Misbranding such products by:

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

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

It is further ordered, That respondents Clin-Tex Products Corp., a corporation, and its officers, and Jerome Shapiro, and Sol Stafford, individually and as managers of said corporation, and respondents' representatives, agents and employees directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of interlining material or any other textile products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in quilting material or any other textile products on invoices or shipping memoranda applicable thereto or in any other manner.

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

IN THE MATTER OF

TRANEX SCIENTIFIC, INC., ET AL. DOING BUSINESS AS TRANEX SCIENTIFIC OF ILLINOIS

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

Docket C-710. Complaint, Feb. 13, 1964—Decision, Feb. 13, 1964

Consent order requiring concerns in Hinsdale, Ill., engaged in leasing a device designated as "Tranex" for use in cases of enuresis, or bed-wetting, to cease representing falsely in advertisements in newspapers, magazines and other media that use of the device would stop bed-wetting and correct the bed-wetting habit in all cases, and had been utilized successfully in the treatment of over 275,000 cases of bed-wetting.

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 Tranex Scientific, Inc., a corporation, Morton N. Rosenberg, individually and as an officer of said corporation, Robert T. Marquardt and Dorothy Jean Marquardt, copartners doing business under the name of Tranex Scientific of Illinois, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Tranex Scientific, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its main office and principal place of business at 7410 North Talman Avenue, Chicago, Illinois. Morton N. Rosenberg is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as the corporate respondent's.

Robert T. Marquardt and Dorothy Jean Marquardt are individuals doing business as copartners under the name of Tranex Scientific of Illinois at 629 Hillside Avenue, Hinsdale, Illinois.

PAR. 2. Respondents are now, and have been for some time last past, engaged in the leasing of a device designated as Tranex, for use in cases of enuresis, commonly referred to as "bed-wetting". Tranex is a device within the meaning of that term as set forth in the Federal Trade Commission Act.

PAR. 3. Respondents cause said device when leased to be transported from their places of business in the State of Illinois to lessees thereof located in various States of the United States. Respondents maintain, and at all times mentioned herein have maintained a substantial course of trade and business in the leasing of said devices in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their said businesses respondents have disseminated, and caused the dissemination of, certain advertisements concerning the Tranex device through the United States mails and by various means in commerce as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and other advertising media, for the purpose of inducing and which were likely to induce directly or indirectly the leasing of said device in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical of the statements and representations contained in said advertisements are the following:

Stops Bed Wetting Problems.

The Tranex method to solve bed-wetting problems has proven successful in over 275,000 cases.

Dry Bed Training solves this problem.

PAR. 6. Through the use of said advertisements and others similar thereto, but not specifically set out herein, respondents have represented, and are now representing, directly and by implication, that the use of said Tranex device will stop enuresis or bed-wetting and correct enuresis or the bed-wetting habit in all cases, and that respondents' device has been utilized successfully in the treatment of over 275,000 cases of bed-wetting.

PAR. 7. In truth and in fact:

1. The use of said device will not be effective in helping an individual to control enuresis, or to correct bed-wetting, if an organic defect or disease is involved.

2. The respondents' Tranex device has not been used successfully in the treatment of over 275,000 cases of enuresis or bed-wetting.

Therefore, the advertisements referred to in Paragraph Five were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act.

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

DECISION AND ORDER

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

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

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

1. Respondent, Tranex Scientific, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 7410 North Talman Avenue, Chicago, Illinois. Respondent Morton N. Rosenberg is an officer of said corporation and his address is the same as that of said corporation.

Respondents Robert T. Marquardt and Dorothy Jean Marquardt are copartners doing business as Tranex Scientific of Illinois. Their principal place of business is located at 629 Hillside Avenue, Hinsdale, Illinois, and their address is the same as that of said partnership.

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

ORDER

It is ordered, That respondents, Tranex Scientific, Inc., a corporation, and its officers, Morton N. Rosenberg, individually and as an officer of said corporation, and Robert T. Marquardt and Dorothy Jean Marquardt, copartners doing business under the name of Tranex Scientific of Illinois, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, leasing or distribution of a device known as "Tranex" or any other device which functions in substantially the same manner, do forthwith cease and desist from directly or indirectly:

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

(a) That the use of the Tranex device is of value in stopping bed-wetting or correcting enuresis; unless such advertisement is expressly limited in a clear and conspicuous manner to cases of enuresis or bed-wetting not caused by organic defects or diseases.

(b) That respondents' device has been successful in the treatment of over 275,000 cases of enuresis or bed-wetting or of any other specified number of cases not established by evidence in the possession of respondents.

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

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

In the Matter of

NATIONAL HOME SUPPLY CO., INC., ET AL.

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

Docket C-711. Complaint, Feb. 13, 1964—Decision, Feb. 13, 1964

Consent order requiring Omaha, Nebr., sellers of siding material to the public, to cease making false representations, directly and through their salesmen, that buildings of purchasers would be used as models to demonstrate and advertise their siding and that purchasers would receive a reduced price; and that buildings would be entered in contests after the siding was installed and winning owners would receive substantial prizes.

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 National Home Supply Co., Inc., a corporation, and Lee Sloan and Robert Sloan, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Respondent National Home Supply Co., Inc., is a corporation organized, existing and dong business under and by virtue of the laws of the State of Nebraska, with its principal office and place of business located at 4408 Capitol Avenue, Omaha, Nebraska.

Respondents Lee Sloan and Robert Sloan are officers of said corporation. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices herein

after set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of siding material to the public.

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

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their products, respondents and their salesmen and representatives have made numerous statements and representations respecting contest prizes, prices and model or demonstration houses and buildings.

Typical and illustrative of the foregoing, but not all inclusive thereof, are the following:

1. That the houses and buildings of prospective purchasers would be used as models to demonstrate and advertise respondents' siding, and that such prospective purshasers would receive a reduced price for said siding.

2. That certain houses and buildings were to be entered in contests to determine which showed the greatest improvement after the siding was installed and that the owners of the winning houses and buildings were to receive various prizes, including a free trip to a foreign country or to the State of Hawaii, a resort cottage, and a new automobile.

PAR. 5. In truth and in fact:

1. Respondents did not use the houses or buildings of purchasers as models or otherwise to demonstrate or advertise said siding. Such purchasers did not receive a reduced price for said siding, but were required to pay respondents' usual and regular price.

2. Respondents have neither conducted the contests nor awarded the prizes as set forth in Paragraph Four (2).

Therefore the statements and representations set forth in Paragraph 4 are false, misleading and deceptive.

PAR. 6. 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 sid-

ing materials of the same general kind and nature as that sold by respondents.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission, having reason to believe that the respondents have violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. National Home Supply Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nebraska, with its office and principal place of business located at 4408 Capitol Avenue, in the city of Omaha, State of Nebraska.

Lee Sloan and Robert Sloan are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents, National Home Supply Co., Inc., a corporation, and its officers, and Lee Sloan and Robert Sloan, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of siding materials and any other product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing that respondents will use the house or building of any purchaser as a model or for demonstration or other advertising purposes.

2. Representing, directly or by implication that respondents' merchandise is being offered at a reduced price, unless such price constitutes a reduction from the price at which such merchandise has been usually and regularly sold by respondents in the recent regular course of their business, or otherwise misrepresenting the usual and regular price of such merchandise.

3. Representing that respondents are conducting, or will conduct, contests and are awarding, or will award, prizes, unless respondents establish that such contests were conducted in good faith and the prizes were awarded as promised.

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

IN THE MATTER OF

MODERN HANDCRAFT, INC., ET AL.

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

Docket C-712. Complaint, Feb. 13, 1964—Decision, Feb. 13, 1964

Consent order requiring Kansas City, Mo., book sellers to cease representing falsely, in letters to delinquent customers, that their name would be trans-

mitted to a credit reporting agency and their credit rating would be adversely affected; and through use on letterheads of the names "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", and "John J. Murphy, Attorney at Law", that delinquent accounts had been turned over to a separate, bona fide collection or credit reporting agency or to an outside attorney for institution of legal suit.

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 Modern Handcraft, Inc., a corporation, and John E. Tillotson, II, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Modern Handcraft, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 543 Westport Road in the city of Kansas City, State of Missouri.

Respondent John E. Tillotson, II, is an officer of said corporate respondent. He formulates, along with the directors and stockholders, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of encyclopedias, books and magazines to the general public. Said merchandise is advertised, sold and payment made therefor through the United States mails.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business in the State of Missouri to purchasers thereof located in the 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 merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business and for the purpose of inducing the payment of purportedly delinquent accounts, respondents have made certain statements and representations

through letters and materials sent through the United States mails to purportedly delinquent customers who have purchased encyclopedias or other merchandise.

Typical, but not all inclusive of said statements and representations, are the following:

a. On the letterhead of "Modern Handcraft, Inc.":

> This matter is getting serious and soon it will be out of our hands and will be taken over by the collection manager.
>
> It is his job to collect past due accounts. He does a good job.
>
> Protect your credit standing. Mail your check in the enclosed envelope to us today.
>
> Will you help me win an argument I'm having with our credit manager?
>
> He says you have not paid for books in the amount shown on the enclosed statement and he wants to place your account with The Mail Order Credit Reporting Association for collection.
>
> I disagree with him, because I am convinced you have merely overlooked his bills or have a good reason for ignoring them. I have prevailed upon him to delay sending your account to The Mail Order Credit Reporting Association for a few more days.
>
> Important you are hereby on notice that three weeks from the date shown on the enclosed bill, your account will be transferred to The Mail Order Credit Reporting Association
>
> * * * * * * *
>
> Will you not help us to protect your credit standing at once by remitting immediately and in full the amount due as shown on the enclosed bill?

b. On the letterhead of The Mail Order Credit Association, Inc., Credit Reports Collections, 15 West 38th Street, New York 18, N.Y.

> Your name has been sent to us regarding your Illustrated Encyclopedia subscription, to be included in our files.
>
> Please be sure to mail at once your remittance for your Illustrated Encyclopedia account, if you have not already done so!
>
> * * * * * * *
>
> I am certain that you would not like to be refused credit at some future date because of a small bill that you had every opportunity to settle?
>
> We have been asked to give you every opportunity to settle this small account, because our client wishes to keep your goodwill and friendship. If you deliberately ignore our effort to collect this debt, we have been advised by our client that it will take recourse in the established legal processes of the courts.
>
> That certainly would not be pleasant, and may result in your having to pay court costs and disbursements in addition to the balance now due.

c. On the letterhead of "MODERN HANDCRAFT, INC.":

> Important Notice
>
> Ten days from the mailing of this notice, we will turn over to our counsel your debt for the Illustrated Encyclopedia.

Final Notice Before Suit

FIRST: You are indebted as shown above.

FURTHER: Due notice has been given you and demand made for payment which has not been received.

FURTHER: Debt is justly due, not barred by Statute of Limitations.

FINALLY: Unless payment is made at this office, Delinquent Accounts Department, within Ten Days after receipt of this notice * * * claim will be due for full amount with interest at six percent per annum, together with the cost and disbursements of any action and service made by court officer in your district.

* * * * * * *

Note: WE URGE FRIENDLY SETTLEMENTS AS PREFERABLE TO LEGAL PUBLICITY AND EXPENSE

d. On the letterhead of "John J. Murphy, Attorney at Law, 15 West 38th St., New York 18, N.Y.":

I have been consulted by my client in connection with their claim against you for goods sold and delivered in the amount shown on the enclosed statement (Enclosed with the aforesaid letter):

Transfer of Account

To: John J. Murphy, Attorney at Law, 15 West 38th Street, New York 18, N.Y.

we hereby transfer this account to you to institute what legal action you deem necessary on the claim shown above.

(In script) Important! This is a duplicate of the claimant's transfer sheet. Be sure to return it with your remittance. J.J.M.

PAR. 5. By and through the use of the aforesaid statements, representations and practices, and others of similar import not specifically set out herein, respondents represent and have represented that:

a. If payment is not made, the delinquent customer's name is transmitted to a bona fide credit reporting agency.

b. If payment is not made, the customer's general or public credit rating will be adversely affected.

c. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", is a separate, bona fide collection and credit reporting agency located in New York City.

d. Respondents have turned over to said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." the delinquent account of the customer for collection and other purposes.

e. If payment is not made, the delinquent customer's account will be transferred to an outside attorney with instructions to institute suit or take other legal steps to collect the outstanding amount due.

f. "Mr. John J. Murphy" is an outside Attorney at Law, located in New York City, to whom the delinquent customer's account has been transferred for institution of suit or other legal steps.

g. The letters and notices on the letterheads of the said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." and "John J. Murphy, Attorney at Law" have been prepared and mailed by said organization or named attorney.

PAR. 6. In truth and in fact:

a. If payment is not made, the delinquent customer's name is not transmitted to a bona fide credit reporting agency.

b. If payment is not made, the customer's general or public credit rating is not adversely affected.

c. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." is not a separate, bona fide collection agency or credit reporting agency. Said organization is a fictitious name utilized by respondents and others for the purpose of disseminating collection letters.

d. Respondents have not turned over to said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." the delinquent account of the customer for collection or any other purpose.

e. If payment is not made, the delinquent customer's account is not transferred to an outside attorney with instructions to institute suit or other legal steps to collect the outstanding amount due.

f. The delinquent customer's account has not been transferred to "Mr. John J. Murphy" for institution of suit or other legal steps.

g. The letters and notices on the letterheads of the said "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC., and "John J. Murphy, Attorney at Law" have not been prepared and mailed by said organization or named attorney. Said letters and notices have been prepared and mailed or caused to be mailed by respondents. Replies in response to said letters and notices are forwarded unopened to respondents.

Therefore, the statements and representations as set forth in Paragraphs 4 and 5 hereof were and are false, misleading and deceptive.

PAR. 7. 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 payment of substantial sums of money to respondents by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Modern Handcraft, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 543 Westport Road, in the city of Kansas City, State of Missouri.

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

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

ORDER

It is ordered, That respondent Modern Handcraft, Inc., a corporation, and its officers, and John E. Tillotson, II, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of encyclopedias, books, magazines or other products, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that:

1. A customer's name will be turned over to a bona fide credit reporting agency or that a customer's general or public credit rating will be adversely affected unless respondents, where pay-

ment is not received, in fact refer the information of said delinquency to a separate, bona fide credit reporting agency;

2. a. Delinquent accounts will be turned over to a bona fide, separate collection agency or attorney for collection unless respondents establish that a prior determination had been made in good faith to make such referral;

b. Delinquent accounts have been turned over to a bona fide, separate collection agency or attorney for collection unless respondents establish that such is the fact;

3. Delinquent accounts have been or will be turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." or "Mr. John J. Murphy, Attorney at Law" for collection or any other purpose;

4. "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", any fictitious name, or any trade name owned in whole or in part by respondents or over which respondents exercise any direction or control, are independent, bona fide collection or credit reporting agencies;

5. "John J. Murphy" or any other person or firm is an outside, independent Attorney at Law or firm of attorneys representing respondents for collection of past due accounts unless a bona fide attorney client relationship exists between respondents and said attorney or attorneys, for purposes of collecting such accounts;

6. a. Delinquent accounts have been or will be turned over to "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC." or "John J. Murphy" with instructions to institute suit or other legal action to collect amounts purportedly due;

b. Delinquent accounts will be turned over to any other organization, attorney, firm of attorneys, or person with instructions to institute suit or other legal action unless respondents establish that a prior determination had been made in good faith to take such action;

c. Delinquent accounts have been turned over to any other organization, attorney, firm of attorneys, or person with instructions to institute suit or other legal action unless respondents establish that such is the fact;

7. Notices or other communications which respondents have, or have caused to be prepared, written or mailed, have been sent by "THE MAIL ORDER CREDIT REPORTING ASSOCIATION, INC.", "John J. Murphy" or any other person, firm or agency.

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

Complaint

IN THE MATTER OF

TYREX, INC., ET AL.

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

Docket C-713. Complaint, Feb. 13, 1964—Decision, Feb. 13, 1964

Consent order requiring a membership corporation—organized in 1958 to formulate standards and promote Tyrex rayon tire cord and which, in addition to its promotional activities, certified its members to use the collective mark "Tyrex" on rayon tire yarn, cord and fabric—along with its members which produced almost all the rayon cord used in the manufacture of tires in the United States, to cease conspiring to fix and maintain prices and terms of sale of their products; exchanging through Tyrex or otherwise, information as to future prices or price policies or the maintenance of current prices, and holding meetings concerned with such purposes; and using Tyrex or any other agency as an instrumentality for performing such prohibited acts or practices.

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 Tyrex, Inc., a membership corporation and American Enka Corporation, A.V.C. Corporation, Beaunit Corporation, and Midland-Ross Corporation, corporations, have violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C.A. Sec. 45) 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 Tyrex, Inc., is a membership 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 350 Fifth Avenue, New York, New York. The members of Tyrex, Inc. are American Enka Corporation, A.V.C. Corporation, Beaunit Corporation, Midland-Ross Corporation, and Courtaulds (Canada) Ltd.

Respondent American Enka Corporation (hereinafter sometimes referred to as Enka) is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Enka, North Carolina.

Respondent A.V.C. Corporation (hereinafter sometimes referred to as A.V.C.) is a corporation organized, existing, and doing business

under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1617 Pennsylvania Boulevard, Philadelphia 3, Pennsylvania.

Respondent Beaunit Corporation (hereinafter sometimes referred to as Beaunit) 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 261 Fifth Avenue, New York 16, New York.

Respondent Midland-Ross Corporation (hereinafter sometimes referred to as Midland-Ross) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 55 Public Square, Cleveland 13, Ohio.

The aforementioned members of Tyrex, Inc., will hereinafter sometimes be referred to as "respondent members". Courtaulds (Canada) Ltd., the remaining member of Tyrex, Inc., is a Canadian corporation which does not do business in the United States.

PAR. 2. Tyrex, Inc., was established on June 26, 1958, under the name, The American Tyrex Corporation, which was subsequently changed to American Tyrex Corporation, and finally on October 20, 1958, to Tyrex, Inc. Tyrex, Inc., succeeded the American Rayon Institute and was organized in part, for the purpose of formulating standards and promoting the sale and public acceptance of rayon tire yarn, cord and fabric. Employees of respondent members participate actively on the committees and other operating units of Tyrex, Inc. Some of the officers of Tyrex, Inc., and members of the Board of Directors of Tyrex, Inc., are officers and employees of respondent members. The budget of Tyrex, Inc., is substantial and represents continuing contributions from respondent members, among others. In addition to promotional activities, Tyrex, Inc. certifies the respondent members to use the collective mark "Tyrex" on rayon tire yarn, cord, and fabric which meet certain specifications of quality.

The original membership of Tyrex, Inc., consisted of Enka, Courtaulds (Canada) Ltd., and Industrial Rayon Corporation. A.V.C. joined Tyrex, Inc., on September 5, 1958, and Beaunit joined on October 2, 1958.

Industrial Rayon Corporation was acquired by Midland-Ross in April 1961 by exchange of capital stock and is now operated as the Industrial Rayon Division of Midland-Ross. Former officers of Industrial Rayon Corporation, who participated actively in the unlawful practices, hereinafter alleged, are now officers of Midland-Ross. Midland-Ross has ratified and continued the unlawful practices of

Tyrex, Inc., and the Industrial Rayon Corporation, as hereinafter alleged.

PAR. 3. Rayon tire yarn, cord, and fabric promoted by Tyrex, Inc. is manufactured and sold by respondent members as either "Tyrex rayon tire yarn", "Tyrex rayon tire cord", or "Tyrex rayon tire fabric". The basic product herein is rayon tire cord: rayon yarn is the component of the cord, and fabric is the form of the cord. Yarn consists of a multiplicity of filaments slightly twisted and is designated by its denier, *i.e.*, its weight in grams per 9000 cm. in length. Cord is a multiplicity of yarns, usually two, twisted with precision to a given number of turns per inch; it is designated by the yarn denier followed by the number of cord plies. For example, two-ply cord manufactured from 1100 denier yarn is expressed as 1100/2. Fabric is a number of cords arranged parallel to one another, joined by picks holding the cords parallel. The word "cord" is sometimes used in the industry to embrace cord, yarns, and fabric and as used hereinafter will mean cord, yarn, or fabric.

PAR. 4. Respondent members manufacture Tyrex rayon tire cord at the following places: Enka at Enka, North Carolina and Lowland, Tennessee; A.V.C. at Lewiston, Pennsylvania and at Front Royal, Virginia; Beaunit at Elizabethton, Tennessee and Coosa Pines, Alabama, and Midland-Ross at Painsville, Ohio. In 1961, respondent members produced approximately 160,000,000 pounds of Tyrex tire cord valued in excess of $90,000,000.

Respondent members produce almost all the rayon cord used in the manufacture of tires in the United States. Tire cord is an essential element in tire construction, imparting most of the strength and impact resistance to tires. Rayon tire cord is used in all original equipment passenger tires and in a large percentage of the replacement tires manufactured in the United States. The product is sold by some of all of respondent members in either 1100, 1650, 2200, or 3300 deniers.

PAR. 5. Respondent members have caused and now cause the aforesaid Tyrex rayon tire cord when sold to be transported from the respective States where respondent members maintain production or processing facilities to purchasers located in various other States of the United States. Respondent members maintain, and at all times mentioned herein have maintained, a course of trade in said Tyrex rayon tire cord in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent members' volume of business in such commerce is and has been substantial.

PAR. 6. In the course and conduct of their business in commerce respondent members have been and would now be in active competition with each other in the manufacture, processing, sale and distribution of rayon tire cord except to the extent that competition has been lessened, hindered, restrained, or eliminated by the acts and practices as herein alleged.

PAR. 7. Tyrex, Inc., was organized for the purpose of formulating standards and promoting Tyrex rayon tire cord; it has, however, since its inception in 1958 and continuing to the present time, been used as a medium for respondent members to communicate with one another and as an instrumentality through which respondent members adopt and carry out certain acts and practices hereinafter more fully described. Through Tyrex, Inc., respondent members have joined together to participate in, and are now participating in, understandings, agreements, combinations, conspiracies, and a planned common course of action or a course of dealing for the purpose or with the effect of restraining trade and lessening or eliminating competition in the production, processing, distribution, and sale of Tyrex rayon tire cord. As part of, pursuant to, and in furtherance of the aforesaid joint actions, communications, understandings, agreements, combinations, conspiracies, common course of action, and course of dealing, respondent members have authorized, participated in, adopted, placed in effect, carried out, or ratified the following acts, policies and practices:

1. Determined, fixed, established, stabilized, maintained, and made effective, and are now determining, fixing, establishing, stabilizing, maintaining, and making effective uniform, identical, and noncompetitive prices in the sale of Tyrex rayon tire cord between 1958 and the present time. These prices were so fixed and established although substantial quality differences existed in the Tyrex rayon tire cord produced by respondent members.

2. Agreed and conspired to increase, fix, and maintain the price of Tyrex rayon tire cord and did increase, fix, and maintain the price of Tyrex rayon tire cord.

3. Held meetings of, and do now hold meetings of Tyrex, Inc., for the purpose or with the effect of fixing, establishing, and maintaining uniform prices and price quotations, including a meeting at a "Christmas party" in a private suite at a Montreal hotel on December 21, 1960.

4. Exchanged, and do now exchange, information relating to current and future prices, pricing factors, and cost of production, processing, and distribution in connection with the manufacture and sale of Tyrex rayon tire cord.

PAR. 8. By reason of the aforesaid acts and practices, respondent members have:

1. Lessened or eliminated, and are now lessening or eliminating, competition in the production and sale of Tyrex rayon tire cord; and

2. Fixed and maintained, and are now fixing and maintaining arbitrary, artifical, and noncompetitive prices for Tyrex rayon tire cord.

PAR. 9. The acts, practices, and agreements of respondent members as herein alleged are all to the prejudice and injury of the public; have a dangerous tendency unduly to lessen, hinder, restrain, or eliminate competition; constitute unfair methods of competition; and are unfair acts and practices in commerce within the intent and meaning of, and in violation of, Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Tyrex, Inc., is a membership 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 350 Fifth Avenue, New York, New York. The members of Tyrex, Inc., are American Enka Corporation, A.V.C. Corporation, Beaunit Corporation, Midland-Ross Corporation, and Courtaulds (Canada) Ltd.

Respondent American Enka Corporation is a corporation organized, existing and doing business under and by virtue of the laws of

the State of Delaware, with its principal office and place of business located at Enka, North Carolina.

Respondent A.V.C. Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1617 Pennsylvania Boulevard, Philadelphia 3, Pennsylvania.

Respondent Beaunit Corporation 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 261 Fifth Avenue, New York 16, New York.

Respondent Midland-Ross Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 55 Public Square, Cleveland 13, Ohio.

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

ORDER

It is ordered, That respondents Tyrex, Inc., a membership corporation; American Enka Corporation, a corporation; A.V.C. Corporation, a corporation; Beaunit Corporation, a corporation; and Midland-Ross Corporation, a corporation, and their officers, directors, agents, representatives, employees, successors, or assigns, directly or through any corporate or other device, in connection with the production, promotion and sale of rayon tire yarn, rayon tire cord, or rayon tire fabric in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action or course of dealing or understanding, agreement, combination, or conspiracy, between or among any two or more of the said respondents, or between any one or more of the said respondents and any others not parties hereto, to do or perform any of the following:

1. Fixing, establishing, or maintaining prices, terms or conditions of sale of rayon tire yarn, rayon tire cord, or rayon tire fabric, or adhering to or promising to adhere to prices, terms, or conditions of sale so fixed, established, or maintained.

