initial decision filed by counsel supporting the complaint and by counsel for respondent.

The amended complaint in this matter in effect charges respondent watch manufacturer with having violated Section 5(a)(1) of the Federal Trade Commission Act [1] by preticketing its watches with fictitious prices and thereby representing, directly or by implication, that said prices are the usual and customary retail prices for such watches in the trade areas where offered for sale, when in truth and in fact the watches usually sell for substantially lower prices. The complaint further charges that by the above practice respondent places 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 its watches. Respondent's answer essentially denied all material charges of the complaint.

To prove his case, counsel in support of the complaint relied principally upon testimony of twenty-four watch retailers from the following four communities: New York City; Newark, New Jersey; Boston, Massachusetts; and Washington, D.C. Counsel for respond-

[1] 38 Stat. 719 (1914); 52 Stat. 111 (1938); 15 U.S.C.A. § 45(a)(1).

ent produced thirty-one rebuttal witnesses from the latter three of the above areas.

On October 11, 1962, the hearing examiner issued his initial decision, holding that the allegations of the complaint had been sustained in only the Washington, D.C., area. The order proposed by the hearing examiner would require respondent to cease and desist from falsely preticketing watches " * * * for sale in Washington, D.C., and other jurisdictions in which fair trade agreements are not enforced * * * ."

Respondent has taken exception to the hearing examiner's finding that the evidence concerning the sale of respondent's watches at retail in Washington, D.C., provides sufficient basis for the order and has requested that the complaint be dismissed. Counsel in support of the complaint has taken exception to the order on the basis that it is too narrow, in view of the hearing examiner's finding that the watches had been sold in all of the above-mentioned communities " * * * at various prices less than the preticketed price."

Subsequent to the date on which the initial decision herein was filed, the Commission promulgated Guides Against Deceptive Pricing (effective January 8, 1964) which deal specifically with practices of the type challenged in this proceeding. Guide III thereof relates to the advertising of retail prices which have been established or suggested by manufacturers and states in pertinent part:

> * * * Typically, a list price [which includes a pre-ticketed price] is a price at which articles are sold, if not everywhere, then at least in the principal retail outlets which do not conduct their business on a discount basis. It will not be deemed fictitious if it is the price at which substantial (that is, not isolated or insignificant) sales are made in the advertiser's trade area (the area in which he does business). Conversely, if the list price is significantly in excess of the highest price at which substantial sales in the trade area are made, there is a clear and serious danger of the consumer being misled by an advertised reduction from this price.
>
> * * * * * * *
>
> * * * a manufacturer or other distributor who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises or disseminates a list or pre-ticketed price in good faith (i.e., as an honest estimate of the actual retail price) which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice.

We have reviewed the record in this case and can find no evidence that respondent has preticketed its watches with amounts in excess of the highest prices at which substantial sales were made in the area in which it was doing business. As a matter of fact, the record discloses that in three of the four communities selected by counsel supporting the complaint to show that respondent engaged in fictitious pricing, the products are fair traded and the preticketed prices are the prevailing prices of this merchandise.[2] The hearing examiner has made the following finding concerning the retail prices of respondent's watches in these communities:

> * * * with regard to the Newark, New Jersey, New York City, New York, and Boston, Massachusetts areas, the evidence is abundant that, although the prices of respondent's watches vary from the ticketed price to some degree, the respondent has been diligent and reasonably successful in enforcing its preticketed prices as the fair trade prices of its watches. Under these circumstances preticketing cannot be deemed to be meaningless and therefore fictitious or misrepresentative. To the contrary, the respondent's preticketed prices are exceptionally meaningful as a media for enforcement of predetermined prices within the scope of the fair trade laws of New York, New Jersey and Massachusetts. A substantial likelihood of deception would therefore appear to be remote since the ticketed price (also the fair trade price) of respondent's watches is the usual and regular price generally prevailing in the Newark, New Jersey, New York City, and Boston, Massachusetts trade areas.

Under these circumstances we find no basis for holding that respondent's preticketed prices were fictitious or that the practices challenged by the complaint were deceptive under the new pricing guides. Consequently, the complaint will be dismissed and an order so providing will be issued herewith.

Commissioner MacIntyre not participating, and Commissioner Reilly not participating for the reason that he did not hear oral argument.

Final Order

FEBRUARY 28, 1964

Respondent and counsel in support of the complaint having filed exceptions to the hearing examiner's initial decision, and the matter having been heard on briefs and oral argument; and

The Commission having concluded for the reasons stated in the accompanying opinion that the record fails to establish that the practices challenged by the complaint herein are in violation of Section 5 of the Federal Trade Commission Act, and having further concluded that the complaint should be dismissed:

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

By the Commission, Commissioner MacIntyre not participating and Commissioner Reilly not participating for the reason that he did not hear oral argument.

[2] It also appears that even in the one community, Washington, D.C., where the examiner found that the preticketed prices were "meaningless", twelve dealers testified that they sold respondent's watches at the preticketed prices and the majority of these dealers testified that they sold exclusively at such prices.

IN THE MATTER OF

CARROLL F. CHATHAM TRADING AS CHATHAM RESEARCH LABORATORIES ET AL.

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

Docket 7609. Complaint, Oct. 13, 1959—Decision, Feb. 28, 1964

Order reinstating consent order of Apr. 4, 1960 (56 F.T.C. 1196)—vacated April 5, 1962—requiring a San Francisco manufacturer of man-made stones having the appearance of emeralds, and the New York City wholesalers of the stones, to cease representing falsely that said stones were cultured or natural or identical to natural stones, and using the word "emerald" as descriptive thereof unless preceded by the word "synthetic" or some other word which would clearly disclose that the product was not natural; and adding the provision that the charges of the complaint be dismissed in so far as they might be construed to allege that the term "Chatham-Created Emeralds" was deceptive.

Mr. Berryman Davis and *Mr. Paul F. Helfer* for the Commission.

Mr. Caesar L. Pitassy, New York, N.Y., for respondents *Mr. Carroll L. Chatham*, trading as Chatham Research Laboratories, Anglomex, Inc., and *Mr. Dan E. Mayers.*

Mr. Peter W. Quinn, New York, N.Y., for respondents Ipekdjian, Inc., *Mr. Adom Ipekdjian*, *Mr. Georges Ipekdjian*, and Cultured Gem Stones, Inc.

Hollabaugh & Jacobs, Washington, D.C., for all respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

SEPTEMBER 4, 1963

The Federal Trade Commission issued a complaint herein on October 13, 1959, charging in effect that respondents' advertising was misrepresentative. The complaint alleged that respondents variously referred to their product as "Chatham Emeralds" and "Chatham Cultured Emeralds", and claimed their stones are identical to natural emeralds in all their properties; that these statements were exaggerated, false, misleading and deceptive because the stones were not identical to emeralds, but were synthetic.

Soon after the complaint was issued, the parties entered into discussions for the purpose of working out a consent order. The chronology of events at that time is hereinafter set forth.

On December 28, 1959, counsel for respondents wrote the Commission's Compliance Division, referring to the discussions and to a proposed consent order submitted by the Commission. In this letter [1] counsel stated:

> As we understand it, your position is that the use by respondents, in connection with their advertising, of the phrase "Chatham-Created Emeralds" would not violate the proposed order, and that the Compliance Division would so recommend to the Commission in the event the question, whether or not that phrase violates the proposed order, is ever raised by or before the Commission.
>
> Would you be kind enough to confirm by letter that the foregoing accurately sets forth the substance of our conferences.

The reply of the Compliance Division dated January 11, 1960, states: [2]

> In response to your letter of December 28, 1959, it is my personal opinion that "Chatham-Created Emeralds" would comply with the terms of the proposed consent order forwarded by you.
>
> You are again reminded, however, that this opinion is not binding on our Bureau of Consultation or the Commission.

After receiving these assurances, the respondents and counsel for the Commission signed an Agreement for a Consent Order, dated February 3, 1960.[3] This was accepted by Hearing Examiner Walter R. Johnson whose Initial Decision of February 29, 1960, contained an order requiring respondents to cease and desist from:

> 1. Representing, directly or by implication, that such stones have been cultured, are natural stones, or are identical to natural stones;
>
> 2. Using the word "emerald" or the name of any other precious or semiprecious stone as descriptive of such stones unless such word or name is immediately preceded, with equal conspicuity, by the word "synthetic" or by some other word or phrase of such meaning as clearly to disclose the nature of such product and the fact that it is not a natural stone; provided, however, that this prohibition shall not be construed as requiring respondents, or any of them, to disclose the method or process, or any part thereof, used by respondent Chatham in the manufacture of his stones.

The hearing examiner's Initial Decision became the decision of the Commission on April 4, 1960 [56 F.T.C. 1196], and in an order issued April 8, 1960, respondents were directed to submit a compliance re-

[1] RX 1.
[2] RX 2.
[3] RX 3.

port. They claim they have complied.[4] In this connection, they adopted the name "Chatham-Created Emeralds", having previously received the Compliance Division's qualified assurance concerning the use of the term.

On July 27, 1960 (RX-6), the Compliance Division advised the respondents that on July 25, 1960, the Commission itself decided that the term "Chatham-Created Emeralds" does not violate the order, unless used ambiguously. It has to be made clear "that it is only the 'emerald' which has been created by Chatham." "Great care should be taken to see to it that the words 'Chatham-Created' are adjectives to and modify the word 'emeralds' and nothing else", the Commission directed.

Respondents gave assurances that such care would be observed[5] and on September 21, 1960, submitted a further compliance report.[6] Thereafter, respondents received a letter dated November 18, 1960, from the Acting Assistant General Counsel for Compliance,[7] which stated:

> On November 15, 1960, the Commission rescinded its action of July 25, 1960, wherein it accepted your use of the term "Chatham-Created Emerald" when not used ambiguously.
>
> The Commission directed that you be required to modify the term in conformity with the order to cease and desist.

No reasons were stated in the letter for the action taken by the Commission on November 15, 1960. Respondents requested the Commission to reconsider its action of November 15, which request was denied by the Commission on January 24, 1961.

On January 19, 1962, the Commission issued an Order to Show Cause Why Order to Cease and Desist Should Not be Vacated, Complaint Amended, and Further Proceedings Conducted. On March 26, 1962, respondents filed a Memorandum Showing Cause in which they requested a hearing prior to a reopening of the case in reliance upon the provisions of Section 5(b) of the Federal Trade Commission Act and Section 4.29 of the Commission Rules of Practice. On April 5, 1962 [60 F.T.C. 1889], the Commission issued an Order Reopening

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[4] RX 5.
[5] RX 7.
[6] RX 8.
[7] RX 9.

Matter, Vacating Order, Amending Complaint and Remanding for Further Proceedings. This order amended Paragraphs Four, Five and Six of the original complaint. In amended Paragraph Four the respondents were charged again with calling their product "Chatham Emeralds" and "Chatham Cultured Emeralds", and also with calling their product "Chatham-Created Emeralds", even though the use of this name had been previously approved by the Commission. The amended complaint was accompanied by a proposed new order which would require respondents to cease and desist from:

1. Representing, directly or by implication, that such stones have been cultured, are natural stones, or are identical to natural stones;

2. Using the word "emerald" or the name of any other precious or semiprecious stone as descriptive of such stones, unless such word or name is immediately preceded, with equal conspicuity, by the word "synthetic".

The matter was assigned to the hearing examiner for further proceedings. Thereafter, on April 23, 1962, respondents filed a Motion to Reconsider and to Rescind, Vacate or Set Aside the Order Issued April 5, 1962, contending the Commission acted without authority in issuing the reopening order, in that respondents were not granted a hearing as was requested in their Memorandum Showing Cause dated March 26, 1962. The Commission denied the motion on May 29, 1962 [60 F.T.C. 1891].

Thereafter, on July 11, 1962, the respondents filed their answer, two prehearing conferences were held, prehearing briefs were filed, hearings before the undersigned hearing examiner commencing on May 13, 1963, in New York City, extended over a period of approximately four weeks, and an order was entered closing testimony as of June 20, 1963.

The history of the proceedings reflects that from the initial stages, respondents have adopted a cooperative attitude. The initial order was agreed to without undue delay, and after assurances were obtained that what respondents proposed to call their product would be in compliance with the order.

The hearing examiner has carefully considered the proposed findings of fact and conclusions submitted by counsel in support of the complaint and counsel for the respondents, and such proposed findings and conclusions if not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case the hearing examiner makes the following findings of facts and conclusions:

FINDINGS OF FACT

1. Respondent Carroll F. Chatham is an individual trading as Chatham Research Laboratories, with his principal office and place of business located at 70 - 14th Street, in the city of San Francisco, State of California. [8]

2. Respondent Anglomex, 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 214 East 18th Street, in the city of New York, State of New York. Respondent Dan E. Mayers is president and principal owner of this corporate respondent. He formulates, directs and controls the acts and practices of this said corporate respondent, including the acts and practices hereinafter set out. The address of this individual respondent is the same as that of the said corporate respondent.[9]

3. Respondent Ipekdjian, 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 580 Fifth Avenue, in the city of New York, State of New York. Respondent Georges Ipekdjian is the president and respondent Adom Ipekdjian the vice president of this said corporate respondent. These individuals formulate, direct and control the policies, acts and practices of this corporate respondent, including the acts and practices hereinafter set out. The address of these individual respondents is the same as that of the said corporate respondent.[10]

4. Respondent Cultured Gem Stones, 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 580 Fifth Avenue, in the city of New York, State of New York. This corporate respondent is a whollyowned subsidiary of corporate respondents Ipekdjian, Inc. Respondent Georges Ipekdjian is the president and respondent Adom Ipekdjian the vice president and treasurer of this said corporate respondent. These individuals formulate, direct and control the policies, acts and practices of this corporate respondent, including the acts and practices hereinafter set out. The address of these individual respondents is the same as that of the said corporate respondent.[11]

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[8] See complaint and answer.
[9] See complaint and answer.
[10] See complaint and answer.
[11] See complaint and answer.

5. Respondent Carroll F. Chatham is now, and for some time past has been, engaged in the manufacture of synthetic stones which have the appearance of emeralds, advertising the same, and the sale thereof to respondents Anglomex, Inc., and Dan E. Mayers. In the course and conduct of his business, respondent Carroll F. Chatham causes his said synthetic stones to be moved from his place of business in San Francisco to a receiver located in New York City who acts in the capacity of a grader of such merchandise on behalf of respondents Anglomex, Inc., Dan E. Mayers, Ipekdjian, Inc., Cultured Gem Stones, Inc., Adom Ipekdjian and Georges Ipekdjian.[12]

6. Respondents Anglomex, Inc., and Dan E. Mayers are now, and for some time last past have been, engaged in the sale to respondents Ipekdjian, Inc., Adom Ipekdjian and Georges Ipekdjian of synthetic stones manufactured by, and purchased from, respondent Carroll F. Chatham, and delivered by said Carroll F. Chatham to the aforementioned grader. Thereafter, respondents Anglomex, Inc., and Dan E. Mayers require the grader to deliver such synthetic stones to respondents Ipekdjian, Inc., Adom Ipekdjian and Georges Ipekdjian. Respondents Anglomex, Inc., and Dan E. Mayers oversee, direct and control advertising which is disseminated by respondents Ipekdjian, Inc., Adom Ipekdjian and Georges Ipekdjian in their promotion and sale of such synthetic stones to retailers of jewelry and to the purchasing public.[13]

7. Advertising disseminated by respondents Ipekdjian, Inc., Adom Ipekdjian and Georges Ipekdjian in their promotion of synthetic stones manufactured by respondent Carroll F. Chatham is approved by respondents Carroll F. Chatham, Anglomex, Inc., and Dan E. Mayers.[14]

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[12] Partially admitted by answer. That respondent Chatham is now, and for some time has been, engaged in advertising synthetic stones manufactured by him is reflected by the record. See Tr. 116 and 223, also 134–136 showing that this respondent participated in the preparation of CX 4B–D, copy containing claims basic to all subsequent copy. See CX's 3, 13, 14, and 15A.

That the stones in question are synthetic was conceded by Chatham who makes them. Tr. 166–167.

That the stones are those stones advertised and sold by the other respondents as Chatham Cultured Emeralds or Chatham-Created Emeralds is thoroughly demonstrated by the evidence. See Tr. 114, 121, 200, 201.

See Tr. 160, 161 to the effect that the stones are not cultured.

[13] Partially admitted by answer. To the effect that respondent Anglomex, Inc., and respondent Dan E. Mayers oversee, direct and control the advertising in question which respondents Ipekdjian, Inc., Cultured Gem Stones, Inc., and Adom and Georges Ipekdjian have disseminated and are disseminating in the promotion of the synthetic stones simulating the appearance of emeralds manufactured by respondent Carroll F. Chatham is established by testimony, see Tr. 208 and 209, and related CX's 12, 13, 14, 15, and 16.

[14] CX's 4, 5, 10, 12, 13, 14, and 15.

8. Respondents Ipekdjian, Inc., Adom Ipekdjian and Georges Ipekdjian are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of natural and synthetic stones, including synthetic stones manufactured by respondent Carroll F. Chatham, which said synthetic stones are those synthetic stones that have been sold by respondent Carroll F. Chatham as aforesaid to respondents Anglomex, Inc., and Dan E. Mayers, and thereafter purchased by respondents Ipekdjian, Inc., Adom Ipekdjian and Georges Ipekdjian from respondents Anglomex, Inc., and Dan E. Mayers.[15]

9. Respondents Cultured Gem Stones, Inc., Adom Ipekdjian and Georges Ipekdjian are now, and for some time last past have been, engaged in the sale and distribution in interstate commerce of synthetic stones, which said synthetic stones are those same synthetic stones that have been manufactured by respondent Carroll F. Chatham, purchased therefrom by respondents Anglomex, Inc., and Dan E. Mayers, and sold by the latter to respondent Ipekdjian, Inc., the corporate parent of corporate respondent Cultured Gem Stones, Inc.[16]

10. All of the respondents have cooperated and acted together in the advertising and promotion, and sale to the public, of synthetic stones which they described and referred to as Chatham Cultured Emeralds, Chatham-Created Emeralds and Chatham Emeralds.[17]

11. In the course and conduct of their businesses, respondents Ipekdjian, Inc., Cultured Gem Stones, Inc., Adom Ipekdjian and Georges Ipekdjian now cause, and for some time last past have caused, their said synthetic stones, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other states of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said synthetic stones in commerce, as "commerce" is defined in the Federal Trade Commission Act, in the maintenance of which said course of trade

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[15] Partially admitted by answer.

That respondents Ipekdjian, Inc., and the two Ipekdjians engaged, and now are engaged, in advertising and selling the synthetic stones in question is clearly established by the evidence. See Tr. 200, 215 and 237, and related CX's 19-23, 25-34.

[16] Partially admitted by answer.

Also see footnote 12 as to evidence stones are synthetic. That sales and distribution of such synthetic stones have been made is also evidenced. See Tr. 215 and CX's 19-23 and 25-34.

[17] The interrelationship of all respondents leading to the sale of the synthetic stones at issue manufactured by respondent Chatham is thoroughly evidenced despite claims to the contrary. See also footnotes 12-16.

these said respondents were aided, assisted and abetted by respondents Carroll F. Chatham, Anglomex, Inc., and Dan E. Mayers.[18]

12. In the course and conduct of their businesses, and for the purpose of inducing the sale of their synthetic stones, respondents have made certain statements with respect to the nature of the synthetic stones offered for sale and sold by them, in advertisements in magazines of national circulation and by other means, of which the following are typical:

Chatham Emeralds
Chatham-Created Emeralds
Chatham Cultured Emeralds

These stones are identical to natural emeralds in all of their properties: chemically, physically, optically, with the same crystal faces, atomic arrangement, and even the same inclusions and "gardens".[19]

13. Through the use of the aforesaid false representations (with the exception of the statement "Chatham-Created Emeralds" unaccompanied by other representations set forth in Finding No. 12, and also unaccompanied by the advertiser's name as "Cultured Gem Stones, Inc." [20] respondents misrepresented that their said synthetic stones or synthetic emerald products had been cultured, were emeralds and were identical to emeralds, when in fact they were not natural, not cultured, and not identical in all respects.[21]

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[18] Partially admitted by answer.

That sales and distribution of such synthetic stones were to purchasers located in states outside the State of New York is also evidenced. See Tr. 215 (and CX's 19–23 and 25–34).

The course of trade was substantial ($150,000–$245,000 by the Ipekdjians through their two companies in 1961 [Tr. 242], and about $317,000 in 1962 [Tr. 243]).

That respondents Chatham, Anglomex, Inc., and Mayers aided, assisted and abetted the maintenance of this course of trade is shown by CX's 3, 4, 5, 11, 12, 13, 14, 15, and 16. Respondent Mayers even insisted on the Ipekdjians' corporate reorganization at a time when "financial manipulations" of the Ipekdjians appeared to have brought discredit to respondent Chatham's product (CX 16) and Mayers paid for the reorganization (Tr. 241); and respondent Chatham considered his contribution to the preparation of advertising as being "* * * you might say for the whole cause". (Tr. 144.)

[19] Substantially conceded by respondents' answer.

Typical advertisements containing one or more of the quoted references are CX's 6, 8, 17, 18, 35, 36, and 55.

[20] See advertisements RX 13–17 in which respondents identified their stones as "Chatham-Created Emeralds", as advertised by "Cultured Gem Stones, Inc.", thereby imputing that such stones are cultured, although this is unestablished by the evidence, since Chatham refused to testify as to the creative process on the ground that it was and is a trade secret. (Tr. 163.) Furthermore, in avoidance of divulging the trade secret, Mr. Chatham conceded the Commission's contention that the stones at issue were synthetic. (Tr. 166.) Although, in this connection, respondents adduced evidence to the effect that the Chatham-Created Emeralds are not the result of synthesis and are of better quality than stones loosely termed by the jewelry trade and the public as synthetic, this argument becomes academic in view of Mr. Chatham's concession that his stones are synthetic. (Tr. 900–912.) See also transcript pages and exhibits cited at pages 30–42 of the respondents' brief.

[21] That they are not identical to emeralds was conceded by the manufacturer (Tr. 128, 129), confirmed by the expert witness Holmes (Tr. 445, 449, 450) and tests of the expert witness Crowningshield (Tr. 538, 539, 540, 542).

14. The use of the term "Chatham-Created Emeralds" unassociated with other words or statements imputes, as established by the evidence, that this product is not a creation of nature, that it is man-made, and that it is artificial or synthetic.[22] Such usage is, therefore, not deceptive.

15. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of emeralds.

16. The use by the respondents of the statements and practices, heretofore identified as deceptive, has had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements were and are true, and to induce a substantial number thereof into the purchase of respondents' synthetic stones by reason of said erroneous and mistaken belief.

17. 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.

CONCLUSIONS

Under section 5 of the Federal Trade Commission Act, the Commission is empowered to act against misrepresentation if the advertising involved has a tendency to mislead or to deceive a substantial segment of the purchasing public. *Herzfeld* v. *FTC*, 140 F. 2d 207

[22] The hearing examiner is aware of the Commission's possible position that the words "Chatham-Created" might infer that the stones in question are natural stones of Chatham design. However, the words "created" and "designed" are not in any sense synonymous as defined by any known dictionary. Furthermore, numerous witnesses queried on the subject, including experts, those in the trade, and others, all testified without contradiction that the terminology "created", prefixed by a name, would impute to them that the product created was synthetic. (Tr. 248, 258, 263, 278, 295, 307, 906–907, 792–793, 801, 270–273, 536–537, 414, 298–301.) Thus, the evidence clearly establishes that any reasonable interpretation of the statement "Chatham-Created Emeralds", regardless of the practice in the industry to the use of the word "synthetic" (Tr. 250–266, 280, 296, 297, 328, and 383) imputes such emeralds are synthetic and not real or natural emeralds of Chatham design. Nevertheless, it seems reasonable to assume that the advertising of "Chatham-Created Emeralds", supplemented by Cultured Gem Stones, Inc., as the advertiser, suggests that the "Chatham-Created Emeralds" are cultured. Since Mr. Chatham concedes, for the purpose of this proceeding, that his emeralds are synthetic, it must be assumed, in the absence of evidence to the contrary, that they are not cultured. Therefore, it would appear to be misrepresentative to suggest that the emerald created by Chatham is a cultured gem rather than a synthetic gem, which the use of the name "Cultured Gem Stones, Inc.", as advertiser, seems to suggest in contradiction to the reasonable inference, which is that "Chatham-Created Emeralds" are synthetic emeralds.