2. Exchanging, distributing, or relaying directly or through Tyrex, Inc., or through any other medium or agency, any information relating directly or indirectly to: future prices or price policies of any respondent; future prices or price policies, for

rayon or non-rayon tire yarn, tire cord, or tire fabric, of any other producer; pricing factors of rayon or non-rayon tire yarn, tire cord, or tire fabric, such as cost of production and distribution thereof; or the maintenance of current prices of rayon or non-rayon tire yarn, tire cord, or tire fabric.

3. Holding or attending any meeting for the purpose of agreeing upon, discussing, or considering, directly or indirectly, future prices or price policies of any respondent; future prices or price policies, for rayon or non-rayon tire yarn, tire cord, or tire fabric, of any other producer; pricing factors of rayon or non-rayon tire yarn, tire cord, or tire fabric, such as cost of production and distribution thereof; or the maintenance of current prices of rayon or non-rayon tire yarn, tire cord, or tire fabric.

4. Employing or utilizing Tyrex, Inc., or any other medium or agency in any way as an instrumentality or aid in performing or doing any of the acts or practices prohibited by this Order.

It is further ordered, That nothing contained in this Order shall be construed as prohibiting the establishment or maintenance of any lawful bona fide agreement, discussions, or other action solely between any corporate respondent and its parent.

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

IN THE MATTER OF

WILSON'S OF CALIFORNIA, INC., ET AL.

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

Docket C-714. Complaint, Feb. 14, 1964—Decision, Feb. 14, 1964

Consent order requiring Los Angeles manufacturers of fur-trimmed ladies' coats and suits to cease violating the Fur Products Labeling Act by labeling to show as "natural" fur which was artificially colored; to show falsely that they had places of business in Paris and Rome, and, by use of the words "Paris", "Rome" and "Design by Ardoni" that fur products were created and styled in Europe; by labeling and invoicing which failed to show the true animal name of fur; by invoicing which failed to disclose when fur was dyed or bleached, and the country of origin of imported furs; by furnishing false guaranties that certain of their fur products were not misbranded, falsely invoiced, or falsely advertised; by substitut-

ing non-conforming labels for those originally affixed to fur products and failing to preserve the required records; and by failing in other respects to comply with requirements of the Act.

COMPLAINT

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

PARAGRAPH 1. Respondent Wilson's of California, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

Respondent Louis Wilson is an officer of the corporate respondent and formulates, directs, and controls the acts, practices, and policies of the said corporate respondent including those hereinafter set forth.

Respondents are manufacturers and distributors of fur products, namely, fur-trimmed ladies' coats and suits, with their office and principal place of business located at 834 South Broadway, Los Angeles, California.

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

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show that fur contained therein was natural, when the fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show that the respondent corporation had a place of business in Paris, France, and Rome, Italy, which representation was false and deceptive in that respondents did not maintain an office or facilities in Paris, France, or Rome, Italy, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 5. Certain of said fur products were misbranded in violation of Section 4(1) of the Fur Products Labeling Act in that said fur products were falsely and deceptively labeled by means of a label which contained the statements "Paris", "Rome" and "Design by Ardoni" thus representing that such fur products were created, designed, and styled in Europe. In truth and in fact the said statements were false in that such fur products were not created, designed and styled in Europe.

PAR. 6. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder. Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to show the true animal name of the fur used in the fur product.

PAR. 7. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on labels in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

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

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

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

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

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

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

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

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

3. To show the country of origin of imported furs used in fur products.

PAR. 9. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in that required item numbers were not set forth on invoices in violation of Rule 40 of the said Rules and Regulations.

PAR. 10. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respect:

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

PAR. 11. Respondents furnished false guaranties that certain of their fur products were not misbranded, falsely invoiced or falsely advertised when respondents in furnishing such guaranties had reason to believe that fur products so falsely guarantied would be introduced, sold, transported, or distributed in commerce, in violation of Section 10(b) of the Fur Products Labeling Act.

PAR. 12. Respondents in introducing, selling, advertising, and offering for sale, in commerce, and in processing for commerce, fur products; and in selling, advertising, offering for sale, and processing fur products which have been shipped and received in commerce, have misbranded such fur products by substituting thereon, labels which did not conform to the requirements of Section 4 of the Fur Products Labeling Act, for the labels affixed to said fur products by the manufacturer or distributor pursuant to Section 4 of said Act, in violation of Section 3(e) of said Act.

PAR. 13. Respondents in substituting labels as provided for in Section 3(e) of the Fur Products Labeling Act, have failed to keep

and preserve the records required, in violation of said Section 3(e) and Rule 41 of the Rules and Regulations promulgated under the said Act.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent, Wilson's of California, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 834 South Broadway, Los Angeles, California.

Respondent Louis Wilson is an officer of said corporation and his address is the same as that of the said corporation.

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

ORDER

It is ordered, That respondents Wilson's of California, a corporation, and its officers, and Louis Wilson, individually and as an officer

of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Representing directly or by implication on labels that the fur contained in any fur product is natural when the fur contained therein is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

2. Representing in any manner on labels that respondents have an office, facilities or place of business in Paris, France, or Rome, Italy, or at any other place when respondents do not maintain an office, facilities or place of business as represented.

3. Representing in any manner, contrary to fact, on labels that respondents' fur products were created, designed, or styled in Europe or in any place where they are not actually created, designed, or styled.

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

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

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

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

8. Failing to set forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulation promulgated thereunder on labels in the se-

quence required by Rule 30 of the aforesaid Rules and Regulations.

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

B. Falsely or deceptively invoicing fur products by:

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

2. Failing to set forth on invoices the item number or mark assigned to fur products.

3. Failing to set forth the term "natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

It is further ordered, That respondents Wilson's of California, a corporation, and its officers, and Louis Wilson, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any fur product is not misbranded, falsely invoiced or falsely advertised when the respondents have reason to believe that such fur product may be introduced, sold, transported, or distributed in commerce.

It is further ordered, That Wilson's of California, a corporation, and its officers, and Louis Wilson, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, sale, advertising, or offering for sale, in commerce, or the processing for commerce, of fur products; or in connection with the selling, advertising, offering for sale, or processing of fur products which have been shipped and received in commerce, do forthwith cease and desist from:

1. Misbranding fur products by substituting for the labels affixed to such fur products pursuant to Section 4 of the Fur Products Labeling Act labels which do not conform to the requirements of the aforesaid Act and the Rules and Regulations promulgated thereunder.

2. Failing to keep and preserve the records required by the Fur Products Labeling Act and the Rules and Regulations pro-

mulgated thereunder in substituting labels as permitted by Section 3(e) of the said Act.

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

IN THE MATTER OF

SPERRY RAND CORPORATION

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

Docket 7559. Complaint, Aug. 5, 1959—Decision, Feb. 17, 1964

Order dismissing—for the reason that the basis of the complaint was an isolated, non-recurring transaction which occurred as the result of abnormal conditions in the industry and in respondent's business and not likely to be repeated, and the effects on competition of this single incident appear too insubstantial to require formal action—complaint charging a manufacturer with discriminating in price by selling portable typewriters to Sears, Roebuck at lower prices than it sold them to other customers competing with Sears, notably, Gimbel's and Strawbridge & Clothier's of Philadelphia.

COMPLAINT

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

PARAGRAPH 1. Respondent, Sperry Rand Corporation, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 30 Rockefeller Plaza, New York, New York.

PAR. 2. Respondent Sperry Rand Corporation is the successor, by consolidation on June 30, 1955, of Remington Rand, Inc., and The Sperry Corporation.

The principal activities of the respondent are conducted through many divisions including the Remington Rand Division which maintains headquarters at 315 4th Avenue, New York, New York, and manufacturing plants located in approximately 22 cities in various states of the United States.

Prior to June 30, 1955, Remington Rand, Inc., was engaged in the manufacture, sale and distribution of various products including typewriters, business machines, systems and equipment. Since the aforesaid consolidation, respondent Sperry Rand Corporation, through its Remington Rand Division, has, and is now, engaged in the manufacture, sale and distribution of the same products.

PAR. 3. In the course and conduct of its business respondent engages in commerce, as "commerce" is defined in the Clayton Act, in that it causes said products, when sold, to be transported from their places of manufacture to purchasers thereof located in the same and various other states of the United States. Said products are sold and distributed for use and consumption in the various states of the United States.

PAR. 4. The respondent, in the course and conduct of its business, has been, and is, in competition with other corporations, individuals, partnerships, and firms engaged in manufacturing, selling and distributing said products in commerce between and among the various states of the United States and the District of Columbia.

Respondent's purchasers of said products are competitively engaged in the resale of said products at retail in the various territories and places where said purchasers respectively carry on their business. Included among such purchasers are mail order houses, department stores, specialty shops, and other retailers.

PAR. 5. In the course and conduct of its business, as above described, respondent has sold its products to some of said purchasers at higher prices than it has sold such products of like grade and quality to other of said purchasers. Respondent's favored purchasers are now, and have been, competing with its non-favored purchasers in the resale of said products.

PAR. 6. Illustrative of the pricing practices alleged in Paragraph Five is the following:

During an approximate six month period commencing June 1, 1958, respondent offered to sell and sold typewriters to a favored customer having branches located in various cities including New York, New York; Philadelphia, Allentown, Pittsburgh, Pennsylvania; and Atlanta, Georgia, at prices, including Federal excise tax, of $59.40 and $64.19.

During the same period of time respondent sold typewriters of like grade and quality to other customers located in the same cities at prices, including Federal excise tax, ranging from approximately $74.84 to $79.56.

Many of the aforesaid purchasers paying the higher prices for respondent's products were, and are, competitively engaged in the resale of said products with purchasers paying the lower prices.

PAR. 7. The effect of such discriminations in price made by respondent as set forth in Paragraph Six hereof injured, destroyed or prevented competition with respondent's purchasers who received the benefit of such discriminations, and, if permitted to be resumed, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and its purchasers are respectively engaged; or to injure, destroy or prevent competition with respondent or its purchasers who receive the benefit of such discriminations.

PAR. 8. The foregoing acts and practices of the respondent, as above alleged, violate Section 2(a) of the Clayton Act, as amended, (U.S.C., Title 15, Sec. 13).

OPINION OF THE COMMISSION

FEBRUARY 17, 1964

By the Commission:

The complaint in this matter charges violation of Section 2(a) of the Clayton Act, as amended, by respondent in connection with the sale of some 45,000 "Quiet-Riter" portable typewriters, manufactued by respondent's Remington Rand Division, to Sears Roebuck and Company during a three-month period in 1958. The hearing examiner rendered an initial decision in which he (a) found that this sale to Sears Roebuck had inflicted injury on Sears' competitors, who were forced to pay respondent higher prices for the same machines, (b) rejected respondent's defenses of cost-justification, changing-conditions, and good-faith meeting of competition, and (c) entered an order to cease and desist. Respondent has appealed.

We find it unnecessary to reach, and we intimate no view upon, the merits of any of respondent's contentions on this appeal. The purpose of Commission cease and desist orders is not to punish law violators, but to prevent the recurrence of unlawful conduct. If the probability of such recurrence is remote and insubstantial, the Commission may conclude that the public interest does not require entry of a formal order.

In the unique circumstances of this case, we believe that termination of this proceeding without entry of a cease and desist order is the appropriate disposition. It appears that the special sale to Sears Roebuck which is the basis of the complaint was an isolated, nonrecurring transaction, which occurred as the result of abnormal conditions in the industry and in respondent's business that are very unlikely to be repeated. The effects on competition of this single incident appear too insubstantial to require formal action.

Accordingly, and without adjudicating the merits of the case, the initial decision will be vacated and the complaint dismissed.

Commissioner Reilly did not participate for the reason that he did not hear oral argument.

Commissioner MacIntyre did not concur for the reason that he cannot locate in the record of this proceeding the evidence apparently relied upon by the Majority for its action. For example, the action of the Majority appears to be based upon an assurance that the discriminatory conduct herein charged will not be repeated. According to the Majority, that assurance stems from the "unique circumstances of this case." He cannot find in the "unique circumstances of this case" evidence of the assurance so readily apparent to the Majority.

FINAL ORDER

Upon consideration of respondent's appeal from the initial decision of the hearing examiner, and for the reasons stated in the accompanying opinion,

It is ordered, That the initial decision be, and it hereby is, vacated and set aside.

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

Commissioner MacIntyre not concurring for the reason that he cannot locate in the record of this proceeding the evidence apparently relied upon by the Majority for its action. For example, the action of the Majority appears to be based upon an assurance that the discriminatory conduct herein charged will not be repeated. According to the Majority, that assurance stems from the "unique circumstances of this case." He cannot find in the "unique circumstances of this case" evidence of the assurance so readily apparent to the Majority.

Commissioner Reilly did not participate for the reason that he did not hear oral argument.

IN THE MATTER OF

AROUND-THE-WORLD SHOPPERS CLUB TRADING AS TRANS-WORLD SHOPPERS CLUB ET AL.

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

Docket 8460. Complaint, Jan. 16, 1962—Decision, Feb. 17, 1964

Order requiring operators of buying clubs—members of club receive monthly, in return for their so-called membership fees, an article of merchandise

from a foreign country—to cease making deceptive pricing, savings, and "free" claims for foreign made merchandise to its club members and prospective members.

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 Around-the-World Shoppers Club, a corporation trading as Trans-World Shoppers Club, and David W. Margulies, Don Haas, Joe Vine, and I. G. Margulies, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Around-the-World Shoppers Club trading as Trans-World Shoppers Club is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 833 Newark Avenue, in the City of Elizabeth, State of New Jersey.

Respondents David W. Margulies, Don Haas, Joe Vine, and I. G. Margulies, are individuals and are officers of said corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent. Their address, as individuals and as officers, is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the business of advertising, offering for sale, and selling so-called subscriptions of membership in buying clubs, operated under the afore-mentioned names, to members of the purchasing public. In return for their so-called membership fees, the purchaser receives, monthly, an individual article of merchandise from a foreign country. Said articles of merchandise consist of candlesticks, scarves, lamps, statues and various other items purchased by the respondents in foreign lands and shipped to said purchasers.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, the aforesaid subscriptions, certificates, and articles of merchandise to be shipped from their aforesaid place of business in the State of New Jersey, and from the various places of business of their suppliers located in the different states of the United States and foreign countries,

to said subscribers located in various 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 subscriptions, certificates, and articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of said subscriptions, certificates, and articles of merchandise, respondents now make, and have made, numerous statements and representations with respect to the regular retail selling price of the afore-mentioned articles of merchandise, and the savings afforded subscribers. Said statements and representations have been made in letters, leaflets, tear sheets, and other kinds of promotional material mailed to prospective customers and subscribers throughout the United States and the District of Columbia.

Typical and illustrative of the foregoing, but not all inclusive thereunder, are the following:

Yours for Only $10

This exquisite silver-plated 5-pc. coffee & tea service * * * Guaranteed * * * $50 Value

WHY we offer this $50 service for only $10

You may wonder why we are making you this once-in-a-lifetime offer. Our purpose is to introduce you, through this fabulous Coffee & Tea Service, to the rich benefits of membership in the Trans-World Shoppers Club.

* * * * * * *

"Minolta-16 Retail Value * * * 39.95

The world's most exciting camera yours for only $10

* * * * * * *

Dear Friend,

Yes, it's true! Incredible as it seems, for only $10, I want to send you the amazing Minolta-16 camera (sold everywhere for $39.95) * * * as a demonstration of the fabulous values that members of the exclusive Trans-World Shoppers Club enjoy!

* * * * * * *

This magnificent 400 day clock FREE! with membership in the Deluxe Around-the-World Shoppers Club

Your free Heirloom Clock stands 12" high and 8" wide at the base * * * and has a verified store price of $30.

PAR. 5. Through the use of the aforesaid statements and representations, and others similar thereto, but not specifically herein set forth, respondents have represented, directly or indirectly, that:

a. $50 is the usual and regular retail price of the coffee and tea service in all of the trade areas in which it is offered for sale;

b. $39.95 is the usual and regular retail price of the Minolta-16 camera in all of the trade areas in which it is offered for sale;

c. $30 is the usual and regular retail price of the 400 day anniversary clock in all of the trade areas in which it is offered for sale;

d. Such alleged usual and regular retail price of the coffee and tea service has been reduced to $10 with consequent savings afforded to the purchasers thereof;

e. Such alleged usual and regular retail price of the Minolta-16 camera has been reduced to $10 with consequent savings afforded to the purchasers thereof;

f. The said 400 day anniversary clock is a gift or gratuity given without cost to the recipient.

PAR. 6. The foregoing representations are false, misleading, and deceptive. In truth and in fact:

a. $50 is not the usual and regular retail price of the said coffee and tea service in all of the trade areas in which it is offered for sale;

b. $39.95 is not the usual and regular retail price of the said Minolta-16 camera in all of the trade areas in which it is offered for sale;

c. $30 is not the usual and regular retail price of the said 400 day anniversary clock in all of the trade areas in which it is offered for sale;

d. Savings in the amount herein above stated are not afforded to purchasers of said articles;

e. The said 400 day anniversary clock designated as "free" is not a gift or gratuity, or without cost to the recipient, but on the contrary, the prospective purchaser, before he is entitled to receive said clock, must purchase a membership in respondents' club or clubs, thus becoming obligated to purchase a minimum of six articles of merchandise over a period of six months or twelve articles of merchandise over a period of one year, the fulfillment of which obligation inures directly to the benefit of and profit to the respondents.

PAR. 7. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals engaged in the sale of articles of merchandise of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations, and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were and are true and into the purchase of substantial quantities of respondents' articles of merchandise by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violations of Section 5(a)(1) of the Federal Trade Commission Act.

OPINION OF THE COMMISSION

This is an appeal by complaint counsel from the initial decision of the hearing examiner, which dismissed the complaint on the grounds that the respondents had discontinued the challenged practices. The complaint, filed January 16, 1962, charged that respondents had engaged in "unfair or deceptive acts or practices in commerce" in violation of Section 5 of the Federal Trade Commission Act, 38 Stat. 719 (1914); 52 Stat. 111 (1938); 15 U.S.C. § 45(a)(1).

Around-the-World Shoppers Club is a New Jersey corporation which has engaged for a number of years in the business of advertising and selling memberships in its buying club to the purchasing public. In return for a fee each member received a monthly article of merchandise selected by the respondent corporation. Such merchandise was obtained in various countries throughout the world and mailed directly to the consumer from abroad. The articles included such items as candlesticks, scarves, lamps and statues. Respondents David Margulies, Joe Vine, Don Haas, and I. G. Margulies were alleged to be officers of the corporation and responsible for its activities.

The record reveals that respondents sent subscriptions, advertisements and certificates from their place of business in New Jersey to members and prospective members all over the United States, and that articles of merchandise were also sent to members in various parts of the United States. In this manner a substantial amount of trade in commerce was maintained at all times.

In 1957, respondents began to make special "bonus" offers to attract new members. Respondents first represented that a "400 day" clock would be given free to each new member. When this offer was discontinued, they advertised a "$39.95" Minolta camera would be sent to each new member for a payment of only $10 in addition to the regular membership fee. The "camera" offer was replaced by a silver-plated coffee and tea service which was represented as having a retail value of $50, but which new members would receive for $10. The complaint charged that the representations made in connection with these campaigns were false and misleading in that the clock

was, in fact, not "free" since a charge was made therefor, and the usual and regular prices of the camera and coffee and tea service in all trade areas were not respectively $39.95 and $50 but were substantially less.

The hearing examiner held that the respondent corporation, David W. Margulies and Joe Vine falsely represented that the usual and regular retail price of the camera was $39.95 and that the clocks were "free." However, since these representations were discontinued prior to March 1961, the hearing examiner held the matter was moot because of discontinuance. The examiner also held that there was insufficient proof that the respondents had falsely represented that $50 was the usual and regular retail price of the coffee and tea sets. He further ruled that the complaint should be dismissed as to respondent Don Haas because there was a failure of proof of violation and also because his address was unknown and it would be difficult to serve an order against him.

There are two main issues on appeal. The first is whether the hearing examiner was correct in ruling that there was insufficient proof that respondents had falsely represented that $50 was the regular and usual retail price of the coffee and tea sets. The second is whether his dismissal on grounds of mootness is proper.

The hearing examiner did not consider the evidence sufficient to establish misrepresentation with regard to the coffee and tea set. He felt the evidence clearly established that the respondent corporation had represented that the coffee and tea set had a "value" of $50. But he stated:

> The proof offered by complaint counsel to show that $50 was not the usual and regular retail price of the set in all said areas, and that there was no saving of $40, was completely insufficient. There was no evidence of any actual retail sale or sales of the set. No retailer of the set was introduced as a witness. The only witness was the manufacturer of the set, that is, its sales manager. * * * The witness testified that he knew the retail price was $36, but to support this gave only two examples, both special sales at about $28 * * *.[1]

The witness referred to above, Mr. Cohen, was the sales manager of the Sheridan Silver Company, the manufacturer of the coffee and tea services. Mr. Cohen was in the silverware business as a sales representative for twenty-four years prior to spending six years with Sheridan as sales manager. He has about ten salesmen under him who cover the United States from "coast to coast." In addition, Mr. Cohen personally engages in selling in the company's New York showroom and at various shows and conventions.

[1] Initial decision, at page 13 (August 29, 1962).

Mr. Cohen testified that the coffee and tea set was generally sold in the New York trade area at $36, with some special sales made at $29.95. He also noted that the price list of the Sheridan Silver Company stated that the suggested retail price was $36. He noted, furthermore, that in some instances special sales were made at $29.95. The foregoing, of course, tends to support the Commission charge of fictitious pricing.

A similar issue as to the existence of substantial evidence arose in the *Gimbel Brothers, Inc.*, case.[2] That case also involved fictitious pricing claims with regard to merchandise sold in the New York area. A single witness testified that Hotpoint refrigerators generally were not sold at list price in the New York City area. In evaluating the testimony of this witness, the Commission stated:

> * * * The foregoing facts were testified by the district manager of Hotpoint's New York District; a man with twenty-three years' experience who supervises four sales managers and eighteen wholesale salesmen; who personally, periodically contacts a cross-section of Hotpoint retail dealers; and who makes it his business to know the general level at which his customers sell Hotpoint products. Such a witness is, in our view, worthy of belief and his testimony should be afforded weight. Using this testimony as a basis, we find that the list prices suggested by Hotpoint and used by Gimbel's in the advertisement are not the "usual and customary" prices for Hotpoint refrigerators in the New York area.[3]

The evidence here is equally probative to that relied upon in *Gimbel Brothers, Inc.* The Commission feels that Mr. Cohen's testimony is adequate to support a finding that $50. was not the usual and regular price of the coffee and tea set in the New York City trade area. It is immaterial that there was no evidence of "usual" price in terms of individual sales. We believe that there is sufficient evidence to sustain the conclusion that the respondents falsely represented the regular and usual retail price of the coffee and tea set and the hearing examiner's contrary finding will be set aside.

We are also of the opinion that respondent's representations as to "price" and "value" of the merchandise in question failed to meet the standards for truthful advertising set forth in our recently issued Guides Against Deceptive Pricing. The claim that the Minolta Camera "sold everywhere for $39.95" would lead the reader to believe that the camera is sold at $39.95 in all types of outlets in all communities throughout respondent's trade area. The showing that in New York City the camera was usually sold in discount houses for $25 reveals that the claim is untrue. As to the representation that the silver-plated coffee and tea service has a $50 value," the testimony that the manufacturer's suggested price for this item was $36 and

[2] *Gimbel Brothers, Inc.*, Docket No. 7834, 61 F.T.C. 1051, Oct. 17, 1962.
[3] *Id.* at page [61 F.T.C. 1051, 1070].

that sales were sometimes made at less than the suggested price supports the conclusion that the prevailing price of this merchandise was not $50 (see Guides II and III).

We turn now to the issue created by the hearing examiner's dismissal of the complaint for mootness. The record clearly establishes that at the present time the respondents have ceased making the type of representations which is challenged in this proceeding. They stopped representing that the clock was "free" sometime in 1958. Representations as to the value of the cameras terminated in February 1960. Representations as to the value of the coffee and tea set ceased in January 1961. All such representations had ceased one year prior to the issuance of the complaint in January 1962. It was also established that respondent corporation is involved in Chapter 11 bankruptcy proceedings. On this basis the hearing examiner concluded that the proceeding was moot and no order to cease and desist was necessary.

We cannot agree with this conclusion. The mere fact that all false representations ceased one year before the issuance of the complaint does not mean such practices have been permanently abandoned. *Deer* v. *Federal Trade Commission*, 152 F. 2d 65 (2d Cir. 1945). Nor can such an inference be drawn from the fact that the respondent is now involved in Chapter 11 bankruptcy proceedings. Cease and desist orders have issued against corporations undergoing dissolution or bankruptcy proceedings. *Neo-Mineral Co., Inc.*, v. *Federal Trade Commission*, 48 F.T.C. 487, 498 (1951). It is possible that the corporate respondent will perfect an arrangement in bankruptcy which will allow it to resume its business operations later.[4]

In cases of asserted abandonment, the Commission is vested with broad discretion in determining whether a practice has been surely stopped and whether an order to cease and desist is proper. *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321 (7th Cir. 1944). The burden of proof is on the defendant to establish the defense of abandonment; it must establish that there is no likelihood that these practices will be resumed in the future. Dismissal of complaints in abandonment cases is not the usual procedure and should be limited to truly unusual situations. *Ward Baking Company*, 54 F.T.C. 1919, 1922 (1958).

We conclude that the respondents have failed to establish that they have permanently discontinued the challenged practices. In fact, they have failed to offer any assurance whatsoever that they will not re-

[4] Respondent corporation has liabilities of $500,000 against assets of $100 in cash and $10,000 in merchandise. However, $200,000, or two-fifths of its total liabilities, consists of a debt owed to Damar Products, Inc. David Margulies is the president of Damar and also owns a majority share of its stock.

sume these practices in the future. *Galter* v. *Federal Trade Commission*, 186 F. 2d 810, 813 (7th Cir. 1951). If the respondents' corporate entity is reconditioned in the bankruptcy proceedings, the false representations could be resumed, either in conjunction with the same shopping club business, or through some similar mode of merchandising. Since the respondent corporation has failed to sustain its burden of proving that there is no likelihood that the challenged practices will be resumed, issuance of a cease and desist order is proper.

A cease and desist order to cover the two individual respondents, David Margulies and Joe Vine, is required for several reasons. These individuals were shown to exercise control over the activities and policy of the corporate respondent. If the corporation can continue false and misleading advertising practices in the future, so, of course can its offices. In addition, the record indicates that Margulies is president of and owns a substantial portion of the stock in Damar Products, Inc., another mail order house located at the same address as respondent corporation. Thus it would appear that respondent David Margulies has other avenues through which he may continue fictitious pricing practices.

Counsel supporting the complaint argues that the cease and desist order should also cover respondent Don Haas.[5] However, it seems clear that Mr. Haas did not have control over the advertising and merchandising activities of Around-the-World Shoppers Club. Although he was vice president of the corporation for a substantial period of time, his domain was "operations." There is no evidence that he had any control whatsoever over the advertising functions; decisions in that area were made solely by David Margulies and Joe Vine. Thus there appears to be no record basis for an order against respondent Haas.

An order setting aside the initial decision will issue. The Commission will make its own findings, conclusions and order to cease and desist.

Commissioner Elman dissents.

Commissioner Reilly did not participate for the reason that he did not hear oral argument.

Findings as to the Facts, Conclusions and Final Order

FEBRUARY 17, 1964

This matter having been heard by the Commission upon the appeal of complaint counsel from the hearing examiner's initial decision filed August 29, 1962, and the Commission, for the reasons stated in

[5] Respondent I. G. Margulies was dismissed by stipulation.

the accompanying opinion, having determined that the initial decision should not be adopted as the decision of the Commission but should be vacated and set aside, now makes in lieu thereof these, its findings as to the facts, conclusions and final order.

FINDINGS AS TO THE FACTS

1. Respondent Around-the-World Shoppers Club, also doing business as Trans-World Shoppers Club, is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 833 Newark Avenue, in the City of Elizabeth, State of New Jersey.

2. Respondents David W. Margulies and Joe Vine are individually responsible, along with the corporate respondent, for the acts and representations referred to herein. Margulies directs and controls the acts of the respondent corporation, both as its president and dominant stockholder. He approved the stated value representations as to the "bonus" items prior to dissemination among prospective new members. Joe Vine, as vice president in charge of advertising and merchandising, approved the stated value representations. Furthermore, he had the power to hire and fire employees, and to enter into contracts in behalf of the corporation.

3. Respondents have engaged for some years in the business of advertising, offering for sale, and selling subscriptions of "membership" in a so-called buying club or clubs, to members of the purchasing public. In return for the membership fee each member received monthly an individual article of merchandise selected by the corporation in various countries throughout the world and mailed directly to the member from abroad. The articles included such items as candlesticks, scarves, lamps, and statues. Membership for six months generally costs $18. A twelve-months membership cost $33.

4. In the course and conduct of their business, respondents caused the aforementioned subscriptions and certificates, as well as solicitations for new memberships, to be sent from their place of business in the State of New Jersey to members and prospects located in various states of the United States and the District of Columbia. They also caused the monthly articles of merchandise to be sent from foreign countries to members in various states.

5. In an attempt to increase flagging membership, respondents in about 1957 commenced offering "bonus" items of merchandise to new members. The first such item was a "free" clock. The second was a camera for $10, and the third, a silver-plated coffee and tea set for $10.

6. In offering these "bonus" items—the clock, camera and coffee and tea set—the respondents represented that the clock was "free"; that the coffee and tea set was a $50 value; and that the camera had a retail value of $39.95.

7. In 1957–58 respondents mailed out on a nationwide basis about two million brochures with other papers, offering a "free" clock as an inducement for club membership, as aforestated.

8. The clock was not "free." The membership application shows that membership for six months, without the clock, was $18. With the clock in addition, the same membership cost $23. The latter figure was stated, on the membership application, to include "special handling and shipping charge of $5 on the clock." In fact, the special handling and shipping charges were not $5. The postage for mailing one of these clocks from Germany to the United States was $1.49. The balance, $3.51, went towards the cost of the clock itself. Thus, the club member enrolling for six months did not receive the clock free, and the aforesaid representations were false, misleading and deceptive.

9. Early in 1960 respondents mailed out, on a nationwide basis, 12,000 brochures, offering to new members a "Minolta-16 camera for $10," plus the regular membership fee. In these brochures, it was stated that the camera "sold everywhere for $39.95."

10. Through the use of such statements respondents represented that $39.95 was the usual and regular retail price of the Minolta-16 camera in all trade areas where the representation was made. In fact, $39.95 was not the usual and regular retail price of said camera in all such trade areas. The record shows that in New York City the camera was usually sold by camera stores of the "discount" variety for about $25. Accordingly, the aforedescribed representations were false, misleading and deceptive.

11. Commencing in 1960 and continuing into 1961 the respondents mailed out quantities of brochures offering new members a "$50 Value" silver-plated coffee and tea service for $10, plus the regular membership fee. Through the use of such statements respondents represented that $50 was the usual and regular retail price of the set in all of the trade areas in which respondents' representations were made.

12. The record indicates that $50 was not the usual and regular retail price of the set in all said areas. The manufacturer's suggested retail price and the usual retail price of the set in the New York area was $36. Therefore, the aforesaid representations were false, misleading and deceptive.

13. There is no substantial evidence in the record to indicate that respondents Don Haas and I. G. Margulies are responsible for the unlawful acts above found.

CONCLUSIONS

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

2. The aforesaid acts and practices of respondents are to the prejudice and injury of the public.

3. The false, misleading and deceptive representations constitute unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of the Federal Trade Commission Act.

FINAL ORDER

It is ordered, That respondents, Around-the-World Shoppers Club, a corporation trading under that or any other trade name or names, and David W. Margulies and Joe Vine, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of coffee and tea service sets, cameras, clocks or any other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing that said merchandise is being offered for sale at a price lower than the price charged by others for the same merchandise when the represented higher price appreciably exceeds the highest price at which substantial sales of the merchandise are being made in the trade area in which respondent is doing business.

2. Using the word "free," or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe articles of merchandise, when a charge is made for such merchandise.

It is further ordered, That the initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents Don Haas and I. G. Margulies.

It is further ordered, That respondents Around-the-World Shoppers Club, a corporation, David W. Margulies and Joe Vine 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 Elman dissenting and Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

PRODUCT TESTING COMPANY, INC., ET AL.

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

Docket 8534. Complaint, Oct. 10, 1962—Decision, Feb. 17, 1964

Order requiring Elizabeth, N.J., mail-order sellers of coffeemakers, dinnerware, luggage, toaster-broilers and other merchandise to cease making—in circulars, return mail pieces and other promotional material distributed to prospective customers—false claims concerning the character of their business operations and using deceptive prices, quality, guarantee, and performance claims to promote the sale of their merchandise.

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 Product Testing Company, Inc., a corporation, and Damar Products, Inc., a corporation, also trading as Mrs. Dorothy Damar, Damar's, Emma & Jed's Country Store, The Consumer Research Bureau, and Product Testing Bureau, and David W. Margulies, individually and as an officer of each of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Product Testing Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 833 Newark Avenue, in the city of Elizabeth, State of New Jersey.

Respondent Damar Products, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New Jersey. In addition to doing business under its corporate name it also trades and does business under the several trade

names of Mrs. Dorothy Damar, Damar's, Emma and Jed's Country Store, The Consumer Research Bureau, and Product Testing Bureau. Its office and principal place of business is located at the above stated address.

Respondent David W. Margulies is an individual. He formulates, directs and controls the acts and practices of the said corporate respondents, including the acts and practices herein set forth. His office and principal place of business is located at the above stated address.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution, by and through the United States mails, of coffeemakers, dinnerware, luggage, toaster-broilers, and other articles of merchandise to members of the purchasing public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, the aforesaid articles of merchandise to be shipped from their aforesaid place of business in the State of New Jersey, and from the various places of business of their suppliers located in other States of the United States, to members of the purchasing public located in various 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 articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. The majority of the shares of stock of each of the said corporate respondents is owned by the said Margulies who, as aforesaid, formulates, controls and directs the affairs of each of the corporate respondents. The remainder of such shares of stock is owned in its virtual entirety by members of the said Margulies family and is under the control of the said Margulies. Through the device of the said Damar Products, Inc., the said Margulies falsely represents, among other things, that allegedly preferred customers are being afforded the opportunity to purchase merchandise through corporate respondent Damar Products, Inc., at substantial savings without the payment of commissions to wholesalers, middlemen, etc. Through the device of Product Testing Company, Inc., the said Margulies falsely represents, among other things, that tests, surveys, etc., of consumer preference for new products are being conducted prior to the time said products are offered for sale to the general public and that to induce consumer participation said goods are being offered at substantial savings to prospective purchasers. The two corporate respondents are, therefore, but the devices employed by

the said Margulies to effectuate his false and misleading plans to mislead and deceive members of the purchasing public.

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the sale of the various articles of merchandise offered for sale and sold by them, respondents have made and are now making numerous statements and representations with respect to the character of their business operations and the price, quality, guarantee, performance and other characteristics of the articles of merchandise they sell. Said statements and representations have been made in circulars, return mail pieces and other kinds of promotional material distributed to prospective customers.

A. Typical and illustrative of said statements and representations made by and through said Product Testing Company, Inc., but not all inclusive thereof, are the following:

This is a Consumer Test * * * disregard prices on circulars!

Dear Friend:

Here's a thrilling offer you won't want to miss. The articles described on the enclosed circulars can be yours at far less than retail prices. Our product testing service is making this unusual offer to a limited number of consumers at the request of a large national retailer who is interested in determining which articles homemakers would be interested in, prior to their nationwide campaign.

To take advantage of this test, simply fill in the attached coupon and mail with your remittance to the address shown.

Product Testing Co.,
P.O. Box 51,
Hillside, New Jersey

I am enclosing $_____ for the test offers checked below, at the special bureau testing price shown.

☐ Test No. 1—Flavoramic Coffeemaker at $9.59
☐ Test No. 2—52-pc. Dinnerware Set at $10.20
☐ Test No. 3—15-pc. Cookware Set at $11.65
☐ Test No. 4—3-pc. Luggage Set at $14.89*
*Fed. Excise Tax included.

* * * * * * *

NOTE: Offer expires August 31, 1960 10-day return privilege permitted for any reason on this product test.

Accompanying said cards are circulars which read, in part:

15 cup Flavoramic Coffeemaker * * * brews from 4 to 15 cups * * * Automatically!! * * * Naturally, it's fully guaranteed * * * Fully Guaranteed! * * * now only $19.95.

* * * * * * *

Edgebrook * * * nationally advertised Break Resistant Dinnerware * * * complete service for 8, $29.95.

* * * * * * *

15 piece all purpose Sun-Craft Heavy Aluminum Waterless Cookware * * * suggested retail $29.95.

* * * * * * *

Mac Gregor Plaid 3-pc. Flite Light Luggage set * * * complete 3-pc. set $29.95 * * *

* * * * * * *

Special panel member Price Test * * * disregard price on circular!

Dear Panel Member:

A large national retailer wishes to determine the most popular price at which to offer the $19.95 Toaster-Broiler featured on the enclosed circular. During this test you may order one for yourself at the price you select, even though it may be offered at a much higher price after the test. Simply detach the Test Form. Check your price and mail with your remittance to the address below.

Product Testing Co.
P.O. Box 51, Hillside, N.J.

No. 1120P

PT-1Y
Special Price Test
What price should it sell for?
(Check only one)

☐ $10.95	☐ $11.59	☐ $11.95	☐ $12.49
☐ $12.99	☐ $13.79	☐ $14.95	☐ $15.79
☐ $17.49	☐ $19.95		

* * * * * * *

Fill-in and Mail Today

I enclose $ ---------- for ---------- Broiler-Toaster #340 at the price I have checked above, plus 95¢ for each unit ordered to cover actual postal handling and shipping charges.

NOTE: Offer expires January 15, 1961. 10-day return privilege permitted for any reason on this product test.

Accompanying said cards are circulars which read in part:

Flavoramic Toaster Broiler * * * Retail $19.95 * * *

* * * * * * *

This is a Consumer Test * * * disregard prices on circulars!

Dear Friend:

Here's a thrilling offer you won't want to miss. The article described on the enclosed circulars can be yours at far less than retail price.

Our product testing service is making this unusual offer to a limited number of consumers at the request of a large national retailer who is interested in determining which articles homemakers would be interested in, prior to their nationwide campaign. To take advantage of this test, simply fill in the attached coupon and mail with your remittance to the address shown.

Product Testing Co.,
P.O. Box 51, Hillside, N.J.

Would you like to become a regular Panel Member? See reverse side.

Product Testing Co., Consumer Test Form, P.O. Box 51, Hillside, N.J. Test Acct. No. 1137.

I am enclosing $ ---------- for the test offers checked below at the special testing price shown.

☐ Test No. 1—Coffeemaker (No. 902) Deluxe at $9.89
☐ Test No. 2—Coffeemaker (No. 901) Regular at $8.89
☐ Test No. 3—52-pc. Dinnerware Set (No. 2) at $10.54
☐ Test No. 4—15-pc. Cookware Set (No. 343) at $11.93
☐ Test No. 5—3-pc. Luggage Set (No. 904) at $15.95*
*Federal Tax included.

☐ I wish to become a panel member at $1.00

Please add 50¢ for each article ordered on Test No. 1 and No. 2; add $1.00 for each article on Test No. 3 and No. 4; and $1.45 on Test No. 5 —to cover actual postage, handling and shipping charges.

NOTE: Offer expires May 25, 1961. 10-day return privilege permitted for any reason on this product test.

PT-2E

Accompanying said card are circulars which read in part:

15 cup Flavoramic Coffeemaker * * * brews from 4 to 15 cups * * * Automatically!! * * * Naturally, it's fully guaranteed * * * Fully Guaranteed! * * * now only $19.95. See special discount offer! * * *

* * * * * * *

Edgebrook * * * nationally advertised Break Resistant Dinnerware * * * complete service for 8, $29.95.

* * * * * * *

15 piece all purpose Sun-Craft Heavy Aluminum Waterless Cookware * * * suggested retail $29.95.

* * * * * * *

Mac Gregor Plaid 3-pc. Flite Light Luggage set, complete 3-pc. set $29.95 * * *

B. Typical and illustrative of said statements and representations made under the name of said Damar Products Inc., are the following:

DAMAR'S
78 Damar Building,
Elizabeth, New Jersey

Disregard the manufacturer's price on the enclosed circular * * *.

Dear Preferred Customer:

The enclosed certificate is for your use only! No one else can use it * * * It is sent only to our most valued customers in sincere appreciation of their loyalty and patronage * * *, in order to show our appreciation we have made arrangements with a leading manufacturer that will save you many dollars * * *.

In order to save the high cost of many small shipments to ordinary wholesalers, salesmen's commissions and middlemen's profits, the factory has agreed to give us their production of the new 1961 model before it is offered nationally * * * and at a price that will save our preferred customers over $11.00.

* * * * * * *

* * * Each of these jumbo sized coffeemakers is equipped with one of the best automatic thermostats made * * * produced and unconditionally guaranteed by world-famous Westinghouse * * *.

* * * * * * *

* * * It makes 15 cups of coffee at one time * * *.

You save over $11.00 as a preferred customer! Our price to you is not $22.95 nor even $19.95, which you would expect to pay for any ordinary coffeemaker without the beautiful gold-tone base, but as a Preferred Customer you pay a very low $8.89 when you use the enclosed certificate. Otherwise, you pay the regular customer's price.

* * * So use your special privilege certificate now while it saves you money, * * *.

Accompanying said letters are circulars which read in part:

15 cup Flavoramic Coffeemaker * * * brews from 4 to 15 cups * * * Automatically!! * * * Naturally, it's fully guaranteed * * * Fully Guaranteed! * * * now only * * * see special discount offer * * *

* * * * * * *

DAMAR'S
78 Damar Building,
Elizabeth, New Jersey.

Disregard the manufacturer's price on the enclosed circular * * *.

The enclosed certificate is for you alone! No one else can use it. * * * It is sent only to a few of our most valued customers—in sincere appreciation for their loyalty and patronage.

At a cost far below that offered by anyone * * * anywhere!

You'll save a fortune * * *.

* * * * * * *

The low, low special price to you as a preferred customer is the biggest surprise of all!

You save $19.41 on this special one-time offer!

* * * It's all yours for only $10.54!

How we can make this offer! * * * by eliminating salesmen's commissions, wholesalers, jobbers and middlemen, all the profits on-top-of profits that inflate prices have been eliminated. * * * just $10.54 for the complete 52-pc. Edgebrook Set!

* * * * * * *

1. * * *
2. It is guaranteed for 2 years against breaking, chipping, cracking, crazing from any cause whatever.
3. Lifetime Guarantee against defects in manufacture or workmanship, * * *.

Accompanying said letters are circulars which read in part:

Edgebrook * * * nationally advertised Break Resistant Dinnerware * * * complete service for 8, $29.95.

* * * * * * *

DAMAR's
78 Damar Building,
Elizabeth, New Jersey.

Disregard the manufacturer's price on the enclosed circular * * *.

Dear Preferred Customer:

The enclosed certificate is for your use only—No one else can use it—* * * It is sent only to our most valued customers in sincere appreciation of their loyalty and patronage * * * we have made arrangements with a leading manufacturer that will save you many dollars * * *.

* * * * * * *

* * * in order to save the high cost of many small shipments to ordinary wholesalers, retailers, salesmen, commissions and middlemen's profits—the factory has agreed to reserve at a price that will save you, our preferred customers * * * over $8.00!

* * * * * * *

You save over $8.00 as a special preferred customer!

Our price to you is not $22.95, nor even $19.95, which you would expect to pay for such a magnificent kitchen appliance with Automatic Westinghouse Thermostat, all bakelite sides and gleaming chrome. As a Preferred Customer you pay a very low $11.78 when you use the enclosed certificate. Otherwise, you pay the regular customer's price.

* * * so use your special privilege certificate now while it saves you money, * * *.

Accompanying said letter are circulars which read in part:

Flavoramic Toaster-Broiler * * * retail $19.95 * * * see special price offer.

PAR. 6. Through the use of the aforesaid corporate and trade names, statements and representations, and others similar thereto, but not specifically set forth, respondents have represented, directly or indirectly,

(a) That Product Testing Company, Inc., The Consumer Research Bureau and Product Testing Bureau are independent testing companies which conduct tests, trial offerings or surveys to determine consumer reaction, preference or marketability of products.

(b) That the Damar Products, Inc., offer to sell said merchandise is made only to a limited number of preferred customers;

(c) That the aforesaid higher price amounts whether accompanied or unaccompanied by words or terms such as "Retail", "SUGGESTED RETAIL", etc. are the prices at which the merchandise referred to is usually and customarily sold at retail in all of the trade areas in which it is offered for sale; and that purchasers of respondents'

merchandise realize savings equal in amount to the differences between the said higher prices and the corresponding lower prices.

(d) That said coffeemaker when used as directed has the capacity to make or brew and will in fact so make or brew with one filling of the necessary ingredients and at one time sufficient coffee to fill or serve 15 cups with net contents of coffee at least equivalent in amount to that usually and customarily served in homes, lodges, clubs, churches, schools, offices, restaurants, shops, etc.

(e) That said Flavoramic Coffeemaker is unconditionally guaranteed in every respect by said Product Testing Company, Inc., and said Damar Products, Inc., for the lifetime of said coffeemaker.

That said coffeemaker thermostat is unconditionally guaranteed by the Westinghouse Electric Corporation, 3 Gateway Center, Pittsburgh, Pennsylvania, for the lifetime of said coffeemaker.

That said dinnerware set is unconditionally guaranteed for 2 years against breaking, chipping, cracking, crazing from any cause whatsoever by said Damar Products, Inc. and that said dinnerware set is unconditionally guaranteed against defects for the lifetime of the purchaser, the lifetime of said product or some other extended but unspecified period of time by Damar Products, Inc.

(f) That said Sun-Craft Cookware Set consists of 15 pieces of heavy aluminum cookware.

(g) That said Damar Products, Inc. purchasers its said merchandise directly from the manufacturer and thereby avoids the payment of a middleman's profit and that said savings are passed on to the purchasers.

PAR. 7. In truth and in fact:

(a) Products Testing Company, Inc., The Consumer Research Bureau and Product Testing Bureau are not independent testing companies and do not conduct consumer tests, trial offerings or surveys to determine consumer reaction, preference or marketability of products.

(b) Damar Products, Inc., offers to sell said merchandise are not made only to a limited number of preferred customers;

(c) The aforesaid higher price amounts whether accompanied or unaccompanied by words or terms such as "Retail", "SUGGESTED RETAIL", etc. are not the prices at which the merchandise referred to is usually and customarily sold at retail in all of the trade areas in which it is offered for sale; and purchasers of respondents' merchandise did not realize savings equivalent in amount to the differences between the said higher prices and the corresponding lower prices. Said higher price amounts are in excess of the price or prices at which said merchandise was generally offered for sale and sold in said trade areas.

(d) Said coffeemaker when used as directed does not have the capacity to make or brew and will not in fact make or brew with one filling of the necessary ingredients and at one time sufficient coffee to fill or serve 15 cups with net contents of coffee at least equivalent in amount to that usually and customarily served in homes, lodges, clubs, churches, schools, offices, restaurants, shops, etc. The cups of coffee above referred to by respondents are of a 4 oz. net content. The usual and customary cups of coffee served in homes, lodges, clubs, churches, schools, offices, restaurants, etc., contain substantially more than 4 ozs. net.

(e) Said Flavoramic coffeemaker is not unconditionally guaranteed by said Product Testing Company, Inc. or Damar Products, Inc. for the lifetime of said coffeemaker. Such guarantee as may be provided is subject to numerous restrictions, limitations and conditions as to its nature, extent and duration and is given by a wholly different guarantor. Said coffeemaker thermostat is not unconditionally guaranteed by the Westinghouse Electric Corporation, 3 Gateway Center, Pittsburgh, Pennsylvania, for the lifetime of said coffeemaker. Such guarantee as may be provided is subject to numerous restrictions, limitations and conditions as to its nature, extent and duration. Said dinnerware set is not unconditionally guaranteed for 2 years against breaking, chipping, cracking, crazing from any cause whatever by said Damar Products, Inc., and said dinnerware set is not unconditionally guaranteed against defects for the lifetime of the purchaser, the lifetime of said product or some other extended but unspecified period of time by Damar Products, Inc. Such guarantee as may be provided is subject to numerous restrictions, limitations and conditions as to its nature, extent and duration and is given by a wholly different guarantor.

(f) Said Sun-Craft Cookware Set does not consist of 15 pieces of heavy aluminum cookware. Two of said co-called pieces are a scouring pad and cookbook and respondents' count of "15 pieces" is made up by separately tallying each component part such as pot-lids, dividers, etc.

(g) Said Damar Products, Inc. does not purchase all of its said merchandise directly from the manufacturer and thereby avoid the payment of a middleman's profit and said savings are not passed on to the purchaser.

Said statements and representations were, therefore, false, misleading and deceptive.

PAR. 8. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms, and individuals engaged

in the sale of articles of merchandise of the same general kind and nature as those sold by respondents.

PAR. 9. 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' articles of merchandise by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of the respondents as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce, in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Mr. Terral A. Jordan and *Mr. George J. Luberda* for the Commission.

Blum Jolles, Haimoff, Szabad & Gersen; Mr. Seymour Kehlmann, of counsel; New York, N.Y., for respondents.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

JUNE 18, 1963

By complaint issued October 10, 1962, the above-named respondents were charged with the use of false, misleading, and deceptive acts and practices in connection with the sale and offering for sale of certain products in commerce as "commerce" is defined in the Federal Trade Commission Act, in violation of Section 5 of the Act.

After answer was made by the respondents, prehearing conferences were held by order of the hearing examiner. In that order the parties were advised to prepare, if desired, requests for the admission of the genuineness of documents pursuant to Section 4.11 of the Rules of Practice. After several postponements a prehearing conference was held on February 11, 1963, at which considerable progress was made by way of stipulations with respect to certain issues in the case. When it appeared that extended discussions between counsel might be necessary for further stipulation and agreement, the possible use of Section 4.11 of the Rules of Admissions was suggested for greater expedition. Pursuant thereto, complaint counsel by letter dated March 6, 1963, requested respondents to admit the genuineness of certain documents as well as both the genuineness and truthfulness of certain other documents. A similar letter was also sent by

complaint counsel on the following day, March 7, 1963. These letters were served upon respondents' counsel on March 7 and March 8, 1963, respectively.

The respondents served neither sworn statements denying the relevant matters of which the admissions were requested or setting forth in detail the reasons why they could neither truthfully admit or deny them, nor written objections on the ground that the matters involved were irrelevant, privileged, or improper. As a consequence, the requested admissions were deemed made pursuant to Section 4.11 of the Rules.