(2d Cir. 1944); *S. Buchsbaum & Co.* v. *FTC*, 160 F. 2d 121 (7th Cir. 1947). The accepted test is whether the natural and probable result of the respondents' advertising makes the average purchaser unwittingly, under ordinary conditions, purchase that which he did not intend to buy. *Pep Boys-Manny, Moe & Jack* v. *FTC*, 122 F. 2d 158, 161 (3rd Cir. 1941); *Indiana Quartered Oak Co.* v. *FTC*, 26 F. 2d 340, 342 (2d Cir. 1928). The *probability* of deception must be a real one and not remote, and the finding of a probability of deception cannot be a result of some fanciful exercise of semantics. *Arnold Stone Co.* v. *FTC*, 49 F. 2d 1017 (5th Cir. 1931).

Nevertheless, the Commission and the courts have also held that an advertisement which is ambiguous is deceptive, and an advertisement which is capable of two meanings is likewise deceptive, and a totally false statement in an advertisement cannot be qualified or modified. It has also been held that the Commission may require advertisements to be so carefully worded that the most ignorant and unsuspecting purchaser will be protected.[23]

Under the foregoing concept it is apparent that reference to respondents' product as "Chatham Emeralds" or "Chatham Cultured Emeralds" is deceptive. The former description imputes such emeralds may be natural, which admittedly they are not. The latter description specifically asserts the emeralds are cultured, which also admittedly they are not. It is of no consequence these admissions emanate from the desire of the respondent Chatham to keep a trade secret. The refusal of the respondents to produce evidence as to the procedures involved in making such stones requires that the inference be drawn that they are not natural or cultured, and that they are synthetic, which is also conceded.

Furthermore, respondents have ceased using these terminologies as descriptive of their product after the filing of the original complaint and agreement to a consent order precluding such use. They, therefore, apparently do not question the propriety of an order precluding the advertising of their product as "Chatham Emeralds" or "Chatham Cultured Emeralds". The fact that such a consent order has been vacated in order to permit the taking of evidence as regards all of the respondents' representations in selling their synthetic emeralds does not vitiate the need for the entry of an order to prevent a subsequent recontinuance of those representations that appear in accordance with the evidence to be false and deceptive.

Not only have the foregoing terminologies been misrepresentative of respondents' product, but the indication that the Chatham syn-

[23] *U.S.* v. *Ninety-Five Barrels of Vinegar*, 265 U.S. 438, 442, 443; *Progress Tailoring Co.* v. *F.T.C.*, 153 F. 2d 103, 105 (C.A. 7, 1946); 4 S.&D. 455, 459.

thetic stones are identical to natural stones is also deceptive and must be enjoined. The fact that there are many similarities between a natural emerald and a Chatham creation does not entitle respondents to represent they are identical. In fact, all of the experts, as indicated in the findings, found differences in the natural stone and Chatham's synthetic, particularly with regard to fluorescence under instrumentation.

As regards the use of the terminology "Chatham-Created Emeralds", this would not appear to be deceptive since any reasonable inference that may be drawn therefrom suggests only that such emeralds are Chatham created and must, therefore, be synthetic since they are not created by nature. Every witness, without exception, queried on this point was of the view that "Chatham-Created Emeralds" meant they were synthetic. Nor does this or other evidence suggest the slightest ambiguity in substituting "Chatham-Created" for Chatham synthetic in thus identifying respondents' product. However, the use of the name Cultured Gem Stones, Inc., as the advertiser of "Chatham-Created Emeralds" does create an ambiguity as to whether or not the Chatham creation is actually a cultured emerald. The use of the name of this advertiser, which incorporates the word "cultured" in its firm name, can and does destroy the reasonable inference that a "Chatham-Created Emerald" is a synthetic emerald. Obviously, therefore, the use of the advertiser's name, accompanied by the word "cultured" must be eliminated and enjoined if the terminology "Chatham-Created Emeralds" is to be used in substitution for "Chatham Synthetic Emeralds", otherwise the use of the terminology "Chatham-Created Emeralds" becomes ambiguous and therefore deceptive, as established by the cases hereinbefore cited.

The respondents argue that every effort must be made to preserve their trade name "Chatham-Created Emeralds". In this connection they cite *Jacob Seigel Co.* v. *FTC*, 327, U.S. 608, 613 (1946), and the Commission's *Country Tweeds, Inc.*, decision 50 FTC, 470, 474 (1953). In the latter decision it is pointed out by the Commission that "* * * every effort must be made to reach a solution which will be fair to all parties, which will afford the public and competitors reasonably adequate protection and which, at the same time, will avoid unnecessary hardship and loss to the owner of the tradename. Tradenames are valuable business assets, and should never be prohibited absolutely if less drastic measures will suffice."

Examination of the record in the case discloses that before respondents first used the trade name "Chatham-Created Emeralds", approximately three years ago, they received the approval of the

Commission provided the terminology was used unambiguously. According to respondents, large sums of money have been expended to promote the trade name "Chatham-Created Emeralds" in their advertising in reliance upon the Commission's ruling. Respondents, however, overlook the fact that they have not used the term unambiguously in that they have included in the advertising an advertiser whose name is Cultured Gem Stones, Inc., which imputes that the emeralds are possibly cultured rather than synthetic. This is an ambiguity which can hardly be overlooked in view of the fact that the evidence does not establish that "Chatham-Created Emeralds" are cultured. Quite to the contrary, the respondent Chatham admits they are synthetic. It would appear, therefore, that respondents have not complied with the Commission's original approval. Accordingly, there is no merit to respondents' contention that it would be inequitable to preclude them from using a trade name which the Commission has heretofore approved. There is merit, however, to their contention that their trade name should be preserved unless as used it is ambiguous or misrepresentative of their product.

There is also some merit to respondents' position that the Commission should not exercise its questionable power to require positive disclosures to the point of indicating the semantics to be used in making such disclosures.[24] The Commission in issuing a cease and desist order based upon available evidence may properly foreclose the possibility of misrepresentation or deception by negative restraining provisions. On the other hand, they are hardly in a position to look into a crystal ball to ascertain specifically what appropriate terminology should be used in describing a product, particularly without a formula upon which such description may be based. In the instant case, there is no evidence concerning the formula of the "Chatham-Created Emerald" since Chatham has refused to divulge the composition or the process in making their product which is herein at issue. Obviously, the Commission should not exercise its power of requiring positive disclosure categorically in a vacuum, even assuming that respondents admit their product is synthetic, in the absence of evidence of the product's chemical or inorganic composition and process formula. To do so in issuing an order applicable to the future conduct of the respondents might well lead to the condonement of a deceptive practice. This could clearly be the case if Chatham decided to make what is recognized in the industry as an imitation stone rather than a synthetic stone. In this same connection, it is also observed that the use of the terminology "Chatham-Created Emeralds" is more protective in the public interest than a required terminology of "Chatham Synthetic Emeralds" since the former

[24] See *Alberty* v. *FTC*, 182 F. 2d 36 (D.C. Cir. 1950) *cert. denied* 340 U.S. 818 (1950).

merely imputes that the emeralds are man-made and not natural. This being the case, the public is put on notice that it should ascertain exactly what sort of a product they are purchasing.[25] However, the term "synthetic" may ambiguously impute respondents' product under a strict construction of the word "synthetic" is the result of synthesis, which expert testimony indicates it is not.

Contrary to the position taken by respondents, it would appear that all respondents should be made subject to the order, in view of the "pattern and framework of the whole enterprise" as evidenced, which suggests an interlocking relationship in which all respondents were participants in the resulting deception to the extent heretofore indicated herein in the findings of fact.[26] Accordingly, the following order shall issue:

ORDER

It is ordered, That respondents Carroll F. Chatham, an individual, trading as Chatham Research Laboratories, or under any other name; Anglomex, Inc., a corporation, and its officers, and Dan E. Mayers, individually and as an officer of said corporation; Ipekdjian, Inc., a corporation, and its officers, and Cultured Gem Stones, Inc., a corporation, and its officers, and Adom Ipekdjian and Georges Ipekdjian, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the manufacture for sale, offering for sale, sale and distribution of stones now known as "Chatham Emeralds" or "Chatham-Cultured Emeralds", or any other manufactured stone having essentially the same optical, physical and chemical properties, as a natural stone, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that such stones have been cultured, are natural stones, or are identical to natural stones;

2. Using the word "emerald" or the name of any other precious or semi-precious stone as descriptive of such stones unless such word or name is immediately preceded, with equal conspicuity, by the word "synthetic" or by some other word or phrase of such meaning as clearly to disclose the nature of such product and the fact that it is not a natural stone; provided,

[25] See *Keele Hair & Scalp Conditioners, Inc.* v. *FTC*, 275 F. 2d 18 (5th Cir. 1960); *Ward Laboratories* v. *FTC*, 276 F. 2d 952, 954 (2d Cir. 1960) *cert. denied* 364 U.S. 827 (1960); and *Lanolin Plus, Inc.*, Docket No. 8150.

[26] Where the businesses of several are interwoven, all are responsible for the acts and practices charged. See the Opinion of the Commission, per Chairman Dixon, In the Matter of *Delaware Watch Co., Inc., et al.*, Docket No. 8411, Aug. 15, 1963 [63 F.T.C. 491], citing *Lifetime, Inc., et al.*, Docket No. 7616.

however, that this prohibition shall not be construed as requiring respondents, or any of them, to disclose the method or process, or any part thereof, used by respondent Chatham in the manufacture of his stones.

and it is

Further ordered, That the charges of the complaint insofar as they may be construed to allege that the statement "Chatham-Created Emeralds" is deceptive when used exclusively and unaccompanied by the name of an advertiser whose corporate or firm name suggests it markets cultured gems is herein and hereby dismissed.

Opinion, Dissenting in Part

FEBRUARY 28, 1964

By Anderson, *Commissioner:*

I dissent from the majority's action in adopting that part of the hearing examiner's initial decision which holds in effect that there is no reasonable likelihood that the public would understand the expression "Chatham Created Emeralds" to refer to anything other than synthetic emeralds. I do not agree that the public is placed on notice by this expression that the stones so designated are synthetic stones.

Decision of the Commission and Order to File Report of Compliance

This matter having been heard by the Commission on appeal of counsel supporting the complaint from the initial decision of the hearing examiner, filed September 4, 1963, and upon briefs and argument in support thereof and in opposition thereto, and the Commission, having concluded that the appeal should be denied, and that the aforesaid initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner, filed September 5, 1963, be, and it hereby is, adopted as the decision of the Commission.

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 the order to cease and desist.

Commissioner Anderson dissenting in part, and Commissioner Reilly not participating.

IN THE MATTER OF

BAKERS OF WASHINGTON, INC., ET AL.

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

Docket 8309. Complaint, Mar. 7, 1961—Decision, Feb. 28, 1964 *

Order requiring a trade association with headquarters in Seattle, Wash., along with its responsible officers, and wholesale and retail baker members in Washington State, to cease conspiring among themselves and with others to fix and maintain prices, terms or conditions of sale of bread, and to deter or attempt to deter any competitor from exercising his individual judgment as to prices and terms of 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 Commission, having reason to believe that the parties named in the caption hereof and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 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 Bakers of Washington, Inc., (hereinafter sometimes referred to as Bakers) is an incorporated association organized and existing under the laws of the State of Washington, with its principal office at 1512 Tower Building, Seattle, Washington.

Respondent Bakers is the medium whereby the officials and members of Bakers have performed many of the illegal acts and practices hereinafter alleged. Such illegal acts and practices were intended to, and did, bind said officials and said members in the same manner and with the same effect as though they had individually engaged in same.

PAR. 2. Respondents George B. Buchan, Richard Hoyt, and Arthur H. Lalime (hereinafter sometimes referred to as Bakers officials) are officers of respondent Bakers. The address of respondent George B. Buchan is 1604 North 34th Street, Seattle, Washington. The address of respondent Richard Hoyt is 600 First Avenue North, Seattle, Washington. The address of respondent Arthur H. Lalime is 1512 Tower Building, Seattle, Washington.

*Proceedings reopened and remanded to hearing examiner on May 21, 1964, 65 F.T.C. 1308; effective date of cease and desist order of Feb. 28, 1964, stayed pending the proceedings on remand by order dated June 3, 1964; order modifying findings of fact in Commission's opinion of Feb. 28, 1964 and making effective the cease and desist order of Feb. 28, 1964, issued Dec. 3, 1964, 66 F.T.C. 1222.

During the several years last past the officials of respondent Bakers have varied from year to year. Those Bakers officials named and designated herein are fairly representative of all Bakers officials, and are herewith and hereby made respondents individually, in their respective capacities as officials of Bakers, and as representative of the officers, Board of Trustees, employees, representatives and agents of Bakers. The officials of respondent Bakers, as represented by the Bakers officials hereinabove specifically named, are hereby made parties respondent as though specifically named herein.

The control, direction and management of Bakers' business, affairs, policies, practices and actions are and, during the several years last past, have been vested in Bakers' officials. Said officials have formulated, directed and controlled the policies and activities of Bakers and in so doing have expressly or impliedly authorized, performed, adopted or affirmed the policies, acts and practices herein alleged to have been performed. Said officials aided, abetted, furthered and cooperated with other respondents and with others in establishing and carrying out the understandings, agreements, combinations and planned common courses of action hereinafter set forth, and participated in the furtherance thereof.

Respondent Arthur H. Lalime is now and has been since November 15, 1957, Secretary-Manager of respondent Bakers, and as such officer has full and complete charge of the administrative activities of Bakers, helps conduct, and actually participates in the meetings of the members of Bakers and helps formulate the policies of Bakers, all in pursuance and furtherance of the establishing, carrying out and maintaining of the understandings, agreements, combinations and planned common courses of action hereinafter set forth.

PAR. 3. Respondent Buchan Baking Co. is a corporation organized and existing under the laws of the State of Washington, with its principal office at 1604 N. 34th Street, Seattle, Washington.

Respondent Continental Baking Company is a corporation organized and existing under the laws of the State of Delaware, with executive offices at Halstead Avenue, Rye, New York, and a branch office and plant at 1805 Main Street, Seattle, Washington.

Respondent Langendorf United Bakeries, Inc., is a corporation organized and existing under the laws of the State of Delaware, with general offices at 1160 McAllister Street, San Francisco, California, and a branch office and plant at 2901 6th Avenue South, Seattle 14, Washington.

Respondent Hansen Baking Co., Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office at 600 First Avenue North, Seattle, Washington.

Respondent Holsum Baking Company is a corporation organized and existing under the laws of the State of Idaho, with its principal office at 1303 9th Avenue, Lewiston, Idaho.

Respondent Trennery's Bakery Co.,* a wholly owned subsidiary of respondent Holsum Baking Company, is a corporation organized and existing under the laws of the State of Washington, with its principal office at 1202 Division Street, Yakima, Washington.

Respondent Snyder's Bakery, Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office at 31 North Fourth Street, Yakima, Washington.

Respondent John M. Larson is an individual trading under the firm name and style of Larson's Bakery, with principal office at 25 No. 2nd Avenue, Yakima, Washington.

Respondent Vic H. Goethals is an individual trading under the firm name and style of Fortune's Bakery, with principal office at 604 Commercial Street, Anacortes, Washington.

Each of the respondents named in this paragraph with the exception of respondent Holsum Baking Company, has been during the several years last past, a member of respondent Bakers. During that period, the membership of Bakers has varied from year to year. Furthermore, the total membership of Bakers constitutes a class so numerous as to render it impracticable to specifically name each member as a party respondent herein, without manifest delay and inconvenience. Therefore, the aforesaid members of Bakers are named parties respondent, individually, and, since they are fairly representative of the entire membership of Bakers, they are also named as representative of all members of Bakers. All members of Bakers, as represented by the respondent members of Bakers hereinbefore specifically named, are hereby made parties respondent as though specifically named herein.

Each of the members of Bakers has for a number of years, through membership in Bakers or otherwise, directly or indirectly participated in the understandings, agreements, combinations planned common courses of action and other instances of cooperative and collective action hereinafter alleged. Each of the members of Bakers has authorized, participated in, adopted, confirmed, or otherwise ratified, as members of Bakers or otherwise, one or more of the alleged illegal acts, practices and policies of Bakers or of others of its members.

PAR. 4. Respondent Safeway Stores, Inc., is a corporation organized and existing under the laws of the State of Maryland, with principal offices at 4th & Jackson Streets, Oakland, California; a

*[The correct spelling is Trenerry's Bakery Co.]

Bread Division located at San Jose, California; and a Bread Plant at 1000 Fairview North, Seattle, Washington.

Respondent Safeway Stores, Inc., and respondent Holsum Baking Company have, for the several years last past, aided and abetted and participated in one or more of the wrongful acts and practices hereinafter alleged and have participated in the understandings, agreements, combinations, planned common courses of action and other instances of cooperative and collective action of all of those named herein as respondents, in the formation, putting into operation and making effective the methods, systems, practices and policies which are alleged herein to be unlawful.

PAR. 5. In the course and conduct of their respective businesses, various respondents produce bread for sale to retail sellers or to consumers, and transport, or cause to be transported, such bread to, or to be distributed to such retail sellers or to such consumers, many of whom are located in Territories of the United States or in states of the United States other than the states of origin of said shipments. Such respondents are and were, during the several years last past, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. The various remaining respondents, who are incorporated associations, or officials thereof or whose business consists of the production and sale of bread in intrastate commerce only, all aided, abetted, furthered and cooperated with the respondents specified in Paragraph Five hereof, as well as with each other, in establishing and carrying out the unlawful understandings, agreements, combinations and planned common courses of action hereinafter set forth, and actively participated in or acquiesced in the furtherance thereof.

PAR. 7. Each of the respondents described in Paragraphs Three and Four hereof is and was in competition with one or more of the other respondents therein described, and with other producers, distributors and sellers of bread not parties hereto, in the production, distribution and sale of bread in commerce, as "commerce" is defined in the Federal Trade Commission Act, except to the extent that actual and potential competition has been hindered, lessened, restricted, or restrained by the unfair methods and practices hereinafter set forth.

PAR. 8. For several years last past, Bakers and the other respondents, in some instances with the aid and assistance of, and also by and through Bakers, have been and are engaged in unfair acts and practices and unfair methods of competition in commerce, as herein described, by cooperating, combining, conspiring, agreeing and entering into understandings and following a planned common course of action to hinder, lessen, restrict and suppress competition among and between themselves and others in the production, distribution and sale of bread.

PAR. 9. As a part of and pursuant to said understanding, agreement, combination, conspiracy and planned common course of action and to effectuate their common purpose, respondents have committed and are committing unlawful acts and have promulgated, used, adopted, accepted or acquiesced in, and are promulgating, using, adopting, accepting or acquiescing in unlawful policies, methods, and practices, among which are the following:

(1) Determined, fixed, established, stabilized, maintained, and made effective, and still do determine, fix, establish, stabilize, maintain and make effective, uniform, identical, non-competitive prices in the sale of bread.

(2) Cooperatively promoted adherence and do now cooperatively promote adherence to the said uniform, identical, non-competitive prices.

(3) Respondent Bakers officials and Bakers members organized, have operated and do now operate respondent Bakers as an incorporated association to promote and serve the mutual interests of Bakers members, and have used it and now use it as an instrument or vehicle for their joint and cooperative purpose and action in hindering, frustrating, suppressing and eliminating competition in price in the sale and distribution of bread.

(4) Regular meetings of the members of Bakers have been and are held from time to time in Seattle, Washington, and elsewhere, and, at said meetings, said members, including the respondent members herein named, have discussed and do discuss, with each other and with Bakers officials, trade and competitive conditions in the production, distribution and sale of bread and have agreed upon and established, and do agree upon and establish, trade policies to be followed and prices to be charged by respondent members in the sale of their said bread.

(5) Respondent Bakers, and respondent members thereof have employed and do employ respondent Arthur H. Lalime, to serve them as a common agent to make more effective their suppression of price competition, and he has served them, and does now serve them, as a common agent in the suppression of price competition in the sale of their said bread.

(6) Each respondent described in Paragraphs Three and Four hereof, with the knowledge that each other said respondent and each other member of respondent Bakers simultaneously does likewise, for the purpose and with the result of making more effective

the fixing, establishing, stabilizing and maintaining of uniform, identical, non-competitive prices in the sale of bread, has sold and does sell its bread at such prices.

PAR. 10. The capacity, tendency and effect of the aforesaid understandings, agreements, combinations, conspiracies and planned common courses of action, and of the acts, policies, practices and things done thereunder and pursuant thereto by the respondents, as hereinbefore set forth, has been and is now to unlawfully restrict, restrain, hinder and prevent price competition between and among the said respondents in the sale of bread in interstate commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 11. In addition to the effects hereinbefore set forth, the understandings, agreements, combinations, conspiracies and planned common courses of action of the respondents, and the acts, practices and policies of the respondents, likewise have the capacity and tendency to substantially increase the cost of food by their effect on the prices which the public is required to pay for bread produced, distributed and sold in commerce, as aforesaid.

PAR. 12. The acts and practices of the respondents, all and singularly, as hereinbefore set forth, are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Lynn C. Paulson, *Mr. R. E. Ely* and *Mr. Karl Vasiloff*, for the Commission.

Mr. Griffith Way, and *Preston, Thorgrimson, Horowitz, Starin & Ellis*, Seattle, Wash., for respondents Bakers of Washington, Inc., and Mr. Arthur H. LaLime.

Croson, Johnson & Wheelon, Seattle, Wash., for respondents Mr. George B. Buchan and Buchan Baking Co.

Little, Palmer, Scott & Slemmons, Seattle, Wash., for respondents Mr. Richard Hoyt, Langendorf United Bakeries, Inc., and Hansen Baking Co., Inc.

Mr. Roy M. Anderson, Rye, N.Y., and *Covington & Burling*, Washington, D.C., for respondent Continental Baking Company.

Cox, Ware, Stellmon & O'Connell, Lewiston, Idaho, for respondents Trenerry's Bakery Co. and Holsum Baking Company.

Mr. George E. Clark, Yakima, Wash., for respondent Snyder's Bakery, Inc.

Palmer, Willis & McArdle, Yakima, Wash., for respondent Larson's Bakery.

Bogle, Bogle and Gates, Seattle, Wash., and *Mr. Drummond Wilde*, *Mr. Bernal E. Dobell* and *Mr. Robert J. Van Gemert*, Oakland, Calif., for respondent Safeway Stores, Inc.

Unrepresented, respondent Fortune's Bakery.

INITIAL DECISION BY RAYMOND J. LYNCH, HEARING EXAMINER

JULY 20, 1962

The Federal Trade Commission issued its complaint against the above-named respondents on March 7, 1961, charging them with violating the provisions of Section 5 of the Federal Trade Commission Act.

The complaint alleges in substance that Bakers of Washington, Inc., (sometimes hereinafter referred to as Bakers) and others combine and agree to suppress price competition among and between themselves and others in the sale and distribution of bread including the establishment and maintenance of uniform and non-competitive prices therefor.

A prehearing conference was held in Washington, D.C. on August 30, 1961. Hearings were held in Seattle, Washington on September 18-21, 1961 and February 26, 1962. At the conclusion of the Commission's case, respondents filed motions to dismiss. These motions were denied by the examiner and respondents rested their cases and renewed their motions to dismiss.

Respondent Fortune's Bakery was not represented by counsel nor did they enter an appearance. John M. Larson, trading as Larson's Bakery, did not file answer.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, and proposed findings of fact and conclusions filed by the parties. The hearing examiner has carefully reviewed and considered same. Proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

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

FINDINGS OF FACT

1. Respondent Bakers of Washington, Inc., was initially incorporated in 1936 in the State of Washington under the name of Bakers of Western Washington,Inc. In August of 1937 the corporate name was changed to its present name. Bakers' members are classified by division according to geographical location. More than half of the members have places of business in Seattle, Washington, but there

are also divisions in Aberdeen, Yakima, Bellingham, and Tacoma. All dues are paid to respondent Bakers in Seattle. Both wholesale and retail bakeries are included in the membership, but within the trade areas served by the Association, the great majority are wholesale bakeries.