On February 28, 1963, a receiver was appointed by respondent Damar Products, Inc. The receiver, however, has not been brought into these proceedings, nor has he appeared in any way. Counsel for the respondents, at the hearing on this matter held March 27, 1963, indicated that their appearance was general and unconditional for respondent David W. Margulies. As to the other respondents, their appearance was conditional because of their belief that they had no authority to act for a corporate respondent in receivership. For the record, however, counsel stated:

> * * * we will continue to represent the defendants to the extent that we have the authority to do so.

The hearing examiner invited counsel to make a formal motion to withdraw. Counsel, however, declined to do so.

At the conclusion of the hearing both parties filed proposed findings and briefs, which have been carefully considered. To the extent the proposed findings are inconsistent with those made, they are deemed rejected.

FINDINGS OF FACT

The Respondents

1. Respondent Product Testing Company, Inc., is a corporation organized on June 29, 1960, and which presently exists under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 833 Newark Avenue, in the city of Elizabeth, State of New Jersey.

2. Damar Products was started in 1948 by respondent David W. Margulies, trading as Damar Distributing Company. Respondent Damar Products, Inc., was incorporated on January 11, 1952, and has been and is now existing and doing business under and by virtue of the laws of the State of New Jersey. In addition to doing business under its corporate name it also trades and does business under the several trade names of Mrs. Dorothy Damar, Damar's,

Emma and Jed's Country Store, The Consumer Research Bureau, and Product Testing Bureau. Its office and principal place of business is located at the above-stated address.

3. Respondent David W. Margulies is the President of Damar Products, Inc. The majority of the shares of stock of said Damar Products, Inc., is owned by the said Margulies and the balance is owned by a member of his family. The stock of said Product Testing Company, Inc., is wholly owned by respondent Damar Products, Inc. The said Margulies formulated, directed and controlled the acts and practices of the said corporate respondents hereinafter set forth and participated directly in such acts and practices. His office and principal place of business is located at the above-stated address.

4. Corporate respondent Product Testing Company, Inc., has been located at the same address as Damar Products, Inc., has had no active corporate officers or directors, paid no corporate franchise taxes to the State of New Jersey, has always been wholly owned by respondent Damar Products, Inc., and during its active life, which covered the period June 29, 1960, to around the middle of 1961, was operated by the same persons that operated respondent Damar Products, Inc. The corporate independence of Product Testing Company, Inc., was and is a mere fiction. Said Product Testing Company, Inc., and Damar Products, Inc., have been and are now one company. Product Testing Company, Inc., has been and is now in reality just another trading name of Damar Products, Inc.

5. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, and distribution, by and through the United States mails, of coffeemakers, dinnerware, luggage, toaster-broilers, and other articles of merchandise in substantial quantities to members of the purchasing public. However, offers to sell the Flavoramic Toaster-Broiler, Flavoramic Coffeemaker, Edgebrook Dinnerware Set, Sun-Craft Cookware Set and MacGregor Luggage Set, specifically mentioned in the complaint, ceased around the middle of 1961.

6. In the course and conduct of their business, respondents now cause, and for some time last past have caused, the aforesaid articles of merchandise to be shipped from their place of business in the State of New Jersey, and from the various places of business of their suppliers located in other states of the United States, to members of the purchasing public located in various 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 articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

The Advertisements

7. In the course and conduct of their business, and for the purpose of inducing the sale of the various articles of merchandise offered for sale and sold by them, respondents have made statements and representations with respect to the character of their business operations and the price, quality, guarantee, performance and other characteristics of the articles of merchandise they sell. Said statements and representations have been made in circulars, return mail pieces and other kinds of promotional material distributed to prospective customers.

A. Typical and illustrative of said statements and representations made by and through said Product Testing Company, Inc., but not all inclusive thereof, are the following:

THIS is a Consumer Test * * * Disregard prices on circulars!

Dear Friend:

Here's a thrilling offer you won't want to miss. The articles described on the enclosed circulars can be yours at far less than retail prices. Our product testing service is making this unusual offer to a limited number of consumers at the request of a large national retailer who is interested in determining which articles homemakers would be interested in, prior to their nationwide campaign.

To take advantage of this test, simply fill in the attached coupon and mail with your remittance to the address shown.

Product Testing Co.,
P.O. Box 51,
Hillside, New Jersey.

* * * * * * *

I am enclosing $_____ for the test offers checked below, at the special bureau testing price shown.

☐ Test No. 1—Flavoramic Coffeemaker at $9.59
☐ Test No. 2—52-pc. Dinnerware Set at $10.20
☐ Test No. 3—15-pc. Cookware Set at $11.65
☐ Test No. 4—3-pc. Luggage Set at $14.89*

*Fed. Excise Tax included.

* * * * * * *

NOTE: Offer expires August 31, 1960. 10-day return privilege permitted for any reason on this product test.

PT-1M

Accompanying the above card are circulars which read, in part:

15 cup Flavoramic Coffeemaker * * * brews from 4 to 15 Cups * * * Automatically!! * * * Naturally, it's fully guaranteed * * * Fully guaranteed! Now only $19.95.

* * * * * * *

Edgebrook * * * nationally advertised Break Resistant Dinnerware * * * complete service for 8, $29.95.

* * * * * * *

15 piece all purpose Sun-Craft Heavy Aluminum Waterless Cookware * * * suggested retail $29.95.

* * * * * * *

MacGregor Plaid 3- pc. Flite Light Luggage Set * * * complete 3-pc. set, $29.95.

* * * * * * *

Special Panel Member Price Test * * * disregard price on circular!
Dear Panel Member:

A large national retailer wishes to determine the most popular price at which to offer the $19.95 Toaster-Broiler featured on the enclosed circular. During this test you may order one for yourself at the price you select, even though it may be offered at a much higher price after the test. Simply detach the Test Form. Check your price and mail with your remittance to the address below.

Product Testing Co.
P.O. Box 51, Hillside, N.J.

PT–1Y
Special Price Test #1120P

What price should it sell for?
(Check only one)

☐ $10.95	☐ $11.59	☐ $11.95	☐ $12.49
☐ $12.99	☐ $13.79	☐ $14.95	☐ $15.79
☐ $17.49	☐ $19.95		

* * * * * * *

Fill-in and Mail Today

I enclose $_____ for ____ Broiler-Toaster #340 at the price I have checked above, plus 95¢ for each unit ordered to cover actual postal, handling and shipping charges.
NOTE: Offer expires January 15, 1961. 10-day return privilege permitted for any reason on this product test.

Accompanying this card are circulars which read in part:

Flavoramic Toaster-Broiler * * * Retail $19.95 * * *

This is a Consumer Test * * * Disregard prices on circulars!

Dear Friend:

Here's a thrilling offer you won't want to miss. The article described on the enclosed circulars can be yours at far less than retail price.
Our product testing service is making this unusual offer to a limited number of consumers at the request of a large national retailer who is interested in determining which articles homemakers would be interested in, prior to their nationwide campaign. To take advantage of this test, simply fill in the attached coupon and mail with your remittance to the address shown.

Product Testing Co.
P.O. Box 51, Hillside, N.J.

Would you like to become a regular panel member? See reverse side.
Product Testing Co., Consumer Test Form, P.O. Box 51, Hillside, N.J.
Test Acct. No. 1137.

I am enclosing $_____ for the test offers checked below at the special testing price shown.

☐ Test No. 1—Coffeemaker (No. 902) Deluxe at $9.89
☐ Test No. 2—Coffeemaker (No. 901) Regular at $8.89
☐ Test No. 3—52-pc. Dinnerware Set (No. 2) at $10.54
☐ Test No. 4—15-pc. Cookware Set (No. 343) at $11.93
☐ Test No. 5—3-pc. Luggage Set (No. 904) at $15.95*
*Federal Tax included.
☐ I Wish to become a Panel Member at $1.00

Please add 50¢ for each article ordered on Test No. 1 and No. 2; add $1.00 for each article on Test No. 3 and No. 4; and $1.45 on Test No. 5—to cover actual postage, handling and shipping charges.

NOTE: Offer expires May 25, 1961. 10-day return privilege permitted for any reason on this product test.

PT-2E

Accompanying this card are circulars which read in part:

15 cup Flavoramic Coffeemaker * * * brews from 4 to 15 cups * * * Automatically!! * * * Naturally, it's fully guaranteed * * * Fully Guaranteed! * * * now only $19.95—see special discount offer!

* * * * * * *

Edgebrook * * * nationally advertised Break Resistant Dinnerware * * * complete service for 8, $29.95.

* * * * * * *

15 piece all purpose Sun-Craft Heavy Aluminum Waterless Cookware * * * suggested retail $29.95.

* * * * * * *

Mac Gregor Plaid 3-pc. Flite Light Luggage Set complete 3-pc. set, $29.95 * * *

B. Typical and illustrative of said statements and representations made under the name of Damar Products, Inc., are the following:

DAMAR'S,
78 Damar Building,
Elizabeth, New Jersey.

Disregard the manufacturer's price on the enclosed circular * * *.

Dear Preferred Customer:

The certificate enclosed is for your use only! No one else can use it * * * It is sent only to our most valued customers in sincere appreciation of their loyalty and patronage * * * in order to show our appreciation we have made arrangements with a leading manufacturer that will save you many dollars * * *.

* * * In order to save high cost of many small shipments to ordinary wholesalers, salesmen's commissions and middlemen's profits, the factory has agreed to give us their production of the new 1961 model before it is offered nationally * * * and at a price that will save our preferred customers over $11.00.

* * * * * * *

* * * Each of these jumbo sized coffeemakers is equipped with one of the best automatic thermostats made * * * produced and unconditionally guaranteed by world-famous Westinghouse * * *.

* * * * * * *

* * * It makes 15 cups of coffee at one time * * *

* * * * * * *

You save over $11.00 as a Preferred Customer! Our price to you is not $22.95 nor even $19.95, which you would expect to pay for any ordinary coffeemaker without the beautiful gold-tone base, but as a Preferred Customer you pay a very low $8.89 when you use the enclosed certificate. Otherwise, you pay the regular customer's price.

* * * So use your special privilege certificate now while it saves you money * * *.

Accompanying this letter are circulars which read in part:

15 cup Flavoramic Coffeemaker * * * brews from 4 to 15 cups * * * Automatically!! * * * Naturally, it's fully guaranteed * * * Fully Guaranteed! * * * now only $19.95. See special discount offer!

* * * * * * *

DAMAR'S,
78 Damar Building,
Elizabeth, New Jersey.

Disregard the manufacturer's price on the enclosed circular.

* * * * * * *

The enclosed certificate is for you alone! No one else can use it * * *. It is sent only to a few of our most valued customers—in sincere appreciation for their loyalty and patronage.

* * * * * * *

At a cost far below that offered by anyone * * * anywhere! You'll save a fortune * * *

* * * * * * *

The Low, Low Special Price to you as a preferred customer is the biggest surprise of all! You save $19.41 on this special one-time offer! * * * It's all yours for only $10.54!

How we can make this offer! * * * by eliminating salesmen's commissions, wholesalers, jobbers and middlemen, all the profits on-top-of profits that inflate prices have been eliminated * * *. Just $10.54 for the complete 52-pc. Edgebrook set!

* * * * * * *

1. * * *
2. It is guaranteed for 2 years against breaking, chipping, cracking. crazing from any cause whatever.
3. Lifetime guarantee against defects in manufacture or workmanship, * * *.

Accompanying this letter are circulars which read in part:

Edgebrook * * * nationally advertised Break Resistant Dinnerware * * * complete service for 8, $29.95

DAMAR'S,
78 Damar Building,
Elizabeth, New Jersey.

Disregard the manufacturer's price on the enclosed circular.

* * * * * * *

Dear Preferred Customer:

The enclosed certificate is for your use only—No one else can use it * * *. It is sent only to our most valued customers in sincere appreciation of their loyalty and patronage * * * we have made arrangements with a leading manufacturer that will save you many dollars * * *.

* * * * * * *

* * * in order to save the high cost of many small shipments to ordinary wholesalers, retailers, salesmen, commissions and middlemen's profits—the factory has agreed to reserve at a price that will save you, our preferred customers * * * over $8.00!

* * * * * * *

You save over $8.00 as a special preferred customer! Our price to you is not $22.95, nor even $19.95, which you would expect to pay for such a magnificent kitchen appliance with Automatic Westinghouse Thermostat, all bakelite sides and gleaming chrome. As a preferred customer you pay a very low $11.78 when you use the enclosed certificate. Otherwise, you pay the regular customer's price. * * * So use your special privilege certificate now while it saves you money * * *.

Accompanying said letter are circulars which read in part:

Flavoramic Toaster-Broiler * * * retail $19.95 * * * see special price offer.

8. Through the use of the aforesaid corporate and trade names, as well as the aforesaid statements and representations and others similar thereto, but not specifically set forth, respondents have represented, directly or indirectly:

(a) That Product Testing Company, Inc., The Consumer Research Bureau and Product Testing Bureau are independent testing companies which conduct tests, trial offers or surveys to determine consumer reaction, preference or marketability of products.

(b) That the Damar Products, Inc., offer to sell said merchandise is made only to a limited number of preferred customers.

(c) That the aforesaid higher price amounts, whether accompanied or unaccompanied by words or terms such as "Retail," "Suggested Retail," were the prices at which the merchandise referred to was usually and customarily sold at retail in all of the trade areas in which it was offered for sale; and that purchasers of respondents'

merchandise realize savings equal in amount to the differences between the said higher prices and the corresponding lower prices.

(d) That said coffeemaker when used as directed has the capacity to make or brew and in fact will so make or brew, with one filling of the necessary ingredients and at one time, sufficient coffee to fill or serve 15 cups with net contents of coffee at least equivalent in amount to that usually and customarily served in homes, lodges, clubs, churches, schools, offices, restaurants, shops, etc.

(e) That said Flavoramic Coffeemaker is unconditionally guaranteed in very respect by said Product Testing Company, Inc., and said Damar Products, Inc., for the lifetime of said coffeemaker.

That said coffeemaker thermostat is unconditionally guaranteed by the Westinghouse Electric Corporation, 3 Gateway Center, Pittsburgh, Pennsylvania, for the lifetime of said coffeemaker.

(f) That said dinnerware set is unconditionally guaranteed for 2 years against breaking, chipping, cracking, crazing from any cause whatever by said Damar Products, Inc., and that said dinnerware set is unconditionally guaranteed against defects for the lifetime of the purchaser, the lifetime of said product, or some other extended but unspecified period of time by Damar Products, Inc.

(g) That said Sun-Craft Cookware Set consists of 15 pieces of heavy aluminum cookware.

(h) That said Damar Products, Inc., purchases its said merchandise directly from the manufacturer and thereby avoids the payment of a middleman's profit and that said savings are passed on to the purchasers.

Falsity of Representations

9. In truth and in fact:

(a) Products Testing Company, Inc., The Consumer Research Bureau and Product Testing Bureau are not independent testing companies and do not conduct consumer tests, trial offerings or surveys to determine consumer reaction, preference or marketability of products. Indeed, some of the so-called "test mailings" were made subsequent to many of the large mailings offering the same product by the respondents without any mention of tests. Thus the Product Testing offer, mailing 1137, made in April 1961, was preceded by mailings 1088A, 1106B, 1107C, 1121R, 1123T, and 1132.

(b) The offers of Daman Products, Inc., to sell said merchandise are not made to a limited number of preferred customers only, but were, in fact, made during the regular course of respondents' business for over a year and a half to members of the purchasing public generally. Thus, mailings to more than a million customers were

made in each of the months of August 1960, December 1960, July 1961, and August 1961. In between these dates, there were a score or more of mailings, some of which ran into the hundreds of thousands. Such extensive mailings, despite the fact that respondents claimed to have three million customers, are hardly indicative of a limited number of preferred customers.

(c) The aforesaid higher price amounts, whether accompanied or unaccompanied by words or terms such as "Retail," "Suggested Retail," etc., were not the prices at which the merchandise referred to was usually and customarily sold at retail in all of the trade areas in which it was offered for sale; and purchasers of respondents' merchandise did not realize savings equivalent in amount to the differences between the said higher prices and the corresponding lower prices. Said higher price amounts were in excess of the price or prices at which said merchandise was generally offered for sale and sold in said trade areas. Although the actual price at which this merchandise was usually and customarily sold at retail is not shown in the record, it is uncontroverted that the usual and customary retail price was substantially below the advertised price in the respondents' mailings.

(d) Said coffeemaker when used as directed does not have the capacity to make or brew, and will not in fact make or brew, with one filling of the necessary ingredients and at one time sufficient coffee to fill or serve 15 cups with net contents of coffee at least equivalent in amount to that usually and customarily served in homes, lodges, clubs, churches, schools, offices, restaurants, shops, etc. The cups of coffee above referred to by respondents are of less than 4 ounce net content. The usual and customary cups of coffee served in homes, lodges, clubs, churches, schools, offices, restaurants, and similar places contain 5 ounces or more of coffee.

(e) Said Flavoramic coffeemaker is not unconditionally guaranteed by Product Testing Company, Inc., or Damar Products, Inc., for the lifetime of said coffeemaker. Instead, a one-year guarantee against electrical or mechanical defects is provided by the supplier-manufacturer. The coffeemaker thermostat is not unconditionally guaranteed by the Westinghouse Electric Corporation of Pittsburgh, Pennsylvania, for the lifetime of said coffeemaker. Since the Spring of 1958, the thermostats have been made by a subsidiary of the Westinghouse Electric Corporation and sold to the percolator supplier-manufacturer without any guarantee. Since April 1962, however, the percolator manufacturer has been allowed to make returns to the thermostat manufacturer.

(f) The dinnerware set is not unconditionally guaranteed for two years against breaking, chipping, cracking, or crazing for any cause whatever by Damar Products, Inc., and is not unconditionally guaranteed against defects for the lifetime of the purchaser, the product, or some other unspecified period of time by Damar Products, Inc. Instead a one-year guarantee, involving a service charge of 15¢ per unit, is provided by the supplier-manufacturer.

(g) Said Sun-Craft Cookware Set does not consist of 15 pieces of heavy aluminum cookware. Two of said so-called pieces are a scouring pad and cookbook, and respondents' count of "15 pieces" is made up by separately tallying each component part such as pot-lids, dividers, etc.

(h) Said Damar Products, Inc., does not purchase all of its merchandise directly from the manufacturer and thereby avoid the payment of a middleman's profit, and said savings are not passed on to the purchaser.

Competitive Effects

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

11. 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' articles of merchandise by reason of said erroneous and mistaken belief.

Respondents' Contentions

Respondents oppose the issuance of a cease and desist order on several grounds which will be discussed below.

First, respondents argue that the Commission has failed to sustain its burden of proof. They argue that since no witnesses were called by the Commission to testify on any of the allegations of the complaint, there has been incomplete foundation for the issuance of an order. This argument, however, ignores completely the purpose and effect of Section 4.11 of the Rules of Practice. The Federal Trade Commission Act gives the Commission express authority to make rules and regulations for the purpose of carrying out the provisions of the Act. These rules have the force and effect of law.

Commission counsel have used these rules correctly and with more than adequate notice to counsel for the respondents. It would be nonsensical to require live testimony to prove what has already been admitted by respondents pursuant to the Rules of Practice. It is fundamental that judicial admissions are proof possessing the highest possible probative value and no testimony is required to be taken in a case where all of the material allegations of the complaint can be established by such admissions. *Joe B. Hill, et al.*, v. *Federal Trade Commission*, 124 F. 2d 104 (5th Cir. 1941) 3 S.&D. 436.

Second, respondents contend the complaint should be dismissed because the respondents have discontinued the practice complained of. They concede the principle which prohibits a dismissal for abandonment where it appears that the unlawful practices may be resumed. However, they cite the testimony of respondent Margulies to the effect that the discontinued practices will not be resumed.

The assurance of the respondents that they will not resume these practices is not in itself sufficient to warrant the dismissal of the complaint. The record must show the unlikelihood of the resumption of the practice. This is an affirmative defense that must be undertaken and proven by the respondents. It is not for the Commission to disprove the unlikelihood of resumption. The respondents have not supplied the necessary proof in this instance. The fact that Damar Products, Inc., is presently bankrupt is not sufficient, as will be shown below. There is no allegation or inference that business conditions have changed making the resumption of the practices unlikely. For example, see *Sheffield Merchandise, Inc.*, Docket No. 6627, 56 F.T.C. 991 (1960), *Firestone Tire & Rubber Co.*, Docket No. 7020, 55 F.T.C. 1909 (1959), *Bell & Howell Co.*, Docket No. 6729, 54 F.T.C. 108 (1957), *N. Erlanger, Blumgart & Co., Inc.*, Docket No. 5243, 46 F.T.C. 1139 (1950) *National Retail Furniture Association*, Docket No. 5324, 48 F.T.C. 1540 (1951), and *National Coat and Suit Industry Recovery Board*, Docket No. 4596, 47 F.T.C. 1552 (1950), as well as other cases cited by this hearing examiner in his initial decision in *Tung-Sol Electric Inc., et al.*, Docket No. 8514, May 13, 1963.

Third, counsel for the respondents argues that in any event a dismissal as to the individual respondent David W. Margulies is appropriate. Although that respondent admittedly had direction and control of the corporate respondents, it is contended that he had little or nothing to do with the false representations, being primarily concerned with the finances of the corporations. This contention must be dismissed. It is elementary that the lack of knowledge or intent is no defense in actions of this type. See *Federal Trade Com-*

mission v. *Algoma Lumber Co.*, 291 U.S. 67 (1934); *Koch* v. *Federal Trade Commission*, 206 F. 2d 311 (6th Cir. 1953); *Gimbel Bros., Inc.*, v. *Federal Trade Commission*, 116 F. 2d 578 (2d Cir. 1941); *L & C Mayers Co., Inc.*, v. *Federal Trade Commission*, 97 F. 2d 365 (2d Cir. 1938). Moreover, this argument belies the important role Mr. Margulies played. He was not only the principal stockholder of the corporate respondent Damar but its president as well. Although the advertising was in charge of a vice president, the employment and discharge of that employee was fixed in Mr. Margulies who also had the power to alter or even cancel any proposed advertisements planned by the corporation. Considering the ease with which this individual respondent creates and operates corporations and does business under various trading names, the order must include him if it is to have any prophylactic effect at all.

Finally, respondents' argument with respect to the bankruptcy issue must be rejected. Communications from the counsel for the receiver of Damar Products, Inc., indicate the possibility of the debtor, Damar Products, Inc., perfecting a plan of arrangement under the bankruptcy proceeding which will enable it to resume its business operations later. Even an adjudication of bankruptcy would not necessarily terminate the existence of the corporation. A bankrupt corporation "continues to exist as a bankrupt individual continues to live and after it has been discharged from its liabilities it is free to do business again * * * under the corporate name." Harry D. Nims, *Unfair Competition and Trade Marks*, Baker, Voorkes & Co., Inc., 1947, at pg. 134, citing *Theobald-Jansen Electric Co. v. Harry I. Wood Electric Co.*, 285 F. 2d 29 (6th Cir. 1922); *In re Connolly & Wallace Co., Inc.*, 32 F. Supp. 827 MD. Pa., 1940); *Nicholson v. Thomas*, 277 Ky. 760, 127 SW (2d) 155 (1939); *Armington v. Palmer*, 21 RI 109, 42 A.308, 43 LRA 95 (1898). The New York rule seems to limit the use of the corporate name, see *Mutual Life Ins. Co., v. Manin*, 115 F. 2d 975 (2nd Cir. 1940).

As long, therefore, as the possibility exists that Damar Products, Inc., will again be selling and advertising merchandise, this order must apply to it because of its past history of illegal practices.

ORDER

It is ordered, That respondents Product Testing Company, Inc., a corporation, and its officers, Damar Products, Inc., a corporation, and its officers, also doing business as Mrs. Dorothy Damar, Damar's, Emma and Jed's Country Store, The Consumer Research Bureau, and Product Testing Bureau, and David W. Margulies, individually,

and as an officer of each of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of coffeemakers, dinnerware, luggage, toaster-broilers, or any other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Testing" or the words "Consumer Research Bureau" or "Research Bureau" or any other word or words of similar import or meaning as a part of their respective corporate names or trade names unless such business is actually engaged in conducting bona fide, independent consumer tests, trial offerings or surveys to determine consumer reaction, preference or marketability of products.

2. Representing, directly or by implication, through the use of the words "This is a Consumer Test" or "Product Testing Service," or any other word or words of similar import or meaning that respondents are engaged in conducting bona fide, independent consumer tests, trial offerings or surveys to determine consumer reaction, preference or marketability of products; or misrepresenting, in any manner, the purpose or reason merchandise is offered for sale.

3. Representing, directly or by implication, that any offer to sell said merchandise is made to a limited number of preferred customers; or misrepresenting, in any manner, the class, group or number of persons to whom offers to sell merchandise are made.

4. Representing, directly or by implication, that any amount is the usual and customary price of merchandise in the trade area or areas where the representations are made when it is in excess of the generally prevailing price or prices at which said merchandise is sold in said trade area or areas.

5. Using the expressions "Retail," "Suggested Retail," or any other words or terms of similar import or meaning in connection with the retail prices of merchandise unless the prices so designated are the generally prevailing price or prices at which said merchandise is sold in the trade area or areas where the representations are made.

6. Representing, directly or by implication, that any saving from a trade area price is afforded in the purchase of merchandise unless the price at which it is offered is lower than the generally prevailing price or prices at which said merchandise

is sold in the trade area or areas in which the representations are made.