2. Respondent George B. Buchan is President of respondent Buchan Baking Co., and President of respondent Bakers of Washington, Inc. The address of respondent George B. Buchan is 1604 North 34th Street, Seattle, Washington.

3. Respondent Richard Hoyt is the vice president of the Bakers of Washington, Inc., and his address is 600 First Avenue North, Seattle, Washington.

4. Arthur H. LaLime, secretary-manager of Bakers since November 15, 1957, was preceded in that position for some twenty years by Harry Alford. LaLime is paid a salary of $12,000 a year by the Association and receives a retainer of $600 annually from Safeway. The address of respondent is 1512 Tower Building, Seattle, Washington.

5. Respondent Buchan Baking Co. is a corporation organized and existing under the laws of the State of Washington with its principal office at 1604 North 34th Street, Seattle, Washington. Respondent does a gross annual volume of four million dollars.

6. Respondent Continental Baking Company is a corporation organized and existing under the laws of the State of Delaware with executive offices in Rye, New York, a branch office and bakery plant at 1805 Main Street, Seattle, Washington. Respondent had net sales in excess of $350,000,000 for the calendar year of 1960.

7. Respondent Langendorf United Bakeries, Inc., is a corporation organized and existing under the laws of the State of Delaware, with general offices at 1160 McAllister Street, San Francisco, California, and a branch office and plant at 2901-6th Avenue South, Seattle 14, Washington. Respondent had net sales of $73,825,340 for fiscal 1961.

8. Respondent Hansen Baking Co., Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office at 600 First Avenue North, Seattle, Washington. Respondent does a gross annual volume of three million dollars.

9. Respondent Trenerry's Bakery Co., (erroneously named in the complaint as Trennery's Bakery Co.) is a corporation organized and existing under the laws of the State of Washington, with its principal office at 1202 Division Street, Yakima, Washington. Since April 1, 1959, it has been a wholly owned subsidiary of respondent Holsum Baking Company.

10. Snyder's Bakery, Inc., is a corporation organized and existing under the laws of the State of Washington, with its principal office at 31 North Fourth Avenue, Yakima, Washington.

11. Respondent John M. Larson is an individual trading under the firm name and style of Larson's Bakery, with principal office at 25 No. 2nd Avenue, Yakima, Washington.

12. Respondent Vic H. Goethals is an individual trading under the firm name and style of Fortune's Bakery, with principal office at 604 Commercial Street, Anacortes, Washington.

13. Respondent Safeway Stores, Inc., is a corporation organized and existing under the laws of the State of Maryland, with principal offices at 4th and Jackson Streets, Oakland, California. A Bread Division of Safeway is located at San Jose, California, and a Bread Plant at 1000 Fairview North, Seattle, Washington. Respondent had net sales in excess of $2,468,000,000 for the calendar year of 1960.

14. Respondent Holsum Baking Company is a corporation organized and existing under the laws of the State of Idaho, with its principal office at 1724 Carson Avenue, Lewiston, Idaho. This respondent is not a member of Bakers.

15. The following were members of Bakers of Washington, Inc., as of September 19, 1961:

Ashbrook Bakeries Corp., 1407 11th Avenue, Seattle.
Albertson's, Inc., 17000 Aurora Avenue, Seattle.
Baders' Dutch Bakeries, 3755 University, Seattle.
Baker Boy Bakery, 8050 Bothell Way, Seattle.
Bake-Rite Bakery, 1414 14th Avenue, Seattle.
Bellinger Bakery, North Bend.
Best Pie Company, Inc., 132 Queen Anne Avenue, Seattle.
Big Four Donut, Inc., 319 Nickerson Street, Seattle.
Blake's Bakery, Inc., 4729 California Avenue, Seattle
Bookter's Seattle Bakery, Inc., 3409 4th Avenue South, Seattle.
Buchan Baking Company, 1604 No. 34th Street, Seattle.
Butter-Krisp Bakery, Inc., 2203 23rd Avenue South, Seattle.
Boldt's Western Hotels Food Service, Inc., Boeing Cafeteria, Boeing Plant No. 2, Seattle.
Carolyn's Cakes, 518 15th Avenue North, Seattle.
Caster's Lake City Bakery, 12532 Bothel Way, Seattle.
Continental Baking Company, (Wonder Bread Division), (Hostess Cake Division) 1805 Main Street, Seattle.
Frederick & Nelson, (Bakery Department), 5th at Pine, Seattle.
Gai's Seattle French Baking Co., Inc., 2006 Weller Street, Seattle.
Golden Rule Bakery, Inc., 4450 Fremont Avenue, Seattle.
Grandma Cookie Baking Co., Inc., 3402 Wallingford Avenue, Seattle.
Hansen Baking Company, Inc., 600 First Avenue North, Seattle.
Karl's Bakery, 1614 Hewitt Avenue, Everett.
Kent Bakery, 213 First South, Kent.

Langendorf United Bakeries, Inc., (Bread and Cake Plants), 2091 6th Avenue South, Seattle.
Lippman's Bakery, Inc., 119 23rd Avenue, Seattle.
Lindsay's Thriftway Market, 11100 Roosevelt Way, Seattle.
Manning's, Inc., 621 Seaboard Building, Seattle.
Richard's Fried Pies, Inc., 220 1st Avenue North, Seattle.
Swiss Pastry & Candy Shop, 1325 5th Avenue, Seattle.
Smith & Sonnleitner Cookie Co., 1238 No. 99 W., McMinnville, Oregon, (7710 Bagley, Seattle, Washington).
Van de Kamp's Holland Dutch Bakers, 823 Yale Avenue North, Seattle.
Grand Central Bakery, Market & H Streets, Aberdeen.
Swanson's Foods, Inc., 1401 Simpson Avenue, Aberdeen.
Veldkamp's Olympic Bakery, 417 W. Wishkah Street, Aberdeen.
Bame's Ye Olde Home Bakery, Riverside, Mount Vernon.
Bellingham Baking Company, 2001 State Street, Bellingham.
City Bakery, 607—1st Street, Mount Vernon.
Fortune's Bakery, 604 Commercial Avenue, Anacortes.
Thrifty Foods, 130 Fairhaven Avenue, Burlington.
Buchan Baking Company, 3802 So. Yakima Avenue, Tacoma.
Continental Baking Company, 701 S. Sprague, Tacoma.
Golden Rule Bakery, Inc., 915 Center Street, Tacoma.
Hansen Baking Co. of Tacoma, Inc., 909 Center Street, Tacoma.
Jordan Baking Company, 3623 S. 54th Street, Tacoma.
Eddy Bakeries Company, Inc., 232 S. Front Street, Yakima.
Larson's Bakery, 25 No. Second Street, Yakima.
Sigman Food Stores, P. O. Box 618, Yakima.
Snyder's Bakery, Inc., 31 No. 4th Street, Yakima.
Trenerry's Bakery, 1206 Division Street, Yakima.

16. Officers, committee members and trustees of Bakers as of the date of the complaint also named as respondents are as follows:

Officers: President—George B. Buchan. Buchan Baking Company, Inc., 1604 No. 34th Street, Seattle, Washington; Vice President—Richard Hoyt, Hansen Baking Company, Inc., 600 First Avenue North, Seattle, Washington; Treasurer—Miss Maud Pemberton, Golden Rule Bakery, Inc., 4450 Fremont Avenue, Seattle, Washington; Section Manager—A. H. LaLime, Bakers of Washington, Inc., 1512 Tower Building, Seattle, Washington.

Bakers has an executive and financial committee with the following members:

George B. Buchan, Buchan Baking Company, Inc., 1604 No. 34th Street, Seattle, Washington; Henry Richards, Continental Baking Company, P. O. Box 3227, Seattle, Washington; Lloyd C. Mitchell, Van de Kamp's Holland Dutch Bakers, 823 Yale Avenue North, Seattle, Washington; Lou Blackfield, Bake-Rite Bakery, 1414-14th Avenue, Seattle, Washington.

Trustees of Bakers are as follows:

Horace Snyder, Snyder's Bakery, Inc., 31 North 4th Street, Yakima, Washington; Al Moore, Langendorf United Bakeries, Inc., 2901-6th Avenue South, Seattle, Washington; Roy Reynolds, Grandma Cookie Baking Co., Inc., 3402 Wallingford, Seattle, Washington; LeConie Stiles, Jr., Ashbrook Ruth Bakeries Corp., 1407-11th Avenue, Seattle, Washington; Henry Gai, Seattle French Baking Co., Inc., 2006 Weller Street, Seattle, Washington; Donald R. Due, Best Pie Company, Inc., 132 Queen Anne Avenue, Seattle, Washington; Maurice Bybey, Baker Boy Bakery, 8050 Bothell Way, Seattle, Washington.

17. The purposes for which Bakers was formed as specified in its articles of incorporation include the collection and dissemination among its members of all lawful information for the benefit of the business of its members. Negotiations of labor contracts are not specifically mentioned.

18. Meetings of members are held in Divisions outside of Seattle. Regular meetings are held in Seattle almost weekly, generally on Monday, which is convenient for bakers. These meetings last about an hour and a half. Although Safeway is not a member, a representative from Safeway infrequently attends. These meetings are also attended by representatives of Buchan, Continental, Hansen & Langendorf. Bakers' expenses are defrayed by membership dues. Members include the largest wholesalers of bread in the Seattle area.

19. Arthur H. LaLime, secretary-manager of Bakers since November 15, 1957, was preceded in that position for some twenty years by Harry Alford. LaLime is paid a salary of $12,000 a year by the Association and receives a retainer of $600 annually from Safeway.

20. Respondents are engaged in interstate commerce and are subject to the jurisdiction of the Federal Trade Commission. Pertinent facts concerning interstate sales are set forth below.

21. Buchan Baking Company operates four bakery plants, one in Bellingham, two in Seattle and one in Tacoma. It grosses approximately four million dollars annually. Buchan sells bread to customers in Alaska.

22. Hansen's Baking Company, Inc., operates two plants, one in Seattle and one in Tacoma. It distributes most varieties of bread, primarily at wholesale, and other items which it purchases from competitors. Hansen does an annual volume of about three million dollars a year. It sells and ships bread to customers in Alaska.

23. Respondent Snyder's Bakery, Inc., transports bread produced in its plant in the State of Washington for sale in the State of Oregon.

24. Respondent Trenerry's Bakery Co. (erroneously named in the complaint as Trennery's Bakery Co.), a member of the Yakima Division of Bakers, is a wholly owned subsidiary of respondent Holsum Baking Co. Respondent Holsum Baking Co., causes bread produced by it in Lewiston, Idaho, to be transported to its wholly owned subsidiary, respondent Trenerry's for sale in and around Yakima, Washington.

25. Langendorf United Bakeries, Inc., has a bread and cake plant in Seattle. The bread plant produces bread and other various types of bread products such as brown and serve rolls and hamburger buns. It makes shipments of bread to customers in Alaska. The Seattle plants are but two of 11 bakeries operated by Langendorf in the States of California, Oregon and Washington. Its sales of bakery products for the fiscal year ended July 1, 1961, exceeded $73,800,000 and it has almost 3,900 employees. It is engaged in interstate commerce in the sale and distribution of bread and other bakery products in California, Oregon, Washington and Alaska. Langendorf's operations are conducted upon an integrated basis. Ingredients for its products are centrally purchased and receipts from sales go into a single treasury. Ultimate responsibility for company affairs is vested in top management personnel in the company's general offices in San Francisco, California, and the control of operations which rests in plant managers, beyond that which is peculiar to the position of plant managers, such as house-keeping functions, is vested in them by delegation from top management. Each element of Langendorf's bread and bakery products' business is part of an integrated whole, the company being a single business entity benefiting or suffering from what is done locally by and through each plant or office.

26. Continental Baking Company has two baking plants in Seattle, one for bread and one for cakes. It sells and ships bread to customers for resale and delivery to Alaska and to its plant in Portland, Oregon. Continental produces bread and other bakery products in more than 70 bakeries located in 60 cities in 29 States. Its net sales of bread and other bakery products exceeded $350,000,000 for the year ended December 31, 1960, and at that time it had more than 27,000 employees. Continental is regularly engaged in interstate commerce in the sale and distribution of bread and other bakery products. It operates on an integrated basis. The ingredients for its products are purchased centrally and receipts from sales go into a single treasury. Ultimate responsibility for company affairs is vested in top management personnel at the company's general offices at Rye, New York. Each element of the company's bread and bakery business is part of an integrated whole. Continental is a single business

entity and benefits or suffers from what is done locally by and through each plant or office. The control over operations which rests in plant managers, beyond that which is peculiar to the position such as housekeeping functions, is vested in them by delegation from top management.

27. Safeway Stores, Inc., is one of the three largest operators of chain retail grocery stores in the United States. At the end of December 1960, Safeway operated some 2,000 grocery stores located in 28 States of the United States and in the District of Columbia. At the end of that year, Safeway and its subsidiaries had more than 63,500 employees and its net sales exceeded $2,468,000,000. During each of the past 10 years, net sales have increased. Net sales made in 1960 exceeded those made in 1949 by more than $1,270,000,000. Safeway's common stock is traded on the New York Stock Exchange daily or almost daily and is held by thousands of stockholders residing in every State in the Union. From time to time, the company declares and pays dividends upon this stock from profits realized from its operations. Profits are not segregated by store or facility. Safeway operates all of its stores or other facilities as a single business entity with its principal offices in Oakland, California. In the course of its business, Safeway purchases many products from many vendors in numerous States for resale through stores it operates. It also purchases from suppliers who are located in States other than the State of manufacture, ingredients to be used in the manufacturing by Safeway of products for resale. Many products manufactured by Safeway, including bread and other bakery products, are shipped by Safeway to its stores in other states than those of the State of manufacture, and sold to customers located in those States. Bread produced by Safeway within the State of Washington is shipped or sold outside the State of Washington.

28. Respondents, who do not sell or ship across State lines, are in competition with other respondents who do and all respondents are members in common with respondent Bakers and parties to a program of concerted action on methods, acts and practices as hereinafter found.

29. Bakers of Washington, Inc., serves not only as a medium for its members to negotiate uniform contracts with the unions with which they as bakers are concerned, but also serves as a medium for lessening and eliminating price competition between and among them. Respondents, using Bakers as a medium, do two things: one, cooperate in the establishment and announcement of price changes; and two, collectively enforce adherence to prices established and announced.

30. Respondents for many years have periodically discussed prices at Bakers' meetings. Price rises were usually discussed after negotiation of new labor contracts were concluded. Respondent Buchan testified that *all* competitors must move up or none can, and illustrated his point by reference to an experience of his own in which he stayed at 10½ cents per loaf when others went to 11 cents and the others had to drop back. Mr. Buchan said that increased labor costs meant increased prices and that costs of new labor contracts were the subject of discussion at Bakers' meetings.

31. Mr. Harry H. Shafer, who formerly owned and operated a bakery in Bellingham and was a member of Bakers, frequently attended meetings of Bakers in Seattle. He said prices were regularly discussed and that it was the wholesalers who were discussing prices. The head of Bakers was looked to for price leadership.

32. Wholesalers are in competition with bakers who bake for retail by themselves and do not wholesale. Accordingly, Mr. LaLime discussed retail prices with Mr. Charles D. Sylvester, the president of Washington Retail Bakers Association. He sought a working arrangement between them on prices. Prices of retail bakers affect those of wholesalers and retail bakers also were members of Bakers and attended meetings. However, price leadership rested with the major wholesalers.

33. Mr. Alford, Mr. LaLime's predecessor, conducted luncheon meetings where prices were discussed.

34. Albert A. Pettersen, bakery supervisor for Albertson's Food Stores, a member of Bakers, testified that prices were discussed at luncheon meetings conducted by Mr. LaLime.

35. LaLime and Alford followed the practice of calling members by phone to announce price increases in advance of the date of the increase. LaLime called Mr. Pettersen more than once. Mr LaLime told Pettersen he acted for Bakers of Washington, Inc., in announcing prices.

36. Albert A. Pettersen from about 1955 through at least a part of 1959 was supervisor of the bread and baking operations for Albertson's Food Stores chain in the Seattle district. He was responsible for that portion of an Albertson's advertisement offering raisin bread for sale at 19¢ per loaf which appeared in the Seattle Port-Intelligencer on August 3, 1959. When this advertisement appeared, he was called by Mr. LaLime and urged to get the regular price of 26¢. He was called by LaLime two or three times. Mr. LaLime's predecessor, Mr. Alford, also called him with respect to his pricing practices on the same type of deal. When Pettersen was in Seattle, he attended the luncheon meetings held by Bakers. He attended

such meetings around the period of the August 1958 price increase. At these meetings, ingredient prices were discussed and it was decided there should be a raise in bread prices. From there, the statement would be made "What do you think about certain prices?" and that proposal would then be "kicked around." After meetings he would receive information either written or by phone from LaLime that prices were going up. When he was managing for Albertson's, Pettersen testified that the chain could be independent in the pricing of bread but that " * * * we would like to be along and keep the prices right and be with the association here."

37. A former member of Bakers, Mr. Frank A. Maxeiner, Jr., who was engaged in the bakery business in Seattle, was told of price increases by Alford.

Mr. Maxeiner testified:

Q. Now, during the time Mr. Alford was associated with Bakers of Washington, did he ever contact you with respect to impending prices as to bread?

A. Yes, he called on the phone.

Q. And did this happen on several occasions?

A. Yes, it did over the years.

Q. Did he advise you as to an impending price rise in bread when he called?

A. Yes, he would usually indicate that we were to advance the price of bread.

38. During the period 1957–1960, which is the approximate time period of this complaint, there were three price rises in bread. The close coordination that prevailed between price announcements by the major companies is graphically shown when these announcements are tabulated. Price movements in 1957, 1958 and 1960 by the majors were as follows:[1]

From 30¢ to 31¢, July 22, 1957	From 31¢ to 33¢, Aug. 11, 1958	From 33¢ to 34¢, Sept. 19, 1960	From 33¢ to 34¢ Sept. 22, 1960
Buchan Langendorf	Buchan Hansen Langendorf Continental	Hansen Langendorf	Buchan Continental

This shows that on July 22, 1957, respondents Buchan and Langendorf announced a price increase to 31 cents. The record is silent as to when Hansen moved up to 31 cents. Hansen's price was 31 cents before August 11, 1958.

39. It shows that in 1958 respondents Buchan, Continental, Hansen and Langendorf all moved up to 33 cents on August 11.

[1] Prices shown are for the standard one and one-half pound loaf.

40. In 1960, respondents Hansen and Langendorf increased their prices to 34 cents on September 19 and were followed on September 22 by respondents Buchan and Continental.

41. Respondents' explanations for price uniformity are without merit or completely absent. Witness Moore, local manager for Langendorf could offer no explanation as to why Langendorf had not raised its prices in 1959 for several months after wages had been raised.

Concerning the price rise in 1958, respondent George B. Buchan testified in answer to a question whether he had any advance information of it or working arrangement with respondents Hansen, Langendorf and Continental, "Just what I might surmise". It is hardly plausible that Mr. Buchan who said prices had to move together, moved his prices up upon surmise. Simultaneous movement of prices upward by a number of competitors strongly suggests collusion.

42. One of the most important functions of Bakers was to secure adherence to established prices. Bread baking has become highly standardized. In the State of Washington it is further standardized by state law. Pan sizes and certain other factors in the production and labeling of bread are fixed by state statute. The fact that bread is standardized adds importance to cooperative action to lessen price competition since the opportunity for price competition in stardardized products is less than in non-standardized products. Price changes occur infrequently in the bread business. The principal avenue for price competition is in departure from established prices. Bakers of Washington was particularly active in preventing deviations from established prices and securing constant adherence thereto. Mr. LaLime and his predecessor Mr. Alford both worked at this task, and the evidence shows that they used full power of the organization in furtherance of this objective.

43. Mr. LaLime had a strong personal philosophy about price stability in the market, and he preached this philosophy to Bakers' members. It was that price wars were wasteful and that price competition was undesirable, as the following testimony he gave shows:

Q. When you are holding meetings aren't you from time to time approached with regard to these price situations?

A. No. I am not approached with the price situation. However, I vehemently recommend no price wars because it is economic waste and very devastating to the industry.

Q. How do you do that. How do you convey that recommendation?

A. By every persuasion that I am capable of stating.

Q. In the open meeting you use that philosophy, do you?

A. No, I don't recall of open meeting discussions on that basis. No. sir.

Q. Then how do you convey your philosophy to the membership?

A. By personal contact.

Alford and LaLime both considered it part of their job to stabilize prices, prevent price wars and assist in the establishment of uniform prices by giving advance notice of price increases and by policing adherence to announced prices.

44. Mr. LaLime explained that it was his practice to contact bakers who were cutting prices and to get them back in line. He testified that his job was to keep prices up to "where they belong."

45. In 1957 there was a break in bread prices in Bellingham. Concerning this price war one of the local bakers, Mr. Haggen, who operates a supermarket with an in-store bakery, said that in 1957 Mr. LaLime had talked to him about the price war in Bellingham, saying that he represented Bakers. Two week after the visit by Mr. LaLime, the price war stopped. The price war involved the in-store bakeries only.

46. In Bellingham there was another price war in November-December of 1959. Respecting his efforts to stop this war, Mr. LaLime testified as follows:

Q. I see. Going back specifically to the Bellingham situation, do you remember talking with anybody in particular up at Bellingham?

A. Oh, yes. I talked to Mr. Haggen.

Q. That is Haggen's Thriftway.

A. Yes.

Q. What did you say to him?

A. I asked him to not perpetuate a price war, not to become involved in one.

47. Mr. LaLime said he went to Bellingham specifically to stop the price competition there and that he talked to others of those engaged in it. He said he saw the Hall brothers:

Q. Did you go up there specifically because of the price war?

A. Yes.

Q. Who else did you see?

A. A man by the name of Hall.

Q. Two Hall brothers run a store up there, do they not?

A. Yes.

* * * * * * *

Q. Did you go to Clark's Supermarket?

A. Yes.

Q. Did you talk with the manager there?

A. Yes.

Q. What did you say to him anyway?

A. The same.

Q. Again?

A. I pointed out that a price war was very uneconomical, that it would be disastrous to the industry and it would be particularly disastrous especially to a smaller operation, that any time these price wars started there was only one thing that happened and that was complete chaos.

Mr. LaLime's testimony is corroborated by the testimony of those who were contacted by him.

48. Mr. Robert Hall, a partner in Hall's Bakery in Bellingham corroborated Mr. LaLime's testimony. He said he was urged by Mr. LaLime to get his prices in line and solicited to join respondent Bakers. He added that in the summer of 1958 a meeting was called:

Q. And in the summer of 1958, was a meeting of bakers held in Bellingham?
A. Yes, sir.
Q. Were you invited to attend that meeting?
A. I did attend.

* * * * * * *

Q. By whom were you invited to attend?
A. The representative for the Bakers of Washington.
Q. And can you identify some of the people who were at that meeting?
A. Yes, sir. Mr. Buchan, the owner of Fortune's Bakery, the secretary from Hansen's Bakery.
Q. And can you tell us what transpired at that meeting?
A. Discussion of prevailing prices, and the bread rise that was about to take place and - -
Q. Continue. Have you finished your answer?
A. Yes.
Q. Was there any discussion of what Hall's Bakery intended to do with its price conduct?
A. Yes. Hall's Bakery had been known as a cut-rate bakery and they would like to have us join and follow in line with the rest of the bakeries.
Q. And did you refuse to do that?
A. I told them that we still had Hall's Bakery name on our place of business and we were maintaining our own place of business.

49. Mr. Robert Hall testified that he was informed by a representative of Bakers that one of the purposes of Bakers was price maintenance. He said:

Q. When you were solicited, were any representations made to you as to the purpose of this organization?
A. Yes. It said to make better labor relations, to maintain prices and generally better baking conditions.

50. Mr. LaLime did not make these calls as an individual to expound his own philosophy. He called in his official position as Secretary-Manager of Bakers of Washington, Inc., and on behalf of the wholesalers in that organization. He called at one time one Mr. Albert A. Pettersen who, when he was called, was Bakery Supervisor of Albertson's Food Stores in Seattle. Albertson's had about 12 stores in Seattle and had an in-store bakery. Mr. LaLime called Mr. Pettersen in regard to an advertisement he had run advertising raisin bread for 19¢. This was in 1959. Mr. LaLime told Mr. Pettersen that the wholesale bakers protested his price. Mr. Pettersen be-

lieved that Mr. LaLime acted for respondent wholesalers. He was asked:

Q. When he called you, did he say that he was calling because some wholesale baker protested your price?
A. That is right.

51. The brother of the above Mr. Robert Hall, Ralph Lorraine Hall, also testified that Mr. LaLime apprised the Halls before any price increase in bread, giving a week's prior notice in fact.

52. Respondent Victor H. Goethals, trading as Fortune's Bakery, in Anacortes, testified that Bakers through Mr. LaLime had contacted him in 1958 to raise his prices to the level of the rest of the wholesalers. This was done by telephone. Before the price rise in 1958, Mr. Goethals received notice of the price rise from Bakers. Mr. Alford also called Mr. Goethals to get him in line price-wise. The major bakeries through Mr. LaLime kept control of the in-store bakeries. These bakeries had low overhead and could afford to sell lower than prevailing prices. In fact, they and other on-the-premises bakeries, would have enjoyed a much larger volume if they were able to sell below advertised brands. Wholesalers have production costs for selling and delivery and packaging not incurred by in-store bakeries.

53. Vincent Kenneth Noga, from about October of 1954 to October 1959, operated an in-store bakery in a supermarket in Union Gap near Yakima, Washington, and for a part of this period, had a "cold spot" outlet in Yakima to which he transported bakery products from his "hot" location at Union Gap. His competition in bakery products was Snyder's, Continental, Langendorf, Trenerry's, Atkinson's and Safeway, among others. In the early part of 1958, Noga was charging 33¢ for the standard 1½ lb. loaf. However, in the summer of 1958 when it became apparent that he was going to lose the cold spot, which did a volume of approximately $500 weekly, which volume was necessary to survival, Noga cut the price on this loaf to 25¢ to bring volume to his bakery. On several occasions, Bud Snyder of respondent Snyder's Bakery, approached Noga and urged him to get his prices in line with the rest of the bakeries. Continental's agent in Yakima, a friend of Noga's asked him how he would like to have a truck load of bread given away free in front of his store. Snyder inquired as to what Noga would do if they had Safeway cut the price of bread to 15¢ or even 10¢. Noga refused to raise his price, however, because he had to have the volume to keep his doors open. Noga was unable to maintain the 25¢ price very long, however, perhaps a week or two, because he lacked the physical capacity to meet

the demand for bread at that price. He, therefore, raised the price to 29¢ a loaf at which price the demand on week days leveled off at 150 loaves and reached 250 to 300 on Saturday. At this price, Noga was able to realize a satisfactory profit. His earnings more than tripled. From $9.00 per day at 33 cents per loaf, he went to $30.00 per day at 29 cents per loaf.

54. Wayne Atkinson at one time operated the Old Holland Bakery in Yakima which produced a full line of bakery products. In the fall or late summer of 1957, Atkinson advertised a week-end special on 1½ lb. white loaf bread of 21c per loaf at a time when the regular price of this loaf was 31¢. Atkinson was visited by Jim and Bud Snyder of Snyder's Bakery who inquired if he was attempting to break the price of bread. After his conversation with the Snyder's, Atkinson went back to his original price. A few days later, a meeting was held at the Chinook Hotel which was attended by both of the Snyders, Dick Trenerry, the manager of Eddy's Bakery, and various representatives of retail bakeries including Atkinson. At this meeting it was agreed that retailers would not cut the prices on the large white and whole wheat loaves. Only one in-store bakery was permitted an exception to the rule that all prices must be the same at the retail level and this was respondent Safeway. Safeway was allowed to sell at 1¢ below the retail list required of the others.

55. It is the contention of respondents that a determination of a violation of Section 5 of the Federal Trade Commission Act requires the threshhold finding that the alleged acts and practices — assuming they had been proved — were "unfair methods of competition in commerce." Respondent Continental-Seattle, together with respondents Hansen, Buchan and Fortune's filed a Motion to Dismiss prior to hearings in this proceeding in which they presented their contention that, because they sold bread only in the Seattle marketing area where no bread is sold in interstate commerce, any conspiracy to raise prices, even if proved, could not be held to be a violation of Section 5 of the Federal Trade Commission Act. These Motions to Dismiss were all renewed after respondents rested their cases.

Respondents contend that the sales by respondents that occur in the Seattle market are simply not sales of bread baked outside the State of Washington and for that reason if there had been any price fixing agreements in this market they could not be "unfair methods of competition in commerce." Therefore, respondents contend that Commission counsel has failed to prove jurisdiction over any such agreements, even if they had been proved.

56. Respondents suggest that Commission counsel will apparently make two arguments in resisting this conclusion. First, they ap-

parently will argue that Continental's, Langendorf's and Safeway's activities in Seattle are so controlled by the general offices located in Rye, New York, San Francisco and Oakland, California that anything done in Seattle is an act or practice "in commerce." Secondly, they will apparently argue that because some of the respondents in various ways cause their bread to be shipped out of the State of Washington, the commerce element of the Section 5 violation is made out.

57. Respondents argue that the fact that Continental, Langendorf and Safeway are corporations engaged in commerce with top managements responsible for the acts of their agents in Seattle, under the respondeat superior doctrine, is not sufficient to place the acts themselves in commerce. Respondents contend that the jurisdictional question is still that stated by the Federal Trade Commission as recently as *Union News Co.*, Docket 7396 (January 10, 1961) [58 F.T.C. 10, 23]: "Thus, the relevant jurisdictional issue is whether the practices subjected to challenge were employed in commerce, and not whether all operations of the entity employing the methods, acts, or practices were performed in interstate commerce."

58. The respondents rely on *FTC* v. *American Tobacco Co.*, 264 U.S. 298, where the Commission was denied access to records relating to intrastate sales and *FTC* v. *Bunte Bros, Inc.*, 312 U.S. 349 where the Supreme Court held that methods of competition of Bunte in Illinois, relating to goods manufactured in Illinois, were beyond the jurisdiction of the Federal Trade Commission acting under Section 5. Respondents contend that Bunte Brothers like Continental, Safeway and Langendorf was a large centrally organized corporation doing business in many states of the nation.

59. Respondents argue that the distinction between such cases as *Central Ice Cream Co.* v. *Goldenrod Ice Cream Co.*, 287 F. 2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961) and *Brosius* v. *Pepsi-Cola Co.*, 155 F. 2d 99 (3d Cir. 1946) which hold that no interstate commerce is involved, and those such as *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951) and *Holland Furnace Co.* v. *FTC*, 269 F. 2d 203 (7th Cir. 1959), holding that the flow of interstate commerce continued to the time of sale, is that in the former cases there was no interstate importation of the finished product, but simply importation of raw materials subsequently converted to the article sold. In short, respondents contend that no case has ever held that the flow of interstate commerce continued to the point of sale where there was, as in this case, complete *de novo* manufacture of the product in question in the state of sale.

60. In sum, the respondents argue that while they are engaged in interstate commerce as that term is defined in the Act, they nevertheless are *not* engaged in interstate commerce insofar as this proceeding is concerned because all of the sales of bread are intrastate.

61. While it is admitted by Continental and Langendorf that they sell bread to customers in Alaska, they contend that their sales are all made f.o.b. Seattle dock and therefore not interstate in nature. It appears to the examiner that *California Rice Industry* v. *FTC*, 102 F. 2d 716, 718 and *Carter Carburetor Corporation* v. *FTC*, 112 F. 2d 722, 730 reach a different conclusion.

62. In addition to the lack of jurisdiction argument propounded by respondents, they contend that in any event this proceeding should be dismissed because counsel supporting the complaint has failed to prove any unfair acts or practices or unfair methods of competition. It appears to the examiner that counsel supporting the complaint has met the above contentions by very strong legal and factual arguments. Counsel supporting the complaint contends and the examiner finds that respondents are engaged in interstate commerce and that they engaged in unfair methods of competition and unfair acts and practices in commerce.

63. In general, the cement case is appropriate here not the Bunte case. In the cement case (*FTC* v. *Cement Institute, et al.*, 333 U.S. 683 (1948)), two of the numerous respondents therein charged with combining to fix the price of cement, contended the Commission lacked jurisdiction as to them because they made all of their sales within the State of Washington. They relied upon the Bunte case for dismissal. The Court decisively rejected their argument with the following reasoning:

> We cannot sustain this contention. The charge against these respondents was *not that they, apart from the other respondents, had engaged in unfair methods of competition * * * simply by making intrastate sales.* Instead, the charge was, as supported by the Commission's findings, that these respondents in combination with others agreed to maintain a delivered price system in order to eliminate price competition in the sale of cement in interstate commerce. The combination, as found, included the Institute and cement companies located in many different states. * * * The fact that one or two of the numerous participants in the combination happen to be selling only within the borders of a single state is not controlling in determining the scope of the Commission's jurisdiction. The important factor is that the concerted action of all parties to the combination is essential in order to make wholly effective the restraint of commerce among the states. *The Commission would be rendered helpless to stop unfair methods of competition in the form of interstate combination and conspiracies if its jurisdiction could be defeated on a mere showing that each conspirator had carefully confined his illegal activities within the borders of*

a single state. We hold that the Commission did have jurisdiction to make an order against Superior Portland and Northwestern Portland." (Emphasis added).

This reasoning applies here for many of these respondents are in interstate commerce and those who might not be, who have combined with them to suppress competition, cannot escape the Federal Government's jurisdiction.

This same idea of the interconnections of companies engaged in a common course of action also applies inter-company-wise. As counsel supporting the complaint points out, respondents seek to create an intra-state island of the trade territory in and around Seattle, but the record is to the contrary.

64. An earlier case *U.S.* v. *Swift & Company*, 196 U.S. 375 (1905), sets forth a test of interstate commerce which is applicable here. In that case the Supreme Court said transactions should be regarded in the light of their setting, that the whole picture should be viewed to determine the position of something which, when viewed alone, appears local. The Court said:

> * * * that the transaction, as an entirety, including each part calculated to bring about the result, reaches into two or more States; and that the parties dealing with reference thereto deal from different States. *United States* v. *Swift & Company* 122 Fed. 529, 532-533 *aff'd.*, 196 U.S. 375 (1905).

In *Salt Producers Assn.* v. *FTC*, 134 F. 2d 354, 359–360, the Court said:

> Respondent [FTC] was acting within its legal power when it directed a cessation of any conspiracy to curtail or regulate the production of salt. The production of salt is a local transaction, but an *agreement* between many producers, of diverse citizenship to limit their respective products is an unfair method of competition *in* interstate commerce. The Bunte case, *supra* is not, we think, a holding to the contrary. 134 F. 2d at 359, 360.

65. The Commission followed the rule of the foregoing cases in the *Matter of J. H. Filbert, Inc.*, 54 F.T.C. 359 (1957). Therein respondent, a Maryland corporation, with its principal place of business in Baltimore, was charged with violation of Section 2(d) of the Clayton Act. It was alleged that respondent gave special allowances to Food Fair for advertising respondent's products and anniversary promotions by Food Fair. Respondent admitted that it was engaged in commerce in that it shipped its products from its principal place of business to customers located not only within Maryland but to other states and the District of Columbia; that it also sold its products through route and driver-salesmen to retail establishments in D. C., Pennsylvania and New York but contended that the payments from Filbert to Food Fair did not involve interstate commerce, and

also that respondent's production for delivery and sale, as well as the payment to Food Fair, were all made entirely for exclusive use within the State of Maryland. The Commission over-ruled the initial decision of the hearing examiner agreeing with this contention and stated as follows:

> We must decline to restrict ourselves to this fragmented view of either respondent's or Food Fair's business in a "nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part." *Stafford* v. *Wallace*, 258 U.S. 495, 519 (1922). Nor does such a view appear consistent with the evidence in the record.
>
> Our conclusion that these "special payments" to Food Fair were made by the respondent in the course of its business in interstate commerce, part of which includes sales to Food Fair for interstate distribution, depends on (a) the character of the Food Fair organization which resells respondent's products and (b) the character of the advertising for which such payments were made, *regardless of the mere locus of the transactions between the respondent and Food Fair.* (Emphasis supplied).
>
> So far as the record shows, all dealing between the respondent and Food Fair occurred in Baltimore.
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> * * * * * * *
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> As the hearing examiner found, Food Fair Stores, Inc., is "a supermarket chain incorporated in Pennsylvania conducting an *integrated interstate operation*" (emphasis supplied) with "headquarters at Philadelphia but with branches in other states * * *, buying products from many suppliers in various states and reselling them to consumers through 216 supermarkets located from New York to Florida, with average annual sales per store being $2,000,000." Management of the supermarkets is directed from the organization headquarters in Philadelphia.
>
> * * * * * * *
>
> We believe it fair to conclude that sales to Food Fair and these payments to Food Fair were made in the whole course of respondent's sale and distribution of its products in interstate commerce.

If sales were solely in Baltimore by Filbert are regarded as made "in the whole course of its sales and distribution of products in interstate commerce," the same rationale must apply to the instant proceeding.

Additional support for holding that respondent's activities are in interstate commerce is to be found in other recent decisions both under the Sherman Act and the Federal Trade Commission Act.

66. In 1954, the question of jurisdiction was raised in *Moore* v. *Mead's Fine Bread Company*, 348 U.S. 115 (1954). The defendant maintained that jurisdiction was lacking under Section 2(a) of the Clayton Act, as amended, over a purely intrastate price discrimination where the prices affecting interstate sales were maintained. Re-

spondent was in the baking business, having plants in Texas and New Mexico, and sold bread both locally in New Mexico and interstate. In the course of business, respondent cut the price in New Mexico and maintained the price in interstate sales:

On pages 119–120 the Court said:

> We think that the practices in the present case are also included within the scope of Antitrust Laws. We have here an interstate industry increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only the respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns. No instrumentality of interstate commerce would be used to destroy the local merchant and expand the domain of the combine. But the opportunities afforded by interstate commerce would be employed to injure local trade. Congress, as guardian of the Commerce Clause certainly has power to say that those advantages shall not attach to the privilege of doing an interstate business.
>
> * * * * * * *
>
> The federal power to regulate interstate commerce is the power both to limit its employment to the injury of business within the state, and to protect interstate commerce itself from injury by influences within the state.

67. In a case very close to the instant one on its facts, the Supreme Court decided that price fixing, limited to intrastate sales came within the Commerce Clause. In *U.S.* v. *Frankfort Distilleries*, 324 U.S. 293 (1945), retail liquor dealers had agreed to fix the price on *retail* sales in Colorado. In that state the retailer dealers must purchase all their liquor from Colorado wholesalers. The Court stated on pages 297–298:

> It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce. * * * On the other hand, the sole ultimate object of respondents' combination in the instant use was price fixing or price maintenance. And with reference to commercial trade restraints such as these, Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it "exercised all the power it possessed." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495.

The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices, does not of itself remove it from the scope of the Sherman Act; retail outlets have ordinarily been the object of illegal price maintenance. Whatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the boundaries of Colorado.

68. Suppression of price competition by concert of action between competitors falls under the interdiction of Section 5 of the Federal Trade Commission Act. The law against price fixing is clearly defined. It is well established that collective action to tamper with prices is illegal per se. *U.S.* v. *Socony Vacuum Oil Co., Inc.* 310 U.S. 150 (1940). It is equally well settled law that the Federal Trade Commission can deal with price fixing under its power to prevent unfair methods of competition. *FTC* v. *Cement Institute*, 333 U.S. 683 (1948). However, it is appropriate to note that the Commission has in many cases condemned price fixing in varied forms and that in previous actions, it has dealt with activities very similar to those, in issue here. The following are cases in point: *Milk and Ice Cream Can Institute, et al.* v. *FTC*. 152 F. 2d 478 (1946); *Bond Crown & Cork Co.* v. *FTC*, 176 F. 2d 974 (1949); *Fort Howard Paper Co., et al.* v. *FTC*, 156 F. 2d 899 (1946); *American Chain & Cable Co., Inc., et al.* v. *FTC*, 139 F. 2d 622, (1944), 142 F. 2d 909; *FTC* v. *Pacific States Paper Trade Assn., et al.*, 273 U.S. 52 (1927). These cases outline the tests for conspiracy and combination under modern methods of corporate behaviour and demonstrate the broad coverage of the rule against price fixing. It is not only outright agreements upon prices that the Commission may reach, but any and all concerted actions to eliminate, lessen or restrain price competition.

69. The Commission in *Milk & Ice Cream Can* followed the reasoning of the Supreme Court in *Sugar Institute* v. *U.S.* 297 U.S. 553, 601 (1936). There the Supreme Court said:

The unreasonable restraint which defendants imposed lay not in advance announcements but in the step taken to secure adherence without deviation, to prices and terms thus announced.

In the *Sugar Institute* case the Supreme Court also pointed out that with regard to standardized products, there is a strong tendency toward price uniformity and that "makes it more important that such opportunities as may exist for fair competition should not be impaired." This rule is important here because bread is a highly standardized item at least in the State of Washington. Thus the elimination of any opportunity to compete as between these respondents is suspect.

70. The rule of strict surveillance over concerted action to lessen competition on standardized products was emphasized in the *Mal-*

sters case. In upholding the Commission's order in that case, the Court said:

[I]n the instant case the fact that malt is a standardized product, if such it be, with a tendency toward uniformity of price, makes it all the more important that such products be permitted to enter the channels of commerce unfettered by any restrictions which might impair such competition as otherwise exists. *United States Maltsters Assn., et al.* v. *FTC*, 152 F. 2d 161 (1945).

71. Direct evidence of conspiracy is not required in price fixing cases. Concerted action to eliminate price competition constitutes proof of conspiracy to fix prices. This rule is clearly expressed in *Advertising Specialty National Association, et al.* v. *FTC*, 238 F. 2d 108 (1956) where the Court said:

It should be emphasized that, to affirm the order below, it is unnecessary for us to find a formal agreement among the jobbers or direct evidence of a conspiracy. "The agreement may be shown by a concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose." *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 107 (C. A. 6th, 1944), aff'd 328 U.S. 781 (1946). "As in the case of most conspiracies to restrain trade and destroy competition, there is no direct evidence of any express agreement to do what the law forbids; but no such evidence is required, nor is the commission required to accept the denials of those charged with the conspiracy merely because there is no direct evidence to establish it, for it is well settled that 'The essential combination or conspiracy may be found in a course of dealings or other circumstances as well as in any exchange of words." *Fort Howard Paper Co.* v. *Federal Trade Com-* 7 Cir., 156 F 2d 899, 905 [re F.T.C. 1087; 4 S. & D. 496]. *Bond Crown & Cork Co.* v. *FTC*, 176 F. 2d 974, 979 (C.A. 4th, 1949) [46 F.T.C. 1419; 5 S. & D. 150] Cf. *Interstate Circuit Inc.* v. *United States*, 306 U.S. 208 (1939).

72. The following observations of the Court in *Bond Crown & Cork* (*supra*) are also apposite here:

Innocent explanations are offered as to each of the circumstances relied on by the commission, and if it were permissible to consider each of the circumstances out of connection with the others, there would be much force in the argument of the petitioners. When all of the circumstances are considered together, as they must be, however, there can be no question as to their sufficiency to support the findings and conclusions of the commission.

* * * * * * *

As in the case of most conspiracies to restrain trade and destroy competition, there is no direct evidence of any express agreement to do what the law forbids; but no such evidence is required, nor is the commission required to accept the denials of those charged with the conspiracy merely because there is no direct evidence to establish it, for it is well settled that "The essential combination or conspiracy may be found in a course of dealings or other circumstances as well as in any exchange of words." *Fort Howard Paper Co.* v. *Federal Trade Com'n*, 7 Cir. 156 F. 2d 899, 905.

73. The respondents named as directors, officers, and members of the association were such and were fairly representative of the entire

membership, as a class, which was so numerous that all could not be made parties without manifest inconvenience and oppressive delay.

The methods of competition described in the complaint contravene established public policy and are against the public interest.

CONCLUSIONS

The activities of respondents as set forth in the findings taken together add up to a conspiracy and combination on the part of respondents to fix prices and compel adherence to them and constitute unfair methods within the intent and meaning of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent Bakers of Washington, Inc., an incorporated association, and respondents George B. Buchan, Richard Hoyt, and Arthur H. LaLime, individually and as officers of respondent association, and their representatives, agents and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of bread, do forthwith cease and desist from:

Entering into, carrying out, continuing or cooperating in any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or members of Bakers of Washington, Inc., or between any one or more of them and others not parties hereto, to do or perform any of the following things:

(1) Establish, fix or maintain prices, terms or conditions of sale of bread,

(2) Adhere to any prices, terms or conditions of sale so fixed or maintained, or

(3) Deter or attempt to deter any competitor from exercising his individual judgment as to prices, terms or conditions of sale of bread.

It is further ordered, That respondents Buchan Baking Co., Continental Baking Company, Langendorf United Bakeries, Inc., Hansen Baking Co., Inc., Trenerry's Bakery Co., and Snyder's Bakery, Inc., corporations, John M. Larson, trading as Larson's Bakery, and Vic H. Goethals, trading as Fortune's Bakery, all members of respondent association, and the following members of said association, not named as respondents herein, Ashbrook Bakeries Corp., 1407 11th

Avenue, Seattle, Washington; Albertson's, Inc., 17000 Aurora Avenue, Seattle; Baders' Dutch Bakeries, 3755 University, Seattle; Baker Boy Bakery, 8050 Bothwell Way, Seattle; Bake-Rite Bakery, 1414 14th Avenue, Seattle; Bellinger Bakery, North Bend; Best Pie Company, Inc., 132 Queen Anne Avenue, Seattle; Big Four Donut, Inc., 319 Nickerson Street, Seattle; Blake's Bakery, Inc., 4729 California Avenue, Seattle; Bookter's Seattle Bakery, Inc., 3409 4th Avenue South, Seattle; Butter-Krisp Bakery, Inc., 2203 23rd Avenue South, Seattle; Boldt's Western Hotels Food Service, Inc., Boeing Cafeteria, Boeing Plant #2, Seattle; Carolyn's Cakes, 518 15th Avenue North, Seattle; Caster's Lake City Bakery, 12532 Bothell Way, Seattle; Frederick & Nelson (Bakery Department), 5th at Pine, Seattle; Gai's Seattle French Baking Co., Inc., 2006 Weller Street, Seattle; Golden Rule Bakery, Inc., 4450 Fremont Avenue, Seattle; Grandma Cookie Baking Co., Inc., 3402 Wallingford Avenue, Seattle; Karl's Bakery, 1614 Hewitt Avenue, Everett; Kent Bakery, 213 First South, Kent; Lippman's Bakery, Inc., 119 23rd Avenue, Seattle; Lindsay's Thriftway Market, 11100 Roosevelt Way, Seattle; Manning's Inc., 621 Seaboard Building, Seattle; Richard's Fried Pies, Inc., 220 1st Avenue, North, Seattle; Swiss Pastry & Candy Shop, 1325 5th Avenue, Seattle; Smith & Sonnleitner Cookie Co., 1238 No. 99 W., McMinnville, Oregon (7710 Bagley, Seattle, Washington); Van de Kamp's Holland Dutch Bakers, 823 Yale Avenue North, Seattle; Grand Central Bakery, Market & H Streets, Aberdeen; Swanson's Foods, Inc., 1401 Simpson Ave., Aberdeen; Veldkamp's Olympic Bakery, 417 W. Wishkah Street, Aberdeen; Bame's Ye Olde Home Bakery, Riverside, Mount Vernon; Bellingham Baking Company, 2001 State Street, Bellingham; City Bakery, 607 1st Street, Mount Vernon; Thrifty Foods, 130 Fairhaven Avenue, Burlington; Golden Rule Bakery, Inc., 915 Center Street, Tacoma; Jordan Baking Company, 3623 S. 54th Street, Tacoma; Eddy Bakeries Company, Inc., 232 S. Front Street, Yakima; Sigman Food Stores, P. O. Box 618, Yakima; Miss Maud Pemberton, Golden Rule Bakery, Inc., 4450 Fremont Avenue, Seattle; Henry Richards, Continental Baking Company, P. O. Box 3227, Seattle; Lloyd C. Mitchell, Van de Kamp's Holland Dutch Bakers, 823 Yale Avenue North, Seattle; Lou Blackfield, Bake-Rite Bakery, 1414 14th Avenue, Seattle; Horace Snyder, Snyder's Bakery, Inc., 31 North 4th Street, Yakima; Al Moore, Langendorf United Bakeries, Inc., 2901 6th Avenue South, Seattle; Roy Reynolds, Grandma Cookie Baking Co., Inc., 3402 Wallingford, Seattle; LeConie Stiles, Jr., Ashbrook Ruth

Bakeries Corp., 1407 11th Avenue, Seattle; Henry Gai, Seattle French Baking Co., Inc., 2006 Weller Street, Seattle; Donald R. Due, Best Pie Company, Inc., 132 Queen Anne Avenue, Seattle; and Maurice Bybey, Baker Boy Bakery, 8050 Bothell Way, Seattle; and their representatives, agents and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of bread, do forthwith cease and desist from:

Entering into, carrying out, continuing or cooperating in any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or members of Bakers of Washington, Inc., or between any one or more of them and others not parties hereto, to do or perform any of the following things:

(1) Establish, fix or maintain prices, terms or conditions of sale of bread,

(2) Adhere to any prices, terms or conditions of sale so fixed or maintained, or

(3) Deter or attempt to deter any competitor from exercising his individual judgment as to prices, terms or conditions of sale of bread.