7. Misrepresenting, in any manner, the savings available to purchasers of respondents' merchandise or the amount by which the price of merchandise has been reduced from the price at which it is customarily sold by respondents or their competitors in the usual course of business, in the trade area or areas where the representations are made.

8. Representing, directly or indirectly, that said coffeemaker has the capacity to make or brew any specified number of cups of coffee unless it will in fact brew the specified number of cups of coffee so that each cup may contain five ounces or more; or that any of said products has a capacity, content or size different from what it has in fact.

9. Representing, directly or by implication, that said products are guaranteed unless the nature, extent and duration of the guarantee, the manner in which the guarantor will perform thereunder and the name and address of the guarantor are clearly and conspicuously disclosed and respondents do in fact fulfil all of their requirements under the terms of said guarantee.

10. Using the expression "15 piece * * * heavy * * * aluminum * * * cookware" or any other words or terms of similar import or meaning to describe a cookware set which does not in fact contain the specified number of separate cooking utensils; or misrepresenting in any manner or by any means the number of pieces or constituent parts making up or comprising any of the aforesaid items or sets of merchandise.

11. Representing, directly or by implication, that said merchandise is purchased directly from the manufacturer or without the payment of profits to middlemen unless such is the fact.

Opinion of the Commission

FEBRUARY 17, 1964

This is an appeal by respondents from an initial decision finding that they had engaged in certain false, misleading and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719 (1914); 52 Stat. 111 (1938); 15 U.S.C.A. 45(a)(1). The hearing examiner found that respondents conduct a mail-order business selling items such as luggage, coffeemakers, cooking and dinnerware to buyers located throughout the United States. Orders are solicited by means of letters, brochures and catalogs sent through the United States mails.

There is substantial evidence that the advertising or solicitory materials mailed by respondents contained false, deceptive and misleading representations of various kinds constituting violations of law as alleged in the complaint.

On appeal, respondents have raised only two principal issues. They contend that the cease and desist order is improperly issued against David W. Margulies in his individual capacity. Their other exceptions are to the terms and scope of the order to cease and desist.

The only evidence pointed to by respondents to exculpate Mr. Margulies is his own testimony to the effect that he had direction and control of the corporate respondents only in the sense that the president of any corporation has such direction and control. He further testified that he did not exercise specific control in the sphere of corporate advertising and that this responsibility was delegated to his subordinates. While self-compurgating testimony is not completely devoid of probative value, when standing alone without corroboration, it is readily outweighed by documentary or other evidence not weakened by a partisan disability.[1]

In this record there is much evidence to establish that the respondent Margulies actually exercises complete power and control over the activities of the two corporate respondents. While the corporations are not mere fictions, the evidence shows that in actual fact Margulies is the real party in interest behind their operations. Margulies owns a majority of the shares of stock of respondent Damar Products, Inc., with the balance being held by his father, Isaac G. Margulies. All of the stock of the respondent, Product Testing Company, Inc., is owned by Damar Products, Inc. Moreover, while not necessarily controlling to our decision here, we have previously found in earlier litigation naming Margulies as an individual respondent that he was responsible for the therein-found unlawful activities of Damar Products, Inc. *Damar Products, Inc., et al.*, Docket No. 7769, 59 F.T.C. 1263, December 6, 1961. This finding was affirmed on appeal. *Damar Products, Inc., et al.* v. *Federal Trade Commission*, 309 F. 2d 323 (3d Cir. 1962). And, further, in a decision issued this day, we have found the respondent Margulies responsible for the operations of still another corporation. *Around-the-World Shoppers Club*, Docket No. 8460 [p. 845 herein]. All of the respondent Margulies' corporations are headquartered at the same location.

Documentary evidence in this record indicates that Margulies at first admitted his responsibility for the unlawful activities of the corporate respondents. In response to a specification of a subpoena

[1] See *United States* v. *Gypsum Co.*, 333 U.S. 364, 396 (1948).

duces tecum asking for the names of persons responsible for the sales and promotional activities of the corporate respondents, Margulies submitted a signed statement averring that the:
"Persons responsible for the advertising, offering for sale, etc., were Joseph Vine and David W. Margulies".

Margulies' own testimony indicates that he exercises powers not ordinarily accorded to the president of a corporation. He testified that he had the responsibility for hiring the other officers, including the vice president in charge of advertising, the vice president in charge of operations and the controller. When asked whether he had authority to fire these officers, he responded "Sure".

The witness testified that he did review advertising material before mailing or distribution and that he "certainly" had the power to veto or "kill" anything that came to him for final review.

On the basis of the foregoing evidence the hearing examiner found that the order to cease and desist must run against respondent Margulies in his individual capacity " * * * if it is to have any prophylactic effect at all." We most heartily agree. An excerpt from the opinion of Judge John Paul in a recently decided and quite similar case accurately and succinctly sums up our conclusion on this issue:

> To the foregoing we might add the comment that it would seem in cases of this sort to be a futile gesture to issue an order directed to the lifeless entity of a corporation while exempting from its operation the living individuals who were responsible for the illegal practices. *Pati-Port, Inc., et al* v. *Federal Trade Commission*, 313 F. 2d 103, 105 (4th Cir. 1963).

We turn now to respondents' exceptions to the terms of the order to cease and desist entered by the hearing examiner. Respondent first objects to the provisions of paragraphs 2 and 3 of the order on the ground that they prohibit certain representations even if truthful. Respondents' interpretation of these provisions of the order is correct, for they flatly prohibit the respondents from representing that their merchandise is offered in connection with a product test or survey or that it is offered to a limited number of preferred customers. Respondents would have us add a qualifying phrase such as "except when such is the fact", arguing that unqualified prohibitions of this type are beyond the power of the Commission.

The described prohibitions conform to the Commission's policy of forbidding without qualification any representations which are unlikely to ever be true. This is not a case where respondents are forever barred from making representations which the normal course of their business requires them to make and which could be more often than not truthful, as would be the case, for example, were we to flatly prohibit a clothing manufacturer from representing that

his garments were all wool on the basis of a record showing that one or two garments so advertised were in fact not composed solely of wool. Respondents here are not engaged in testing or consumer surveys or limited offerings to preferred customers but are hucksters, pure and simple. They are engaged solely in the sale of merchandise for profit, and their advertising, giving a contrary representation, is completely false. Thus, the order must comprehensively enjoin such misleading representations without qualification.

In this connection we note that the first paragraph of the order to cease and desist does contain a qualification in that, pursuant to its terms, the respondents are forbidden use of the words "Testing," "Consumer Research Bureau," or "Research Bureau" or words of similar meaning as a part of a corporate name or trade name "unless such business is actually engaged in conducting bona fide, independent consumer tests, trial offerings or surveys to determine consumer reaction, preference or marketability of products." While this paragraph of the order was promulgated by the hearing examiner exactly as it was contained in the complaint, the record discloses that respondents conducted no tests, surveys or research and had no facilities for doing so. Under these circumstances, paragraph 1 of the orders should prohibit the use of the words testing, consumer research bureau, research bureau or words of similar import as a part of a trade name without qualification, and the hearing examiner's proposed order will be modified by striking therefrom the qualifying language beginning with the word "unless".

The Commission's authority to enter orders which unqualifiedly prohibit a course of conduct is clear. *Caroline R. Macher, et al.* v. *Federal Trade Commission*, 126 F. 2d 420 (2d Cir. 1942). It is highly unlikely that these respondents will change their method of operation and become a bona fide research or testing organization. However, should this occur, the Commission will be available to entertain an application for an appropriate modification of this order. See *Federal Trade Commission* v. *National Lead Company, et al.*, 352 U.S. 419 (1957); *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52 (4th Cir. 1950).

The remainder of respondents' objections to the terms of the order to cease and desist are not sufficiently meritorious to warrant detailed discussion and are denied.

The initial decision of the hearing examiner will be modified to conform to the views of the Commission as expressed herein and, as so modified, will be adopted as the decision of the Commission.

Commissioner Elman concurred in the result, and Commissioner Reilly did not participate.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision and upon briefs in support thereof and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the appeal should be denied and that the initial decision should be modified, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner be modified by striking the following words from paragraph 1 of the proposed order to cease and desist:

> "unless such business is actually engaged in conducting bona fide, independent consumer tests, trial offerings or surveys to determine consumer reaction, preference or marketability of products."

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

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

Commissioner Elman concurring in the result, and Commissioner Reilly not participating.

IN THE MATTER OF

WESTINGHOUSE ELECTRIC CORPORATION

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

Docket 8545. Complaint, Nov. 21, 1962—Decision, Feb. 17, 1964

Order dismissing, for lack of evidence to sustain the allegations, complaint charging a manufacturer with selling rebuilt television picture tubes containing used parts to distributors, with inadequate disclosure of such used condition.

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 Westinghouse Electric Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the

Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Westinghouse Electric Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 3 Gateway Center, Pittsburgh, Pennsylvania.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, offering for sale, sale and distribution of rebuilt television picture tubes containing used parts to distributors who sell to others for 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 products, when sold, to be shipped from its places of business in various states, including the State of New York, to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, and for the purpose of inducing the sale of its products, respondent has made certain statements concerning its products in periodical advertisements and other media, of which the following are typical:

New Westinghouse Gold Star Picture Tubes.

"Glass-Gard" positively identifies the picture tube as new and fresh from the factory.

PAR. 5. Through the use of the aforesaid statements, respondent represented, directly or by implication, that certain of its television picture tubes were new in their entirety.

PAR. 6. In truth and in fact, the television picture tubes represented as new are not new in their entirety.

The aforesaid statements and representations were, therefore, false, misleading and deceptive.

PAR. 7. The television picture tubes sold by respondent are rebuilt and contain used parts. Respondent does not disclose in its advertising and on invoices, and has not adequately disclosed on the tubes and their cartons, that said television picture tubes are rebuilt and contain used parts.

When television picture tubes are rebuilt containing used parts, in the absence of any disclosure to the contrary, or in the absence of an adequate disclosure, such tubes are understood to be and are readily

accepted by the public as new tubes, a fact of which the Commission takes official notice.

PAR. 8. By failing to disclose the facts as set forth in Paragraph Seven, respondent places in the hands of uninformed or unscrupulous dealers the means and instrumentalities whereby they may mislead and deceive the public as to the nature of their said television picture tubes.

PAR. 9. In the conduct of their business, and at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of television picture tubes.

PAR. 10. The use by respondent of the aforesaid false, misleading and deceptive statements and representations and the failure of respondent to disclose in its advertising and on invoices, and in an adequate manner on its television picture tubes, and on the cartons in which they are packed that such tubes are rebuilt containing used parts, 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 said tubes by reason of said erroneous and mistaken belief.

PAR. 11. 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 methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a) (1) of the Federal Trade Commission Act.

OPINION OF THE COMMISSION

FEBRUARY 17, 1964

By the *Commission:*

The complaint herein charges respondent with violating the Federal Trade Commission Act by allegedly representing that its replacement television picture tubes containing a used glass bulb or envelope (*i.e.*, the outer glass covering) are entirely new tubes, and by placing into the hands of certain dealers the means or instrumentalities whereby they may mislead and deceive the purchasing public as to the nature of their tubes.

The hearing examiner found the charges sustained and entered an order to cease and desist. The parties have filed cross-appeals to the initial decision. Respondent mainly contends that the evidence does not support the allegations. Counsel supporting the complaint, in his appeal, is concerned principally with the form of the order.

As we view it, the only important issue here is whether or not respondent has adequately disclosed the reused nature of the envelope for its replacement television picture tubes. The record shows that respondent on the side of such tubes and on the cartons in which they are shipped places a notice disclosing that the envelope is reused. A like notice is put on the warranty which is designed to be given to the consumer or set owner by the dealer. We cannot say from the showing herein that respondent as to a disclosure notice should be doing more than it is now doing or was doing when this action was brought. The examiner erred when he found that respondent's notice was insufficient. There is no evidence that respondent has failed to adequately disclose that the aforementioned part is used and there is no sufficient evidence to sustain any of the allegations.

It is accordingly concluded that the complaint should be dismissed. In view of this action it is unnecessary for us to consider the merits of respondent's Motion for Official Notice and Completion of Record, filed January 14, 1954, and that motion is hereby denied. An appropriate order will be entered.

Commissioner Reilly did not participate for the reason that he did not hear oral argument.

ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT

This matter having been heard by the Commission upon the cross-appeals of respondent and counsel supporting the complaint to the hearing examiner's initial decision; and

The Commission for the reasons stated in the accompaning opinion having determined that the complaint should be dismissed:

It is ordered, That the initial decision be, and it hereby is, vacated and set aside.

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

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

IN THE MATTER OF

ALD, INC., ET AL.

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

Docket C-715. Complaint, Feb. 19, 1964—Decision, Feb. 19, 1964

Consent order requiring Chicago sellers of equipment for laundromat stores to the public to cease misrepresenting their business methods, the cost of

establishing a laundromat store, the operating expenses involved, and the profits to be derived.

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 Ald, Inc., a corporation, and Frank J. Wright, individually and as an officer of said corporation, and Frank E. Ross, individually and as a former officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ald, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 7045 North Western Avenue in the city of Chicago, State of Illinois.

Respondent Frank J. Wright, is an officer of the corporate respondent, and respondent Frank E. Ross was an officer of said corporate respondent. During all times material herein, they formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The address of Frank J. Wright is the same as that of the corporate respondent. The address of Frank E. Ross is 600 West Lexington Avenue, Astoria, Oregon.

PAR. 2. For some time last past, respondents have engaged in the advertising, offering for sale, sale and distribution of equipment for laundromat stores to the public.

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

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their laundromat equipment, respondents have made certain statements and representations, concerning their business methods, the cost of establishing a laundromat store, the operating expenses of such a store, and the profits to be derived from owning and operating a laundromat store, and other

matters. Among and typical of such statements and representations are the following:

1. That a laundromat store can be fully equipped, and the business established and launched for a certain amount, varying with the operator.

2. That the store should gross from $350 for the first month and $900 per month, after the fourth month and that net profits can be obtained in varying amounts approximating $4,000 to $8,000 per year.

3. That the equipment has a useful life expectancy of from 5 to 10 years.

4. That respondents will provide continuing assistance to laundromat store owners in the operation of their business.

5. That respondents will survey various neighborhoods for profitable store locations for the purchaser.

6. That no experience is necessary for successful operation of a laundromat store.

7. That prompt delivery and assistance in installation are furnished by respondents

PAR. 5. In truth and in fact:

1. The respondents underestimate the cost of installing the laundromat equipment and make no allowance for the operating costs incurred of necessity during the period required to establish the business.

2. The representations as to monthly and annual gross and net business respectively are greatly exaggerated.

3. The life expectancy of the equipment is grossly exaggerated and falsely represented.

4. Respondents in many instances do not render the assistance promised laundromat store operators.

5. The only survey conducted consists of locating stores which are vacant.

6. Purchasers who have had no experience in operating a laundromat store are at a distinct disadvantage and frequently are not capable of succeeding in such an enterprise.

7. Respondents do not deliver the equipment promptly and afford the purchaser no assistance in its installation.

Therefore, the statements and representations as set out in Paragraph Four hereof were and are exaggerated, false, misleading and deceptive.

PAR. 6. 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 laundromat

equipment of the same general kind and nature as that sold by respondents.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Ald, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of business located at 7045 North Western Avenue, in the city of Chicago, State of Illinois.

Respondent Frank J. Wright is an officer of said corporation, and his address is the same as that of said corporation.

Respondent Frank E. Ross is a former officer of said corporation, and his address is 600 West Lexington Avenue, Astoria, Oregon.

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

ORDER

It is ordered, That respondents Ald, Inc., a corporation, and its officers, and Frank J. Wright, individually and as an officer of said corporation, and Frank E. Ross, individually and as a former officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of laundromat equipment or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly that:

1. A laundromat store can be established and started for any designated amount of money in any particular area or location unless respondents can establish that the amount stated is an accurate figure for the total actual cost of the equipment and an estimate of the total cost of delivery and installation of said equipment and all reasonably anticipated additional expenses incidental to opening for business; and unless clear and conspicuous disclosure is additionally made of estimated operating costs.

2. Representing that any costs which are based upon estimates are other than estimated costs and unless respondents can establish that such estimated costs are not less than those which may reasonably be expected to be incurred by such purchaser.

3. The operator or operators of a laundromat store or stores can realize gross receipts or net profits of any designated amounts when such amounts are in excess of those which respondents can establish as being the gross receipts or net profits such operator or operators may reasonably expect to achieve.

4. Equipment being sold for laundromat stores has a life expectancy of any period of time which is greater than respondents can establish to be the fact.

5. Respondents assist laundromat store owners in the operation of their business in any manner not in accordance with the facts.

6. Respondents make a survey or an investigation of neighborhoods for suitable locations for laundromat stores for their customers unless the nature and extent of such survey or investigation is clearly and expressly revealed and the respondents can

establish that such survey or investigation actually has been made.

7. Any inexperienced person will be successful in operating a laundromat store.

8. Respondents will deliver their merchandise within a specific period of time, or on a specific date, unless in each instance such delivery is made as represented by respondents, or misrepresenting in any other manner the time within which respondents' merchandise will be delivered; or representing that respondents assist in the installation of laundromat equipment unless respondents in each instance furnish such assistance at the time of the delivery.

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

IN THE MATTER OF

SAV-COTE CHEMICAL LABORATORIES, INC., ET AL.

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

Docket C-716. Complaint, Feb. 10, 1964—Decision, Feb. 19, 1964

Consent order requiring an Alexandria, Va., mail-order seller of its "Sav-Cote" products and other paints or coatings, to cease making—in direct-mail and newspaper advertisements and otherwise—numerous false statements concerning its business organization, the durability and protective qualities of "Sav-Cote," the use of its products by the armed forces, tests and approval by the Navy, and the guarantee to purchasers, among other deceptive claims.

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 Sav-Cote Chemical Laboratories, Inc., a corporation, and William Moskowitz, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sav-Cote Chemical Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its principal office and place of business located at 20 South Dove Street, Alexandria, Virginia.

Respondent William Moskowitz is the president of Sav-Cote Chemical Laboratories, Inc. He formulates, directs and controls the acts and practices of Sav-Cote Chemical Laboratories, Inc., including the acts and practices hereinafter set forth. His office and principal place of business is located at the above stated address.

PAR. 2. Respondents have been and are now engaged in the preparation, offering for sale, sale and distribution of "Sav-Cote" plasticlear and "Sav-Cote" colors, sometimes hereinafter referred to collectively as "Sav-Cote" products or simply as "Sav-Cote", and other paints or coatings. Such products have been and are now offered for sale, sold and distributed through the mail directly to the general public.

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

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of "Sav-Cote" products, respondents have made numerous statements and representations concerning the manner in which their business is organized, the merits and characteristics of "Sav-Cote", the use of such products by the armed forces, tests and approval by the Navy, the proof available to support their advertising representations, and the guarantee provided to purchasers.

A. Typical and illustrative of such statements and representations, but not all inclusive thereof, are the following which respondents caused to be printed and distributed in direct-mail advertisements sent to individuals and other members of the public through the United States mail and otherwise:

MARINE DIVISION. RESINS & PLASTIC DEPARTMENT.

It actually defies aging * * * lasts indefinitely.

PUTS AN END TO YOUR PAINT & SURFACE COATING PROBLEMS.

Waterproofs.

Stops rust & rot.

Resists * * * flame.
Doesn't Peel, * * * or Crack.
Forms a * * * leakproof elastic skin as it's applied.
Sav-Cote has been used by the armed forces, tested by the Navy Laboratories, accelerated weather testing at the Bayonne, N. J. testing grounds, * * *

B. Typical and illustrative of such statements and representations, but not all inclusive thereof, are the following which respondents caused to be printed and published in newspapers having a general circulation:

Elastic
PROVEN: * * * actually never needs removal.
Proven to cut refinishing cost to 80%.
Goes over old paints.
GUARANTEED: * * * full money back if not satisfied, for any reason in the world, within 30 days.

PAR. 5. Through the use of the aforesaid statements and representations, and others similar thereto, but not specifically set forth, respondents have represented, directly or by implication, that:

(a) Sav-Cote Chemical Labs., Inc., maintains a marine division and a resins and plastic department.

(b) "Sav-Cote" finishes last for an indefinitely long period of time without aging.

(c) "Sav-Cote" puts an end to all paint and surface coating problems.

(d) "Sav-Cote" finishes are impenetrable by water or water vapor under all usual and ordinary conditions of use.

(e) "Sav-Cote" arrests all corrosion and decay.

(f) "Sav-Cote" is not flammable.

(g) "Sav-Cote" doesn't peel, * * * or crack under any conditions of use.

(h) A surface to which "Sav-Cote" has been applied will not leak under any conditions.

(i) "Sav-Cote" has been regularly used by the armed services: has been tested and approved by the Naval Research Laboratory, Washington, D.C.; and has been subjected to accelerated weather testing by naval testing facilities located at Bayonne, New Jersey.

(j) "Sav-Cote" plasticlear finishes are elastic.

(k) Respondents have scientific or empirical evidence which proves that "Sav-Cote" finishes never need removal.

(l) Respondents have scientific or empirical evidence which proves that the use of "Sav-Cote" will reduce the cost of refinishing surfaces up to 80%.

(m) "Sav-Cote" can be applied over old badly cracked or peeling painted surfaces.

(n) Respondents guarantee for 30 days from date of purchase to make a full refund for any reason given.

PAR. 6. In truth and in fact:

(a) Sav-Cote Chemical Labs., Inc., does not maintain a marine division or a resins and plastic department and is neither departmentalized or divided into divisions.

(b) "Sav-Cote" finishes do not last for an extended or indefinitely long period of time without aging.

(c) "Sav-Cote" does not put an end to all paint and surface coating problems.

(d) "Sav-Cote" finishes are not impenetrable by water or water vapor under all usual and ordinary conditions of use.

(e) "Sav-Cote" does not arrest all corrosion and decay. If applied over a surface which has started to corrode or decay "Sav-Cote" will not stop such corrosion or decay.

(f) "Sav-Cote" is flammable and will burn easily when in liquid form as during application.

(g) "Sav-Cote" does peel and crack under some conditions of use.

(h) A surface to which "Sav-Cote" has been applied will leak under some conditions.

(i) "Sav-Cote" has not been regularly used by the armed forces; such sales as respondents may have made have been isolated sales to individual commands. "Sav-Cote" has not been tested or approved by the Naval Research Laboratory, Washington, D.C.; and has not been subjected to accelerated weather testing or any other kind of testing by naval facilities at Bayonne, New Jersey.

(j) "Sav-Cote" plasticlear finishes are not elastic.

(k) Respondents do not have scientific or empirical evidence which proves that "Sav-Cote" finishes never need removal.

(l) Respondents do not have scientific or empirical evidence which proves that the use of "Sav-Cote" will reduce the cost of refinishing surfaces up to 80% or any other amount.

(m) "Sav-Cote" cannot be efficiently or satisfactorily applied over old badly cracked or peeling painted surfaces.

(n) Respondents do not guarantee for 30 days from the date of purchase to make a full refund for any reason given. Respondents do not guarantee the results obtained in any manner.

Therefore said statements and representations were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of paints and coatings.

PAR. 8. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of "Sav-Cote" products by reason of said erroneous and mistaken belief.

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

DECISION AND ORDER

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

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

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

1. Respondent Sav-Cote Chemical Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its principal office and place of business located at 20 South Dove Street, in the city of Alexandria, State of Virginia.

Respondent William Moskowitz is the president of Sav-Cote Chemical Laboratories, Inc., and his address is the same as that of said corporation.

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

ORDER

I

It is ordered, That respondents Sav-Cote Chemical Laboratories, Inc., a corporation and its officers, and William Moskowitz, individually, and as an officer of said corporation, and their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of Sav-Cote plasticlear or Sav-Cote colors, or any other paint or coating, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Falsely representing, directly or by implication, that respondents' business is divided into departments or divisions.

2. Representing, directly or by implication, that any of such products defy aging or last indefinitely without aging or put an end to paint and surface coating problems; or misrepresenting, in any manner, the durability of any of such products.

3. Using the unqualified representation "Waterproofs" or "Stops rust & rot" or "Resists * * * flame" or "Doesn't Peel, * * * or Crack" or "forms a * * * leakproof * * * skin" or "Goes over old paints" or any other word or words of similar unqualified import or meaning; or misrepresenting, in any manner, any merits or characteristic of any of such products.

4. Using the word "Elastic" to describe any finish which is not capable of being readily stretched or expanded without essential alteration.

5. Using the word "PROVEN", or any other word or words of similar import or meaning in connection with any representation, unless respondents have scientific or empirical evidence available which establishes the truth of such representation.

6. Representing, directly or by implication, that any of such products has been tested by any person, company, organization or group which has not tested such product; or misrepresenting, in any manner, the results of any test conducted on any of such products.

7. Representing, directly or by implication, that any of such products has been approved by any person, company organization or group which has not approved such products; or misrepresenting, in any manner, the approval given or granted to any of such products.

8. Representing, directly or by implication, that any person, company, organization or group has used any of such products unless such person, company, organization or group has usually, normally and regularly used such products.

II

It is further ordered, That respondents Sav-Cote Chemical Laboratories, Inc., a corporation and its officers, and William Moskowitz, individually, and as an officer of said corporation, and their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of Sav-Cote plasticlear or Sav-Cote colors, or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, directly or by implication, that any product is guaranteed unless the nature and extent of the guarantee, the manner of performance and the identity of the guarantor are clearly and conspicuously disclosed.