It is further ordered, That Safeway Stores, Inc., and Holsum Baking Company, corporations, respondents, but not members of the respondent association, and their representatives, agents and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of bread, do forthwith cease and desist from:

Entering into, carrying out, continuing or cooperating in any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or members of Bakers of Washington, Inc., or between any one or more of them and others not parties hereto, to do or perform any of the following things:

(1) Establish, fix or maintain prices, terms or conditions of sale of bread,

(2) Adhere to any prices, terms or conditions of sale so fixed or maintained, or

(3) Deter or attempt to deter any competitor from exercising his individual judgment as to prices, terms or conditions of sale of bread.

OPINION OF THE COMMISSION

FEBRUARY 28, 1964

By DIXON, *Commissioner*:

Respondents appeal from the hearing examiner's decision holding that they have fixed bread prices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

Bakers of Washington, Inc., is a corporate trade association organized under the laws of the State of Washington for the purpose of promoting the interests of the baking industry. Its principal office is located in the city of Seattle, and more than half of its 49 members have their places of business there. The other members are located in the surrounding cities and towns of western Washington, particularly in Bellingham, Aberdeen, Tacoma, and Yakima. The association has "divisions" in each of those towns.

The complaint named as respondents the association; its three officials, including its former secretary-manager, Arthur H. LaLime, now deceased; eight of its members as representative of the entire membership; and two other companies, Safeway Stores and Holsum Baking Company.

The examiner found that the wholesale and retail members of this association had attended frequent association meetings at the Athletic Club in downtown Seattle; that, by means of agreements or "understandings" reached at these meetings, price competition in the sale of bread at both the wholesale and retail level had been eliminated or lessened; and that respondent Arthur H. LaLime, then secretary-manager of the association, acting as common agent for the several members, had engaged in various acts of suppressing or lessening price competition among the members of the association.

Respondents take exception to the examiner's decision in four principal particulars. They contend that there has been no price fixing; that, if such price fixing occurred, it did not occur "in" interstate commerce; that, if the association's secretary did in fact cause the suppression of price competition among certain of the association's members, the evidence is insufficient to hold various of the other members legally responsible therefor; and that, in any event, the order is excessively broad.

I.

The members of the association include both "wholesale" and "retail" bakers. As we understand the trade terminology a "wholesale" baker is one that produces (bakes) bread and sells it exclusively to retail establishments (e.g., grocery stores); it does not generally sell directly to consumers. A "retail" baker, on the other hand, is one that performs both the producing (baking) and retailing functions. The most familiar example is the traditional retail bake shop with its baking plant in the rear of the establishment, and its retail sales counter in the front of the shop. Another is the "in-store" bakery. This includes the grocery store owner who installs, in one section of his store, a baking plant and a bakery products "sales counter," or who permits another party to lease a portion of his store for such an operation. The term "retail" baker also includes the grocer that, instead of installing baking equipment on its *store* premises, sets up a separate baking plant at some other location and then transports the self-baked bread to its grocery stores for retail sale. Safeway, a respondent here, has such a plant in Seattle. It bakes a "private brand" bread called "Mrs. Wright" and retails it at the various Safeway grocery stores located throughout the western Washington marketing area.

A further aspect of the relationship between the wholesale and retail bakers should be mentioned at the outset. The grocery store that bakes its own bread also handles the major "name brand" breads. For example, Safeway buys "Wonder" bread from Continental and retails it alongside its own self-baked private brand, "Mrs. Wright." Hence Safeway is *both a competitor and a customer of Continental*. The small retail bake shops, those that generally deal exclusively in baked goods, are of course competitors of both Safeway and Continental—all are striving for the same consumer bread dollars.

It is undisputed that a number of these bakers are not engaged in interstate commerce. Some of them are small bake shops who do no business of any kind outside the city of Seattle. They bake the bread in Seattle, and retail it to consumers in Seattle. Obviously, a price fixing conspiracy exclusively among these bakers to regulate their prices in Seattle would be of no concern to the Federal Trade Commission. On the other hand, if it appears that they have joined in a conspiracy with one or more firms that *are* fixing prices in interstate commerce, then even the most local of these bakers is subject to the federal law. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 695-696 (1948).

It is also undisputed that several of these respondents are, in fact, "engaged in" interstate commerce. Respondent Continental Baking Company, a Delaware corporation with principal offices in Rye, New

York, the baker of "Wonder" bread, owns and operates more than 70 bakeries in 60 cities located in 29 states and the District of Columbia. It had sales of bread and other bakery products of more than $350 million in 1960, and more than 27,000 employees. Respondent Langendorf United Bakeries, Inc., a Delaware corporation with general offices in San Francisco, California, owns and operates 11 bakeries in California, Oregon, and Washington. It had 3,896 employees, and sales of more than $73 million in 1961. Safeway Stores, Inc., a Maryland corporation with its principal offices in Oakland, California, operates some 2,000 grocery stores in 28 states and the District of Columbia. In 1960 it had more than 63,500 employees and sales of more than $2,468,000,000. Safeway is one of the three largest retail grocery chains in the United States.

These respondents argue, however, that, while they are "engaged in commerce" and thus subject generally to the jurisdiction of the Federal Trade Commission, the particular "acts" or "practices" challenged in the instant complaint did not themselves occur "in commerce." They contend that counsel supporting the complaint would have met his burden on this point only if he had shown that state lines had been crossed by either (1) the price fixing conspiracy itself, or (2) overt acts committed pursuant to that conspiracy, *i.e.*, sales at the fixed prices. Respondents contend that this record shows neither.

Assuming that a conspiracy has been established, and assuming further, for the sake of argument, that the conspiracy itself is "local" in the eyes of the law, we do not agree that the overt acts committed pursuant to it—the sales subsequently made at the fixed prices—were themselves local. First of all, this record shows that several of these wholesale bakers sell something like 1% or less of the production of their Seattle plants in Alaska.[1] Further, it appears that

[1] Langendorf's Seattle plant manager testified that less than 1% of his sales were made to buyers in Alaska. Tr. 313. According to his affidavit, n. 4, *infra*, this amounted to $35,789.50 in 1960. "It is sold FOB Dock right here [Seattle] at our regular wholesale prices." Tr. 344. Continental's Seattle plant manager testified that he sold less than "one-half of one per cent" in Alaska. Tr. 399. Since his plant has annual sales of some $4.5 million, this suggests annual sales from Seattle to Alaska of about $22,500. Buchan, with annual sales of some $4 million, sells "less than a fraction of one per cent" to Alaska buyers. Tr. 230. Hansen makes some shipments to Alaska also. Answer, p. 3.

Interestingly enough, respondents claim even these sales, assuming a Seattle conspiracy, are not actionable under the statute. They say there is no showing that prices charged to Alaska buyers "affect" Seattle prices, or that Seattle sellers are "interested" in Alaska prices. But this assumes the inquiry is directed solely to retail prices. To be sure, the price at which an Alaska buyer *resells* the bread is of no interest to the Seattle conspirators. But we are concerned here with *wholesale* as well as retail prices. And these sales to Alaska purchasers were made f.o.b. the Seattle docks, at the "regular" (*i.e.*, the fixed) wholesale price. Hence they are sales "in" commerce at a price inflated by a conspiratorial agreement.

some Seattle bread is shipped to adjoining states [2] and that a small amount of the bread sold in the Seattle area was in fact baked in another state.[3] While these amounts are not *de minimis*, this case involves a much larger problem. We think it not only important but necessary that we deal with the question of whether these great interstate firms can claim immunity from the statutory prohibition against price fixing in regard to the remaining 99% of the transactions involved, those that took place within the borders of the State of Washington.

Bakery products, including bread, are highly perishable (bread, to be considered acceptably "fresh," must be sold to the ultimate consumer within something like 48 hours after baking). And bakery products are bulky in relation to weight and value, thus making long distance transportation economically impractical. The result is that Continental, for example, instead of baking all its bread in New York and then transporting it into 29 states for sale to local grocery stores, gathers up the men, equipment, and ingredients that it needs, transports them to each of the 29 states, erects a baking plant in each, bakes the product inside the borders of each such State, and sells it inside those borders.

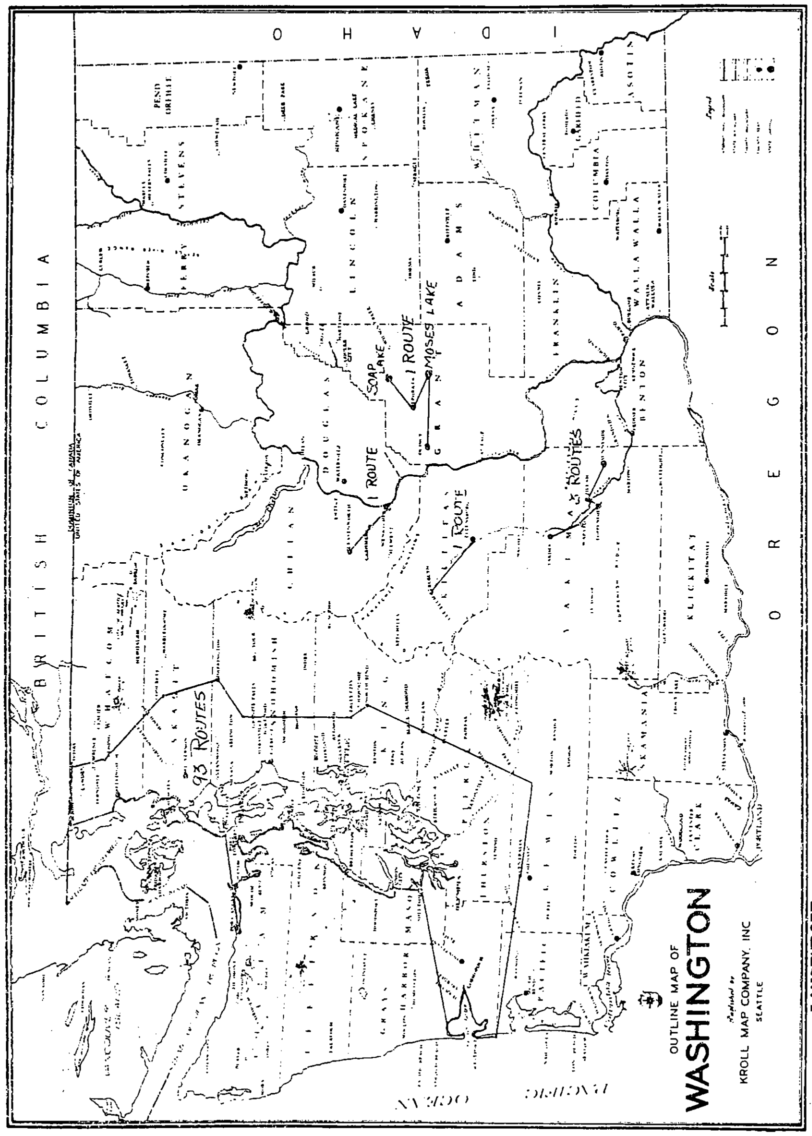
The fact that Continental has selected this method of doing business in Seattle is thus due to the nature of bakery products. It appears that, because of the bulk and perishability of bread, something on the order of 150 miles is the maximum distance from the baking plant it can be economically marketed. Here the Seattle marketing area (see Map of Washington,[4] p. 1112a) runs generally from Seattle to the Canadian border on the north; [5] to the Pacific Ocean on the west; to Yakima (Washington) to the southeast; and to the Cascade mountain range to the east. None of these market boundaries are more than 150 miles from Seattle. This is the area this trade association has selected for its theater of operations. Within it, respondents' prices are the same. When the retail price of bread goes from 33¢ to 34¢ in Seattle, it also goes up by precisely that amount in Bellingham (about 100 miles to the north), in Tacoma (some 25 miles south of Seattle), in Aberdeen (near the Pacific, roughly 100 miles west of Seattle), and in Yakima (over 100 miles southeast of

[2] Safeway (Answer, p. 2). Snyder ships some bread to Oregon (Answer, p. 2).

[3] Holsum ships bread from its Idaho plant to its Trennery subsidiary in Yakima (Answer, pp. 1–2).

[4] Attachment, affidavit of Al Moore, manager of Langendorf's plant in Seattle, filed July 13, 1961. (For a description of the marketing area of Continental's Seattle plant, see attachment, affidavit of Covington, plant manager, filed July 10, 1961. The Yakima area is served by another Continental plant, the one located in Portland, Oregon.)

[5] It appears that these respondents do not sell their bread in Canada because of a "duty" Canada imposes.



LANGENDORF
Market Area for White Bread

Seattle). Yet, because this marketing area is well "inland" from the borders of any adjoining state, respondents contend that, if they fix prices in this area, they are beyond the reach of the Federal Trade Commission Act.

Respondents claim support for their position in *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U.S. 349 (1941). There Bunte, a manufacturer of candy, made the candy in Illinois, and sold it in Illinois. The Commission, finding that Bunte was selling its candy in Illinois by means of a "lottery" scheme, and that it therefore enjoyed an unfair advantage over out-of-state competitors who could not lawfully sell their competitive candy across the state line into Illinois by the "lottery" sales method, concluded that Bunte was adversely affecting interstate commerce and ordered it to cease and desist. The Supreme Court reversed, pointing out that the Federal Trade Commission Act, by its express terms, reaches only unfair acts or practices "in" interstate commerce, and hence does not include those that merely "affect" interstate commerce. The *Bunte* case is not in point here. This complaint alleges that these respondents have fixed prices "in" interstate commerce.

We think the controlling case law here is not to be found in *Bunte*, but in *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 695–696 (1948), and in *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944). In the first of these cases, the Northwestern Portland Cement Company, engaged wholly in intrastate commerce, entered into a planned, common course of action with others who were engaged in interstate commerce. The planned, common course of action restrained price competition. There the Supreme Court held that "the fact that one or two of the numerous participants in the combination happened to be selling within the borders of a single state is not controlling in determining the scope of the Commission's jurisdiction." In the second of these cases, namely *South-Eastern Underwriters Assn.*, an association of fire insurance companies had been indicted under Section 1 and 2 of the Sherman Act [6] for fixing fire insurance premium rates (prices) and attempting to monopolize the fire insurance business, in six Southeastern States. The district court, relying upon *Paul* v. *Virginia*, 8 Wall. 168 (1869), had sustained a demurrer on the ground that insurance simply was not commerce at all, either local or interstate. The Supreme Court reversed.

[6] While Sherman Act cases are not applicable to Federal Trade Commission Act "commerce" problems when the former turned on whether commerce had been "affected" by the acts charged, such cases are of course binding precedent when the issue, as in *South-Eastern Underwriters*, was whether those acts occurred "in" interstate commerce.

One of the contentions of the defendant insurance companies (more than half of which maintained their home offices in either New York, Pennsylvania or Connecticut, employing "local" agents to solicit "local" customers for them in the Southeastern states) was that the insurance policies sold by their agents were "local," not interstate, contracts. The Court replied:

> But this reason rests upon a distinction between what has been called "local" and what "interstate," a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power. * * * We may grant that a contract of insurance, considered as a thing apart from *negotiation* and *execution*, does not itself constitute commerce. * * * But it does not follow from this that the Court is powerless to examine the *entire transaction, of which that contract is but a part*, in order to determine whether there may be a *chain of events which becomes interstate commerce.* Only by treating the Congressional power over commerce among the states as a "technical legal conception" rather than as a "practical one, drawn from the course of business" could such a conclusion be reached. *Swift & Co.* v. *United States*, 196 U.S. 375, 398. In short, a *nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature.* Were the rule otherwise, few businesses could be said to be engaged in interstate commerce. 322 U.S. at 546–547 (emphasis added).

Describing the activities of the defendant insurance companies that were in interstate commerce, the Court said:

> And in great detail the indictment set out these total activities, of which the actual making of contracts was but a part. As recognized by the District Court, the insurance business described in the indictment included *not only the execution* of insurance contracts but also negotiations and events *prior to execution* of the contracts and the innumerable transactions necessary to *performance* of the contracts. All of these alleged transactions, we shall hereafter point out, constituted *a single continuous chain of events*, many of which were multistate in character, and none of which * * * could possibly have been continued but for that part of them which moved back and forth across state lines. 322 U.S. at 537 (emphasis added).

The so-called "local" parts of these transactions had no separate existence of their own. The feet of each transaction were planted in a single southeastern state, but the whole body stretched across several States to its guiding member—the head—in one of the financial centers of the east, either New York, Pennsylvania, or Connecticut.

> This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. A large share of the insurance business is concentrated in a comparatively few companies located, for the most part, in the financial centers of the East. 322 U.S. at 541.

A continuous, life-giving stream flowed back and forth between the head and those distant extremities:

Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, *checks and drafts* flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among the states composed of *collections of premiums, payments of policy obligations*, and the *countless documents and communications* which are essential to the negotiation and execution of policy contracts. *Ibid.* (Emphasis added.)

The channels and instrumentalities of interstate commerce—telephone, telegraph, mail, and traveling agents—were used to effect the so-called "local" sales.

Local agents solicited prospects, utilized policy forms sent from home offices, and made regular reports to their companies by mail, telephone or telegraph. Special travelling agents supervised local operations. 322 U.S. at 542.

The *terms* on which the "local" purchasers bought, and the value of what they got for their money, were determined not by the "local" salesmen, but by out-of-state management:

Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investment it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state. 322 U.S. at 541–542.

In the instant case, at least three of the respondents do business in substantially the same manner as those insurance companies. On November 29, 1961, Continental, Langendorf and Safeway entered into written stipulations with counsel supporting the complaint describing the interstate character of their operations. The stipulation with Continental, set out in part in the footnote below,[7] is sub-

[7] 4. Continental is regularly engaged in interstate commerce in the sale and distribution of bread and other bakery products.

5. Membership in Bakers of Washington, Inc., was made in Continental's name and approved at headquarters.

6. Continental assumes legal responsibility for the acts of its plant manager in Seattle as to which testimony was taken.

7. Continental operates on an integrated basis. Ingredients for the products are purchased centrally [from central offices in New York] and receipts from sales go into a single treasury [in New York].

8. Ultimate responsibility for company affairs is vested in top management personnel at the company's general offices in Rye, New York.

9. Each element of Continental's bread and bakery product business is part of an integrated whole. The company is a single business entity and benefits or suffers from what is done locally by and through each plant or office.

10. The control over operations which rests in plant managers, beyond that which is peculiar to the position such as the housekeeping functions, is vested in them by delegation from top management.

stantially the same as the other two. "Continental operates on an integrated basis. Ingredients for the products are purchased centrally [New York] and receipts from sales go into a single treasury [New York] * * *. Each element of Continental's bread and bakery product business is part of an integrated whole."

The sales involved here are physically made through what are called "driver-salesmen," employees that generally perform both the selling and delivery functions. Each driver-salesman is assigned a specific "delivery route," generally a given number of city blocks. Continental serves 71 delivery routes from its Seattle plant. On those delivery routes, the driver-salesmen make deliveries to those stores that have already agreed to accept their product, and attempt to "sell" those stores that have not yet been persuaded to do so.

There is no suggestion here that these sales have to be "approved" by Continental's New York management. We have no doubt that they are "local" sales in the sense that, in an action for the price of goods sold and delivered, the law of the State of Washington would be controlling. But that is the "type of mechanical criterion" the Supreme Court rejected in *South-Eastern Underwriters*. A purchase-sale transaction under the trade regulation law is considerably more than this. We must, instead, "examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce." Here, as there, the business involved includes not only the execution of the contracts, "but also negotiations and events prior to execution of the contracts and the innumerable transactions necessary to *performance* of the contracts."

The instant record provides us with very little information as to the "innumerable transactions necessary to performance of the contracts" entered into by these local driver-salesmen on behalf of their out-of-state employers. From the stipulation quoted above, we know that Continental's plant manager in Seattle does not buy the ingredients or raw materials that go into the bread he sells; all purchasing is done for him by a central purchasing office located at the company's headquarters in New York. And from his testimony and certain exhibits we know also that there is a "chain of command" running from his plant in Seattle, Washington, to a "Regional Office" in *California*, and thence to top management in New York.[8] When he wants to increase prices, the plant manager writes to his regional manager in California asking for approval. The regional manager, in turn, gets approval from headquarters in New York. (In fact, it appears that the president of Continental personally approved the price increase in 1958.[9])

From this "bare bones" record, we see only the broad contours of the taut strings that tie the Seattle plant manager to his out-of-state employer in New York. Fortunately, however, this Commission knows considerably more than this about Continental's over-all operation. On October 27, 1959, we issued our complaint in a proceeding entitled *In the Matter of Continental Baking Company*, Dkt. 7630, charging this same respondent, Continental Baking Company, with violating Sections 2(a) and 2(d) of the amended Clayton Act by granting discriminatory price concessions, and discriminatory promotional allowances, to certain favored customers. On March 8, 1963, the hearing examiner issued his initial decision dismissing the complaint. He found that, while the discriminations had occurred, and while the discriminations in price may have the requisite adverse effects on competition, they were not violative of the statute because they had been granted to meet the equally low prices and equally attractive promotional allowances of competitors. That initial decision was affirmed by this Commission on December 31, 1963.

One of the principal issues involved in that proceeding was similar to the instant problem—namely, whether, when one of Continental's "local" plants discriminated in price between two customers located in the same state in which the bread was baked, either of the two "*purchases* involved in such discrimination" was "in" commerce. Section 2(a) of the Clayton Act, as amended (emphasis added). The hearing examiner held that those purchase-sale transactions *were* "in" commerce.

In reaching this conclusion, the hearing examiner had the benefit of an adjudicatory record that explored the structure and operation of Continental's business with highly commendable thoroughness. Under the principle that a tribunal may take notice of its own rec-

[8] Tr. 420–427; CX 23A–29.
[9] CX 23E.

ords in other cases,[10] we take official notice of the following facts developed in that record through documentary evidence secured from Continental, and by examination and cross-examination of Continental's officials and employees:

A. *Corporate organization.* Ultimate responsibility for corporate affairs is centered in the company's headquarters in Rye, New York. The headquarters staff is functionally divided into several "divisions," e.g., "purchasing," "sales," etc.

The company's multistate operation is divided into a number of "Regions." Each "regional office" is assigned, by headquarters, a given geographical area, an area that generally includes several states and, of course, several baking plants. The regional office staff, like the headquarters staff, is functionally divided into a number of divisions or departments. Each of these has a department head that reports to the "regional manager." He has (1) a "Regional Sales

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[10] "We may notice the record of that case in this court." *National Fire Insurance Co. v. Thompson,* 281 U.S. 331, 336 (1930). See also *Virginian Ry. Co. v. System Federation No. 40,* 300 U.S. 515, 546, n. 4 (1937) (quoting testimony from another case); *West Ohio Gas Co. v. Public Utilities Comm. (No. 1),* 294 U.S. 63 (1935) (noticing evidence in record of a companion case between same parties); *Crichton v. United States,* 56 F. Supp. 876 (S.D.N.Y. 1944), *aff'd.,* 323 U.S. 684 (1945) (ICC noticed record of earlier case involving same party); Davis, 2 *Administrative Law Treatise* 338, 381–384.

As we understand it, the propriety of taking official notice of facts, whether such notice is taken at the beginning of a proceeding or in the agency's decision, turns upon whether the party is afforded an opportunity to challenge the facts so noticed, if it desires, and thus to correct any errors the tribunal may have made. *United States v. Pierce Auto Freight Lines, Inc.,* 327 U.S. 515, 528–530 (1946); Davis, *id.,* at 388, 394, 400, 411; Davis, "On Official Notice," Proceedings of the Federal Hearing Examiners' First Annual Seminar 13, 22 (September 23–25, 1963). Section 7(d) of the Administrative Procedure Act provides: "Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary." Section 3.25 of our Rules of Practice authorizes the filing of a "petition for reconsideration" of any Commission decision. Should Continental desire to challenge any of these noticed facts, it will thus have an opportunity to do so in such a petition for reconsideration, specifying those particular factual statements it wishes to dispute, and setting forth, preferably by affidavits of knowledgeable persons, the true facts in those particulars.

It appears, however, that these noticed facts are undisputed. They were taken from another record involving the same party; they were presented there through the party's own officers, employees, and written records; they were adduced there for the same purpose as here (to show interstate commerce); and cross-examination and opportunity to present rebuttal evidence were afforded. These facts were then found by the examiner and set forth with great particularity in his initial decision in that case (Dkt. 7630, initial decision filed March 8, 1963, particularly pp. 11–21) [63 F.T.C. 2084–2092]. On its appeal to the Commission, Continental challenged the examiner's legal conclusion that those facts evidenced interstate commerce, but made no effort to dispute any of the factual findings themselves. We could, of course, remand the instant case for the taking of this same evidence a second time. And on a proper showing of the necessity therefor, we would do so. But until such a showing has been made, we are guided by the principle that "the intelligent functioning of the administrative process demands that the Commission [ICC] be not required to indulge in lengthy evidentiary recapitulations of matters just decided in a companion case." *Crichton v. United States, supra,* 56 F. Supp. at 880.

Manager," (2) a "Regional Production Supervisor," (3) a "Regional Cost Analyst," (4) a "Regional Vehicular Supervisor," (5) a "Regional Engineer," and (6) a "Regional Personnel Director." [11]

This form of organization is, in effect, repeated at the bakery or plant level. The "plant manager" is responsible to his immediate superior, the "regional" manager. The plant manager has several divisional or departmental heads to assist him. He has: (1) a "Sales Manager," (2) a "Shop Superintendent," (3) an "Office Manager," (4) a "Fleet Superintendent," (5) a "Chief Engineer," and (6) a "Chief Janitor." [12]

B. *Territorial assignments.* New York management controls the geographical territory served by each regional office. It rearranges these sometimes, taking a baking plant (or a distribution "depot") out of one region and putting it under the jurisdiction of another. The regional office, presumably with the approval of the headquarters sales manager, controls the territory to be served by each of the local baking plants. It can have a particular plant manager confine his sales inside the state in which his plant is located, or it can have him sell across state lines. Local plant managers are assigned, promoted, and transferred from one plant to another, and from one "region" to another.

At the bakery level, the plant manager divides his territory into "delivery routes." Such a route might be 10 blocks long, or only two blocks, depending upon the "density" of the "stops" on that route. (A "stop" is a customer, e.g., a grocery store that buys Continental products.)

C. *Purchasing.* Continental's baking plants in 29 states secure the raw materials or ingredients needed in the baking of their goods by sending a "requisition," apparently through the regional office, to the company's "purchasing division" in Rye, New York. It does this by sending in, each and every week, a "weekly inventory" of the supplies it has on hand. From these, headquarters does the ordering "automatically." The suppliers of the various products needed by Continental's 29-state bakery operations are themselves located in many different states. Upon receipt of an order from Continental's Rye, New York, purchasing division, the suppliers deliver, in many instances across state lines, to whatever baking plant is indicated. Payment for ingredients is of course made by the purchasing division in New York from the central New York treasury.

[11] *In the Matter of Continental Baking Company,* Dkt. 7630, tr. 712.
[12] *Id.,* at tr. 366.

D. *Production.* Continental, in support of its efforts to maintain "a rigid standard of quality throughout the country," issues "Production Bulletins" prescribing in exact detail the production standards its plants are to follow. The regional production supervisor "is constantly in touch with the plants." [13]

E. *Pricing.* The local plant managers can only "recommend" prices. The regional office, presumably with the approval of the headquarters sales manager, determines prices. To get permission to vary his prices, either generally or to a particular customer, the plant manager submits a request to his regional superior.

F. *Money collected from sales.* Continental's local baking plants have no control whatsoever over the money collected from their sale of Continental products. The bakery has two bank accounts. Money collected from customers is initially deposited in a "general" account, and then periodically transferred to a New York headquarters' bank. For its own local expenses, the bakery is given a "local" account. From this account, it can meet its payroll and make certain other "miscellaneous" expenditures. Except in case of emergencies, the purchasing of the local plant manager is limited to expenditures of $50 or less ($300 for engineering services).[14] For expenditure of more than $50 the plant manager must send a requisition to headquarters. As to the money received from the sale of Continental's products, he is simply a collection agent for the headquarters treasury.

G. *Accounting.* Continental's baking plants follow an accounting system prescribed by the headquarters office in New York. Each week they submit a report that gives the home office in New York a complete breakdown on the past week's production, sales, percentage of "returns," etc. The bakery also submits a weekly "profit and loss" statement. A "Travelling Auditor" audits the bakeries' books twice a year, and may also make additional visits. The regional cost analyst also checks on the bakeries.[15]

H. *Personnel.* Continental's bakery manager can hire and fire employees below the "department head" level. He must have regional "approval" before he can hire, say a "production supervisor," or a "sales supervisor." The regional "personnel director" helps the plant personnel man with such programs as the "student program which we carry out at each plant," that is, recruiting from local colleges. Also, the regional personnel director "is a sort of liaison operator working with the plant personnel man in clearing ideas on safety

[13] *Id.,* at tr. 714–715.
[14] *Id.,* at tr. 526–527, 601–602.
[15] *Id.,* at tr. 716.

programs and clearing the distribution of thoughts on hiring, training, et cetera." [16]

I. *Insurance.* All group life and health insurance, for all Continental employees, is purchased by the "Insurance Department" in Rye, New York.[17]

J. *Engineering.* The regional engineer "irons out the engineering kinks" at the local plants. "He is very important. A plant will develop a new manner of maintenance. He picks it up at one plant and passes it on to the next plant, such as it might help their efficiency and maintenance problems, and so forth." [18]

K. *Vehicles.* The regional "vehicular supervisor" assists the local plants in the maintenance and operation of their truck fleet.

L. *Sales.* The regional manager's responsibilities "are to operate the business and the bakeries under my control and try to make some money. * * * I am responsible for pricing in the trading areas that I have charge of." [19] He is responsible to headquarters for the sales volume of each of his bakeries. "I run sales figures for my region constantly." [20] To assist him, he has a regional "sales manager," whose duties are to: "Call on the bakeries, work with the sales departments to develop sales, help them to develop sales campaigns, help in getting the right kind of sales people, help to train them, and make store contacts when necessary." [21] "He is in contact with all the plants in my Region. Each plant has some kind of sales activities going on constantly. Various sales promotions, various sales activities and the regional sales manager's job is to go around [to] the plants and confer with the plant manager and insure that these are activities that are going along, and general contact with the activities of each plant, in the direction of sales." [22]

M. *Labor Relations.* Continental has "a Labor Relations man" that "functions for my region and several others * * *. He is the one that negotiates the contracts." [23]

N. *Packaging.* Continental, at its New York headquarters, has an "art department" that designs most of the packages and wrappers in which its bakery products are sold (e.g., "Wonder" bread). However, if a bakery manager feels strongly about a particular design, it won't be forced on him.

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[16] *Id.*, at tr. 712–713.
[17] *Id.*, at tr. 719.
[18] *Id.*, at tr. 715–716.
[19] *Id.*, at tr. 1837.
[20] *Id.*, at tr. 1888.
[21] *Id.*, at tr. 1922.
[22] *Id.*, at tr. 714.
[23] *Id.*, at tr. 713–714.

O. *Advertising.* In 1961, Continental's bread sales were approximately $187 million. About 6.5% of that total was spent for advertising. Most of this is local or regional, except for some national TV advertising. Newspapers, radio, TV, and billboards are the principal media used. National magazines are not used.

Virtually all advertising is *placed* from headquarters in New York, and is *paid for* from New York. The company has its own "Advertising Department" at headquarters. Further, it retains a New York advertising agency to handle its account. Local bakery managers can "suggest" ads they would like to see run in their local areas, but the preparation of the ad copy, the making of the arrangements with the local media (newspapers, radio and TV stations), and the payment of the media's bill are all headquarters' functions.

The home office also prepares "point-of-purchase" advertising material (signs to be put on the grocery store's bread rack, signs for its windows, etc.) for the local bakeries. The home office keeps the plants informed of the material available, and sends it to them from New York on request.

While the local bakery does not prepare, place, or handle the payment for advertising conducted in its trade area, the costs incurred by headquarters are charged to the bakery.[24]

We think the foregoing facts bring Continental's sales in the State of Washington squarely within the rule of *South-Eastern Underwriters* that a purchase-sale transaction includes not only the "execution" of the contract "but also negotiations and events prior to execution * * * and the innumerable transactions necessary to performance." Here, the acts by which technical title passes from Continental to its grocery store customers are obviously a small part of Continental's total operation. Its local sales agent can easily agree to deliver on consignment a dozen loaves of "Wonder" bread every Monday, but "innumerable transactions," many of them directly "in" interstate commerce, are "necessary to performance." The work of Continental's driver-salesmen is merely the peak of the iceberg; beneath it, sunk deep into the stream of interstate commerce, is the real body of the transaction.

We find that all of Continental's sales in the State of Washington were "in" interstate commerce. All of them involved a New York seller and a Washington buyer. Each of them was an indivisible part of a host of "transactions * * * [that] constituted a single continuous chain of events, many of which were multistate in character, and none of which, * * * could possibly have been continued but for

[24] *Id.*, at tr. 457.

that part of them which moved back and forth across state lines." *South-Eastern Underwriters*, *supra*, 322 U.S. at 537.

We think this result is also in full accord with the Court's decision in *Moore* v. *Mead's Fine Bread Co.*, 348 U. S. 115 (1954),[25] and with the Fifth Circuit's recent opinion in *Shreveport Macaroni Mfg. Co., Inc.* v. *Federal Trade Commission*, 321 F. 2d 404 (1963), *cert. denied*, January 6, 1964. In the latter case it was squarely held that purchase-sale transactions may be "in interstate commerce although the *deliveries* * * * [are] intrastate." 321 F. 2d at 407 (emphasis added). Until the Supreme Court resolves whatever conflict may exist between this case and *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F. 2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963), we feel bound to follow the Court's clear reasoning in *South-Eastern Underwriters*, *supra*, and our understanding of its opinion in *Moore*, *supra*. In doing so, we note that nothing in *Willard* suggests that the Court had the benefit there of the kind of intra-corporate data we have discussed here, a study in depth of the vast substratum of out-of-state control exercised over, and the never-ending stream of interstate activities and communications that form the underlying support for, the out-of-state firm's allegedly "local" sales. This is the "economic and business stuff" out of which these transactions are made, *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963), and we think it shows that any other ruling would not only do violence to the purposes of the statute, but would require this Commission to ignore what our careful study here has led us to believe are the economic realities of present day interstate commerce.

[25] In that case, a private treble damage action brought under the Robinson-Patman Price Discrimination Act, the Court found a discrimination "in" commerce where the defendant, operator of a bakery in Clovis, New Mexico, cut its prices inside the State (in Santa Rosa, New Mexico), thereby injuring a local competitor, while keeping its prices high on sales made nine miles across the border in Farwell, Texas. To be sure, the latter sales were enough to meet the technical requirements of the statute. But they were trifling in amount, by any standard. Farwell, Texas, in 1950, had a population of 400. Assuming the defendant had all the bread business in that town, that it received its full wholesale price of 14¢ per loaf, and that every man, woman, and child in town consumed half a loaf of bread per day, the defendant's gross sales there would have been no more than $28 per day. Assuming a net profit of 10% of gross sales, it could not have netted more than $2.80 per day on its Texas sales. (See analysis in Proposed Findings and Conclusions of counsel supporting the complaint, *Continental Baking Co.*, Dkt. 7630, submitted December 31, 1962, p. 59.) The injured New Mexico competitor won a judgment of $68,400. If the Farwell, Texas, sales were the keystone in the Court's decision, then the holding is simply that the defendant used poor financial judgment in letting its trucks wander nine miles inside the Texas border: it would have had to retain all of the Farwell, Texas, bread business for more than 75 years to earn back that nearly $70,000 sum.

The real basis for the Court's decision, we think, was not that the Mead plant in New Mexico made a few inconsequential sales in a small Texas border town, but the fact that Mead was one of several "interlocked companies," a member of an "interstate combine," 348 U.S. at 119, doing business in many states.

II

Respondents contend that the hearing examiner erred in finding that they had, in fact, conspired to "suppress competition among and between themselves and others in the production, distribution and sale of bread" as charged in the complaint. They call it merely a case of "conscious parallelism." Arguing that nothing has been shown here but price uniformity, they note the principle that: "An inference of conspiracy would only arise from similar business conduct if it appeared more to the interest of competitors to adopt different practices." *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 177 F. Supp. 743, 747 (N.D. Cal. 1959), *cert. denied*, November 18, 1963.

Respondents further contend that, whatever inferences of conspiracy might otherwise have been drawn here, they are affirmatively rebutted by several additional facts, namely, (1) that there is no community of interest between the "wholesale" and "retail" members of the association, and thus no reason for them to conspire: (2) that there is no community of interest, and hence no motive for a conspiracy, between those members that are located in different metropolitan areas; and (3) that several of the alleged conspirators said they had lost money during a part of the relevant time period.

The third contention is wholly fallacious. Even if it had been fully established that some of these wholesale bakers had in fact sustained losses,[26] that fact would be insufficient to rebut a reasonable inference of conspiracy. While conspiracy is normally associated with affluence on the part of the conspirators, it is certainly no guarantee of prosperity.

Nor is there anything in respondents' "territorial" and "functional" arguments that negate the existence of a price fixing conspiracy here. The latter contention—that "wholesale" and "resale" bakers do not compete with each other—is patently unsound. For example, one of the "retail" bakers, Mr. Vincent Noga, operator of an "in-store" bakery in Yakima, testified that while he was baking and selling his own bread in one section of the Yakima supermarket where he had his baking operation, the various "wholesale" brands (including Continental's "Wonder" bread) were being sold in another section of the same store, under the very same roof. He had no doubt that he was "competing" with the bread baked by the wholesaler.[27]

[26] Those respondents offered no documentary evidence to support the claims on this point. The only written financial data in the record is CX 32, Continental's 1960 Annual Report, which shows a net after tax profit of over $9 million (p. 6); and CX 34, Safeway's 1960 Annual Report, which shows a net profit of over $34 million (p. 18).

[27] "[T]he wholesalers were my main competitors." Tr. 526.

It could not be otherwise. Wholesale and retail prices are tied together by a simple, mathematical formula. On their loaves of bread, the wholesale bakers stamp, for the consumer to see, a "suggested retail price." This is the price the retail grocer almost invariably charges the consumer. The price he pays the wholesale baker is simply that suggested retail price *less 20%*.[28] When the consumer is paying 34¢ for the regular loaf, the grocery store is paying 20% less, or 27.2¢. One of the wholesale bakers, testifying in regard to the 2¢ price increase in 1958, remarked that: "We don't get the two cents. We only get a part of that. 20% of it goes to the retailer, the grocer or the restaurant owner * * *."[29]

Hence the big wholesale bakers have a direct and immediate interest in preventing price competition between the retail bakers themselves, and thus between the retail bakers on the one hand and the retail grocery stores (the wholesalers' customers) on the other. For example, one wholesale baker summed up his competition this way: "Well, I was thinking of everybody in the baking industry. You know, our competition isn't just the wholesale baker or the retail baker or the grocery store baker or the house-to-house baker. * * * The *housewife* can bake her own bread. * * * [I]f she thinks the price is too high, she's going to bake in her own kitchen and she says she does a better job."[30]

As to respondents' argument that the geographical distances between these various metropolitan areas establishes the absence of competition and hence any motive for fixing prices, it should be noted first that many of these respondents sell in two or more of the towns in question.[31] In fact, it appears that Safeway sells in *all*

[28] See, e.g., tr. 42–44, 205; CX 31.

[29] Tr. 182.

[30] Tr. 245 (emphasis added).

[31] Of the 49 members of the association, all of whom are respondents in this proceeding (either named directly or through representative members), more than half of them have their businesses in Seattle itself and thus compete with each other in that city. (CX 8, a list of the members as of date complaint issued, and amount of dues paid by each, tr. 177, lists 29 Seattle members.) The others are located in North Bend, Everett, Kent, Aberdeen, Mount Vernon, Bellingham, Anacortes, Burlington, Tacoma and Yakima. All of these towns are well within 150 miles of Seattle, the distance bread can be economically transported from the baking plant. (See Map, p. 1112a.) Buchan has four plants: two in Seattle, one in Bellingham, and one in Tacoma. Tr. 179. Continental's Seattle plant sells all the way north to the Canadian border, east to North Bend, and south to Renton and Tacoma. Tr. 399–401. For example, it has a delivery route in Anacortes (near Bellingham), tr. 438, and thus competes with local bakers there. Langendorf's Seattle plant similarly sells north to the Canadian line, south to Aberdeen, and southeast all the way over to Yakima. Tr. 312–313. Hansen has two plants, one in Seattle and one in Tacoma. Tr. 288, 294–295. It appears, therefore, that each of the 49 members of this association, regardless of the town in which it sells, is competing with bread baked by one or more of these wholesale bakers.

of them.[32] Therefore, a break in prices in any one of these towns would adversely affect not merely those respondents with baking plants in it, but also those who sell there from baking plants located elsewhere.

Returning to respondents' argument that "conscious parallelism," *i.e.*, uniform prices, does not prove a conspiracy, it should be noted at the outset that this is not a "conscious parallelism" case. It is a conspiracy case. To be sure, the record shows that these respondents have "matched" each other's prices with great diligence.[33] But the evidence here goes substantially beyond that. The record shows (1) that these alleged competitors have held regular "meetings" almost every week, generally every Monday at the Athletic Club in Seattle; (2) that they "discussed" prices at those meetings; (3) that, after certain of these meetings, the association's manager informed certain of the members that, on a certain date, there would be an increase in the price of bread; and (4) that the association's manager, as well as his predecessor in that job, repeatedly called on individual members of the association for the purpose of inducing them to refrain from cutting prices, sometimes threatening them with drastic price retaliation if they refused to keep their prices in line with the others.

Only one company was allowed to deviate from those prices—Safeway. While all the other bakers, wholesale and retail, were pressured to retail their bread for the same price Continental got for its "Wonder" bread, Safeway was permitted to sell for 1¢ less. It was permitted to do so for the simple reason that none of the others, not even the big wholesale bakers, had the power to stop it.[34] The result is that respondents have two prices in this market: (1) the high, uniform price (e.g., 34¢ in 1960 for the standard loaf) charged by the group in general—including the advertised brands produced by the big wholesale bakers (Continental's "Wonder" bread, etc.) as well as the unadvertised breads produced by the smallest of the retail bake shops, and (2) the 1¢ lower (33¢) price charged by Safeway for its self-baked, "private brand" bread.

While the association's by-laws provide for "annual" meetings of the entire membership, these are rarely held. Instead, "special" meet-

[32] Safeway "ship[s] all over the State of Washington." Tr. 262.

[33] The hearing examiner's initial decision tabulates, at page 1093, the simultaneous and nearly simultaneous price increases by these respondents in the years 1957 (from 30¢ to 31¢ on the standard loaf of bread), 1958 (from 31¢ to 33¢), and 1960 (from 33¢ to 34¢). For example, in 1958, four of the largest—Continental, Langendorf, Hansen, and Buchan—all raised their prices on the standard loaf of bread from 31¢ to 33¢ on precisely the same day, August 11, 1958.

[34] Buchan, asked why he didn't meet Safeway's 1¢ lower price, replied: "Well, I am afraid that we are not financially able to undercut Safeway." Tr. 195.

ings are called frequently. The Seattle division meets almost every week. "At times we have a meeting every week, not always every week."[35] The number of special meetings actually held each year totals less than 52, but more than 26.[36] While the meetings in Seattle are usually held on Mondays, and at the Athletic Club in Seattle, each meeting is individually called. The record contains a list of the "regulars" who have requested that they be notified of all meetings.[37] Members of the association located in the towns served by the other four divisions[38] are not routinely informed of the Seattle meetings, but are free to, and do, attend if they happen to be in town.[39] The manager of the association (then Arthur LaLime) presided at the meetings.

The ostensible purpose of these meetings is to discuss such matters as contracts with labor unions, labor grievance problems, and regulatory and legislative issues. But the testimony of several witnesses who attended these meetings makes it clear that the discussions frequently involved prices, particularly the alleged "need" of the members to raise their prices in order to recoup the costs of wage increases.

Witness Schafer, former owner of a bakery in Bellingham, testified that, as a member of the association, he occasionally attended its meetings at the Athletic Club when he was in Seattle. "Whenever it was convenient for me to be down here, I would go to their noon luncheon which we considered a luncheon and a meeting combined." He testified further:

Q. Did you ever hear any discussions of prices or price rises when you were at a meeting of the Bakers of Washington, Inc.?

A. Yes, sir.

Q. What would be the circumstances of such discussions? Would they usually occur around labor contract periods or what?

A. That is the reason for raising 'em. * * * Sometimes before and *after* our contract was signed.

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[35] Tr. 36. "Whenever the occasion requires it," a meeting is called. *Ibid.*

[36] Tr. 114.

[37] CX 7, tr. 175.

[38] As noted, the association has five divisions: Seattle; Bellingham (about 100 miles north of Seattle, and about 20 miles south of the Canadian border); Aberdeen (on the Pacific Coast, about 100 miles southwest of Seattle); Yakima (slightly over 100 miles southeast of Seattle); and Tacoma (less than 50 miles south of Seattle).

[39] Tr. 35. The other four divisions have their own meetings. The association's manager, LaLime, apparently called meetings in the divisions whenever those members asked him to. He visited the divisions "[w]henever the occasion requires it. Any time *something happens* that would require it." Tr. 38 (emphasis added). He estimated that he visited each of the divisions about *10 or 12 times per year*. Tr. 38–39. He presided (as chairman) over all meetings. Tr. 40.

Q. Would you hear price discussions at other periods at these meetings or were they generally localized around the contract periods?

A. *Mostly* contract periods, yes.

Q. And what would be the nature of the discussions that you heard?

A. " * * * we're going to use red ink if we don't do something about the bread price." [40]

To the same effect was the testimony of witness Albert Pettersen, formerly bakery supervisor for a local food store chain:

Q. Now, when you were here in Seattle, Mr. Pettersen, did you ever attend any meetings of the Bakers of Washington, Inc., sir?

A. Yes, sir. I attended their Monday luncheon at the Washington Athletic Club.

* * * * * * *

Q. [W]e have had testimony to the effect that the price of bread rose in August, August 11, 1958 here in Seattle, the Seattle area. Do you recall attending any meetings at the Washington Athletic Club of Bakers of Washington, Inc. *in which prices were discussed*, around that period?

A. Yes, I did.

Q. What would be the nature of the price discussion that you heard?

A. Well we discussed the labor, we discussed our price of our material—flour, shortening, sugar. And labor had jumped so high *that they decided that we should have a raise* in our bread. From there we just took it and they said, "What do you think about certain prices?" and they kicked it around and, so that is as far as it went *as long as I sat there.* [41]

After these meetings were over, the witness was notified by the association's manager, Arthur LaLime, that there was going to be a price increase:

Q. Did you receive information that prices were going up after this series of meetings?

A. Yes, sir.

Q. And how did you get that information?

A. Well, I believe it was a form sent to us. Now I am not sure whether it was a form or he called me, Art LaLime called me. I don't know whether it was a paper or telephone call.