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

IN THE MATTER OF

STERLING DRUG, INC., ET AL.

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

Docket 8554. Amended Complaint, Jan. 31, 1963—Decision, Feb. 20, 1964

Order dismissing—following the decision of the United States Court of Appeals for the Second Circuit, 317 F. 2d 669 (7 S.&D. 683), which held that the Commission had not demonstrated that it had "reason to believe" the challenged advertisements were false—complaint charging false advertising of aspirin.

AMENDED COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Sterling Drug, Inc., a corporation, and Dancer-Fitzgerald-Sample, Inc., a corporation, and Thompson-Koch Company, a corporation, hereinafter referred to as respondents, have violated the provisions of said Act,

and it appearing to the Commission that a proceeding by it in respect-thereof would be in the public interest, hereby issues its amended complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sterling Drug, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1450 Broadway in the city of New York, State of New York.

Respondent Dancer-Fitzgerald-Sample, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 347 Madison Avenue in the city of New York, State of New York.

Respondent Thompson-Koch Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 1450 Broadway in the city of New York, State of New York.

PAR. 2. Respondent Sterling Drug, Inc., is now, and for some time last past has been, engaged in the sale and distribution of a product which comes within the classification of a drug as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by respondent Sterling Drug, Inc., for said product, and the formula thereof and directions for use are as follows:

Designation: "Bayer Aspirin"
Formula: Each tablet contains five (5) grains of aspirin.
Directions: Take one (1) or two (2) tablets with water three (3) or four (4) times daily as required.

PAR. 3. Respondent Sterling Drug, Inc., causes the said product, when sold, to be transported 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. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

Respondent Dancer-Fitzgerald-Sample, Inc., and Thompson-Koch Company are now, and for some time last past have been, the advertising agencies of Sterling Drug, Inc., and now prepare and place, and for some time last past have prepared and placed, for publication, advertising material, including the advertising hereinafter referred to, to promote the sale of the said product. In the

conduct of their business, at all times mentioned herein, respondents Dancer-Fitzgerald-Sample, Inc., and Thompson-Koch Company have been in substantial competition, in commerce, with other corporations, firms and individuals in the advertising business.

PAR. 4. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the product referred to in Paragraph Two, above, by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and other advertising media, and by means of television and radio continuities broadcast over networks through stations located in various States of the United States and in the District of Columbia, and by means of other radio and television continuities broadcast over stations having sufficient power to carry such broadcasts across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said Bayer Aspirin; and have disseminated, and caused the dissemination of, advertisements concerning the said Bayer Aspirin by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical, but not all-inclusive thereof, of the statements and representations contained in said advertisements, including audio-visual representations in television broadcasts, disseminated as hereinabove set forth, are the following:

Government-Supported Medical Team Compares Bayer Aspirin and Four Other Popular Pain Relievers

Findings reported in the highly authoritative journal of the AMERICAN MEDICAL ASSOCIATION reveal that the higher priced combination-of-ingredients pain relievers upset the stomach with significantly greater frequency than any of the other products tested, while Bayer Aspirin brings relief that is as fast, as strong, and as gentle to the stomach as you can get.

This important new medical study, supported by a grant from the federal government, was undertaken to compare the stomach-upsetting effects, the speed of relief, and the amount of relief offered by five leading pain relievers, including Bayer Aspirin, aspirin with buffering, and combination-of-ingredients products. Here is a summary of the findings.

Upset Stomach

According to this report, the higher priced combination-of-ingredients products upset the stomach with significantly greater frequency than any of the other products tested, while Bayer Aspirin, taken as directed, is as gentle to the stomach as a plain sugar pill.

Speed and Strength

The study shows that there is no significant difference among the products tested in rapidity of onset, strength, or duration of relief. Nonetheless, it is interesting to note that within just fifteeen minutes, **Bayer Aspirin had a somewhat higher pain relief score than any of the other products.**

(A reproduction of a newspaper advertisement containing the foregoing representations is attached hereto marked Exhibit 1 and incorporated herein.)*

* * * * * * *

Video:	Audio:
Open on tight shot of AMA Journal (JAMA).	Anner (VO) * * * In the December 29 issue of the Journal of the American Medical Association, an important new medical report evaluates five widely advertised pain relievers including Bayer Aspirin. aspirin with buffering and leading combination-of-ingredients products.

(A reproduction of the report referred to in the above-quoted advertisements is attached hereto marked Exhibit 2 and incorporated herein.)*

PAR. 6. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, and are now representing, directly and by implication:

1) That the findings of the medical team of clinical investigators referred to in said advertisements have been endorsed and approved by the United States Government.

2) That the publication of a report of said study, together with the findings of the clinical investigators, in The Journal of The American Medical Association, is evidence of endorsement and approval thereof by that association and by the medical profession.

3) That the clinical investigators found that Bayer Aspirin will not upset the stomach, is as gentle to the stomach as a sugar pill and is more gentle to the stomach than any analgesic product containing more than one ingredient, and that there is no analgesic product available to the consumer which is more gentle to the stomach than Bayer Aspirin.

4) That the clinical investigators concluded that Bayer Aspirin, after fifteen minutes following administration, affords a higher degree of pain relief than any other product tested.

PAR. 7. In truth and in fact:

1) The findings and conclusions reached by the clinical investigators conducting the study referred to in said advertising were and are their own, personally, and have not been endorsed or ap-

*Pictorial Exhibits 1 and 2 are omitted in printing.

proved by the United States Government, by The American Medical Association or by the Medical profession.

2) The clinical investigators did not state as a finding in their report that Bayer Aspirin will not upset the stomach, is as gentle to the stomach as a sugar pill, is more gentle to the stomach than any analgesic product containing more than one ingredient or that there is no analgesic product which is more gentle to the stomach than Bayer Aspirin.

3) The clinical investigators reported that there is no significant difference in the degree of pain relief afforded by the various products tested after a lapse of fifteen minutes following administration.

The aforesaid advertisements set forth and referred to in Paragraph Five above were, and are, misleading in material respects and constitute "false advertisements," as that term is defined in the Federal Trade Commission Act.

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

Mr. Berryman Davis and *Mr. Howard S. Epstein*, counsel supporting the complaint.

Mr. Mathias F. Correa, *Mr. Thomas C. Mason*, and *Mr. H. Richard Schumacher*, of *Cahill, Gordon, Reindel & Ohl*, New York, N. Y., counsel for respondents Sterling Drug, Inc., and Thompson-Koch Company.

Mr. Frank A. F. Severance and *Mr. Gordon M. Lucey*, of *Dunnington, Bartholow & Miller*, New York, N. Y., counsel for respondent Dancer-Fitzgerald-Sample, Inc.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on January 31, 1963, issued its amended complaint[1] charging Sterling Drug, Inc., a corporation, Dancer-Fitzgerald-Sample, Inc., a corporation, and Thompson-Koch Company, a corporation, with violation of Sections 5 and 12 of the Federal Trade Commission Act. Respondent Sterling Drug, Inc., is alleged to be engaged in the interstate sale and distribution of the drug product Bayer Aspirin, and respondents Dancer-Fitzgerald-Sample, Inc., and Thompson-Koch Company are alleged to act as advertising agencies for Sterling Drug, Inc., in the preparation and

[1] The complaint, as originally issued on January 16, 1963, did not include Thompson-Koch Company as a party respondent.

placing of advertisements for the sale of Bayer Aspirin. Said advertisements are alleged to be disseminated by the United States mail and through various means in interstate commerce to induce the intrastate and interstate purchase of Bayer Aspirin.

Set forth in the complaint are reproduced portions of newspaper and video and audio advertisements of Bayer Aspirin allegedly typical of the content of numerous such advertisements referring to an article published and circulated in the Journal of the American Medical Association under date of December 29, 1962. Attached to the complaint and attached to and made part of this Initial Decision is Comm. Ex. No. 1,* a full reproduction of this newspaper advertisement.

Attached to the complaint and attached to and made part of this Initial Decision is Comm. Ex. No. 3,* the said article of December 29, 1962, appearing in the Journal of the American Medical Association and referred to in such advertisements. As hereinafter set forth and described in the Findings of Fact, it is the alleged misrepresentations stated to appear in such Bayer Aspirin advertising which are charged in the complaint to be in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Answers to the amended complaint were filed by the respondents on March 15, 1963. Said answers admit in part and deny in part the various allegations of the amended complaint and ask that the complaint be dismissed. Following a prehearing conference on April 8, 1963, made part of the public record by agreement of all counsel, a hearing on the merits was held in Washington, D.C. on April 22 through April 25, 1963.

At the conclusion of the presentation of the case-in-chief, counsel for the respondents moved to strike the record testimony directed to certain phases of respondents' advertising as given by the witnesses called in support of the allegations of the complaint.[2] Upon the denial of this motion,[3] respondents elected to present no defense witnesses [4] and the case was closed on the record.[5]

The transcript of record in this proceeding consists of 441 pages. Twenty-one witnesses were called during the presentation of the case-in-chief and their testimony extends from page 122 through page 383. Marked for identification and received in evidence without objection under an oral stipulation between counsel is Comm. Ex. No. 1, a full-page Bayer Aspirin advertisement appearing at

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*Pictorial Commission Exhibits Nos. 1 and 3 are omitted in printing.

[2] Tr. 19; 183–184.

[3] Tr. 399–406.

[4] Tr. 421.

[5] Tr. 439.

page A-12 in the Washington, D. C. newspaper, The Evening Star, on January 10, 1963; Comm. Ex. No. 2, a printed volume of 217 pages entitled "United States Court of Appeals for the Second Circuit, Federal Trade Commission, appellant, v. Sterling Drug, Inc., Dancer-Fitzgerald-Sample, Inc., Thompson-Koch Company, appellees, Joint Appendix"; Comm. Ex. No. 2-A, a printed volume of nine pages under the foregoing caption entitled "Supplement to Joint Appendix"; Comm. Ex. No. 3, a printed article of four pages bearing the inscription and date JAMA December 29, 1962, and entitled "A Comparative Study of Five Proprietary Analgesic Compounds", Thomas J. DeKornfeld, MD, Louis Lasagna, MD, and Todd M. Frazier, ScM, Baltimore.

Marked for identification and rejected in the instant proceeding is Comm. Ex. No. 4, entitled "Affidavit of Louis Lasagna, MD", dated March 20, 1963. This exhibit, when offered, was both objected to and further stated by respondents' counsel not to be covered by the oral stipulation between counsel. [6]

Respondents' exhibits marked for identification numbers 1 through 11 were also rejected; [7] Respt. Ex. No. 12, a two-page affidavit dated February 14, 1963, by Mildred P. Clark, Head Librarian, Winthrop Laboratories, Division of Sterling Drug, Inc., and its attached University of Michigan Medical Bulletin of five printed pages were received in evidence without objection.

Written motions addressed both to the Hearing Examiner and to the Commission that the Commission be declared disqualified to make any adjudication on the issues presented by Paragraph Seven (1) of the complaint were denied by the Hearing Examiner [8] and by the Commission on May 16, 1963, with a memorandum opinion accompanying its order.

Commission's rejected exhibit, marked for identification No. 4, and respondents' rejected exhibits, marked for identification numbers 1 through 11, are subject to Section 4.12 (f) of the Commission's Rules of Practice for Adjudicative Proceedings which provides that rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

All counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses presented, and to introduce such evidence as is provided for under Section 4.12 (b) of the Commission's Rules of Practice for Adjudicative Proceedings.

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[6] Tr. 63–69; 119.
[7] Tr. 201, 222, 249, 251, 255, 435, 437.
[8] Tr. 384–390.

Proposed findings of fact, conclusions and supporting briefs were filed by respective counsel, and counsel supporting the complaint submitted a proposed order to cease and desist. Proposed findings and conclusions submitted and not adopted in substance or form as herein found and concluded are hereby rejected.

After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record and the observation of the witnesses testifying herein, the following findings of fact and conclusions therefrom are made, and the following order issued.

FINDINGS OF FACT

1. Respondent Sterling Drug, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1450 Broadway in the city of New York, State of New York. [9]

Sterling Drug, Inc., is now, and for some time last past has been, engaged in the sale and distribution of a product which comes within the classification of a drug as the term "drug" is defined in the Federal Trade Commission Act. [10] The designation used by respondent Sterling Drug, Inc., for said product, and the formula thereof and directions for use are as follows:

Designation: "Bayer Aspirin"
Formula: Each tablet contains five (5) grains of aspirin.
Directions: Take one (1) or two (2) tablets with water three (3) or four (4) times daily as required.[11]

Sterling Drug, Inc., causes the said product, when sold, to be transported from a place of business in the State of New Jersey to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial. [12]

2. Respondent Thompson-Koch Company is a corporation organized, existing and doing business under and by virtue of the laws

[9] Admitted by respondents' answer at page 1.
[10] Section 15 (c). "Aspirin is a drug whose tolerances are prescribed by the United States pharmacopoeia". (Tr. 112).)
[11] Admitted by respondent's answer at page 2.
[12] Averred by respondent's answer at page 3. Respondent's annual product sales exceed $25,000,000 (Tr. 112).

of the State of Ohio, with its principal office and place of business located at 1450 Broadway in the city of New York, State of New York.[13] Thompson-Koch Company is a wholly owned subsidiary of Sterling Drug, Inc., and is used by the latter for the placement of print advertising.[14]

3. Respondent Dancer-Fitzgerald-Sample, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 347 Madison Avenue in the city of New York, State of New York.[15]

Dancer-Fitzgerald-Sample, Inc., prepared all advertising referred to in the amended complaint disseminated by and on behalf of respondent Sterling Drug, Inc., for the latter's promotion of the sale of the product designated Bayer Aspirin. The print advertising for publication in newspapers was prepared by this respondent for placement by and was placed in such media by respondent Thompson-Koch Company. The television and radio advertising disseminated by respondents, including that referred to in the amended complaint, was prepared by this respondent and placed by it with the broadcast media for dissemination throughout the United States.[16]

4. Respondents, in the course and conduct of their business, have disseminated, and caused the dissemination of, certain advertisements concerning Bayer Aspirin by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and other advertising media, and by means of television and radio continuities broadcast over networks through stations located in various States of the United States and in the District of Columbia, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said Bayer Aspirin; and have disseminated, and caused the dissemination of, advertisements concerning the said Bayer Aspirin by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.[17]

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[13] Admitted by respondent's answer at page 1.

[14] Tr. 113–114.

[15] Admitted by respondent's answer at page 1.

[16] Tr. 113–115.

[17] Admitted in part by answer of respondents Sterling Drug, Inc., and Thompson-Koch Company at page 3; admitted in part by answer of Dancer-Fitzgerald-Sample, Inc., at page 3; see also, affidavit of James H. Luther, Jr., and Exhibits A through F to said affidavit appearing at pages 61–95 of Comm. Ex. No. 2 in evidence.

5. Appearing in the December 29, 1962, issue of the Journal of the American Medical Association is an article entitled "A Comparative Study of Five Proprietary Analgesic Compounds". This article is Comm. Ex. No. 3 in evidence and is attached hereto and made part of this Initial Decision. The content of this report has not been challenged in this proceeding and no witness was called either to support or to controvert the worth of such study. The statement at the report's end that "This study was supported by a grant from the Federal Trade Commission, Washington, D. C." is also accepted and not controverted by the respective counsel. There is further, no dispute that this article was published and circulated in the Journal of the American Medical Association on a certain date and that such publication of the said article was authorized by an undisclosed staff official of the Federal Trade Commission. No witness herein testified to the background for and as to what, if any, official meaning is to be ascribed to this authorization and all the evidence in such connection is confined to what appears in the documentary exhibits of record.[18]

Similarly, no representative for the Journal of the American Medical Association or for the Association itself was called to testify herein, and such evidence as is directed to what, if any, official meaning is to be ascribed to the publication of the said article in the said Journal is also confined to what appears in the documentary exhibits of record.[19]

6. Following the publication and circulation of the foregoing article in the December 29, 1962, issue of the Journal of the American Medical Association, the respondents, in connection with the sale of the drug product Bayer Aspirin, caused to be published and circulated advertisements referring to the said article in various newspapers[20] and other media,[21] including television and radio.[22] Comm. Ex. No. 1 in evidence, a complete copy of which is attached hereto and made part of this Initial Decision, is a typical such advertisement. This advertisement reads in pertinent part:

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[18] Comm. Ex. No. 2, stipulation between counsel, at pages 149–151. See, also, statement by the Chairman, Federal Trade Commission, at page 109 of Comm. Ex. No. 2. See, also, the statement of respondents' counsel in the instant proceeding at Tr. 414–415 in this regard.

[19] For example, affidavit of Dr. E. B. Howard and Exhibits A and B to said affidavit. See, Comm. Ex. No. 2 at pages 50–53.

[20] The advertisement referring to said article appeared in approximately 188 newspapers in some 98 cities across the United States. See, Comm. Ex. No. 2 at pages 63–69.

[21] The advertisement also appeared in the special New York editions of Life Magazine for January 18, 1963, and in editions for the rest of the country in the Life Magazine issue of January 25, 1963. See, Comm. Ex. No. 2 at page 61.

[22] Extensive network television and radio commercials also featured this advertisement. See Comm. Ex. No. 2 at pages 70–95.

Government-Supported Medical Team Compares Bayer Aspirin and Four Other Popular Pain Relievers

Findings reported in the highly authoritative journal of the American Medical Association reveal that the higher priced combination-of-ingredients pain relievers upset the stomach with significantly greater frequency than any of the other products tested, while Bayer Aspirin brings relief that is as fast, as strong, and as gentle to the stomach as you can get.

This important new medical study, supported by a grant from the federal government, was undertaken to compare the stomach-upsetting effects, the speed of relief, and the amount of relief offered by five leading pain relievers, including Bayer Aspirin, aspirin with buffering, and combination-of-ingredients products. Here is a summary of the findings.

Upset Stomach

According to this report, the higher priced combination-of-ingredients products upset the stomach with significantly greater frequency than any of the other products tested, while *Bayer Aspirin, taken as directed, is as gentle to the stomach as a plain sugar pill.*

Speed and Strength

The study shows that there is no significant difference among the products tested in rapidity of onset, strength, or duration of relief. Nonetheless, it is interesting to note that within just fifteen minutes, *Bayer Aspirin had a somewhat higher pain relief score than any of the other products.*

7. The amended complaint in this proceeding challenges such aforesaid advertising by the respondents and alleges it to be false, misleading and deceptive and in violation of Sections 5 and 12 of the Federal Trade Commission Act. The amended complaint alleges that respondents, directly and by implication, and contrary to the truth and the fact, represent in such advertising:[23]

1) That the findings of the medical team of clinical investigators referred to in said advertisements have been endorsed and approved by the United States Government.

2) That the publication of a report of said study, together with the findings of the clinical investigators, in The Journal of The American Medical Association, is evidence of endorsement and approval thereof by that association and by the medical profession.

3) That the clinical investigators found that Bayer Aspirin will not upset the stomach, is as gentle to the stomach as a sugar pill and is more gentle to the stomach than any analgesic product containing more than one ingredient, and that there is no analgesic product available to the consumer which is more gentle to the stomach than Bayer Aspirin.

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[23] In construing and evaluating such alleged representations as are claimed in the complaint to have been made by the respondents, it is to be noted that "The Commission cannot interpolate into the petitioner's representations words not there, and then find the petitioner guilty of misrepresentations because the petitioner's product does not meet the Commission's revised representations." See, *International Parts Corporation* v. *Federal Trade Commission* (1943) 133 F. 2d 883 and *Folds* v. *Federal Trade Commission* (1951) 187 F. 2d 658.

4) That the clinical investigators concluded that Bayer Aspirin, after fifteen minutes following administration, affords a higher degree of pain relief than any other product tested.

8. Prior to the administrative hearing on the merits in this matter, a proceeding to enjoin the respondents from further disseminating this challenged advertising, pending the disposition of the complaint before the Commission, was argued and briefed before a United States District Court and a United States Circuit Court. These particular alleged misrepresentations set forth in the instant amended complaint were there examined and made the subject of written court opinions.[24] The documentary exhibits before the courts included all those herein received in evidence as well as the many herein offered and rejected as being improper to the instant administrative proceeding. Not before these two Federal courts for consideration at such time was the additional and further evidence since adduced in the form of the oral testimony of witnesses now of record in this proceeding.

The opinion of the United States Circuit Court, on the appeal from the order of the District Court, concluded with reference to the adduction of further evidence against the respondents herein:

Our affirmance of the order of the District Court should not, however, be thought to render fruitless the Commission's activities in its pending administrative proceeding against Sterling Drug, Inc. Should further evidence there be adduced in support of its allegations of violation of the Federal Trade Commission Act, a cease and desist order may well be valid and its issuance properly sustained upon judicial review. We are sympathetic with the commission's commendable efforts in carrying out the important tasks assigned to it by Congress; we simply hold that in this case, it has failed to make that showing which Congress itself deemed requisite to judicial relief.

9. It would appear clear from a reading of the above-quoted conclusion in the Circuit Court's prior opinion in this injunction matter, that further evidence than that then before it and found wanting is needed to support the issuance of a valid order to cease and desist in the instant proceeding. It would also appear obvious that this further evidence must be both credible and reliable and of sufficient substantial probative weight to supply and overcome the lack of evidence spelled out in this opinion as being needed if a valid showing is to be made that respondents' challenged advertising contains the misrepresentations alleged in the instant complaint. Accordingly, the four primary allegations of the complaint directed to respondents' challenged advertising are hereinafter set forth *seriatim*.

[24] *Federal Trade Commission* v. *Sterling Drug, Inc., Dancer-Fitzgerald-Sample, Inc.,* and *Thompson-Koch Company* (March 8, 1963) 215 F. Supp. 327, affirmed (May 6, 1963) 317 F. 2d 669.

together with that part of the Circuit Court opinion pertinent to the particular allegation:

1) That the findings of the medical team of clinical investigators referred to in said advertisements have been endorsed and approved by the United States Government.

The Circuit Court opinion on this point notes that the Commission selected the research team, supported the study with a grant, and authorized the publication of the report. The Court stated that the capsulized expression "Government-Supported" could not, therefore, be held as misleading. With regard to the large type reference in the advertisement to a "Government-Supported Medical Team" giving the misleading impression that the United States Government endorsed or approved the findings of the research team, the court stated:

Surely the fact that the word "supported" might have alternative dictionary definitions of "endorsed" or "approved" is not alone sufficient to show reason to believe that the ordinary reader will probably construe the word in this manner. Most words *do* have alternative dictionary definitions; if that in itself were a sufficient legal criterion, few advertisements would survive. Here, no impression is conveyed that the *product itself* has its source in or is being endorsed by the Government; for this reason, the cases cited by the Commission are inapt.

10. The second allegation of the complaint regarding said advertising is as follows:

2) That the publication of a report of said study, together with the findings of the clinical investigators, in The Journal of The American Medical Association, is evidence of endorsement and approval thereof by that association and by the medical profession.

The Circuit Court on this point had this, in part, to say:

The Commission's attack upon the use of the phrase "Findings reported in the highly authoritative Journal of the American Medical Association," as misleadingly connoting endorsement and approval, is similarly unfounded, for much the same reasons already discussed. To assert that the ordinary reader would conclude from the use of the word "authoritative" that the study was endorsed by the Journal and the Association is to attribute to him not only a careless and imperceptive mind but also a propensity for unbounded flights of fancy. This we are not yet prepared to do. If the reader's natural reaction is to think that the study, because of publication in the Journal, is likely to be accurate, intelligent, and well-documented, then the reaction is wholly justified, and one which the advertiser has every reason to expect and to seek to inculcate.

11. The third allegation of the complaint regarding said advertising is as follows:

3) That the clinical investigators found that Bayer Aspirin will not upset the stomach, is as gentle to the stomach as a sugar pill and is more gentle to the stomach than any analgesic product containing more than one ingredient, and that there is no analgesic product available to the consumer which is more gentle to the stomach than Bayer Aspirin.

With regard to this point, Comm. Ex. No. 3 states in the summary concluding the comparative study concerned:

Anacin, Bayer Aspirin, Bufferin, Excedrin, and St. Joseph's Aspirin were compared with a placebo and with each other from the point of view * * * of incidence of gastrointestinal distress * * * There was no difference between the incidence of gastrointestinal effects after the placebo and that after Bayer Aspirin, Bufferin, or St. Joseph's Aspirin. The incidence of such side effects was higher after Anacin or Excedrin.

The Circuit Court opinion states with reference to the study this regard:

Upon investigating the incidence of stomach upset after the administration of the five drugs as well as the placebo, the researchers came to this conclusion: "Excedrin and Anacin form a group for which the incidence of upset stomach is significantly greater than is the incidence after Bayer Aspirin, St. Joseph's Aspirin, Bufferin, or the placebo. The rates of upset stomach associated with these last 4 treatments are not significantly different, one from the other." The accompanying table revealed that of the 829 doses taken of Bayer Aspirin, there were nine episodes of upset stomach, a rate of 1.1%; the placebo was administered in 833 cases, and caused stomach upset seven times, a rate of 0.8%.

As regards the use of the term "sugar pill" in the respondents' advertising instead of the word placebo, the Circuit Court opinion held that the pill used as a control in the study was constituted of sugar and that the use of the term "sugar pill" was therefore neither inaccurate nor misleading. With regard to use of the other comparative statements in the advertisement the Court held they "could only be understood to refer to the four other products tested." With reference to the challenged use of the words "as gentle as" leading the reader to conclude that Bayer Aspirin is not in the slightest bit harmful to the stomach and the argument that use of the substitute words "no more upsetting" than a placebo was therefore necessary because use of the placebo in the study caused a very minor degree of stomach upset, the Court stated:

Unlike the standard of the average reader which the Commission avidly endorses throughout these proceedings, it here would have us believe that he is linguistically and syntactically sensitive to the difference between the phrases "as gentle as" and "no more upsetting than." We do not find that the Commission has reason to believe that this will be the case, and we therefore reject its contentions.