Q. It was just the one instance when he called you or sent you a notice or was there more than one instance?

A. Well there was more than one instance because we weren't sure on different items to go up on, like buns and specialty breads.[42]

The explanation offered by respondents for the remarkable coordination of their price increases is that the whole thing is a matter of "price leadership." First, they say, one of the respondents, acting independently of his competitors, decides to raise his prices. Because certain of the very large grocery chains insist on it, a *written* notice

[40] Tr. 488–489 (emphasis added), 490.
[41] Tr. 259–260 (emphasis added).
[42] Tr. 261.

of all price changes is sent to them by the price leader several days in *advance of the effective date* of the change. His competitors, through salesmen calling on the notified chains, learn almost immediately (perhaps the same day the notice was received) that the price leader will increase his prices on a certain date in the future. These competitors, equally eager to increase their own prices (respondents contend), immediately send out similar notices to the chains. For example, four of the principal respondents—Continental, Langendorf, Buchan, Hansen—all picked August 11, 1958, for the *effective* date of their 1958 price increase. On August 7, 1958—four days previous—Continental had sent A & P a written announcement that, effective August 11, 1958, the price of the standard loaf of bread would increase from 31¢ to 33¢ (and similarly on other bread items).[43] The *next day*—August 8, 1958—two of Continental's competitors, Langendorf and Hansen, sent similar announcements to A & P and their other large chain customers.[44] Their announcements, like that of Continental, stated that, effective August 11, 1958, the price would go up from 31¢ to 33¢. Had these three and all of their competitors made their announcements on the same date, say, August 7, it would have been hard to explain; the only inference would have been that each had agreed with the others to go up on that day. But where the first move is made by only one company, the others can claim they subsequently and "independently" learned of that competitor's "independent" announcement the day before, and thus that the moves of all amount to nothing but "meeting competition."[45]

But some of the baker witnesses testified that they learned of their competitors' impending price increases not from the "trade" (grocery chain buyers) but from the *manager of the association*. For example, witness Albert Pettersen was quite clear that, although his employer, Albertsons Stores, was not only a baker of bread but a purchaser of it,[46] it did not receive written notices of price increases from its suppliers, but, instead, from the association.[47]

This was not the only baker witness that testified to the receipt of such advance price information from the association. Mr.

[43] CX 21; tr. 402–403. (These are suggested retail prices; the wholesale price to the grocer is 20% less.)

[44] CX 15; tr. 320. CX 13; tr. 297–298.

[45] See, e.g., CX 23B, tr. 417, where Continental reported that it was *raising* its prices "in order to meet the competitive situation * * *."

[46] Albertsons bakes its own private brand bread and sells it in its own grocery stores. In addition, however, its stores carry the various "brand name" breads, e.g., Continental's "Wonder" bread. Hence Albertsons is both a customer and a competitor of Continental.

[47] Tr. 265–267.

Frank A. Maxeiner, Jr., former proprietor of Model Electric Bakery in Seattle, testified as follows:

Q. Now, during the time Mr. Alford was associated with Bakers of Washington, did he ever contact you with respect to impending price rises as to bread?

A. Yes, he called on the phone.

Q. And did this happen on several occasions?

A. Yes, it did *over the years.*

Q. Did he advise you as to an impending price rise in bread when he called?

A. Yes, he would usually indicate that *we were to advance the price of bread.*[48]

In the face of such testimony, we are not "obliged to accept as true" the denials of the respondents. *Girardi* v. *Gates Rubber Co. Sales Division, Inc.*, 325 F. 2d 196, 202 (9th Cir. 1963). Moreover, even some of the larger respondents virtually admitted they discussed prices at their Seattle meetings and knew in advance of their competitors' impending price increases. George Buchan, president of one of the larger respondents, testified as follows:

Q. Were there any other discussions at the Bakers of Washington, Inc., in connection with the discussions on labor *regarding prices?*

A. Oh, I imagine during the negotiations there were. * * *

Q. Did you discuss then what the added costs would be of the added labor payments?

A. Oh, yes.[49]

On the question of advance knowledge of competitors' price increases, the major respondents repeatedly emphasized that they had merely heard "rumors" of what their competitors were going to do.[50] But much of this testimony had a decidedly equivocal note to it. For example, a Mr. Covington, Continental's bread plant manager in Seattle, testified as follows concerning the 1960 price increases:

Q. Do you know in advance one way or another when a competitor is going to raise his prices?

A. We have some knowledge of it, yes, sir.

* * * * * * *

Q. * * * Do you learn of prospective increases, that is, do you learn in *advance* of the *announcement* of an increase that a competitor is going to make that increase?

A. Not *too far* in advance, no sir.

Q. Do you only learn after some announcement has been made? Which is it?

A. I only know *for sure* after some announcement has been made.[51]

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[48] Tr. 282 (emphasis added).

[49] Tr. 189–190 (emphasis added).

[50] See e.g., tr. 186, 189, 237, 244, 247, 321–322, 335, 412, 443, 449.

[51] Tr. 412–413 (emphasis added).

Representatives of the larger respondents were something less than persuasive when interrogated about how they happened to have picked a particular date to raise prices and about the reasons for deciding to raise the price by the particular amount chosen. Thus, the 1957 increase had been a 1¢ raise, the 1958 increase had been a 2¢ hike, and the 1960 jump was for only 1¢ again. Why pick 2¢ one year, and 1¢ another? "Well, I just didn't feel that I could get any more than one cent."[52] But this doesn't explain why he "felt" he could get 2¢ in 1958. In other words, there were no "false starts" here. Each time a "price leader" raised his prices, it "stuck." The others followed him up quickly; the price leader did not first try 2¢, and then have to "back down" to 1¢. The figure he selected—whether 1¢ or 2¢—was always just the amount that his major competitors, also exercising their "independent" business judgment, agreed was neither too large nor too small for the state of the market.

As to the *dates* selected for the increases, e.g., August 11, 1958, rather than, say, a week earlier or a week later, Mr. Moore, manager of Langendorf's Seattle plant, testified as follows:

Q. Why didn't you do it the *previous* Monday because you were already paying the [increased] labor wages?

A. I can't answer that right now because I can't think why.[53]

Arthur LaLime, then manager of the association, came to the job in November of 1957. He succeeded a Mr. Alford, who had held the post for more than 20 years, until his death in June of 1957. This predecessor had been regarded by the members as the price "bellweather." Witness Harry Schafer, a baker in Seattle until 1956, testified as follows:

Q. Was there someone looked to in those meetings to be the bellweather for prices?

A. Well, usually the head of the bureau * * * . At that time it was Mr. Alford.[54]

Mr. Maxeiner, as noted, testified that Alford had made it a practice, "over the years," to instruct him by telephone when prices were about to be raised: "Yes, he would usually indicate that we were to advance the price of bread."[55]

Victor Goethals, proprietor of a small bakery in the Anacortes-Bellingham area, testified that Alford had threatened him with a "price war" in 1957 "if I do not put it [prices] up with the rest of

[52] Tr. 303.
[53] Tr. 321–322 (emphasis added).
[54] Tr. 491.
[55] Tr. 282.

the bakers."[56] The witness was similarly threatened the following year. "In 1958 I went up because I was almost—well, I was told to go up" by LaLime. "He said I should put the price of bread up with the rest of the wholesalers." [57] This increase was followed because "I didn't want the same trouble I had before, that I had in 1957." [58] Asked what kind of pressure could be put on him, the witness replied: "Well, they can * * * undersell me and break me at any time." [59]

In 1960, however, the witness simply refused to go up again. "I just felt I couldn't afford to go up because you lose too much business by keep raising and raising the prices." [60]

Another witness, Mr. Bennett Haggen, proprietor of a supermarket ("in-store") bakery in Bellingham, testified that LaLime visited his place of business in the fall of 1957 to discuss the fact that three local bakers were cutting prices. It was a substantial visit. "One hour, two hours, I didn't have too much to do." [61]

Q. What occurred at this meeting between yourself and Mr. LaLime?

A. Well, I believe that Mr. LaLime was just new in the territory then and, of course, he came and introduced himself and then because of the situation, we discussed the bread deal.[62]

The witness did not know whether LaLime had actually visited the three price-cutters in 1957, but he knew that, two weeks after LaLime's trip to Bellingham, the "price war" ended.[63]

In 1958, prior to the price raise of August 11, mentioned above, LaLime invited another witness, Mr. Robert Hall, proprietor of a small Bellingham bakery, to attend a meeting of the local bakers. The witness testified as follows:

Q. And in the summer of 1958, was a meeting of bakers held in Bellingham?

A. Yes, sir.

* * * * * * *

[56] Tr. 50. "Alford who was in charge of the [association] had called me and told me to put my price up. I did not do it for quite a while until I had several calls and then he threatened me to—there might be a price war if I do not put it up with the rest of the bakers." Tr. 50. (It appears, however, that the witness was mistaken in attributing this particular incident to Alford. Since Alford had died on June 13, 1957, and since the incident would have logically followed the price increase of July 22, 1957, some five weeks after Alford's death, this threat was probably made either by the "interim" association manager, one Gene Crawford, or by his successor, LaLime, who took the office in November.)

[57] Tr. 51.

[58] Tr. 54.

[59] Tr. 55.

[60] Tr. 51.

[61] Tr. 374.

[62] Tr. 357.

[63] Tr. 366.

Q. By whom were you invited to attend?

A. *The representative for the Bakers of Washington.*

* * * * * * *

Q. And can you tell us what transpired at that meeting?

A. Discussion of prevailing prices, and the bread rise that was *about to take place* and—

* * * * * * *

Q. Was there any discussion of what Hall's Bakery intended to do with its price conduct?

A. Yes. Hall's Bakery had been known as a cut-rate bakery and they would like to have us join and follow on line with the rest of the bakeries.

Q. And did you refuse to do that?

A. I told them that we still had Hall's Bakery name on our place of business and we were maintaining our own place of business.

* * * * * * *

Q. Did Mr. LaLime ever tell you to get your prices up?

A. Mr. LaLime told me that, for instance, if Wonder Bakery [Continental] cared to bring up bread in Bellingham and sell it as an unbranded loaf of bread for 10 cents a loaf, what would that do for your business? * * * He did not say they were going to, he said: "What if they did?" [64]

Mr. Albert Pettersen, former bakery supervisor for the Albertson grocery chain, testified that LaLime, the association's manager, had threatened him with a "bread war" unless he stopped advertising his bread at a cut price. In 1959, the "regular price" of raisin bread had been 26¢ per loaf. The witness ran an ad in a Seattle paper on August 3, 1959,[65] offering it for sale at 19¢. Asked if the ad caused any "repercussions," the witness said: "Well, the Association called me and told me that I shouldn't run raisin bread at 19 cents. * * * Well, he thought maybe we might have a bread war if I keep fooling around with the price of bread." [66]

The smaller bakers in other areas testified to efforts of competitors and the association's manager to persuade them to raise their prices. Mr. Ralph Hall, brother and partner of Robert Hall, mentioned above, testified that "it was suggested by Mr. LaLime on two different occasions that he thought we could get more for our bread and more in line with what the other fellows were getting. However, we ignored all his suggestions and in fact told him that we would not raise the price." [67] One of those occasions was in 1959. "Well, in this regard, he was up there—the last time in 1959 he was there and he asked us—when this last bread war was going on, he asked the reasons. He came in one day and he asked me all about this price that we had on the window and asked us who had started this thing and

[64] Tr. 466–468 (emphasis added).

[65] CX 12, tr. 250.

[66] Tr. 255–257, 273.

[67] Tr. 477–478.

all * * *. Well * * * he asked me to do these things, I mean, he was asking me about them and, of course, the only thing that I can go on, he was the representative for the Washington State Bakers Association and I had a talk with him and that's what he was there about * * *. As my memory of the conversation goes he said to me: 'There are several of the other stores now that are getting 32 cents a loaf and we are wondering if you couldn't come up at least to meet those fellows at 32 cents!'"[68]

LaLime wasn't the only one that tried to persuade Hall to raise his prices: "Now, in the spring, I believe, of 1959 I had a phone call that there was a bread war going on at the time and a fellow that represented himself, he said he was a Safeway store man, he never gave me any name on the phone, but he said he thought we'd *better get the price of bread up there.* And that was the only thing that's ever been said by anybody from the Safeway store. * * * No, in no way would I know except that he told me that he was a Safeway store man and that the price should be brought up there or else we would probably get in a bread war with them."[69]

This occurred, as noted, in Bellingham, some 100 miles north of Seattle. Two years earlier, in 1957, another such incident occurred in Yakima, over 200 miles away. Mr. Wayne Atkinson, owner of a small bakery in Yakima, testified that he had run an advertisement featuring a price cut from 31¢ (the price his competitors were then charging) to 21¢. The ad ran on a Thursday night, and he sold at the low price on Friday and Saturday. On Monday morning, he was called on by Jim and Bud Snyder, owners of a competing bakery. They told him they had received a telephone call from Seattle:

Q. Whom did the Snyders say had called them from Seattle, did they say?
A. Yes, sir. * * * Safeway.

* * * * * * *

Q. Mr. Atkinson, what happened with regard to your prices, what did you do about them following this conversation with the Snyders?
A. I went back to the original price.[70]

We conclude that, while some of the respondents may have thought these repeated price increases were in their "own economic interest," others did not feel that way and would not have raised their prices

[68] Tr. 481–482.
[69] Tr. 478–479.
[70] Tr. 381–383. Before he went back, however, "we had a meeting that was called. I believe it was the following Thursday or within a few days of when I had been called." The meeting was held at the Chinook Hotel, in Yakima. The witness attended, along with "nearly all bakeries in the city of Yakima, including retail and wholesale." Tr. 383. "Well, there were several things that were talked about, mostly coordinating the prices a little bit. * * * [T]hey all more or less *agreed* that we would not shoot [cut] prices on large white and large whole wheat, a pound and a half loaves, we wouldn't shoot the prices on those." Tr. 383, 385–387 (emphasis added).

had it not been for the urgings, and sometimes the threats, of the association's manager and certain of their competitors. We think it clear that there was an actual agreement, understanding, or "meeting of the minds" here between some of the larger, more powerful of these respondents, and that the weaker members acquiesced in the agreement as a result of the promptings and pressures put on them by the former.

III

Respondents argue further that, even if the association's manager had in fact suppressed competition among the Washington bakers, the evidence is insufficient to "connect" the various individual members of the association with that official's unlawful acts. They argue that they hired him to handle their labor relations with the various labor unions; that labor negotiations were "all he was good for"; that he was given no authority to fix prices; that, in fact, he was expressly enjoined from doing so; that, if he did in fact fix prices, the individual members of the association neither knew nor should have known of it; and that, therefore, they cannot be held responsible for it.

The record, however, is otherwise. First of all, Mr. LaLime, the man they employed to run their association, had a deep personal conviction—a working "philosophy"—that was wholly opposed to the national policy in favor of competition. He was against it, and made no bones about it. He described his "philosophy" in these words:

A. No. I am not approached with the price situation. However, I vehemently recommend no price wars because it is economic waste and very devastating to the industry.

Q. How do you do that? How do you convey that recommendation?

A. *By every persuasion that I am capable of stating.*

Q. In the open meeting you use that philosophy, do you?

A. No, *I don't recall* of open meeting discussions on that basis. No, sir.

Q. Then how do you convey your philosophy *to the membership?*

A. *By personal contact.*

Q. What is it you say to them?

A. I tell them that a price war would be very devastating to the industry. The demands that we have from labor are extremely difficult to live with without having a sick industry on top of it.[71]

[71] Tr. 41 (emphasis added). Mr. LaLime elaborated upon this "philosophy" of his in describing the calls he made on members who attempted to cut prices: "I did all in my power to persuade these people not to do so." Tr. 42. "I asked him not to perpetuate a price war, not to become involved in one." Tr. 44. "I pointed out that a price war was very uneconomical, that it would be disastrous to the industry and it would be particularly disastrous especially to a smaller operation, that any time these price wars started there was only one thing that happened and that was complete chaos." Tr. 46.

Respondents contend they knew nothing of Mr. LaLime's proselytizing on behalf of his "philosophy" of noncompetition. They would have us believe that they were completely unaware of his many phone calls and visits to those members that cut prices, and those that were slow to recognize their "economic interest" in raising their prices. They tell us they hired him to take care of labor problems; if he fixed prices, he was strictly on a lark of his own.

We find, as noted above, that prices were discussed at the weekly meetings of the association at the Athletic Club in Seattle, and at meetings held in Bellingham and Yakima. This record establishes that at least 14 of the 49 members of the association were *regularly* in attendance at the Seattle meetings, including Safeway and the larger wholesale respondents in this proceeding, e.g., Continental, Langendorf, Buchan, and Hansen.[72] It has also been shown by the testimony that the group was small enough, and the physical setting was arranged in such a manner, that every person present at those meetings was able to see and hear everything that was done or said. Mr. LaLime presided over these meetings. The smaller members of the association did not understand that labor matters were "all he was good for." They thought the purpose of the organization he represented was "to make better labor relations, *to maintain prices*, and generally better baking conditions." [73] They thought the association's manager was the industry's "bellweather" on prices.[74] They thought he was the one to call when a competitor got out of line on prices.[75] When he appeared in Bellingham for the stated purpose of stopping the local price cutting, they thought he was there as a representative of the association; they "couldn't say that he was up there on his own, no." [76] They took him seriously when he told them he "thought maybe we might have a bread war if I keep fooling around with the price of bread." [77] When they received a written notice that, on a certain date, all the bakers were to raise their prices, they knew it had to have come from him. "[T]hey [the association officials] would be the only logical ones to send us out the price. * * * Well, it was from him. It couldn't be from anybody else but him." [78] When he appeared at a member's place of business, the member knew he was there as the spokesman for the association:

[72] CX 7, tr. 81–94, 175.

[73] Tr. 464 (emphasis added). Mr. LaLime himself had said this to the witness, Mr. Robert Hall of Bellingham. Tr. 464.

[74] Tr. 491.

[75] Tr. 258–259.

[76] Tr. 480.

[77] Tr. 257.

[78] Tr. 265.

"He didn't have to tell me. I know he is."[79] He was not on a lark of his own: "How can he represent himself when he is working for the association?"[80] And he did not represent merely the wholesale bakers, or just the retailers: "Well, sure he represents the wholesale people and the retail people."[81] When he told a retail baker to raise his prices up to the level of his competitors' prices, the baker thought he spoke for the association: "I thought that was his job."[82] When he intimated to a small baker that Continental might be called in to crush him by selling bread at his front door for 10¢ a loaf, that baker "figured he [LaLime] was speaking for the bakers' association of Washington."[83]

The association, therefore, and the activities of the man they jointly put in charge of it, is the cement that binds the members together here. We find as a fact that each member of this association either knew or should have known that LaLime actively discouraged and suppressed price competition throughout the area in which it operates, and that they either affirmatively approved of those activities or acquiesced in them. All knew or should have known of the activities of the association and of its manager, and all adhered to the fixed prices the manager announced and policed.[84] It is elementary that a conspiracy creates an agency relationship among its members; every act performed by any member of the conspiracy in furtherance of its purposes is, in law, the act of all members of the conspiracy.[85] Proof of participation in meetings at which prices have been "discussed" is "sufficient to provide a foundation for the introduction of evidence of other acts on the part of one conspirator, in furtherance of the conspiracy, binding on all. *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 118 (C.A. 6, 1944)." *Continental Baking Co.* v. *United States*, 281 F. 2d 137, 152 (6th

[79] Tr. 270.

[80] Tr. 276.

[81] Tr. 275.

[82] Tr. 62.

[83] Tr. 469–470.

[84] Respondents enjoyed almost complete success in bringing price cutters into line. An exception was Mr. Vincent Noga, owner of a small in-store bakery in a Yakima suburb, who resisted the threats and sold beneath his competitors' prices for over a year (increasing his sales volume from approximately 40 to 150 loaves per day, and his profits from about $9 to $30 per day) until he lost his lease. Tr. 517, 523–525. Bread prices throughout the area are "quite standard." Tr. 185. Asked if "the small retail baker" stayed at his own price level, Buchan, a wholesaler, replied: "Very much so." Tr. 197. See also tr. 514.

[85] "[W]hen any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them." *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U.S. 229, 249 (1917).

Cir. 1960). Here, the principal respondents, including Continental, Langendorf, and Safeway, all participated in the Seattle price discussion meetings. Continental's Seattle plant manager testified that he not only attended those meetings generally, but that he had attended them "around September of 1960," [86] the month in which Continental and its major competitors simultaneously raised their prices from 33¢ to 34¢. Langendorf's Seattle bread plant manager testified that "I attend meetings quite often, yes." [87] He was the witness that, when asked why he had elected to raise his prices on August 11, 1958 (the date on which his major competitors raised their prices), rather than a week earlier or a week later, replied: "I can't answer that right now because I can't think why." [88] Jens Hansen, president of Hansen Baking Company, testified that "Well, I have always been quite regular [in attending the Seattle meetings] but I haven't of late; last year or so I have been off and on." [89] He was quite regular in 1958; in fact, of the 26 or more meetings held by the association in that year, "I attended a good proportion of them." [90] George Buchan, president of Buchan Baking Company, testified that he regularly attended the association's Seattle meetings, and that he "imagined" prices were "discussed." [91] Other witnesses testified to seeing representatives of these and other companies at the Seattle meetings.[92]

[86] Tr. 414.

[87] Tr. 315.

[88] Tr. 322.

[89] Tr. 294.

[90] Tr. 304.

[91] Tr. 189–190.

[92] See, e.g., testimony of Harry Schafer, of Schafer's Bakery, who saw Jim Hansen. George Buchan, Mr. Richards (of Continental), and Al Moore (of Langendorf), at the meetings, tr. 496, together with numerous other wholesale and retail bakers. (The number attending varied from perhaps 10 to 25. Tr. 493, 495.)

The association's manager, LaLime, submitted a list (CX 7) of the "regulars" who had left standing instructions that they be notified of all meetings (tr 87, 94, 175). There are fourteen of these regulars, including Continental. Langendorf, Buchan (represented by respondent George B. Buchan), and Hansen (represented by respondent Dick Hoyt).

The association's manager also testified to the attendance at the meetings of representatives of Safeway, Continental, Langendorf, Hansen (represented by its president, Jens Hansen, or Richard Hoyt, who is also vice president of the association) (tr. 81, 176), and Buchan (president of the association) (tr. 81). Witness Wayne Atkinson, former owner of the Old Holland Bakery in Yakima, identified Jim and Bud Snyder, owners of responent Snyder's Bakery, in Yakima, as competitors who had pressured him to raise

And of course Safeway was represented at those meetings. Safeway was not a "member" of the association. It was not carried on the rolls and did not pay dues. But it nonetheless managed to secure all the benefits of membership by "retaining," on an annual "fee" basis, the association's manager to handle its labor negotiations. Safeway paid LaLime, as it had his predecessor, Alford, a "retainer" of $600 per year.[93] In addition, however, Safeway's representatives attended the Seattle meetings at the Athletic Club:

Q. Does a representative of the Safeway organization attend meetings of the Bakers of Washington, Inc.?

A. Their labor relations man would on occasion during contract negotiations.

Q. What about their *divisional bread man?*

A. He would attend meetings.

Q. He does regularly attend meetings?

A. *Usually, not always.*[94]

As noted, Safeway has its own baking plant in Seattle, producing its "private brand" bread called "Mrs. Wright." It sells this bread in its various retail stores located, apparently, "all over the State of Washington."[95] In addition, Safeway's retail stores handle the "name brand" breads produced by the wholesale bakers. It thus has two prices: first, the full, "suggested" retail price for the wholesalers' bread (e.g., 34¢ for "Wonder" bread); and, second, 1¢ less (33¢) for its own self-baked brand, "Mrs. Wright."