12. The fourth allegation of the complaint regarding said advertising is as follows:

4) That the clinical investigators concluded that Bayer Aspirin, after fifteen minutes following administration, affords a higher degree of pain relief than any other product tested.

With regard to this point, Comm. Ex. No. 3 states in the summary concluding the comparative study:

Anacin, Bayer Aspirin, Bufferin, Excedrin, and St. Joseph's Aspirin were compared with a placebo and each other, from the point of view of analgesic efficacy * * * There was no striking difference among the agents so far as rapidity of onset, peak effect, or duration of analgesia was concerned.

With reference to the foregoing conclusion of the comparative study, the opinion of the Circuit Court states, in part, the following:

As we understand the Commission's argument, no objection is taken to the statement that "The study shows that there is no significant difference among the products tested in rapidity of onset, strength, or duration of relief." Indeed, no objection can properly be taken, for the statement reproduces almost verbatim one of the conclusions enumerated in the article. It is thought, however, that the advertisement improperly represents greater short-run pain relief with Bayer Aspirin by stating that "Nonetheless, it is interesting to note that within just fifteen minutes, Bayer Aspirin had a somewhat higher pain relief score than any of the other products." As we have seen, the statement is literally true, for Bayer's "score" after fifteen minutes was 0.94 while its closest competitor at that time interval was rated 0.90. The fact that the margin of accuracy of the scoring system was 0.124—meaning that the second-place drug might fare as well as or better than Bayer over the long run of statistical tests—does not detract from the fact that on this particular test, Bayer apparently fared better than any other product in relieving pain within fifteen minutes after its administration. It is true that a close examination of the statistical chart drawn up by the three investigators reveals that they thought the difference between all of the drugs at that time interval not to be "significantly different." But that is precisely what the Bayer advertisement stated in the sentence preceding its excursion into the specifics of the pain-relief scores.

* * * * * * *

The Commission relies heavily, especially as to the pain-relief aspects of its case, upon *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52 (4th Cir. 1950). There, Reader's Digest sponsored a scientific study of the major cigarettes, investigating the relative quantities of nicotine, tars, and resins * * * An examination of that case shows that it is completely distinguishable in at least two obvious and significant respects. Although the statements made by Old Gold were at best literally true, they were used in the advertisements to convey an impression diametrically opposed to that intended by the writer of the article * * * In the instant case, Sterling Drug can in no sense be said to have conveyed a misleading impression as to either the spirit or the specifics of the article published in the Journal of the American Medical Association.

No additional and further evidence of record was adduced herein for consideration on this particular point. The evidence of record in the instant regard is none other than what was discussed and passed upon in the hereinbefore cited prior District and Circuit Court opinions.[25]

13. In addition to the documentary evidence of record introduced in this proceeding, 21 witnesses were called to testify during the presentation of the case-in-chief.[26] Under the controlling case law, such witnesses need not have been called, for the Commission, on its own authority, is empowered to find that the questioned advertisements were deceptive and misleading. As has been held, "Actual consumer testimony is in fact not needed to support an inference of deceptiveness by the Commission" and "In evaluating the tendency of language to deceive, the Commission should look not to the most sophisticated readers but rather to the least." *Exposition Press, Inc., et al.* v. *Federal Trade Commission*, (1961) 295 F. 2d 869. Further, the Commission may recognize that the deception was by innuendo rather than outright false statement. That deception may be so accomplished is recognized by the cases. *Bakers Franchise Corporation, et al.* v. *Federal Trade Commission*, (1962) 302 F. 2d 258. Again, and still further, as the case law points out, "Moreover, advertisements are not to be judged by their effect upon the scientific or legal mind which will dissect and analyze each phrase but rather by their effect upon the average member of the public who more likely will be influenced by the impression gleaned from a quick glance at the most legible words." *Ward Laboratories, Inc., et al.* v. *Federal Trade Commission*, (1960) 276 F. 2d 952, *cert. denied* 364 U.S. 827.

In the light of the foregoing and the later District Court and Circuit Court opinions in the present matter, the worth of the testimony of the witnesses herein called will be evaluated.

14. Prior to testifying in this matter, all the witnesses called herein had been previously interviewed by an attorney-examiner of the Commission and shown respondents' challenged advertising and questioned about it. Their responses thereto were noted in the handwriting of the attorney-examiner and this statement, at his request, was signed by the prospective witness.[27] These interviews took place

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[25] Tr. 19 discloses that witnesses would be called by Commission counsel to testify only "On three points—as to United States Government endorsement, endorsement and approval by the American Medical Association, and the clarification as to the question of what 'no more stomach upset than a plain sugar pill' means."

[26] These witnesses were called to testify only for purposes as stated in footnote 25, *supra*.

[27] Tr. 164–170; 184–187; 216–217; 233–236; 266–267; 274; 300; 346; 353–355; 367–368.

in neighborhoods in or adjacent to Metropolitan Washington, D.C., but the record does not disclose the number of prospective witnesses interviewed. The witnesses testifying in this proceeding comprised 11 housewives,[28] an employee of General Motors Acceptance Corporation,[29] a mechanical engineer,[30] a bookkeeper,[31] two aircraft mechanics,[32] a military construction inspector,[33] and four military personnel.[34]

All these witnesses were again interviewed by counsel supporting the complaint before taking the witness stand.[35] Upon the witness stand, after again being asked to read the challenged advertising, they were subjected to questions concerning it on direct examination, and, in most instances, also on cross-examination. In various instances, upon request, their prior signed statements were tendered to respondents' counsel for the aid of such cross-examination.[36] An extensive analysis of this varied testimony by each of these witnesses extending from page 122 through page 383 of the transcript of record, or 261 pages in length, would unduly burden this Initial Decision.

15. Before passing judgement on this testimony, the nature of its content is first to be defined. It is not testimony directed to and does not purport to show that any of the witnesses testifying were deceived by respondents' challenged advertising to the extent that they would not have purchased Bayer Aspirin except for their belief that the advertising representations made for said product were such as alleged by the complaint. The testimony further does not purport to show dissatisfied customers or users of a product which did not meet or live up to the advertising representations allegedly made for it. The testimony under consideration in this proceeding was solely directed to an attempted showing that a reading of respondents' challenged advertising would cause the reader to derive and understand the meaning the complaint alleges it to convey.

The Hearing Examiner, after giving the instant testimony full and complete consideration, finds it to be both insufficient and inconclusive and, accordingly, that it lacks the over-all substantial weight necessary to adequately support the allegations of the complaint. If

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[28] Tr. 122; 158; 179; 202; 224; 258; 262; 309; 348; 364; 376.
[29] Tr. 146.
[30] Tr. 171.
[31] Tr. 269.
[32] Tr. 212; 228.
[33] Tr. 295.
[34] Tr. 315; 324; 341; 357.
[35] Tr. 271–272; 301–303; 319–320; 336–337.
[36] Tr. 166–169; 187; 216–217; 235–236.

one was to sift, pick and choose among this testimony, some of it might be found, directly or by implication, tending to support the allegations of the complaint. Using again the same process of elimination, other of such testimony might be found, directly or by implication, which would appear to be contradictory of the allegations of the complaint.

This testimony, in addition to this lack of adequate substantial weight, is also found to suffer the further infirmity of being suspect as to its credibility. This is not to say that any of the witnesses were knowingly telling an untruth, but that their testimony was not a spontaneous first impression, unclouded by prior contacts and given upon a first viewing of the challenged advertising from the witness stand. In various instances, it was the product of uncertainty as to the meaning of the questions asked by counsel, confusion or uneasiness induced by the hearing room procedures, prior discussion of the advertisement with others, an attempt to recall former impressions given on a prior occasion, and the like.

To cite but a few of the examples:

(a) The first witness, a housewife, was found necessary to be temporarily excused from the hearing room and, upon recall, was withdrawn by complaint counsel from the witness stand. This resulted following a lengthy colloquy between the Hearing Examiner and respective counsel as to the probative weight to be given testimony of the nature being elicited in the face of extended legal and factual argument made before the witness. (Tr. 137-145).[37]

With regard to various of the further witnesses called, the following (b), (c), (d), (e), (f) and (g) are portions of their testimony taken from the transcript of record herein:

(b) HEARING EXAMINER SCHRUP: Do you remember the question?

THE WITNESS: I am just so confused now, really. I don't know. They are talking about a sugar pill and they are talking about Bayer Aspirin and I am telling you, I don't know half the time what you are talking about. (Tr. 199.)

* * * * * * *

(c) HEARING EXAMINER SCHRUP: You may answer the question to the best of your ability.

THE WITNESS: I don't know how. I'm sorry. I'm very upset.

HEARING EXAMINER SCHRUP: I can understand that.

THE WITNESS: If I could go through the way I answered the questions when the man first presented them to me that came to my house . . . I really don't know. (Tr. 259-260.)

* * * * * * *

[37] Tr. 210–211 is also here in point. Further, see Tr. 153, 161, 182, 198, 215, 323–333. While no implication is meant to be derived that respective counsel acted other than as proper and diligent advocates, the foregoing excerpts do serve to point up the probable lack of credibility and reliability of evidence of this nature when given by an impressionable and confused witness in the face of arguments, pro and con, by articulate and persistent counsel.

(d) Q But you never opened a newspaper and saw an ad all by yourself of this type.

A No, I did not.

Q It was first called to your attention by the investigator?

A Yes.

Q And he asked you questions about it.

A Yes, sir.

Q And he made notes of your answers?

A Yes, sir.

Q Now, when you examined the ad a moment ago and said "Well, now, just let me think" were you trying to recall what you had told him?

A No, I was just nervous. I just could not —

Q What were you thinking about? Were you trying to recall something?

A No, I just could not remember what I was reading. (Tr. 266–267.)

* * * * * * *

(e) Q So when you read it here on the witness stand, you had really just finished reading it a few minutes ago; is that right?

A Yes, sir.

Q Now, did you get any more out of it reading it the second time than you did the first time?

A I didn't get anything out of it the first time. I didn't get any more out of it.

Q When was the really first time you read this particular advertisement?

A When the representative from the Federal Trade Commission came to my house. I had never seen the ad before that. (Tr. 273–274.)

* * * * * * *

(f) Q Mrs. _____, directing your attention to the second portion of the advertisement, this paragraph which begins, "Findings reported in the highly authoritative journal", etc., what does that mean to you? What is your impression or opinion of that?

THE WITNESS: If I remember right, when this guy asked me this question before, when I was summonsed here or subpoenaed or whatever you call it, I didn't give an answer for that, because I didn't understand it. (Tr. 311.)

* * * * * * *

(g) Q You say that you don't recall having read anything in the Journal about this. As I understand it, you don't recall having read anything—you recall having read this ad maybe in another paper.

A In a newspaper; yes.

Q But you had no recollection of it?

A Exactly.

Q Until the investigator came and called your specific attention to it?

A When he came and asked me if I had seen it before, I suggest I could recall seeing it, but I hadn't studied it quite as carefully as I did when he was there.

Q So that your testimony here today is based on consideration of the ad in greater detail during the interview with the investigator?

A Well, yes. He asked me to read it over.

Q And not with your casual reading on a prior occasion?

A No. . . .

Q Mrs. _____, what was the nature of the discussions which you and Mrs. _____ had?

A When we got the subpoenas, of course, I mean, we were trying to remember, and recall, exactly what answers we had given. That was, trying to remember exactly the words we had—the answers we had given the gentleman, was all. (Tr. 372–374.)

16. In *Zenith Radio Corporation* v. *Federal Trade Commission* (1944) 143 F. 2d 29, the Circuit Court of Appeals held:

The Commission was not required to sample public opinion to determine what the petitioner was representing to the public. The Commission had a right to look at the advertisements in question, consider the relevant evidence in the record that would aid it in interpreting the advertisements, and then decide for itself whether the practices engaged in by the petitioner were unfair or deceptive, as charged in the complaint.

If the Commission arrived at its finding fairly "and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary" it is our duty to uphold the Commission's findings,

Counsel supporting the complaint, on June 17, 1963, filed a "Reply Memorandum to Respondents' Proposed Findings and Order", which cites the above *Zenith* case and then goes on to state:

While the materiality of misrepresentation, it is submitted, inherent in respondents' advertising is evident from a comparison thereof with the medical study it purports to interpret, and no consumer testimony would have been necessary to establish this fact, counsel supporting the complaint nevertheless offered some such testimony with regard to three aspects of the advertising, simply as corroboration of facts alleged by the complaint. The testimony of the witnesses was reliable and probative and provided substantial evidence to confirm the falsity of the advertising.

Based on the above case law and the finding herein made that this so-called corroborative testimony of the witnesses called in this proceeding was inconclusive and of insufficient probative weight to afford acceptable proof of the allegations of the complaint, the only other evidence of record left for consideration appears to be the documentary exhibits in evidence. The posture of the case then stands and is the same with regard to the allegations of the complaint, as when previously adversely passed on by both a United States District Court and a United States Circuit Court of Appeals.[38]

Admittedly, in so doing, both of these courts acted upon and applied the standard set forth in Section 13 (a) of the Federal Trade Commission Act which requires only that the Commission "has reason to believe" in seeking to enjoin an advertisement in alleged violation of Section 12, pending the issuance and determination of a

[38] See footnote 24, *supra.*

complaint charging violation of Section 5 of the Act. It will also be noted that Section 5 of the Act applies the same criterion as regards the issuance of such a complaint, for subsection (b) of Section 5 likewise states, "Whenever the Commission shall have reason to believe * * * it shall issue and serve * * * a complaint stating its charges in that respect * * *" The quantum of proof required to support the issuance of a valid order to cease and desist quite obviously would thus afford a substantially different test than that needed only to sustain the requirement of "reason to believe" in the initial issuance of the complaint. This fact appears to be recognized in the memorandum of the Commission accompanying its order, filed herein on May 16, 1963, denying respondents' motion that the Commission declare itself disqualified to make any adjudication of Paragraph Seven (1) of the amended complaint in this proceeding.

Based on the foregoing, it would well follow that the present record could carry or be given no more probative weight than that which was before and found insufficient by two Federal courts to sustain an application requiring a showing of only "reason to believe". This is so because also here absent in practical effect is the further evidence since adduced of record and not being given any substantial probative weight in the instant proceeding. Accordingly, the present record would not appear to meet the test of the aforesaid Circuit Court opinion which states, "Should further evidence there be adduced in support of its allegations of violation of the Federal Trade Commission Act, a cease and desist order may well be valid and its issuance properly sustained upon judicial review."

17. There is no dispute herein and the finding is made that the study entitled "A Comparative Study of Five Proprietary Analgesic Compounds" was made pursuant to a contract between the doctors concerned and the Federal Trade Commission, and that a report of this study was authorized to be published in the December 29, 1962 issue of the Journal of the American Medical Association by a staff official of the Federal Trade Commission. There is also no dispute and the further finding is made that the report, when published, stated "This study was supported by a grant from the Federal Trade Commission, Washington, D.C."

The word "supported" has various dictionary definitions, depending on the context in which used. The Hearing Examiner finds that the word "supported", as used in the above report in connection with the word "grant" in reference to the word "study", can here sensibly and properly only be taken to mean that financial aid was being given to those participating in its preparation and that the said

study was financed or paid for by the Federal Trade Commission.[39] The respondents' challenged advertising states in this regard in the opening paragraph or the heading or top of the advertisement:

Government-Supported Medical Team Compares Bayer Aspirin and Four Other Popular Pain Relievers

Again, the word "Supported", as used in this context, is to be read as before and its meaning not distorted, and it is here again therefore found that it can only sensibly and properly be taken as meaning not the endorsement and approval of the result of the study itself, but only that the medical team doing the study was given financial aid or being paid by the government for participating in or doing the work therein involved. This finding is reinforced by the advertisement itself, which later states, in part, with reference to this medical study, "supported by a grant from the federal government". Accordingly, the word "supported", as thus used with the word "government", cannot be found to mean endorsement and approval of the content of the study itself instead of a payment for or the giving of financial aid by the government to the personnel making or performing the study.

It would therefore appear that this allegation of the complaint is not supported by the greater weight of the reliable, probative, and substantial evidence of record and the finding is accordingly made that the record herein fails of adequate proof that respondents have represented, and are now representing, directly and by implication:

1) That the findings of the medical team of clinical investigators referred to in said advertisements have been endorsed and approved by the United States Government.

18. Respondents' challenged advertisement, in its second paragraph, following the opening paragraph, states:

Findings reported in the highly authoritative Journal of The American Medical Association reveal that the higher priced combination-of-ingredients pain relievers upset the stomach with significantly greater frequency than any of the other products tested, while Bayer Aspirin brings relief that is as fast, as strong, and as gentle to the stomach as you can get.

The complaint first alleges, with reference to that part of the above advertisement reading "Findings reported in the highly authoritative Journal of The American Medical Association" that such words, taken in conjunction with the publication of the report's alleged findings, are evidence of endorsement and approval thereof by that Association and the medical profession. While the record dis-

[39] See, Tr. 54 and admission of Commission counsel that "The study was paid for by a grant of funds from the Federal Trade Commission."

closes documentary disclaimers [40] of any such endorsement and approval of this study by the American Medical Association and the medical profession, no affirmative evidence of any substantial probative weight is herein present which would establish that a reading of respondents' advertisements would convey, or did convey, the meaning alleged by the complaint.

The mere fact of publication of an investigative clinical study in a professional medical journal, no matter how respected a journal, would not alone appear to show endorsement and approval of this study by a medical association and the medical profession. It would be fair to recognize that such a study most probably would be performed by reputable medical and technical personnel in a responsible manner before being accepted for publication, but no finding can be made that the mere fact of publication and a recital of the content of the study, alone and without more, would constitute substantial and probative evidence of endorsement and approval of such study by the American Medical Association or the medical profession.

Furthermore, respondents' above advertisement does not so state or represent that the study's findings reported in the Journal of the American Medical Association have been endorsed and approved by the Association and the medical profession. Use of the words "highly authoritative" as descriptive of the aforesaid Journal would appear to be an appropriate and proper description, but such use does not amount to and cannot herein be found to be a representation by the said advertisement that the study and its content, because of being so published, was also thereby endorsed and approved, as alleged by the complaint, nor that such would be so understood by a reader of respondents' advertising describing both the fact of such publication and its alleged content.

It would, therefore, appear that this allegation of the complaint is not supported by the greater weight of the reliable, probative, and substantial evidence of record and the finding is accordingly made that the record herein fails of adequate proof that respondents have represented, and are now representing, directly and by implication:

2) That the publication of a report of said study, together with the findings of the clinical investigators, in The Journal of The American Medical Association, is evidence of endorsement and approval thereof by that association and by the medical profession.

19. The next allegation of the complaint directed to respondents' foregoing advertisement is to the latter part of the second paragraph set forth on the preceding page herein and the following further part of the said advertisement:

[40] Comm. Ex. No. 2, pages 50–53.

Upset Stomach

According to this report, the higher priced combination-of-ingredients products upset the stomach with significantly greater frequency than any of the other products tested, while Bayer Aspirin, taken as directed, is as gentle to the stomach as a plain sugar pill.

The Comparative Study of Five Proprietary Analgesic Compounds, upon which the above is based, states the following:

Excedrin and Anacin form a group for which the incidence of upset stomach is significantly greater than is the incidence after Bayer Aspirin, St. Joseph's Aspirin, Bufferin, or the placebo. The rates of upset stomach associated with these last 4 treatments are not significantly different, one from the other.[41]

It will be noted that the paragraph immediately above the paragraph headed "Upset Stomach" in the said advertisement speaks of five leading pain relievers, including Bayer Aspirin, aspirin with buffering, and combination-of-ingredients products. The study itself speaks of Excedrin and Anacin as forming a group for which the incidence of upset stomach is significantly greater than for Bayer Aspirin, St. Joseph's Aspirin, Bufferin and the placebo. As between these latter products and the placebo, one from the other, there is no significant difference in the rate of upset stomach, according to the study. The study is further confined to these five products and the placebo for comparative purposes, and respondents' challenged advertising is directed to the comparisons therein made as between each of them and Bayer Aspirin.

A reading of respondents' advertisement does not disclose any statement therein that the clinical investigators found that Bayer Aspirin will not upset the stomach, but only that the combination-of-ingredients pain relievers will upset the stomach with significantly greater frequency than any of the other products tested, among which, as stated in the advertisement, was Bayer Aspirin. This statement the study supports for it specifies there is a higher rate of frequency for Excedrin and Anacin than for the others and that there was no significant difference in frequency between Bayer Aspirin, St. Joseph's Aspirin, Bufferin and the placebo.

Accordingly, Bayer Aspirin, under the study, rates as gentle to the stomach as the placebo or a sugar pill, and either is as gentle to the stomach as you can get in the light and the confines of such report. Further, and as noted in the Circuit Court opinion, a table in the study shows that of 829 doses taken of Bayer Aspirin, there

[41] According to the report, "The placebo used in the study was made in the pharmacy of Baltimore City Hospitals and consisted of corn starch and lactose without coloring or flavoring agents." The Circuit Court opinion in this matter held the pill used as a control was constituted of milk sugar and the use of the term "sugar pill" was neither inaccurate nor misleading.

were nine episodes of upset stomach, a rate of 1.1%; the placebo was administered in 833 cases and caused stomach upset but seven times, a rate of 0.8%. This minute difference between Bayer Aspirin and the "sugar pill" is not found misleading in a material respect, as is required in defining a "false advertisement" under Section 15(a)(1) of the Act.

It would therefore appear that this allegation of the complaint is not supported by the greater weight of the reliable, probative and substantial evidence of record and the finding is accordingly made that the record herein fails of adequate proof that respondents' said advertisement is a "false advertisement" and that respondents, in said advertisement, have falsely represented, and are now falsely representing, directly and by implication:

3) That the clinical investigators found that Bayer Aspirin will not upset the stomach, is as gentle to the stomach as a sugar pill and is more gentle to the stomach than any analgesic product containing more than one ingredient, and that there is no analgesic product available to the consumer which is more gentle to the stomach than Bayer Aspirin.

20. The fourth and final allegation of the complaint is directed to the following statement in respondents' advertisement:

Speed and Strength

The study shows that there is no significant difference among the products tested in rapidity of onset, strength, or duration of relief. Nonetheless, it is interesting to note that within just fifteen minutes, Bayer Aspirin had a somewhat higher pain relief score than any of the other products.

The complaint does not challenge the first sentence of the above-quoted paragraph from the advertisement, for the comparative study comments in such connection:

On the basis of this study, it seems that within the limits of generalization permitted by the population studied, there are no important differences among the compounds studied in rapidity of onset, degree, or duration of analgesia.

This last allegation states the said advertisement to here represent that the clinical investigators concluded that Bayer Aspirin, after fifteen minutes following administration, afforded a higher degree of pain relief than any other product tested. A reading of the advertisement shows it not to say that the clinical investigators so concluded, but only to state what a table in the study actually shows. Such evidence of record as supports this allegation of the complaint is limited to the documentary exhibits in evidence. The following reasoning of the Circuit Court opinion on this point in interpreting this material when the matter was before it is herein persuasive:

As we have seen, the statement is literally true, for Bayer's "score" after fifteen minutes was 0.94 while its closest competitor at that time interval was rated 0.90. The fact that the margin of accuracy of the scoring system was 0.124—meaning that the second-place drug might fare as well as or better than Bayer over the long run of statistical tests—does not detract from the fact that on this particular test, Bayer apparently fared better than any other product in relieving pain within fifteen minutes after its administration. It is true that a close examination of the statistical chart drawn up by three investigators reveals that they thought the difference between all of the drugs at that time interval not to be "significantly different." But that is precisely what the Bayer advertisement stated in the sentence preceding its excursion into the specifics of the pain-relief scores.

Further, it seems apparent that this particular paragraph of the advertisement, read as a whole, is not misleading in a material respect as is required by Section 15(a)(1) of the Act.

It would therefore appear that this allegation of the complaint is not supported by the greater weight of the reliable, probative and substantial evidence of record and the finding is accordingly made that the record herein fails of adequate proof that respondents' said advertisement is a "false advertisement" and that respondents, in said advertisement, have falsely represented, and are now falsely representing, directly and by implication:

4) That the clinical investigators concluded that Bayer Aspirin, after fifteen minutes following administration, affords a higher degree of pain relief than any other product tested.

21. Following the foregoing consideration of the entire record in this proceeding, the documentary exhibits in evidence, and the testimony of all the witnesses and the probative weight to be given such testimony, it appears clear, and the finding is made, that the complaint has not been sustained by the greater weight of the reliable, probative and substantial evidence of record herein.

CONCLUSION

The complaint should be dismissed.

ORDER

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

FINAL ORDER

Counsel in support of the complaint having filed an appeal from the hearing examiner's initial decision dismissing the complaint for the reason that the advertisements challenged therein were not shown

to have been "false advertisements" within the meaning of Section 15 of the Federal Trade Commission Act, as alleged; and

It appearing that the hearing examiner's action was based in large part upon the decision of the United States Court of Appeals for the Second Circuit in *Federal Trade Commission* v. *Sterling Drug, Inc., et al.*, 317 F. 2d 669 (1963) [7 S. & D. 683], in which the Court held that the record in that case failed to show that the Commission had "reason to believe" the same advertisements were false and misleading; and

It further appearing that the record in this proceeding contains no substantial evidence in addition to that considered by the Court; and

The Commission having been informed that, in any event, the respondents are not now disseminating the advertising involved and have no intention of resuming it:

It is ordered, That the appeal of counsel in support of the complaint be, and it hereby is, denied.