In fact, Safeway is the local bread industry's club over the smaller bakers. Witness Wayne Atkinson, proprietor of a small bakery in Yakima, testified that when he cut his price, a local competitor, a

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his prices (tr. 379). He also testified to a meeting at the Chinook Hotel, in Yakima, attended "by nearly all bakeries in the city of Yakima, including retail and wholesale" (tr. 383), at which "they all more or less agreed that we would not shoot [cut] prices on large white and large whole wheat * * *." Tr. 386. The witness specifically noted the presence at that meeting of the Snyders, Dick Trenerry (of respondent Trenerry's Bakery, a wholly-owned subsidiary of respondent Holsum Baking Co.), and Jack Larson (tr. 384). Respondent Victor H. Goethals, proprietor of Fortune's Bakery in Anacortes (near Bellingham), testified to following, although apparently "unwillingly." *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 719 (1948), the association's instructions to raise prices (tr. 50–62).

[93] Tr. 32.

[94] Tr. 80 (emphasis added). See also tr. 81–82.

[95] Tr. 262.

Mr. Snyder, immediately showed up at his place of business to tell him Safeway had called about his price:

> Q. Whom did the Snyders say had called them from Seattle, did they say?
> A. Yes, sir.
> Q. And who was it?
> A. Safeway.[96]

Another price cutter testified that he had personally received a threatening phone call from Safeway: "Now, in the spring, I believe, of 1959 I had a phone call that there was a bread war going on at the time and a fellow that represented himself, he said he was a Safeway store man, he never gave me any name on the phone, but *he said he thought we'd better get the price of bread up there.* And that was the only thing that's ever been said by anybody from the Safeway store. * * * No, in no way would I know except that he told me that he was a Safeway store man and that the price should be brought up there *or else we would probably get in a bread war with them.*"[97]

As to the remaining respondents, it is true of course that "mere membership" in the association is not enough to warrant an order against them. *Phelps Dodge Refining Corp.* v. *Federal Trade Commission*, 139 F. 2d 393, 396 (2d Cir. 1943). Here, however, many of these respondents were shown to have either attended meetings where prices were discussed, either in Seattle or in one of the divisions, or to have actively attempted to influence the prices of competitors.[98] And they generally adhered to the prices fixed at those meetings.[99] But certainly all of them knew or should have known of the price fixing activities of the association's manager, LaLime. He was outspoken in his hostility to price competition, openly spreading his "philosophy" to the members by "personal contact." (Each of the "divisions" was visited by LaLime from 10 to 12 times per year.[100]) His threats, and those of Safeway and the other powerful bakers, could hardly have failed to come to the attention of these respondents, and thus to have put them on notice of the fact that the association was engaged in unlawful pricing activities.[101]

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[96] Tr. 381–382A.
[97] Tr. 478–479 (emphasis added).
[98] See n. 92, *supra.*
[99] See n. 84, *supra.*
[100] Tr. 39
[101] "Thus the issue is reduced to whether a member who knows or should know that his association is engaged in an unlawful enterprise and continues his membership without protest may be charged with complicity as a confederate. We believe he may. Granted that his mere membership does not authorize unlawful conduct by the association, once he is chargeable with knowledge that his fellows are acting unlawfully his failure to dissociate himself from them is a ratification of what they are doing. He becomes one of the principals in the enterprise and cannot disclaim joint responsibility for the illegal uses to which the association is put." *Phelps Dodge, supra,* 139 F. 2d at 396–397.

IV

Finally, respondents contend that the order entered by the hearing examiner is improperly broad—that it should be limited to the precise geographical area in which the price fixing has been found (State of Washington), rather than extending to wherever each of the respondents do business; and that, in enjoining them from continuing to fix prices in the future, it should not prohibit them from fixing prices generally, but only from achieving that result by the precise *means* involved here, *i.e.*, through this particular *trade association*, Bakers of Washington, Inc.

The latter contention borders on the frivolous. While the Commission must tailor its orders to the particular "practice" found to have existed, "price fixing" *is* a single, well-defined "practice." Respondents, in contending for an order that merely prohibits price fixing *through the instrumentality* of Bakers of Washington, Inc., misconceives the distinction between a generic "practice" and the several *techniques* of effecting it. For example, an order so limited would leave these respondents free to resume their conspiracy tomorrow, holding conspiratorial meetings at high noon in the most public place in the city of Seattle, so long as they kept the association, Bakers of Washington, out of the matter. Such an order would be no more effective than one limited to a prohibition of price fixing only where it was accomplished by meetings held at a particular place, e.g., at the Athletic Club in Seattle. The order could be avoided by using the telephone instead of having a meeting, or by moving the site of the meeting from the Athletic Club to other premises. In *Cement Institute* v. *Federal Trade Commission*, 333 U.S. 683 (1948), the respondents objected to the fact that the order not only prohibited price fixing by means of the "basing-point system," but also by selling "pursuant to or in accordance with *any other plan or system* which results in identical price quotations or prices for cement * * *." The Court said: "The paragraph is merely designed to forbid respondents from acting in harmony to bring about national uniformity in whatever fashion they may seek by collective action to achieve that result. We think that no one would find ambiguity in this language who concluded in good faith to abandon the old practices." 333 U.S. at 729.

Respondents' suggested "territorial" limitation of the order is equally unsound. The general rule is that a violation of law, whether practiced in one area or in many, warrants an order covering the whole of the violator's business. There being no reason to suppose that an entity showing no reluctance to fix prices in Seattle, Washington, would act differently in another city or another state, the public interest in the cessation of such unlawful conduct requires an order that protects the public in all of the states, not merely in Washington.[102]

Finally, respondents profess the fear that the order, as drafted, might be so construed as to prohibit such lawful business practices as marking their loaves of bread at the baking plant with suggested retail prices, especially since they make "accommodation" sales to each other. The language that bothers them here is that part of the preamble that prohibits conspiracies and collusive understandings between any two or more members of the association "or between any one or more of them and others not parties hereto," to fix prices, adhere to such fixed prices, or deter any competitor from exercising his own independent judgment in pricing his goods. The prohibition of future price fixing conspiracies between one or more of the respondents "and others not parties hereto" is a routine provision, one that has been expressly sanctioned by the Supreme Court. For example, in *Cement Institute* v. *Federal Trade Commission*, *supra*, the order approved by the Court prohibited future conspiracies not only between the parties themselves but "between any one or more of said respondents and others not parties hereto * * *." The Court, noting that the conspirators had secured the aid of others in the past, and that the entry of new members in the industry in the future could be reasonably anticipated, declared that "the Commission was authorized to make its order broad enough effectively to restrain respondents from combining with others as well as among themselves." *Id.*, at 728-729.

The instant order, which is substantially the same as the order approved in *Cement Institute*, *supra*, could not conceivably be construed to prohibit the common practice of placing "suggested" retail prices on bread wrappers. The line between the "suggesting" of prices and the "fixing" of prices is so well settled as to require no discussion. Respondents are simply being required to leave their competitors alone—to stop agreeing with them, and stop interfering with them—in the pricing of bread. Selling them bread that happens to bear a suggested retail price constitutes neither agreement nor interference. As the Court said in *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431 (1957): "Respondents pose

[102] "As to territorial extent, the company, having been found guilty of a flagrant violation of the act, was properly required to cease and desist from such practices in all areas in which it was doing business." *Maryland Baking Co.* v. *Federal Trade Commission*, 243 F. 2d 716, 718 (1957). See also *Foremost Dairies, Inc.*, Dkt. 7475 (1963) [62 F.T.C. 1344], holding that an order was properly extended to the respondent's operations throughout the country, rather than being limited to Albuquerque, New Mexico, the city where the violation was found to have occurred.

hypothetical situations which they say may rise up to plague them. However, 'we think it would not be good judicial administration' * * * to strike the contested paragraph of the order to meet such conjectures. The Commission has reserved jurisdiction to meet just such contingencies. As actual situations arise they can be presented to the Commission in evidentiary form rather than as fantasies." Moreover, under the Commission's present rules of practice, provision is expressly made for those bound by an order to secure advice from the Commission as to whether a proposed course of action would be in compliance therewith. Rules Sec. 3.26(b), (c), 28 Fed. Reg. 7080, 7091 (July 11, 1963). See also *Regina Corp.* v. *Federal Trade Commission*, 322 F. 2d 765 (3d Cir. 1963); *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480, 488 (2d Cir. 1962).

We think the order should be modified in one particular, however. As issued by the examiner, it prohibits any two of these respondents, or any one of them and any other person, from collusively engaging in the described price fixing activities, without regard to whether any of those activities occur in interstate commerce. This Commission is without jurisdiction to issue an order prohibiting two Seattle bakers, neither of which does business of any kind outside the city, from conspiring solely with each other to fix local prices. Accordingly, the order will be modified to prohibit future collusion on prices "where any one or more of the parties to that planned common course of action, understanding, agreement, combination or conspiracy is selling bread in interstate commerce in competition with bread sold by any one or more of the other parties thereto."

Respondents' exceptions are denied. The initial decision and order as supplemented and modified to conform to the findings and views contained in this opinion will be adopted as the decision of the Commission.

Commissioner Anderson concurred in the result; Commissioner Elman dissented and has filed a dissenting opinion; and Commissioner Reilly did not participate for the reason that he did not hear oral argument.

Dissenting Opinion

FEBRUARY 28, 1964

By Elman, *Commissioner*, dissenting:

I do not concur for the following reasons: The Commission's assertion of jurisdiction seems to me to be, at least, highly questionable. On the merits, the finding of an illegal price-fixing conspiracy is not supported by the record. And, even assuming such a conspiracy has been proved, the order is not responsive to the needs of the situation.

I

In *F.T.C.* v. *Bunte Bros. Co.*, 312 U.S. 349, the Supreme Court held that local practices are not within the Commission's jurisdiction under the Federal Trade Commission Act where they have a merely remote or indirect relationship to interstate commerce; they must be "in" commerce. Clearly, the Commission has jurisdiction over a price-fixing conspiracy if there are sales in commerce, or if the conspiracy extends across state lines, or if any of the means or instrumentalities by which the conspiracy is formed or carried out is in commerce. Moreover, the Commission would have jurisdiction, I believe, even over an essentially local price-fixing conspiracy, if one of the participants was engaged elsewhere in interstate commerce and used power or resources, derived from its interstate activities, in furtherance of the conspiracy, for example by bringing pressure on local competitors or customers to join or continue in the conspiracy. Cf. *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115; *Borden Co.*, F.T.C. Docket 7474 (decided Feb. 7, 1964), pp. 2–4 [pp. 534, 574–575 herein] (dissenting opinion). But, so far as appears from the record, none of these conditions obtains in the present case. No interstate sales were involved in the alleged conspiracy;* the markets involved were all within a single state; none of the other acts involved in the alleged conspiracy was in commerce; and interstate commerce was not used as a weapon for suppressing intrastate commerce.

I do not believe that the Commission, under the Federal Trade Commission Act, has jurisdiction over interstate companies as such (compare, e.g., Section 7 of the Clayton Act, as amended; *Foremost Dairies, Inc.*, F.T.C. Docket 6495 (decided April 30, 1962) [60 F.T.C. 944], pp. 36–37 [1077–1079], which seems to be the upshot of the Commission's jurisdictional holding. Certainly *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, on which the Commission chiefly relies, stands for no such proposition. The Supreme Court's detailed tracing in that case of the interstate ramifications of the typical large insurance company was directed to showing that the insurance business is a commercial activity like any other, and that the localized act of contracting for insurance is just one aspect

* As to the evidence that some members of the respondent trade association made sales in Alaska, I find no indication that these sales were part of the alleged price-fixing conspiracy. The vast majority of the association members, who did no business in Alaska, had no interest in fixing prices there. And the theory on which this case was tried is that there was a conspiracy to fix prices in the Washington, not the Alaska, market.

of the business; such an analysis was required because of earlier Supreme Court decisions which had held that the insurance business was basically not commerce at all. Since the indictment in *South-Eastern Underwriters* charged nothing less than a single combination to fix the price terms upon which insurance business was conducted throughout a six-state area, the decision can hardly be said to have established that any restrictive practice by an integrated multi-state enterprise, however localized in its scope and character, is within the reach of the federal antitrust laws, and in particular of Section 5.

II

Direct evidence is rarely available to prove a conspiracy or secret agreement to fix prices. To establish the requisite meeting of minds, it may often be necessary to rely exclusively on circumstantial evidence. Considered individually, the circumstances may be equally consistent with an inference of innocence as with one of guilt; the pattern may have a significance which the pieces lack. But in the present case I fail to discern a pattern indicative of unlawful price fixing.

The Commission in its opinion makes much of the fact that "prices" were occasionally mentioned at meetings of the respondent trade association. But I find it difficult to see a sinister significance in this fact, since the ostensible—and concededly legitimate—purpose of the association was to act as the collective bargaining agent for its members. Some discussion of prices, surely, is inseparable from discussion of wages. Indeed, in *N.L.R.B.* v. *Truitt Mfg. Co.*, 351 U.S. 149, the Supreme Court held that it was an unfair labor practice for an employer to refuse to furnish information as to his financial status to substantiate his claim of inability to pay a requested wage increase.

Next, the Commission emphasizes—and exaggerates—the price uniformity prevailing among the members of the association. Actually, all the record shows is that the prices charged by the largest bakeries were generally the same, and that a price increase by one was soon followed by the others. These facts do not suggest abnormal competitive behavior, especially since bread is a highly standardized product and the bakeries have virtually identical costs.

The Commission places very great emphasis on the conduct of Arthur Lalime, the association's manager. Lalime, the Commission observes, had a "philosophy" of antipathy to bread price wars, and he occasionally communicated his feelings on this subject to some of the members of the association. It was not unnatural for Lalime, whose job was labor negotiations, to have definite views on the price of bread. That he expressed his views on a few occasions to a few of his employers does not, without more, prove that he was a participant in or agent of a price-fixing conspiracy. If all he did was "tell them that a price war would be very devastating to the industry", surely that does not make him a price fixer.

There is some evidence that Lalime occasionally crossed the line between persuasion and intimidation, and also that he sometimes communicated price information to members of the association. Such conduct was *ultra vires* his position as manager of the association, and there is no evidence that the members of the association (apart, of course, from those he allegedly communicated with improperly, who are not respondents in this proceeding) were aware of this conduct, let alone that they put him up to it. The Commission is unable to link up the members of the association in a price-fixing conspiracy, except on the theory, which the record does not support, that they "should have known" of Lalime's misbehavior.

Viewed severally or as a whole, the circumstances upon which the Commission relies do not permit an inference of a conspiracy or agreement to fix prices; they form no sinister pattern. At most, they suggest that Lalime acted with excessive and officious zeal in expressing his views on price wars.

III

Even if the Commission is correct in its conclusion that a price-fixing conspiracy or agreement has been established, I have reservations concerning the appropriate remedy. Stripped of redundancies, the Commission's order is simply a general prohibition against unlawful price fixing. While I do not believe that an order which merely repeats the applicable statutory provision or rule of law is necessarily inappropriate as a remedy for unlawful conduct, in the present circumstances I think it falls short of the most effective relief.

To prevent recurrence of the unlawful conduct, the order in a price-fixing case such as the present, where the existence of a conspiracy is inferred from circumstances which in themselves are for the most part innocuous, should not simply enjoin the conspiracy. Conspiracy is a rather shadowy thing. Its essence is not overt conduct, but a meeting of minds. There may be some deterrent value to enjoining participation in a price-fixing conspiracy. But in view of the existence of criminal sanctions for price fixing, there is a question how much additional deterrence is provided by such an injunction. Moreover, effective deterrence would seem to require that the persons subject to an injunction have a reasonably clear idea of the conduct they must avoid if they are to comply with it.

What, concretely, must respondents do to comply with the Commission's order in this case? Must they dissolve the trade association? Abandon multi-employer collective bargaining? Fire LaLime? Monitor all his telephone conversations? Repudiate his "philosophy"? Cease providing customers with notice of price increases? Engage in price wars? I take it they need do none of these things; but if they do not depart from the overt conduct on which the Commission bases its inference of unlawful price fixing, how can they be sure that they have ceased to conspire? Under the kind of general order entered here, respondents' only guides are their consciences. They are being ordered to refrain from conspiring to fix prices but are not being told what, if anything, they must do to obey this order. If that is all the order does, one wonders, to repeat, whether a significant deterrent has been added beyond the criminal prohibitions to which price fixers are subject in any event.

In my opinion, the way to "beef up" a price-fixing order, and avoid the pitfall of ineffectual generality, is to forbid not only the conspiracy itself but also the specific acts and practices upon which the effectiveness of the conspiracy—its translation into actual anticompetitive conduct—depends. It is immaterial that these acts and practices may be lawful in themselves; the Commission has ample power to forbid them if necessary to ensure that the conspiracy will cease and not be resumed. *F.T.C.* v. *National Lead Co.*, 352 U.S. 419, 430. It might be appropriate in this case—on the assumption that a conspiracy was established—to direct the trade association to terminate its employment of LaLime, who, on the Commission's view of the case, was the prime actor in the conspiracy; to order that a complete record be kept of all association meetings and turned over to the Commission periodically; and to forbid respondents to send price-increase notices to customers more than, say, three days in advance. Conceivably, the Commission might even enjoin respondents' joint bargaining with labor. Cf. Hale, *Agreements Among Competitors: Incidental and Reasonable Restraints of Trade*, 33 Minn. L. Rev. 331, 339–43 (1949). These are examples—not the only and not necessarily the best examples—of what a price-fixing order in a case such as the present can and should provide if it is to offer a fair promise of effectively stopping the conspiracy.

Final Order

This matter having been heard by the Commission upon exceptions to the hearing examiner's initial decision filed by respondents and upon briefs and oral arguments in support thereof and in opposition thereto; and

The Commission having rendered its decision and having determined that the initial decision should be modified in accordance with the views expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the findings of fact in the initial decision be, and they hereby are, modified by adding to finding number 26, page 1091 of the initial decision, the further findings set forth in the paragraphs designated "A" through "O" beginning on page 1118 and extending through the fourth paragraph on page 1122 of the accompanying opinion.

It is further ordered, That in lieu of the order to cease and desist contained in the initial decision, the following be, and it hereby is, entered as the order of the Commission:

> *It is ordered*, That respondent Bakers of Washington, Inc., an incorporated association, and respondents George B. Buchan and Richard Hoyt, individually and as officers of respondent association, and respondents Buchan Baking Co., Continental Baking Company, Langendorf United Bakeries, Inc., Hansen Baking Co., Inc., Trenerry's Bakery Co., and Snyder's Bakery, Inc., corporations, John M. Larson, trading as Larson's Bakery, and Vic H. Goethals, trading as Fortune's Bakery, all members of respondent association; and the following members of said association: Ruth Ashbrook Bakeries Corp., 1407 11th Avenue, Seattle, Washington; Albertson's, Inc., 17000 Aurora Avenue, Seattle; Baders' Dutch Bakeries, 3755 University, Seattle; Baker Boy Bakery, 8050 Bothell Way, Seattle; Bake-Rite Bakery, 1414 14th Avenue, Seattle; Bellinger Bakery, North Bend; Best Pie Company, Inc., 132 Queen Anne Avenue, Seattle; Big Four Donut, Inc., 319 Nickerson Street, Seattle; Blake's Bakery, Inc., 4729 California Avenue, Seattle; Bookter's Seattle Bakery, Inc., 3409 4th Avenue, South, Seattle; Butter-Krisp Bakery, Inc., 2203 23rd Avenue, South, Seattle; Boldt's Western Hotels Food Service, Inc., Boeing Cafeteria, Boeing Plant #2, Seattle; Carolyn's Cakes, 518 15th Avenue, North, Seattle; Caster's Lake City Bakery, 12532 Bothell Way, Seattle; Frederick & Nelson (Bakery Department), 5th at Pine, Seattle; Gai's Seattle French Baking Co., Inc., 2006 Weller Street, Seattle; Golden Rule Bakery, Inc., 4450 Fremont Avenue, Seattle; Grandma Cookie Baking Co., Inc., 3402 Wallingford Avenue, Seattle; Karl's Bakery, 1614 Hewitt Avenue, Everett; Kent Bakery, 213 First South, Kent; Lippman's Bakery, Inc., 119 23rd Avenue, Seattle;

Lindsay's Thriftway Market, 11100 Roosevelt Way, Seattle; Manning's Inc., 621 Seaboard Building, Seattle; Richard's Fried Pies, Inc., 220 1st Avenue, North, Seattle; Swiss Pastry & Candy Shop, 1325 5th Avenue, Seattle; Smith & Sonnleitner Cookie Co., 1238 No. 99 W., McMinnville, Oregon (7710 Bagley, Seattle, Washington); Van de Kamp's Holland Dutch Bakers, 823 Yale Avenue, North, Seattle; Grand Central Bakery, Market & H Streets, Aberdeen; Swanson's Food, Inc., 1401 Simpson Avenue, Aberdeen; Veldkamp's Olympic Bakery, 417 W. Wishkah Street, Aberdeen; Bame's Ye Olde Home Bakery, Riverside, Mount Vernon; Bellingham Baking Company, 2001 State Street, Bellingham; City Bakery, 607 1st Street, Mount Vernon; Thrifty Foods, 130 Fairhaven Avenue, Burlington; Golden Rule Bakery, Inc., 915 Center Street, Tacoma; Jordan Baking Company, 3623 S. 54th Street, Tacoma; Eddy Bakeries Company, Inc., 232 S. Front Street, Yakima; Sigman Food Stores, P. O. Box 618, Yakima; and the following officials of Bakers of Washington, Inc.: Miss Maud Pemberton, Golden Rule Bakery, Inc., 4450 Fremont Avenue, Seattle; Henry Richards, Continental Baking Company, P. O. Box 3227, Seattle; Lloyd C. Mitchell, Van de Kamp's Holland Dutch Bakers, 823 Yale Avenue, North, Seattle; Lou Blackfield, Bake-Rite Bakery, 1414 14th Avenue, Seattle; Horace Snyder, Snyder's Bakery, Inc., 31 North 4th Street, Yakima; Al Moore, Langendorf United Bakeries, Inc., 2901 6th Avenue, South, Seattle; Roy Reynolds, Grandma Cookie Baking Co., Inc., 3402 Wallingford, Seattle; LeConie Stiles, Jr., Ruth Ashbrook Bakeries Corp., 1407 11th Avenue, Seattle; Henry Gai, Seattle French Baking Co., Inc., 2006 Weller Street, Seattle; Donald R. Due, Best Pie Company, Inc., 132 Queen Anne Avenue, Seattle; and Maurice Vyvey, Baker Boy Bakery, 8050 Bothell Way, Seattle, as officers of Bakers of Washington, Inc.; and respondents Safeway Stores, Inc., and Holsum Baking Company, corporations; and respondents' representatives, agents and employees, directly or through any corporate or other device in or in connection with the offering for sale, sale or distribution of bread, do forthwith cease and desist from:

Entering into, carrying out, continuing or cooperating in any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents, or members of Bakers of Washington, Inc., or between any one or more of them and others not parties hereto, where any one or more of the parties to such planned common course of action, understanding, agreement, combination or conspiracy is selling bread in interstate commerce in competition with bread sold by any one or more of the other parties thereto, to do or perform any of the following things:

(1) Establish, fix or maintain prices, terms or conditions of sale of bread.

(2) Adhere to any prices, terms or conditions of sale so fixed or maintained, or

(3) Deter or attempt to deter any competitor from exercising his individual judgment as to prices, terms or conditions of sale of bread.

It is further ordered, That the complaint herein be, and the same hereby is, dismissed as to Arthur H. LaLime, deceased.

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 set forth herein.

Commissioner Anderson concurring in the result; Commissioner Elman dissenting; and Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

WALTHAM WATCH COMPANY ET AL.

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

Docket 8396. Complaint, May 15, 1961—Decision, Feb. 28, 1964

Order requiring Chicago importers of watches, watch movements, cases and attachments which they assembled, to cease using inflated prices, in advertising and preticketing, as regular retail prices, misrepresenting, in advertising and labeling, the number of friction bearing jewels, the extent of their guarantee, and that their watches are manufactured in the United States by the well-known Waltham Watch Co. of Mass. by using such terms as "Waltham Premier, a famous name, part of the American scene since 1850," and the name "Waltham" in advertising and labeling to describe their watches.

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