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

Commissioner MacIntyre concurring only in the result.

IN THE MATTER OF

UARCO, INC.

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

Docket 7087. Complaint, Mar. 13, 1958—Decision, Feb. 24, 1964

Order dismissing, for failure to establish a prima facie case, complaint charging the third largest producer of business form products in the United States, with discriminating in price in violation of Sec. 2(a) of the Clayton Act by allowing favored customers a concession from regular list prices, and by charging customers purchasing under special contracts, prices substantially lower than the prices charged others.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act,

approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Uarco, Inc., respondent herein, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal place of business located at 141 West Jackson Boulevard, Chicago, Illinois. Respondent's main plant is in Chicago, Illinois. Other plants of respondent are located at Deep River, Connecticut; Cleveland, Ohio; Watseka, Illinois; Paris, Texas; and Oakland, California. For sales purposes respondent company has set up eight regions in the United States: (1) New York City; (2) Hartford; (3) Chicago; (4) Great Lakes; (5) Midwest; (6) South-East; (7) South-West; and (8) West.

PAR. 2. Uarco, Inc., hereinafter sometimes referred to as Uarco or as respondent, is engaged in the manufacture, sale and distribution of various classes, types or descriptions of business forms products.

Uarco, Inc., is the third largest producer of business forms products in the United States, and its sales volume in 1955 was in excess of $25 million. Approximately 98% of its sales are made through its own retail sales force to users. The remaining approximately 2% of its sales are made to dealers.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent is now engaged, and for a number of years past has been engaged, in commerce, as "commerce" is defined in the aforesaid Clayton Act, having sold its business forms products from its several plants located in the States of Illinois, Connecticut, Ohio, Texas and California, and transported or caused the same to be transported from its plants or other places of business in said states to purchasers that are users thereof located in other states of the United States, or in other places under the jurisdiction of the United States.

PAR. 4. In the course and conduct of its business as aforesaid, Uarco, Inc., is now and for a number of years past has been in substantial competition with others engaged in the manufacture, sale or distribution of business forms products in commerce between and among the various states of the United States, or other places under the jurisdiction of the United States.

PAR. 5. In the course and conduct of its business, as aforesaid, respondent Uarco has discriminated in price between different purchasers of its business forms products of like grade and quality by selling to some of its user customers at higher prices than to other of its user customers.

Various methods were employed to effectuate the discriminations practiced by respondent. Some of these were:

a. When the "Regular Method" of pricing is used, favored customers are allowed a concession or a cut from the computed list price. The unfavored customer is charged the regular list price without any concession or cut therefrom.

b. When the "Special Estimate" system is used, those customers who are favored by having their purchases priced according thereto are caused to pay a lower price than is charged to unfavored customers buying according to the "Regular Method" without a price concession.

c. Special contracts incorporate prices available to particular purchasers thereunder, which prices are substantially lower than the regular list prices charged to customers not under such contracts who buy according to the "Regular Method" without a price concession.

Examples of the discrimination in price alleged are as follows:

1. During 1955 respondent sold several kinds of its forms of varying characteristics to the Sieg Company at $11.55 per M and at $10.79 per M, whereas during the same period it sold to other customers similar forms of like grade and quality at higher prices, thereby resulting in concessionary differentials in price in excess of 20% in favor of the said Sieg Company, which has a special contract.

2. During 1956 respondent sold certain of its forms to Margo Kraft Distributors, Inc., at $20.90 per M, whereas it sold similar forms of like grade and quality to other customers during the same period at higher prices, thereby resulting in concessionary differentials in price in excess of 20% in favor of the said Margo Kraft Distributors, Inc.

3. In 1956 respondent sold certain of its forms to Westinghouse Electric Corporation at $32.44 per M, whereas it sold similar forms of like grade and quality to other customers during the same period at higher prices, thereby resulting in concessionary differentials in price in excess of 35% in favor of the said Westinghouse Electric Corporation.

4. During a portion of and since 1956, pursuant to special contracts covering "E-Z Out" and "Continuous" forms, respondent sold to Ford Motor Company and its several divisions, a variety of its forms at concessionary prices which were in most instances in excess of 35 to 40% below respondent's established list prices applicable to purchases of similar forms of like grade and quality by other of its customers. The said concessionary prices are not subject to in-

creases during the life of the contract, an advantage not accorded non-contract customers who purchase at list prices prevailing at the time of their particular sales transaction. During the contract period with Ford Motor Company, respondent did in fact increase its prices by varying upward the percentages applicable to specific forms, thereby effecting an increase in price to its customers not under special contract. Because of the aforesaid Ford contract provision, subsequent increases in price were not extended to the same forms purchasable by Ford, thus further accentuating the concessionary prices incorporated basically therein.

The foregoing examples are typical of the many price discriminations in transactions wherein respondent Uarco sold its business forms products of like grade and quality in commerce to different customers, favoring some customers with substantial price concessions and selling to others at list prices as computed from respondent's own price books.

Respondent Uarco's reduced prices and the consequent discriminations in price to its favored customers were sufficient to and did divert business from its competitors. Furthermore, such price reductions by respondent in these and other instances are sufficient to divert business from respondent's competitors to respondent in the future.

Said price concessions by respondent have been extremely harmful and injurious to respondent's competitors who have quoted prices according to their respective price books and have been thus foreclosed from opportunities to compete for the business on which respondent quoted concessionary prices substantially under respondent's own list prices and under the prices quoted by competitors.

PAR. 6. The effect of respondent's said discriminations in price as hereinabove alleged may be to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy, or prevent competition with respondent.

PAR. 7. The discriminations in price, as hereinabove alleged and described, are in violation of subsection (a) of Section 2 of the aforesaid Clayton Act, as amended by the Robinson-Patman Act.

Mr. Herbert I. Rothbart for the Commission.

Dallstream, Schiff, Hardin, Waite & Dorschel, Chicago, Ill., by *Mr. W. Donald McSweeney;* and

Mason, Mander & Harris, Washington, D.C., by *Mr. Lowell B. Mason*, for the respondent.

Initial Decision by William L. Pack, Hearing Examiner

AUGUST 7, 1962

1. The complaint in this matter, issued March 13, 1958, charges the respondent, Uarco, Inc., with discriminating in price in the sale of its products, in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The hearing examiner to whom the case was originally assigned was the late and lamented Frank Hier. Upon Mr. Hier's death, in June 1959, the case was reassigned to the present examiner. There have also been several changes in Commission counsel since the complaint was issued.

2. The case-in-chief in support of the complaint having been concluded, respondent has filed a motion to dismiss on the ground that a prima facie case has not been established. The motion has been ably briefed and argued orally by counsel for both parties.

3. In the present posture of the proceeding, the evidence and all inferences reasonably to be drawn therefrom must, under the Commission's rule, be viewed in the light most favorable to the complaint. Vulcanized Rubber and Plastics Company, D. 6222, 52 F.T.C. 553; Timken Roller Bearing Company, D. 6504, 54 F.T.C. 1909; Scott Paper Company, D. 6559, 55 F.T.C. 2050; Consolidated Foods Corporation, D. 7000, 56 F.T.C. 1663; Brillo Manufacturing Company, Inc., D. 6557, 56 F.T.C. 1672. While the hearing examiner does not agree with the rule, he is, of course, bound by it. (In the examiner's opinion the correct view is that set forth by Commissioners Tait and Kintner in their concurring opinion in Consolidated Foods).

4. Uarco, Inc. (frequently referred to hereinafter as Uarco), is an Illinois corporation, with its main office at 141 West Jackson Boulevard, Chicago, Illinois. It is engaged in the designing, manufacture and sale of business forms. The company is a large one, and sells its products throughout the United States. Its principal plant is located in Chicago and it has some six other plants at various points in the United States. Its approximate gross sales for the years 1955–1959 were: 1955, $25,000,000; 1956, $30,000,000; 1957, $34,000,000; 1958, $36,000,000; 1959, $38,000,000.

5. Practically all of the company's sales—some 98 percent—are made direct to users through its own sales force. The remainder are made to dealers.

6. This is exclusively a "primary line" case. The only competitive injury charged in the complaint is in the line of commerce in which respondent itself is engaged. There is no charge of injury to competition among the purchasers of respondent's forms.

7. Essentially, the issues presented by the motion to dismiss are (1) whether the record establishes prima facie that the forms involved in the several instances of alleged price discrimination were of "like grade and quality", and (2) whether a prima facie case has been established on the issue of competitive injury.

8. The issue of like grade and quality is a very difficult one. Business forms, or at least those sold by respondent, are almost always tailored to the needs of the particular customer and made according to his specifications. There is opinion testimony from several persons in the trade that in the instances of alleged price discrimination disclosed by the record the forms involved were of like grade and quality. The opinions of the witnesses were based largely on the fact that in each instance the forms fell into one of the general categories recognized in the trade: (a) "E-Z Out" or "Snapout" forms, so called because they are designed in such a manner that the several parts or sheets may be separated from the carbon sheets and removed or "snapped out" easily; (b) "Control Punched Continuous" forms; (c) "Fanfold" forms; and (d) "Register" forms.

9. The hearing examiner has great difficulty with this theory. Within each of the categories mentioned there are innumerable variations as to design, size, shape, paper, carbon paper, number of parts (sheets), printing, manufacturing cost, selling price, etc. Moreover, there are contradictions among the witnesses as to some of the forms, and the reasonableness of some of the testimony is questionable when viewed in the light of the forms themselves.

10. Bearing in mind, however, the criterion adopted by the Commission—that at this stage of the proceeding the evidence and all reasonable inferences must be viewed in the light most favorable to the complaint—the hearing examiner is of the opinion that a prima facie case on the issue of like grade and quality has been established.

11. On the issue of competitive injury, there are some six instances disclosed by the record in which competitors of Uarco claimed to have lost business because of discriminatory pricing by Uarco. As indicated above, it is assumed for present purposes that in each instance the forms sold by Uarco at the higher and lower prices were of like grade and quality. The instances were:

(a) *Sale to Bostitch, Inc.* On April 15, 1958, Uarco sold to Bostitch, Inc., East Greenwich, Rhode Island, 11,000 E-Z Out forms for a total purchase price of $517.99. The price per thousand was $37.31, which represented a substantial reduction from Uarco's list price. While E-Z Out forms had previously been sold by Uarco to other customers at higher (list) prices, such sales were made in 1955

and 1956, some two or three years prior to the sale to Bostitch. This lapse of time would seem to cast serious doubt upon the validity of the comparison.

The competitor witness who claimed to have lost this Bostitch order to Uarco was Harold F. Couch, Vice President of Allied Continuous Forms Company, Providence, Rhode Island. There is sharp dispute between counsel as to whether Mr. Couch's bid to Bostitch was on the form actually purchased by Bostitch. It appears that after bids were first requested by Bostitch there were changes in the specifications of the form, and counsel for respondent insist that Mr. Couch never did in fact make a bid on the revised form. For present purposes, however, it is assumed that he did, and that his bid was higher than Uarco's.

Prior to August 1957 Mr. Couch had been connected with Uarco, being its sales representative in Providence. Regarding Uarco's pricing policies, he testified that he was told by his superiors at Uarco that when competing for business against Uarco's principal competitors (Moore Business Forms, Inc., and Standard Register) to adhere pretty closely to Uarco's list prices, but that when competing against local jobbers to check with his home office in regard to offering a price concession. He also stated that these price concessions were "mostly to beat", rather than meet, competition. He further testified that now that he was one of Uarco's competitors he was feeling the effects of its pricing practices.

On cross-examination Mr. Couch conceded that his new company was "doing pretty good", that the company "definitely" was doing more business than when he became associated with it, and that on a number of occasions he had been successful in taking customers away from Uarco, several specific examples of such customers being given by him. As will be seen later, Mr. Couch is the only competitor witness whose testimony included any references to the matter of the effect or lack of effect upon the competitor of the claimed loss of business to Uarco; that is, to the matter of the competitor's general condition, whether its sales were increasing or decreasing, etc.

(b) *Sales to Sieg Company.* During October 1955 and February 1956, Uarco sold to the Sieg Company, Davenport, Iowa, and its subsidiary companies 425,000 E-Z Out forms at prices substantially less than those at which it was selling E-Z Out forms to certain other purchasers. The aggregate purchase price of the forms covered by the sales to Sieg, six in number, was $4,773. It appears that Sieg had invited bids on all of the forms which it had estimated would be needed by it for an entire year. Uarco was the successful bidder and

the sales referred to above were made as a result of the acceptance by Sieg of Uarco's bid.

One of the unsuccessful (higher) bidders for the Sieg business was the Harris Business Forms Company, Moline, Illinois, one of whose executives, Mr. John H. Harris, testified as to the failure of his company to obtain the business.

(c) *Sale to Margo-Kraft Distributors, Inc.* On September 11, 1956, Uarco sold to Margo-Kraft Distributors, Inc., Minneapolis, Minnesota, 50,000 E-Z Out forms at $1,045 or $20.90 per thousand, which was substantially less than the price at which Uarco was selling E-Z Out forms to some other customers. In this instance the unsuccessful bidder was Holden Business Forms, Minneapolis, Minnesota, whose bid was $24.48 per thousand. Testimony as to the loss of the business by Holden was given by one of its executives, Mr. R. B. Tiffany.

(d) *Sale to Minnesota Mining & Manufacturing Company.* In June, July and August 1956 Uarco sold to Minnesota Mining & Manufacturing Company 200,000 E-Z Out forms for a total purchase price of $9,289, which represented a price per thousand substantially less than the price at which Uarco was selling E-Z Out forms to some of its other customers. Here the competitor who claimed to have lost the business because of Uarco's lower price was Arnell Business Forms, Inc., Minneapolis, Minnesota, one of whose officers, Mr. Ray Arnell, testified at the hearings.

(e) *Sales to Westinghouse Electric Corporation.* In June 1956 Uarco sold to Westinghouse Electric Corporation, Pittsburgh, Pennsylvania, two orders of E-Z Out forms aggregating 570,800 forms. The total purchase price was $8,845, which represented as to each order a price per thousand substantially less than that at which E-Z Out forms were being sold by Uarco to some of its other customers. The competitor who claimed to have lost this business because of Uarco's lower price was Consolidated Business Forms Company, Pittsburgh, whose representative testifying at the hearings was Mr. William Ashby.

(f) *Contracts with Ford Motor Company.* Particular reliance is placed by Commission counsel on two contracts or agreements entered into by Uarco with Ford Motor Company, Detroit, Michigan. It appears that in the latter part of 1955 or the early part of 1956 Ford decided that instead of purchasing forms from time to time it would adopt a "package plan" under which it could, for one year, obtain at specified prices the forms which it might need during the year. Each of the package plans covered a particular type of form. The first of these package plans covered E-Z Out forms, and the

contract for supplying the forms was awarded to Uarco. The exact date of the agreement is not clear from the record, but it appears to have been entered into toward the end of 1955 or early in 1956.

Later in 1956 a second agreement, covering Control Punched Continuous forms was entered into between the same parties. The latter agreement appears to have covered the year beginning October 1, 1956 and ending September 30, 1957. Neither of the agreements precluded Ford from purchasing similar forms from other suppliers if it chose to do so. In fact, as will be seen later, Ford did purchase from at least one other supplier during the life of the agreements.

Generally speaking, the prices specified in the two agreements were substantially below prices at which Uarco was selling E–Z Out and Control Punched Continuous forms to some of its other customers.

The aggregate purchase price of the forms supplied by Uarco to Ford as a result of the agreements was very large (Com. Exs. 470 and 471, in camera. Com. Ex. 470 refers to the first contract, and Com. Ex. 471 to the second). The amounts were stated by one of Uarco's executives from memory and are approximate only, being subject to error of as much as 25 or 30 percent. After making allowance for this margin, the amounts still are very large.

The competitor involved in this instance is Business Forms Service, Detroit, two of whose representatives, Mr. Dan C. McKay and Mr. Jack F. Westmeier, testified at the hearings. During the years preceding the agreements between Ford and Uarco, Business Forms Service had sold substantial quantities of forms to Ford, the amounts being:

1952	$26,617.49
1953	34,695.80
1954	23,529.08
1955	3,157.15

It will be observed that for the year 1955 the amount was much lower, dropping from $23,529.08 in 1954 to $3,157.15 in 1955.

The record further establishes that despite repeated efforts on the part of Business Forms Service to obtain some of the package-plan business, it was never invited by Ford to bid on the contracts. It seems clear that Ford did not wish to deal with Business Forms Service insofar as the package plan of purchasing was concerned.

In 1956, after the agreements between Ford and Uarco went into effect, Ford did purchase from Business Forms Service small quantities of forms aggregating some $317, these purchases representing certain forms which Business Forms Service was able to supply on short notice.

In view of the fact that Ford apparently did not wish to deal with Business Forms Service at all on the package-plan contracts, it is difficult to see any causal connection between Uarco's lower prices to Ford and Business Forms Service's loss of the business. It seems clear that Business Forms Service would not have received the business in any event.

12. In summary, the record contains evidence of some six possible instances in which Uarco's different prices to different customers may have caused diversion of business to Uarco from its competitors. In only one of these instances is there any evidence whatever as to the effect of such diversion upon the competitor involved, and here the evidence is adverse to the case in support of the complaint. The competitor admittedly is doing well, his sales have increased substantially, and he is taking customers from Uarco.

13. In the other five instances the record is completely silent as to any effect on competition. There is no indication of any adverse effect either upon competition generally or upon any of the several competitors. The efforts of respondent's counsel to explore during cross-examination of the competitor witnesses the matter of the effect or lack of effect of the claimed loss of business were met by objections on the part of Commission counsel on the ground that such inquiry was beyond the scope of the direct examination; that is, that the direct examination was limited to inquiry regarding the specific instance of alleged loss of business, and that this precluded any inquiry by respondent as to the competitor's general condition, the increase or decrease in his volume of sales, etc.

14. The objections of Commission counsel were substained by both the former and present hearing examiners on the ground stated—that the proposed inquiry was outside the scope of the direct examination of the witness. In sustaining the objections it was made clear to counsel by the present examiner that no inferences of any general effect upon competition or upon the particular competitor would be drawn by the examiner; that the testimony of each of the witnesses would be regarded as relating only to the loss of the specific item of business involved.

15. Thus the most established by the testimony of the competitor witnesses is that in some six separate, isolated instances sales have been lost to Uarco by the several competitors. If this is not the correct view—if any inferences of general adverse effect upon competition or upon any of the several competitors are to be drawn from the testimony—then it necessarily follows that very serious error was committed by both the present and former hearing examiners in

restricting respondent's cross-examination of the competitor witnesses.

16. Surely the burden of proof imposed by the Robinson-Patman Act is not met by showing merely the diversion of a few separate, isolated sales to a respondent from its competitors. It is injury to competition with which the statute is concerned, not merely the diversion of a few sales. And even if the test should be regarded as injury to a single competitor as distinguished from injury to competition, still the evidence is insufficient because there is a complete failure of the proof to show any substantial adverse effect upon any of respondent's competitors. There is no suggestion that the "competitive health"—the ability to compete—of any competitor has been at all impaired.

17. If the contracts with Ford Motor Company should be viewed in a different light than the other transactions because of the duration of the contracts and the large amounts involved, there still is a failure of proof as to competitive injury. This is so because, as pointed out above, no causal connection has been established between Uarco's lower prices to Ford and the competitor's failure to obtain the contracts.

18. While there is evidence of instances of discriminatory pricing by Uarco in addition to the six instances detailed above, such additional instances would appear to be immaterial in view of the fact that there is a complete absence of evidence that they resulted in any diversion of business to Uarco from its competitors. Consequently these additional instances are of no assistance in determining the issue of competitive injury.

19. The record also contains certain "statistical" evidence. Essentially this evidence consists of data as to (a) Uarco's size and its constantly increasing sales volume during recent years; (b) the ratio of Uarco's "price concessions" to its volume of sales; and (c) Uarco's market share.

20. As stated at the outset, Uarco is a large company, and its sales have shown steady and substantial increases during recent years. There is, however, no indication whatever in the record of any causal connection between Uarco's growth and its price discriminations. The fact of Uarco's size and growth would therefor seem to be wholly without probative value on the issue of competitive injury.

21. As for Uarco's "price concessions", this term indicates simply sales by Uarco "off list", that is, at less than list prices. Periodically Uarco compiles and places in the hands of its sales personnel pricing

manuals which show the list prices Uarco wishes to obtain for its products. Where the list price cannot be obtained the difference between the list price and the price actually obtained is termed a price concession. In each of the years 1953 through 1958 the ratio of total price concessions to total sales was: 1953, 4.7 percent; 1954, 5.9 percent; 1955, 6.2 percent; 1956, 5.7 percent; 1957, 6.5 percent; 1958, 9.7 percent.

22. Insofar as possible violation of the Robinson-Patman Act is concerned, the mere fact of price concessions obviously is meaningless unless such concessions are related to specific transactions. That is, it must be established that in specific instances sales at different prices were made to different purchasers, that the goods involved in the two sales were of like grade and quality, and that competitive injury resulted. As such evidence is lacking here, the data as to price concessions are of no assistance in resolving the issues in the proceeding.

23. Emphasis is placed by Commission counsel upon the fact that Uarco budgeted for its price concessions in advance. That is, that in making up its budget in anticipation of each year's operations, Uarco included an amount which it estimated would be required to cover the difference between the total sales at list prices and total sales at less than list prices. The hearing examiner sees nothing sinister or predatory in such action. It would appear to represent nothing more than an attempt by Uarco, in the light of its experience, to make allowance in advance for those instances in which it would be unable to sell at full list prices.

24. The data as to Uarco's market share appear in Commission Exhibits 410-414, all of which are in camera. The source of the figures is Business Forms Institute, which is an association comprised of manufacturers of business forms. Not all members of the Institute report their sales, and some manufacturers of business forms who are not members do report. Consequently the Institute's figures are not entirely reliable. Uarco does, however, regard the figures as providing at least some indication of its relative position in the industry.

25. The figures being in camera, they will not be set out here. As interpreted by the hearing examiner, the figures indicate that during the last several years Uarco has increased its market share somewhat as to certain types of forms, while sustaining losses as to other types. The over-all figures indicate modest gains by Uarco during the years, but it is apparent that Uarco is far from occupying a dominant or controlling position in the industry.

26. In any event, there is an entire absence of evidence indicating any causal relationship between Uarco's market position and the price discriminations.

27. It is, of course, axiomatic that in a proceeding under the Robinson-Patman Act actual injury to competition need not be shown. The statute says "may be". But it is equally fundamental that these words do not open the door to speculation or conjecture. The test is reasonable probability. The present record fails to meet that test.

28. Even under the Commission's rule for appraising the evidence, it must be remembered that nothing less than substantial evidence will establish a prima facie case. Clearly such evidence is lacking here.

CONCLUSION

It is concluded that a prima facie case in support of the complaint has not been established.

ORDER

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

FINAL ORDER

This matter is before the Commission upon appeal by counsel supporting the complaint from the hearing examiner's initial decision. The hearing examiner, upon respondent's motion to dismiss made at the close of complaint counsel's case-in-chief, has concluded that a prima facie case in support of the complaint has not been established and has ordered that the complaint be dismissed.

In his initial decision, the hearing examiner correctly states the rule for judging whether respondent's motion should be granted or denied, that is, that the evidence and all inferences reasonably to be drawn therefrom must be viewed in the light most favorable to the complaint. Upon review of the initial decision, we conclude that the hearing examiner failed to properly apply this rule. Despite this error, however, we find from a careful review of the record in this proceeding that the examiner did not err in his conclusion that a prima facie case has not been established.

The complaint charges respondent with discriminating in price in the sale of business forms in violation of Section 2(a) of the Clayton Act, as amended. The only competitive injury charged is in the line of commerce in which respondent itself is engaged. The evidence, at most, discloses instances of sales below list prices by respondent to six customers with consequent loss of these sales by

respondent's competitors. It cannot reasonably be inferred from the evidence of record that these instances of off-list pricing have the adverse competitive effect proscribed by the statute. In addition, the evidence does not sustain an inference of predatory intent on the part of respondent in its sales at less than list price, as urged by counsel supporting the complaint. Moreover, with respect to evidence of general price concessions by respondent, we agree with the examiner's holding that "the mere fact of price concessions obviously is meaningless unless such concessions are related to specific transactions" and that such evidence is lacking in this record.

In our review of this record, we have noted that the evidence relates to sales made by respondent between the years 1955 and 1958, principally in 1955 and 1956. Under these circumstances, the Commission is of the opinion that remand of this proceeding for reception of additional evidence is not warranted.

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

It is further ordered, That the initial decision of the hearing examiner be, and it hereby is, vacated and set aside.

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

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

IN THE MATTER OF

PONCA WHOLESALE MERCANTILE COMPANY

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

Docket 7864. Complaint, Apr. 18, 1960—Decision, Feb. 24, 1964

Order dismissing—for the reason that respondent wholesaler's challenged cigarette sales in the Roswell and Albuquerque, N. Mex., markets were within the "meeting competition" sanction of Sec. 2(b) of the Clayton Act—complaint charging discrimination in price among competing retailer purchasers, in violation of Sec. 2(a) of the Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C.A.